



WHALEY ESTATE LITIGATION PARTNERS ON WILL & ESTATE CHALLENGES

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ISBN 978-1-7771173-5-1

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CHAPTER 1: CHALLENGING A WILL

INTRODUCTION

In Ontario, a Last Will and Testament/Testamentary document can be challenged on one or more of five grounds, including:

- 1) for failure to comply with the statutory requirements of **due execution**;
- 2) lack of **testamentary capacity** of the testator/testatrix;
- 3) the presence of **undue influence**;
- 4) lack of **knowledge and approval** of the contents of the Will; and
- 5) fraud, or forgery.

Suspicious circumstances, which will be discussed in this chapter, are not a ground for challenge but are an evidentiary consideration relevant to the grounds.

The procedure governing proceedings to determine the validity or invalidity of a Will are found in the [Estates Act](#),¹ as well as in [Rules 74](#) and [75](#) of Ontario's [Rules of Civil Procedure](#).²

Notably, a Will cannot be challenged during a testator/testatrix's lifetime, even where there appear to be grounds to challenge its validity. In [Palichuk v. Palichuk](#),³ the Ontario Court of Appeal identified several public policy reasons in prohibiting such a challenge. First, the testator/testatrix may change their Will as often as they like prior to death. Second, there is no way to determine what property will be left, if any, to distribute until after a testator/testatrix dies. Finally, beneficiaries may predecease the testator/testatrix. If Will challenges were permitted during a testator/testatrix's lifetime, as Trotter J.A. noted, "the courts would be inundated with litigation that is hypothetical during the lifetime of the testator, with the potential for re-litigation after their death."⁴ That said, in certain extraordinary circumstances, a declaration of testamentary incapacity may be made in proceedings prior to death.

1 [Estates Act, R.S.O. 1990, c. E.21.](#)

2 [Rules of Civil Procedure, R.R.O. 1990, Reg. 194.](#)

3 [Palichuk v. Palichuk, 2023 ONCA 116 at para 71](#)

4 [Ibid at para 71](#)

FIVE LEGAL GROUNDS

1. DUE EXECUTION

Due execution relates to the formal requirements for a Will as provided for in the [Succession Law Reform Act](#)⁵ (“**SLRA**”). The formal requirements required depend on the type of Will executed. The two most common being duly executed Wills compliant with the *SLRA* and Holograph wills. The less common types of Will are those made by members of the Canadian Armed Forces and International Wills, which are governed by international convention.⁶ The onus regarding due execution of a Will falls to the ‘propounder’ of the Will, in other words, the individual estate representative proposing to establish a Will as valid.

A duly executed Will is a type of Will document that is signed by the testator/testatrix at the end and is attested by two witnesses signing at the same time. Attested Wills are typically, yet not always drafted/prepared by a lawyer. The formalities for due execution required by the *SLRA* include:

- The Will must be in writing;⁷
- The testator/testatrix must sign the Will or acknowledge a signature in the presence of two or more attesting witnesses present at the same time;⁸
- The witnesses must also sign the Will in the presence of the testator/testatrix;⁹ and,
- The Will must be signed by the testator/testatrix at the end after it has been completed.¹⁰

[Section 8](#) of the *SLRA* provides that a Will is not valid if executed by someone under the age of 18, save for certain exceptions such as being married or being a member of the Canadian Armed Forces.¹¹

A Holograph Will is one written entirely in the testator/testatrix’s own handwriting and is signed by them alone.¹² This type of Will is recognized in the *SLRA* by virtue of both [section 6](#), and [section 7](#). [Section 6](#) provides that a valid holograph Will may be made when it is wholly in his or her handwriting, is signed, and does not require the presence, attestation or signatures of two witnesses.¹³ [Section 7](#) provides for the same requirement as attested Wills, that the testator/testatrix’s signature be situated

5 *Succession Law Reform Act*, [R.S.O. 1990, c. S.26](#) (“**SLRA**”)

6 See [section 6](#) of the *SLRA* for Wills by members of the Canadian Armed Forces Wills and [section 42](#) of the *SLRA* for International Wills.

7 *SLRA* at [section 3](#).

8 *SLRA* at [section 4\(2\)\(b\)](#).

9 *SLRA* at [section 4\(2\)\(c\)](#).

10 *SLRA* at [section 4 \(2\) \(a\)](#).

11 *SLRA* at [section 8](#).

12 *Oosterhoff on Wills* (Thomson Reuters: 9th ed), at page 303.

13 *SLRA* at [section 6](#).

at the end of the Will document.¹⁴ Holograph Wills are considered in Chapter 3.

2. TESTAMENTARY CAPACITY

A testator/testatrix must be capable of executing a Will and therefore must possess the requisite testamentary capacity.

There is no single legal definition of capacity, nor is there a general “test” or criteria to apply for establishing decisional capacity, mental capacity, or competency. For instance, an individual may have the requisite decisional capacity to grant powers of attorney, yet not have the requisite testamentary capacity to give instructions for and/or execute a Will.

Capacity is decision-specific, time-specific, and situation-specific in every instance, in that legal capacity can and does fluctuate. Determining whether a person is, or was, capable of making a decision is a legal determination, but consideration of surrounding evidence and circumstances are relevant to this determination. The question of testamentary capacity is almost wholly a question of fact.

The criterion for testamentary capacity is authoritatively articulated in the long-standing case of *Banks v. Goodfellow*¹⁵, which requires, in summary, that the testator/testatrix have the ability to understand:

- a) The nature of the act of making a Will (or testamentary document) and its effects;
- b) The extent of the property of which he or she is disposing of; and
- c) The claims of persons who would normally expect to benefit under the Will) or testamentary document).¹⁶

In *Banks v. Goodfellow*, the court provided this “classic statement” setting out the test of testamentary capacity:

It is essential to the exercise of such a power that a testator/testatrix shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give affect; and with a view to the latter object no disorder of the mind shall poison his affections, pervert his sense of right or prevent the exercise of his natural faculties; that no insane delusions shall influence his will on disposing of his property, and bring about a

¹⁴ SLRA at [section 7](#).

¹⁵ *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549.

¹⁶ *Ibid.*

disposal of it which should not have been made otherwise.¹⁷

Further elements of the criteria applied for determining requisite testamentary capacity that the testator/testatrix must have, are:

- A “disposing mind and memory” to comprehend the essential elements of making a Will;
- A sufficiently clear understanding and memory of the nature and extent of his or her property;
- A sufficiently clear understanding and memory to know the persons who are the natural objects of his or her Estate;
- A sufficiently clear understanding and memory to know the testamentary provisions he or she is making; and,
- A sufficiently clear understanding and memory to appreciate all these factors in relation to each other, and in forming an orderly desire to dispose of his or her property.¹⁸

The legal burden of proving testamentary capacity is on the propounder of the Will, assisted by a rebuttable presumption of capacity as described in [Vout v. Hay](#)¹⁹:

If the propounder of the Will proves that it was executed with the necessary formalities and that it was read over to or by a testator who appeared to understand it, the testator is presumed to have known and approved of its contents and to have testamentary capacity.²⁰

The Will challenger must raise evidence which calls into question the testamentary capacity of the testator/testatrix and if the Court is persuaded that suspicious circumstances exist, the presumption in favour of the testator/testatrix’s capacity is exhausted. In this instance, the propounder reassumes the burden of proving testamentary capacity.²¹

Accordingly, the burden of proof for testamentary capacity (and knowledge and approval) can be summarized in three phases:

- **Phase I:** The propounder presents evidence to prove on a balance of probabilities that

17 *Ibid.*

18 See *Murphy v Lamphier*, (1914) 31 OLR 287 at 318; *Schwartz v Schwartz*, [1970 CanLII 32 \(ON CA\)](#); *Hall v Bennett Estate*, [2003 CanLII 7157 \(ON CA\)](#); *Key v Key* [2010] EWHC 408 (ch.)

19 *Vout v Hay*, [\[1995\] 2 SCR 876](#) (“**Vout**”).

20 *Ibid.*

21 *Ibid* at [para 27](#).

the Will was executed with the necessary formalities and that it was read over to or by a testator who appeared to understand it.

- **Phase II:** The challenger adduces evidence which raises ‘suspicious circumstances’ about the Will.
- **Phase III:** The propounder of the Will adduces evidence to prove that the testator knew and approved the contents of his Will and was capable of making it.²²

To challenge a Will on the ground of lack of testamentary capacity, it is necessary to obtain cogent and persuasive evidence on a balance of probabilities which substantiates the allegations of lack of testamentary capacity.

Evidentiary requirements include witnesses as to the facts (including neighbors, acquaintances, friends, relatives) to substantiate an allegation of a lack of testamentary capacity.

In many cases, the services of an expert witness will be engaged to give a “retrospective opinion” on capacity after death. The expert witness will review the medical data compiled from any number of sources and will consider the observations of witnesses, as well as the drafting solicitor’s notes from the relative time as at the date of instructions for and then execution of the Will. The evidence obtained either through medical reports or expert witness evidence must be reliable in the context of the testator/testatrix’s entire set of circumstances.

3. UNDUE INFLUENCE

A Will may be challenged on the basis that the testator/testatrix was unduly influenced into making it/ executing it. The hallmarks of undue influence include circumstances of exploitation, breach or abuse of trust, manipulation, isolation, alienation, sequestering and dependency.

For conduct to constitute undue influence, it must amount to coercion, forcing the testator/testatrix under threat to make a will containing gifts that he or she would otherwise not make.²³ Mere influence by itself is insufficient.²⁴ Persuasion is allowed, but where one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power, undue influence may be found.²⁵

22 As helpfully summarised by the Newfoundland and Labrador Supreme Court in *Melendy v. Drodge*, [2016 CanLII 58393 \(NL SC\)](#).

23 John E.S Poyser, *Capacity and Undue Influence* (Toronto: Carswell, 2014) at page 301.

24 *Kohut v Kohut Estate*, [1993 CanLII 15087 \(MB KB\)](#) at para. 38.

25 *Dmyterko Estate v Kulikovsky* (1992) CarswellOnt 543.

Justice Cullity provided an expanded definition of undue influence in [Banton v. Banton](#).²⁶

A testamentary disposition will not be set aside on the ground of undue influence unless it is established on the balance of probabilities that the influence imposed by some other person on the deceased was so great and overpowering that the document reflects the will of the former and not that of the deceased. In such a case, it does not represent the testamentary wishes of the testator/testatrix and is no more effective than if he or she simply delegated his will-making power to the other person.²⁷

Common law continues to apply the historical definition of undue influence, focusing on a mind “overborne” and “lacking in independence”. The allegation of undue influence essentially is proven by the existence of evidence to show that “the free-will of the testator/testatrix was overborne by acts of coercion or fraud.”²⁸

In [Craig v. Lamoureux](#)²⁹, the court stated that:

Undue influence, sufficient to render a Will void, must be an influence which can justly be described by a person looking at the matter judiciously to cause the execution of a paper pretending to express a testator/testatrix’s mind, but which really does not express his mind, but something else which he did not mean.

In considering what constitutes undue influence, the case of *Hall v. Hall*,³⁰ described undue influence as:

Pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment...importunity or threats...if carried to a degree in which the free play of the testator/testatrix’s judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened.³¹

When assessing undue influence, the court will consider the mental and physical strength of a testator/testatrix in determining how much pressure is necessary to overbear their will. That point was expressed in the following terms in *Cattermole v. Prisk*³², a 2006 Chancery Division decision out of England:

26 *Banton v. Banton*, [1998 CanLII 14926 \(ON SC\)](#).

27 *Banton v. Banton*, [1998 \(CanLII\) 14926 \(ONSC\)](#) at para. 89.

28 *Vout v. Hay*, [\[1995\] 2 S.C.R. 876](#) at para. 25.

29 *Craig v. Lamoureux*, [1919 CanLII 416 \(UK JCPC\)](#).

30 *Hall v. Hall* (1868) L.R. 1 P. & D.

31 *Ibid.*

32 *Cattermole v. Prisk* [2006] 1 FLR 693 (Eng. Chancery Div.), at paragraph 13. Norris J. also cited *Killick v. Pountney*, [1999] All E.R. (D) 365.

When there is evidence of some mental incapacity and also evidence tending to show undue influence, it may be easier to establish undue influence, because a lesser degree of pressure or inducement may suffice to produce the desired result where the testator/testatrix is feeble in body or mind than would be required were he in vigorous health. But no amount of evidence of bodily or mental infirmity will, of itself, establish undue influence in the absence of some independent evidence tending to show the exercise of an improper influence.

Whereas the burden of proof for due execution, knowledge and approval and testamentary capacity rests with the propounder of the Will, the burden of proof for undue influence rests with the challenger.³³

The Will challenger is held to the same single standard of proof in civil cases – the balance of probabilities. The level of scrutiny of the evidence does not vary depending on the seriousness of the allegations and the court must look at all the surrounding circumstances.

An assertion of undue influence must be corroborated with other evidence.³⁴ Justice Cullity noted in *Scott v. Cousins*,³⁵ that “undue influence is a subtle thing, almost always exercised in secret, and usually provable only by circumstantial evidence.”

Indirect evidence may be sufficient to prove undue influence. In the English case of *Schrader v Schrader*,³⁶ the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision based on the testator/testatrix’s vulnerability and dependency on the influencer, including consideration of the influencer’s “physical presence and volatile personality.” The court also noted the lack of any identifiable evidence giving reason for the testator/testatrix to disinherit her other son of her own volition. Accordingly, the court has arguably been consistently moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

Courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power. Dependency is not always an indicator since as individuals grow older or develop health issues, it is not unusual for them to rely on others to care for their personal well-being and finances. Family members can perform those duties without taking advantage of the relationship of

33 *Goodman Estate v. Geffen*, [1991 CanLII 69 \(SCC\)](#).

34 [Section 13](#) of the *Ontario Evidence Act*, [R.S.O. 1990, c. E.23](#): In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence; *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, [2011 CarswellOnt 10659](#); [2011 ONSC 3043](#).

35 Cullity J. in *Scott v. Cousins*, [2001] OJ No.19 at para. 48.

36 *Schrader v Schrader* [2013] EWHC 466 (ch).

trust.³⁷

In cases where multiple planning instruments have been drafted and executed, courts will look for a pattern of change involving a particular individual as an indicator that undue influence is/was at play. For example, where a court sees that a testator/testatrix alters their planning documents to benefit the child they are residing with, this may be indicative of influence on the part of one child. A court may then look to the circumstances of the planning document to determine evidence of influence.³⁸

In cases where an individual has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence. For instance, where the only translation of the planning document was provided to the grantor by the grantee, and a relationship of dependence exists, undue influence may be found.³⁹

The Ontario Superior Court of Justice in the decision of [Gironda v. Gironda](#) provided a (non-exhaustive) list of indicators of undue influence:

- The testator/testatrix is dependent on the beneficiary in fulfilling emotional or physical needs;
- The testator/testatrix is socially isolated;
- The testator/testatrix has experienced recent family conflict;
- The testator/testatrix has experienced recent bereavement;
- The testator/testatrix has made a new Will that is inconsistent with prior Wills; and
- The testator/testatrix has made testamentary changes like changes made to other documents such as power of attorney documents.⁴⁰

Moreover, in [Tate v. Gueguegirre](#),⁴¹ the Divisional Court noted that the following factors constituted “significant evidence suggesting that [a] Will was the product of undue influence”:

- Increasing isolation of the testator/testatrix, including a move from home to a new city;
- The testator/testatrix’s dependence on a beneficiary;

37 See for example *Hoffman v. Heinrichs*, [2012 MBQB 133](#) in particular at [para 65](#): a brother who was close to his sister could have accessed her funds throughout her lifetime but did not. He was “scrupulous” in helping her manage her finances and encouraged her to buy things for herself.

38 See for example *Kohut Estate v Kohut*, [1993 CanLII 15087 \(MB KB\)](#), where 7 wills were made by an elderly now deceased testatrix, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer’s office.

39 See; *Grewal v Brar*, [2012 MBQB 214 \(CanLII\)](#); *Gaudet v. Knudsen*, [1985] B.C.J. No. 803; *Re Uppal Estate*, [2004 ABQB 412](#); *Nguyen Crawford v Nguyen*, 2009 CarswellOn 1877.

40 *Gironda v. Gironda*, [2013 ONSC 4133](#).

41 *Tate v. Gueguegirre*, [2015 ONSC 844 \(Div. Ct.\)](#).

- Substantial pre-death transfers of wealth from the testator/testatrix to the beneficiary;
- The testator/testatrix's failure to provide a reason or explanation for leaving an entire estate to a beneficiary and excluding others who would expect to inherit;
- The use of a lawyer chosen by the beneficiary and previously unknown to the testator/testatrix;
- The beneficiary conveyed the instructions to the lawyer;
- The beneficiary received a draft of the Will before it was executed and the beneficiary took the testator/testatrix to the lawyer to have it executed; and
- There were documented statements that the testator/testatrix was afraid of the respondent.⁴²

4. KNOWLEDGE AND APPROVAL

A Will cannot be held to be valid if the testator/testatrix did not know or approve of its contents before it was signed. As such, the propounder must establish that the testator/testatrix both knew and approved of the Will's terms and its effect when it was executed, assisted by the rebuttable presumption of capacity.⁴³

The consequences of a lack of knowledge and approval depend on the exact circumstances. For instance, if it is found the testator/testatrix did not understand the entire Will, then it cannot be held to be validly executed. On the other hand, if there are one or two clauses that are not understood or approved, then those provisions may be excluded, and the balance of the document will be deemed valid.⁴⁴

There is a presumption of knowledge and approval if the testator/testatrix read the Will and appeared to comprehend it.⁴⁵ This presumption is rebuttable if the challenger successfully demonstrates that the testator/testatrix did not understand the contents of the Will even after having read it or having had it read.⁴⁶ Where suspicious circumstances are found to be present, for instance when a beneficiary assists in the preparation, the evidentiary burden shifts and the propounder has the burden of proving knowledge and approval.⁴⁷

42 *Ibid* at [para 9](#).

43 *Oosterhoff on Wills (Thomson Reuters: 9th ed)*, at page 192.

44 *Ibid* at page 193.

45 *Vout v. Hay*, [1995] 2 S.C.R 876.

46 *Fulton v. Andrew* (1875) L.R.7 H.L 448; *Re Morris* (1969) [1971] P. 62.

47 *Tyrell v. Painton* (1894) P. 151 at 159 (C.A) per Davey J.

To rebut the presumption of validity, the Will challenger must adduce some evidence “which, if accepted, would tend to negative knowledge and approval”.⁴⁸ The court in *Scott v. Cousins*⁴⁹ described the requisite evidence as that which “excites the suspicion of the court”. A “general miasma of suspicion that something unsavory may have occurred” is insufficient to rebut the presumption of validity; the evidence must raise a “specific and focused suspicion”.⁵⁰

Even if suspicious circumstances are found, the extent of proof required to remove the suspicion varies with the gravity of the suspicion and the circumstances.⁵¹ In this regard:

[establishing knowledge and approval] is a question of fact – one of degree – in each case whether the person has sufficient mental power left to appreciate and understand the testamentary act. There may be good reasons for the apparent asymmetrical or adverse treatment of family members in a will.⁵²

The ground of challenge based on knowledge and approval is often associated with testamentary capacity, however they differ. While testamentary capacity includes the ability to make choices, knowledge and approval requires no more than the ability to understand and approve the choices that have already been made.⁵³

The crossover between knowledge and approval and testamentary capacity was illustrated in [Stekar v. Wilcox](#),⁵⁴ where the testator executed a Will while in the hospital and at trial issues were raised respecting his testamentary capacity and knowledge and approval. Prior to the execution of his Will, the testator had communicated to his treating physician and various friends what the terms of his Will were. During his time in hospital, the testator suffered from hallucinations, delusions and confusion and was confined to a psychiatric ward. It was found that the testamentary dispositions in the Will were entirely different to those communicated in hospital, and there was no evidence that he gave instructions for the preparation of his Will. The trial judge held these suspicious circumstances had an impact on the burden of establishing knowledge and approval. The court concluded that the testator lacked the requisite testamentary capacity and did not know or approve of the contents of their Will.

48 *Vout v. Hay*, [1995] 2 S.C.R. 876 at para 27; *Maddess v. Racz*, 2009 BCCA 539 at para 31.

49 *Scott v. Cousins*, (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.).

50 *Clark v. Nash*, 1989 CanLII 2923 (BC CA).

51 *Re Martin*; *MacGregor v. Ryan*, 1965 CanLII 17 (SCC), [1965] SCR 757 at page 766; *Vout* at para 24.

52 *Feeney's Canadian Law of Wills* (Toronto : Butterworths, 4th ed) at 2.15.

53 John E.S Poyser, *Capacity and Undue Influence* (Toronto: Carswell, 2014) at page 235.

54 *Stekar v. Wilcox*, 2017 ONCA 1010 (CanLII).

5. FRAUD AND FORGERY

A Will can be challenged on the basis that it is the product of fraud or forgery. Allegations of fraud or forgery are serious and are not as common as the other grounds to challenge a Will. Challenges of this nature should be made with caution and care because of the potential costs consequences that may result from an inability to prove the allegations made.⁵⁵

The onus is on the person alleging the fraud, to prove the fraud. Some allegations, depending on the circumstances, warrant engaging the expertise of a handwriting analyst/expert to ascertain with a greater degree of certainty whether the signature on the Will document is in fact that of the deceased. Obtaining the evidence of the two witnesses to the Will may dispel allegations of fraud.

When making an allegation of fraud or forgery, the challenger must ensure that there is substantive evidence to support the legal allegations made.

A classic case where fraud and forgery were found, is the British Columbia case of [Lee v. Li](#).⁵⁶ The dispute centered on allegations of fraud surrounding the purported Holograph Wills of Dr. Cheng Chi Li (the “**Deceased**”). The plaintiffs, the Deceased’s daughters, claimed that the defendants, the Deceased’s son and daughter-in-law, Thomas Li, and Liao Kwei-Lam, engaged in fraudulent activities when propounding the Holograph Wills as the Deceased’s.

The plaintiffs adduced evidence that highlighted the Deceased’s declining health and shaky handwriting during the period he purportedly executed his Wills. This handwriting was contrasted with the clear and steady handwriting found in the contested Holograph Wills. A handwriting expert, Ms. Silvers, opined that the Wills were not written by the same person. The Court also scrutinized the defendants’ conduct, emphasizing their inconsistent statements, refusal to produce the original Will documents, and contradictory details surrounding the alleged confirmation of the Wills by a notary. Moreover, the defendants’ demeanor during their testimonies raised suspicion, and the court questioned why the Deceased did not involve a lawyer in preparing the Wills. For these reasons, the Court found that the Holograph Wills were not valid and were a product of fraud and forgery perpetrated by the defendants.

SUSPICIOUS CIRCUMSTANCES

Suspicious circumstances are not a ground for a Will challenge. Rather they are an important evidentiary consideration. These may loosely involve circumstances surrounding the preparation

⁵⁵ See *Di Battista v Wawanesa Mutual Insurance Company*, [2005 CanLII 41985 \(ON SC\)](#) at [para 5](#).

⁵⁶ *Lee v. Li*, [2001 BCSC 434 \(CanLII\)](#).

of the Will; circumstances tending to call into question the capacity of the testator/testatrix; or circumstances that show that the free will of the testator/testatrix was over-borne by acts of coercion or fraud.⁵⁷

Examples of suspicious circumstances include:

- physical/mental disability of the testator/testatrix;
- secrecy in the preparation of the Will;
- seemingly “unnatural” dispositions;
- preparation or execution of a Will where a beneficiary is involved;
- lack of control of personal affairs by the testator/testatrix;
- drastic changes in the personal affairs of the testator/testatrix;
- isolation of the testator/testatrix from family and friends;
- drastic changes in the testamentary plan; and
- physical, psychological, or financial dependency of the testator/testatrix on beneficiaries.

Generally, the more evidence of suspicious circumstances adduced, the greater the burden on the propounder of the Will.⁵⁸ Notably, if the suspicious circumstances relate to capacity, the propounder of the Will reassumes the legal burden of establishing requisite testamentary capacity.

When suspicious circumstances are present, the following principles apply:

- 1) The civil standard of proof on a balance of probability applies; however, that evidence must be scrutinized in accordance with the gravity of the suspicion;
- 2) If, after overcoming the initial burden that the formalities have been complied with and the testator/testatrix has approved the contents of the Will, the propounder of the Will reassumes the legal burden of establishing testamentary capacity;
- 3) The burden of those alleging the presence of suspicious circumstances can be satisfied by adducing or pointing to some evidence which, if accepted, would tend to negative knowledge and approval or requisite testamentary capacity; and

⁵⁷ *Vout v. Hay*, [1995] 2 S.C.R. 876.

⁵⁸ *Estate Litigation* by Brian Schnurr (Carswell: 2nd ed) at 2.1.

- 4) The burden of proof on those alleging undue influence or fraud remains with them throughout.

COURT TREATMENT OF GROUNDS FOR CHALLENGES

1. DUE EXECUTION

Clarke Estate (Re)⁵⁹

In *Clarke Estate (Re)*, the court considered [section 4](#) of the *SLRA*, and the due execution of a Will. The court specifically examined [section 4\(2\)\(a\)](#), which provides that a Will document must be signed at the end by the testator or some other person in their presence and by their direction.

The testator was a paraplegic and unable to take a pen in his hand to sign or initial the pages of his Will. An affidavit of execution provided that the testator executed his Will by placing a stamp with his full name on the signature line at the end of the document. The court concluded that the stamping of the Will by the testator represented the best way the testator could comply with this formality. Accordingly, the court deemed the Will valid and in compliance with [section 4\(2\)\(a\)](#) of the *SLRA*.

Sills v. Daley⁶⁰

In *Sills v. Daley*, the testator signed their Will while in hospital for a brain surgery. The court was required to consider the validity of the Will and whether it complied with [section 4\(2\)\(c\)](#) of the *SLRA*, which requires that two witnesses sign a Will.

Whereas one of the intended witnesses signed the Will, the other witness in the room did not and was deliberate in their refusal to do so. The court declined to validate the Will of the testator and admit it to probate, stating that to “declare the Will as valid, would be to by-pass the clear provision of the Act and to create a discretion in this Court which is not found in the Act”.

It is important to note that these decisions arose in Ontario before the introduction of the validating provision found in section 21.1(1) of the *SLRA*. This provision grants a court discretion to admit a Will to probate notwithstanding its non-compliance with the formalities contained in section 4. Section 21.1(1) of the *SLRA* is considered in greater detail in Chapter 2.

59 *Clarke Estate (Re)*, 2008 CanLII 45541 (ONSC).

60 *Sills v Daley* 2003 CanLII 72335 (ON SC).

2. TESTAMENTARY CAPACITY

Roe v. Roe⁶¹

In [Roe v. Roe](#), Ms. Roe (the “**Deceased**”) left a Will dated August 24, 2005 (the “**2005 Will**”) which was challenged on the basis that she lacked the requisite testamentary capacity and was suffering from ‘insane delusions.

The Deceased passed away on July 12, 2014, at the age of ninety. She had four sons: Mark, Richard, Randall, and Raymond. Mark (the “**Applicant**”) was excluded from the Deceased’s 2005 Will and challenged the validity of the document. The Deceased’s prior Will left her entire estate to her four sons equally. The Deceased functioned as the family matriarch for over 20 years, managing her own personal and financial affairs after her husband predeceased her.⁶²

The court engaged an examination of the timeline of events respecting the Deceased’s previous Wills and relationship with the Applicant. The Roe family was plagued by complex and strained dynamics, at first between the Applicant and Richard, and, then between the Applicant and the Deceased. Whereas the Applicant, Randall and Raymond lived separately, Richard lived with the Deceased for most of his life. Each of the siblings agreed that Richard was a difficult person and could be intimidating and controlling of the whole family. The Applicant noted that Richard was anti-social, volatile, and bad tempered.⁶³

In February 2001, the Deceased executed a Will and Powers of Attorney for property and personal care, naming all four sons as her co-Attorney’s and co-estate trustees. In August 2001, the Applicant accused Richard of abusing the Deceased, which precipitated the involvement of the police. The Deceased denied any abuse took place and the allegations caused a strain in the relationship between her and the Applicant.⁶⁴

In 2003, the Applicant’s wife, Kathy, called the Deceased’s family doctor, Dr. Roy, informing him of the situation as between the family and raised the possibility that the Deceased receive psychiatric counselling and an assessment from Sunnybrook Hospital. The Deceased later became aware of this conversation and was very upset that Kathy had called her doctor.⁶⁵

In 2005, the Deceased was diagnosed with early onset Alzheimer’s disease. Shortly thereafter, the Deceased gave instructions for the preparation of her 2005 Will, which disinherited the Applicant. On October 27, 2005, over two months after executing the 2005 Will, the Deceased prepared and

61 *Roe v. Roe*, [2022 ONSC 5821 \(CanLII\)](#) (“**Roe**”).

62 *Ibid* at [para 1](#).

63 *Ibid* at [paras 14-16](#).

64 *Ibid* at [paras 20-25](#).

65 *Ibid* at [paras 26-27](#).

commissioned a letter with the assistance of her drafting lawyer, Ms. Guidolin, delineating the reasons why she disinherited the Applicant. In her letter, the Deceased cited the Applicant's conduct including reporting Richard to the police for elder abuse.⁶⁶

The court then examined the criteria for testamentary capacity as established in *Banks v. Goodfellow*,⁶⁷ that requires the testator/testatrix:

- i. understand the nature of the will and its effect;
- ii. have some understanding of the extent of the property which they are disposing OF under the will;
- iii. are aware of the persons who would usually be expected to inherit; and
- iv. are free from any delusion of the mind that would affect their dispositions to those people.

The Applicant conceded that the Deceased understood the nature of a Will and its effect and could evaluate the claims of those who might expect to benefit from her estate. The Applicant also conceded that he believed the Deceased was capable of communicating a clear and consistent rationale for the distribution of her property. The Applicant however, challenged the Deceased's testamentary capacity on the basis that she did not have knowledge of her assets and that 'insane delusions' affected her Will making. Specifically, that the Deceased suffered delusions in respect of the Applicant's actions in reporting Richard to the police.⁶⁸

The burden is on the propounder of a Will to demonstrate testamentary capacity on a balance of probabilities if the presumption is rebutted. In this regard, the Applicant's brothers, Richard, and Randall, were required to establish that the Deceased had testamentary capacity.

Both parties engaged the expertise of Dr. Shulman and Dr. Sadavoy to conduct retrospective capacity assessments of the Deceased, relying on the available medical records, solicitor records and pleadings. Both doctors agreed that the Deceased understood her assets at the time she gave instructions for the 2005 Will. The drafting lawyer, Ms. Guidolin, indicated that the Deceased arrived at her meeting with a list of her assets.⁶⁹

The court cited the wording of 'delusions' in *Banks*, as well as the medical definition produced by doctors Shulman and Sadavoy, as "a fixed false belief that is out of keeping with one's educational,

66 *Ibid* at [paras 29-31](#).

67 *Banks v. Goodfellow*, (1870) LR 5 QB 549.

68 *Ibid* at [paras 32-24](#).

69 *Ibid* at [para 33](#).

cultural and religious background, and is incapable of being altered when shown to be unfounded”⁷⁰. In *Skinner v. Farquharson*⁷¹, the Supreme Court of Canada stated that a delusion is “insanity where one persistently believes supposed facts (which have no real existence except in his perverted imagination) against all evidence and probability and conducts himself however logically upon the assumption of their existence.”⁷²

Neither Dr. Shulman nor Dr. Sadavoy opined that the Deceased suffered from delusions or exhibited behaviour characteristic of illnesses like Dementia or Alzheimer’s. Moreover, in the court’s review of the evidence, it found that the Deceased was not suffering from insane delusions at the time she executed her 2005 Will. The most persuasive evidence before the court concerning the Deceased’s intentions was her commissioned letter of October 27, 2005, which demonstrated that the Deceased possessed a strong understanding of the facts at that time.⁷³

The court noted that the Deceased’s reasons for disinheriting the Deceased, regardless of their exaggerated nature, were grounded in actual events. The Deceased expressed her view that Richard did not deserve to be reported to the police for something she believed he did not do. The legal test for insane delusions is not whether hyperbolic language is used, but whether there is a factual basis for the testator/testatrix to form a certain viewpoint. A delusion must rise to the level of something that no one in their senses could believe. Moreover, the Deceased also cited the fact that Kathy told her doctor that she should see a psychiatrist for counselling. There is no dispute that Kathy did speak with Dr. Roy about psychiatric counselling or an assessment of the Deceased, though the court notes this was due to Kathy and the Applicant’s belief of elder abuse by Richard.⁷⁴

The court found that Richard and Randall, as propounders’ of the 2005 Will, had demonstrated that it was more likely than not that the Deceased did not operate under insane delusions when she disinherited the Applicant. As such, the court dismissed the Applicant’s Application and the 2005 Will was found to be valid.⁷⁵

Francella v. Tokarz⁷⁶

[*Francella v. Tokarz*](#) involved an uncontested challenge to a Will on the basis that the testator/testatrix lacked testamentary capacity. Ms. Scott (the “**Deceased**”), left a Will dated February 22, 2019 (the “**Will**”), leaving her entire estate to The Humane Society of Canada. The Deceased was survived

70 *Ibid* at [para 36](#).

71 *Skinner v. Farquharson*, (1902), 1902 CanLII 87 (SCC), 32 S.C.R. 58 at page 76.

72 *Roe* at [para 36](#).

73 *Ibid* at [para 43](#).

74 *Ibid* at [para 44](#).

75 *Ibid* at [para 58](#).

76 *Francella v. Tokarz*, 2022 ONSC 7066 (CanLII) (“**Francella**”).

by her daughter Ms. Francella (the “**Applicant**”) and son, Mr. Stackhouse. The Will appointed Ms. Tokarz, the daughter of the Deceased’s neighbour, as the estate trustee. The Applicant challenged the validity of the Will on the basis that the Deceased lacked the requisite testamentary capacity.⁷⁷

In 2012, the Deceased was in a motor vehicle accident which resulted in a serious brain injury. Following which, the Deceased’s friend Ms. Hinnegan was appointed as her guardian for property. Ms. Hinnegan passed away in 2021.⁷⁸

In 2019, the Deceased saw a lawyer to prepare Power of Attorney documents and a Will. Ms. Tokarz took the Deceased to her meeting with the lawyer. The Deceased’s Powers of Attorney for property and personal care appointed Ms. Tokarz as her Attorney. The Will gifted Ms. Tokarz \$5,000 as compensation for her acting as estate trustee and gifted the entire residue of her estate to The Humane Society of Canada. The Applicant was specifically excluded as a beneficiary in the Will on the basis that no relationship existed with the Deceased. The Will made no mention of the Deceased’s son, Mr. Stackhouse. The Deceased died on March 10, 2021, at 74 years old.

The Applicant asserted that following her accident, the Deceased suffered pain because of her injuries. The Deceased also suffered from short-term and long-term memory loss and took various medications before her death. Following the Deceased’s death, Ms. Tokarz took initial steps to administer the Estate with the Will but shortly thereafter renounced her appointment. In an email to the Applicant, she expressed that she did not believe the Deceased was of sound mind when executing the Will and that she did not think the Deceased would have wanted the bulk of her estate to go to The Humane Society instead of her family.⁷⁹

There is a rebuttable presumption that a testator/testatrix knew and approved of the contents of their Will and had the necessary testamentary capacity. The presumption may be rebutted where evidence of suspicious circumstances exists concerning the preparation of the will; circumstances calling into question the capacity of the testator/testatrix; or, circumstances that demonstrate undue influence was at play.

The Court found that the Will was invalid for several reasons:

- (a) No one propounded the Will and the Applicant’s challenge was uncontested. Ms. Tokarz renounced her appointment to act as estate trustee;
- (b) Ms. Tokarz was of the view that the Deceased lacked testamentary capacity and that the Will was invalid;

⁷⁷ *Ibid* at [paras 1-3](#).

⁷⁸ *Ibid* at [para 7](#).

⁷⁹ *Ibid* at [para 16](#).

- (c) There was evidence demonstrating the Deceased had lacked capacity since 2012 following her brain injury, including her need for a guardian for property to make financial decisions on her behalf; and noted,
- (d) Suspicious circumstances were present including, in the rationale for why the Deceased would appoint her neighbour's daughter as her estate trustee and attorney for property and personal care. Moreover, explaining why the Deceased would exclude her family from her Will given their relationship and expectation to inherit.⁸⁰

For these reasons, the Court made orders declaring the Will invalid, and that the Deceased died intestate. As such, the Applicant was appointed as estate trustee without a Will pursuant to [section 5\(1\)](#) of the [Trustee Act](#)⁸¹. The Deceased's estate was distributed on an intestacy basis between the Applicant and Mr. Stackhouse in accordance with [section 47](#) of the *SLRA*. In respect of costs, the court ordered that the Applicant's costs be paid entirely from the Deceased's Estate.⁸²

3. UNDUE INFLUENCE

Re Christie⁸³

In the Manitoba case of [Re Christie](#), two daughters challenged a codicil to their late father's Will. Mr. Christie (the "**Deceased**") died with a Will dated January 17, 2007 (the "**2007 Will**") and a Codicil to his 2007 Will dated July 21, 2009 (the "**Codicil**"). The Deceased had four children, Myrna, Maxine, (the "**Applicants**"), Robert, and Bruce (the "**Respondents**"). The Applicants challenged the validity of the Codicil alleging, amongst other things, that their father was unduly influenced by their stepmother in its execution. The Codicil amended the 2007 Will to include the Respondent, Bruce, as an equal beneficiary in the Deceased's estate, while previous Wills had disinherited him. Prior to executing the Codicil, the Deceased had, however, reconciled with Bruce after a falling out. The stepmother kept the Codicil and the reconciliation of the father and son a secret from the daughters.⁸⁴

The Deceased had limited ability to communicate due to a medical and cognitive impairment but could speak some words and nod or shake his head. The court was presented with evidence from the Deceased's neurologist, the staff of the nursing home where the Deceased resided, and family members. The court was satisfied that it was not the stepmother's idea to include the Respondent as a beneficiary, that it was solely the Deceased's intention, and that she "merely facilitated" it by

80 *Ibid* at [para 20](#).

81 *Trustee Act*, [R.S.O. 1990, c. T.23](#).

82 *Francella* at [para 23](#).

83 *Re Christie*, [2015 MBQB 25](#) ("**Christie**").

84 *Ibid* at [paras 1-14](#); [para 56](#).

calling the son to visit and calling the lawyer to draft the Codicil. The lawyer met with the Deceased and went through every page and paragraph of the Codicil and the Deceased communicated with the lawyer by nodding his head. The drafting lawyer was satisfied that the Deceased was communicating his wishes and understood what he was doing. Furthermore, the stepmother's decision to keep the Respondent's visits and the Codicil a secret from the daughters was so that her husband "could live out his final months in peace".⁸⁵

The stepmother's evidence was corroborated by staff members of the nursing home and other families. The court found the stepmother to be an honest and truthful witness. Accordingly, no undue influence was found, and the Codicil was found to be valid and admitted to probate.⁸⁶

Fanelli v Fanelli-Bruno⁸⁷

[*Fanelli v. Fanelli-Bruno*](#) is a decision where the Applicant sought to prove a claim of undue influence. Ms. Fanelli (the "**Deceased**") left a Will dated March 19, 2018 (the "**Will**"). The Deceased had a son (the "**Respondent**") and a daughter (the "**Applicant**"). In the Deceased's previous Will, she named the Applicant and the Respondent as equal beneficiaries of her estate. One year prior to her death, the Deceased executed the Will, altering her estate planning to add her two grandchildren (children of the Respondent) as 25% beneficiaries of her estate. This resulted in a 25% reduction in the Applicant's share.⁸⁸

The Applicant challenged the validity of the Will on the basis that the Respondent unduly influenced the Deceased. The Applicant made this assertion on two grounds. First, as the Deceased was battling terminal cancer, she had been taking prescribed morphine to counter her pain. The court rejected the argument that this morphine medication affected her capacity such that she was prone to undue influence. It found that this morphine medication did not alter the Deceased's testamentary capacity given she was aware of the value of her assets and those who would expect to inherit. The court stated:

The applicant gives no evidence indicating that Mrs. Fanelli was not managing her own affairs. She was not in end-stage palliative care or in-and-out of consciousness on high doses of medication. Rather, this was almost a year before Mrs. Fanelli died.⁸⁹

The Applicant's second ground for challenging the Will was the Deceased's change in lawyer. The Applicant claimed that this new lawyer may have had familial ties to the Respondent. The Applicant

85 *Ibid* at [paras 52-53](#); [para 57](#).

86 *Ibid* at [paras 58-61](#).

87 *Fanelli v Fanelli-Bruno*, [2023 ONSC 6501](#) ("**Fanelli**").

88 *Ibid* at [paras 1-5](#).

89 *Ibid* at [para 26](#).

in his affidavit provided their recollection of conversation between the Deceased and the Respondent wherein they heavily insisted that the Deceased not go to her previous lawyer because “he was dying”. The Applicant concluded from this conversation that the Respondent manipulated the Deceased into changing her Will through use of a lawyer close to them. The court found this conversation lacking sense, and inadmissible on the basis that it constituted hearsay.⁹⁰

The court found that the Will was not the product of undue influence and dismissed the Applicant’s application. In doing so, the court described the actions of the Applicant as constituting a “long, expensive fishing expedition,” creating a massive expenditure.⁹¹ Accordingly, the court found it fair and reasonable to order that the Applicant to pay the Respondent her costs on a substantial indemnity basis.⁹²

4. KNOWLEDGE AND APPROVAL

Leonard v. Zychowicz⁹³

In [*Leonard v. Zychowicz*](#), a Will was challenged on the basis that the testatrix did not know or approve of the contents of the Will, nor did she have the requisite testamentary capacity to have made a valid Will. The testatrix, Ms. Polomick (the “**Deceased**”) executed her Will on October 23, 2007 (the “**2007 Will**”). The 2007 Will appointed the Deceased’s niece, Ms. Zychowicz (the “**Respondent**”) as her estate trustee and sole beneficiary. The Will was challenged by Ms. Leonard (the “**Applicant**”), who was the Deceased’s family friend. The Deceased suffered from various mental health issues in her life, notably bipolar disorder, but continued to live alone at her matrimonial home until her death on April 4, 2011. The Deceased executed several Wills and codicils prior to the 2007 Will. In 1976, she executed a Will appointing the Applicant’s mother as estate trustee and which left her estate to her children, including the Applicant. In 1984, the Deceased executed a codicil that made the Applicant the sole beneficiary.⁹⁴

In 1989, the Deceased executed a new Will appointing her half-brother as estate trustee and left the residue to him and if he predeceased her, his daughter the Respondent. Then in 2002, the Deceased revoked her previous Will and executed a new Will naming the Applicant as her sole beneficiary with both her and the Respondent as estate trustees. Shortly thereafter, the Deceased removed the Respondent as her estate trustee after a falling out and informed her drafting lawyer, Mr. Sweetlove, of this. The court found the Deceased’s patterns concerning her Wills important since they indicated

90 *Ibid* at [paras 33-34](#).

91 *Ibid* at [para 48](#).

92 *Ibid* at [para 52](#).

93 *Leonard v. Zychowicz*, [2020 ONSC 662 \(CanLII\)](#).

94 *Ibid* at [paras 1-5](#).

that she amended her documents based on her current relationships with her family and friends.⁹⁵

The 2007 Will was prepared by her lawyer, Mr. Sweetlove, who had prepared her previous two Wills. In August 2007, Mr. Sweetlove took notes during her meeting with the Deceased, recording that she wanted to remove the Applicant as a beneficiary since she was upset with her, and she wished for the Respondent to be the sole estate trustee and beneficiary. Mr. Sweetlove stated in evidence that he believed the Deceased expressed awareness of her property and testamentary dispositions.⁹⁶

The court was satisfied that the 2007 Will was duly executed in accordance with the requisite formalities of the *SLRA* and that the Deceased read over the Will document. As such, the Respondent was entitled to the presumption that she knew and approved of the 2007 Will and had the requisite testamentary capacity. The Applicant had the onus of demonstrating that suspicious circumstances existed so as to rebut the presumption that she knew and approved of its contents.

The court found no evidence of suspicious circumstances surrounding the preparation of the 2007 Will. Mr. Sweetlove received instructions from the Deceased, was advised on what assets were in her estate and her intended dispositions. The Deceased gave reason to Mr. Sweetlove for changing her beneficiaries, a reason also given for amendments to her prior Wills. Lastly, the Deceased was not assisted in obtaining Mr. Sweetlove's services and went to his office alone.⁹⁷

The Applicant asserted that the Deceased lacked capacity to execute the 2007 Will, highlighting her history of hospitalizations and her bipolar disorder. The Applicant also produced a retrospective assessment by Dr. Shulman which opined that the Deceased suffered from a mild cognitive impairment in 2007. Dr. Shulman's report noted that due to the Deceased's lifelong history of bipolar disorder, she was both prone to undue influence and could not make property decisions by herself. The court was critical of this finding, given that the Deceased lived independently at her home until her passing, and her fierce independence was noted in affidavit evidence by her family. Medical records demonstrated that the Deceased was hospitalised in 2005 due to complications with her bipolar disorder. However, the court noted that there was a lack of contemporaneous evidence indicating the Deceased's incapacity when the 2007 Will was executed. Limited other medical records were found until the Deceased was hospitalised in 2010 due to injuries and falls, three years after her 2007 Will was executed.⁹⁸

In summary, the court found that the 2007 Will was valid. The Applicant had produced little evidence to suggest suspicious circumstances to rebut the presumption that the Deceased knew and approved of

95 *Ibid* at [paras 9-11](#).

96 *Ibid* at [paras 12-17](#).

97 *Ibid* at [paras 20-25](#).

98 *Ibid* at [paras 33-40](#).

her Will and possessed the requisite testamentary capacity. Moreover, Mr. Sweetlove had no concern about the Deceased's capacity when the 2007 Will was executed. Considering the Deceased's history with her prior Wills and codicils, the 2007 Will was not a radical change from her prior Will in 2002. The Deceased demonstrated that she understood her assets, her potential beneficiaries and that she was not suffering from a delusion or disease of the mind. As such, the Deceased knew and approved of the contents of the 2007 Will.⁹⁹

Henry v. Henry¹⁰⁰

In [Henry v. Henry](#), the deceased, James Henry (the "**Deceased**") executed a Will dated May 12, 2005 (the "**Will**"). The Deceased died of cancer on May 28, 2005, less than two weeks after executing the Will. The Will was challenged by one of his children, Tyrone, on the grounds of lack of knowledge and approval, testamentary capacity, and undue influence.¹⁰¹

Under the Will, the Deceased left his estate to his wife if she survived him by 30 days, failing which one half was to be given to his four children, all of whom were children by his previous wife from whom he was divorced. The other half would be given to the six brothers and sisters of his wife. As his wife survived him, she became the sole residuary beneficiary. At trial, the court considered witness evidence from two of the Deceased's children, the drafting solicitor Mr. Ross, the clerk who also witnessed the Will and the Deceased's wife.¹⁰²

The drafting solicitor provided his contemporaneous notes when he met with the Deceased. The Deceased first met the drafting solicitor in November 2001 to deal with a separate legal matter. Then the following month he asked the solicitor to draft him a Will and prepare a transfer of his home from himself to him and his wife as joint tenants. At that time, he told the solicitor he wanted to leave his estate to wife and if she did not survive him, to two of his children, Tyrone, and Conrad. For reasons unknown to the parties, the Deceased did not contact the solicitor again in reference to the Will and property transfer.¹⁰³

The Deceased then met again with the drafting solicitor in April 2005. The drafting solicitor testified that when Deceased came back on April 7, it was not obvious to him that the Deceased had cancer, stating that mentally and physically he looked capable and healthy. The drafting solicitor drafted the Will to reflect Deceased's intentions. When the Deceased met the solicitor two months later, the solicitor testified that he was taken back with the degradation in the Deceased's health. Nevertheless,

99 *Ibid* at [paras 47-49](#).

100 *Henry v. Henry*, [2009 CanLII 92131 \(ON SC\)](#).

101 *Ibid* at [para 1](#).

102 *Ibid* at [para 3](#).

103 *Ibid* at [paras 9-14](#).

the solicitor noted that while the Deceased looked physically weak, he appeared mentally capable.

To ensure the Deceased could understand and appreciate the Will, the solicitor asked him to go over testamentary dispositions once again. Without seeing the draft Will, the Deceased was able to accurately recite what was in it. It was evident to the solicitor that the Deceased knew what they were doing and how he was distributing the assets of his estate. The court found that the evidence clearly established that Deceased understood and approved contents of the Will and that he possessed the requisite capacity and was not unduly influenced. As such, the Will was found to be validly executed.¹⁰⁴ Given Tyrone's failure to successfully challenge the Will, the court ordered that the estate was entitled to their costs of the action from Tyrone.¹⁰⁵

Silano v. Silano¹⁰⁶

In [Silano v. Silano](#), a dispute arose between four siblings over the validity of their late father's Will. The deceased, Mr. Silano, (the "**Deceased**") died with a Will dated December 18, 2013 (the "**Will**"). The Deceased had four children, Barbara, Mary, Giulio (the "**Applicants**") and Pasquale (the "**Respondent**"). The Applicants challenged the validity of the Will on the basis that the Deceased lacked the requisite knowledge and approval of the Will's contents, was unduly influenced and lacked requisite testamentary capacity.¹⁰⁷

The Applicants asserted that the Deceased lacked knowledge and approval based on multiple factors. First, the Will was written in English, even though the Deceased was only fluent in Italian. Second, there was an error in the Will regarding the Respondent's marital status. Third, the drafting lawyer of the Will was hired by the Respondent because of a personal relationship.¹⁰⁸

The court examined evidence from the parties, as well as from the drafting lawyer of the Will, an Italian speaking lawyer. The court was not swayed by the Applicants' argument, finding that no suspicious circumstances were present, and that the Deceased knew and approved of the contents of the Will. The major factors that contributed to the court's finding was that the Deceased's lawyer completed the necessary formalities imposed by the SLRA to execute the Will while accommodating the Deceased's native language of Italian. The evidence demonstrated that the Deceased was aware of the mistake in the Will and provided a reasoning for it, and lastly, it was provided that the lawyer and the Respondent did not have a personal relationship. The Respondent was able to successfully rebut the claims asserted by his siblings, thus permitting the courts to admit the Will to probate.¹⁰⁹

104 *Ibid* at [paras 16-18](#); [para 52](#).

105 *Ibid* at [para 54](#).

106 *Silano v. Silano*, [2019 ONSC 2776 \(CanLII\)](#).

107 *Ibid* at [paras 1-6](#).

108 *Ibid* at [paras 20-22](#).

109 *Ibid* at [paras 78-83](#).

Given the Respondent was successful in the matter, the court ordered that they were entitled to their costs payable by the Applicants.¹¹⁰

5. FRAUD AND FORGERY

Ward v. Anderson Estate¹¹¹

In [*Ward v. Anderson Estate*](#), a beneficiary challenged the validity of her mother's Will on the basis that it was the product of fraud. The case concerned the Estate of Lorraine Elizabeth Agnes Anderson (the "**Deceased**"). The Deceased had four children including Larissa (the "**Applicant**"), the Respondent Lurlene (the "**Respondent**") and their brothers Jack and Trevor.¹¹²

The Deceased died testate with a Will dated May 27, 2017 (the "**2015 Will**") that appointed the Respondent, as estate trustee. All four children were beneficiaries under the 2015 Will. In October 2018, the Respondent applied for a Certificate of Appointment of Estate Trustee with a Will. The Applicant filed a Notice of Objection claiming that her mother lacked testamentary capacity to execute the 2015 Will and notably that the Respondent had forged the 2015 Will.¹¹³

The Applicant made two very serious allegations concerning the 2015 Will. First that the Respondent forged the Deceased's signature and initials on the 2015 Will. Second, that the drafting lawyer Mr. Vanular, and his assistant, Ms. Tittell, conspired with the Respondent to allow the forgery to be perpetrated.

On the first issue, the Applicant submitted an expert report by Ms. Brenda Petty ("**Ms. Petty**"), a Certified Questioned Document Examiner. In Ms. Petty's report, she compared the signatures of the Respondent and the Deceased. Ms. Petty was given samples of the Deceased's signature from her previous 2014 Will, the 2015 Will, and signatures on nine documents related to her real estate transactions in April 2015. There was also an independent undated sample of her handwriting.

The Deceased's given names were Lorraine Elizabeth Agnes. On all the samples but one she signed her name "E Anderson" or "EA Anderson". On the 2015 Will (including her initials) she signed "L Anderson". The examiner concluded that this brought the 2015 Will into suspicion. The examiner also noted that the "LA" initials were circled which was not Mrs. Anderson's writing habit. Her overall conclusion in her report was that the signature and initials of Mrs. Anderson on the 2015 Will were "suspicious." The court rejected the findings in Ms. Petty's report, noting that the Deceased had three first names (Lorraine, Elizabeth, and Agness) all of which she used interchangeably. On the 2015 Will,

110 *Ibid* at [para 85](#).

111 *Ward v. Anderson Estate*, [2021 ONSC 8337 \(CanLII\)](#).

112 *Ibid* at [paras 1-5](#).

113 *Ibid* at [paras 8-11](#).

the Deceased decided to sign as “L. Anderson” (Lorraine) and not her usual signature “E. Anderson” (Elizabeth). This alone does not deem the 2015 Will invalid or raise suspicious circumstances.¹¹⁴

On the second issue, regarding Mr. Vanular, and Ms. Tittel’s role in the fraud, the court found this argument was “without foundation and border[ed] on ludicrous”. The Applicant’s accusations related to the fraud were found to be based solely on her uncorroborated and self-serving affidavit evidence. The Applicant was required to put “her best foot forward” in respect of her evidence of fraud and the court found it to be insufficient.¹¹⁵

The court found in favour of the Respondent and dismissed the Application on summary judgment. Accordingly, it found that the Deceased possessed the requisite testamentary capacity to execute her 2015 Will and that the Applicant failed to provide evidence to forward a claim based on fraud or forgery.¹¹⁶

CONCLUDING COMMENTS ON WILL CHALLENGES

The purpose of this chapter has been to explore the five key grounds upon which a Will can be challenged in Ontario. It is important to appreciate how these grounds often overlap, with an interplay of the concepts of testamentary capacity, undue influence and knowledge and approval. Suspicious circumstances, while not a ground to challenge, are an important ongoing evidentiary consideration.

It is important to note that there are cost consequences to bringing a Will challenge, given estates matters follow the general “loser pays” cost principle. In Ontario, the courts will only award a parties’ costs out of an estate where there are reasonable grounds to challenge a Will or there are ambiguities that require the court’s adjudication.¹¹⁷ Moreover, unreasonable conduct by a party can result in cost consequences, or elevated cost consequences against them.¹¹⁸

114 *Ibid* at [paras 76-81](#).

115 *Ibid* at [paras 83-87](#).

116 *Ibid* at [para 123](#).

117 *McDougald Estate v. Gooderham*, [2005 CanLII 21091 \(ON CA\)](#).

118 As highlighted in *Fanelli v Fanelli-Bruno*, [2023 ONSC 6501](#).

CHAPTER 2: VALIDATING PROVISION UNDER S.21.1(1) OF THE SUCCESSION LAW REFORM ACT

In Canada, many jurisdictions have enacted validating provisions for Wills that do not meet legislative due execution requirements. In January 2022, section 21.1 of Ontario's *Succession Law Reform Act* ("**SLRA**")¹ came into force. This section permits a court to validate a Will that would have failed because it did not comply with statutory formalities. Section 21.1(1) provides as follows:

21.1(1) If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a Will of the Deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the Will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it has been properly executed or made².

Previously, Ontario was a "strict compliance" jurisdiction, meaning that a Will had to meet the formalities set out in the *SLRA*. This required a Will to be signed by the testator (or someone else present and directed), in the presence of two or more attesting witnesses at the same time, and two or more of such attesting witnesses having executed the will in the presence of the testator.³

COURT TREATMENT OF SECTION 21.1(1)

Since its introduction, there have been several cases that have applied [section 21.1\(1\)](#).

Grattan v. Grattan⁴

In *Grattan v. Grattan*, the deceased met with a solicitor and provided instructions to prepare a Will, which bequeathed the residue of her estate to her surviving brother. They met once, a draft copy was prepared and returned to the solicitor with minor corrections. Dates were canvassed for a follow-up appointment to formally execute the will, however the Deceased died 15 days later.

1 *Succession Law Reform Act*, [RSO 1990, c.S.26 \[SLRA\]](#).

2 *SLRA* at [section 21\(1\)\(1\)](#).

3 *SLRA*, *supra* note 1 at [section 4\(2\)](#).

4 *Grattan v. Grattan*, 1 February 2023, Ontario 22-054 (ONSC). *unreported decision

The court held that on a balance of probabilities the 15-day delay did not constitute evidence of a change in the deceased’s testamentary intentions nor give rise to an inference she changed her intentions. Pursuant to section 21.1(1), the will was declared valid and fully effective despite non-compliance with section 4(2).

Cruz v. Public Guardian and Trustee⁵

In [*Cruz v. Public Guardian and Trustee*](#), the deceased had prepared his own Will document. The Will was described to be clearly drafted and clearly expressed the testamentary intentions of the deceased; however, the document was unsigned and unwitnessed. In determining whether [section 21.1\(1\)](#) could be utilized to validate the testator’s Will, the court looked to the British Columbia decision in [*Estate of Young*](#),⁶ and was ultimately satisfied that the document in question “records a deliberate or fixed and final expression of intention as to the disposal of the deceased’s property on death”.⁷ In determining the Will to be valid and fully effective, Myers J. held that “[f]ixing this type of mistake is precisely what s. 21.1 seems to be for.”⁸

White v. White⁹

In [*White v. White*](#), [section 21.1\(1\)](#) was addressed but not plead by an applicant who sought directions to obtain access to the files of his late mother’s lawyer, commencing an application under [Rule 75.06\(1\)](#) of the [*Rules of Civil Procedure*](#).¹⁰ The deceased, Ms. White (the “**Deceased**”) prepared a draft Will in 2022 (the “**Draft Will**”). The Deceased also executed a Will in 2014 (the “**2014 Will**”). The applicant, Thorne (the “**Applicant**”) was the Deceased’s son.

The Applicant’s counsel argued that the Draft Will that was being prepared might be an expression of the Applicant’s mother’s testamentary intention to revoke or alter her 2014 Will and that if so, the court might recognize the Draft Will under [section 21.1\(1\)](#) of the SLRA.

According to the Applicant, he engaged a lawyer in 2021 to help the Deceased update her Will. As such, he emailed a lawyer on July 10, 2022, to book a consultation appointment. Several conversations took place over the ensuing weeks concerning the updating of the Deceased’s Will. Between August 9 to 12, three emails were sent to the lawyer to book an appointment to finalize the Will. An appointment was set for August 16, 2022. On the morning of the appointment, the Deceased suffered a stroke and was hospitalized. The lawyer attended the hospital for formal execution, but the Deceased was

5 *Cruz v. Public Guardian and Trustee*, [2023 ONSC 3629 \(CanLII\)](#) (“**Cruz**”).

6 *Estate of Young*, [2015 BCSC 182](#).

7 *Cruz* at [para 9](#).

8 *Cruz* at [para 9](#).

9 *White v. White*, [2023 ONSC 3740 \(CanLII\)](#) (“**White**”).

10 *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194](#).

unable to sign, dying six days later, on, August 22, 2022.

The court was curious and queried whether [section 21.1\(1\)](#) could apply on these facts and noted that the email on August 16, 2022 between the lawyer and the Deceased only referenced that she wanted to have a telephone conversation. The court did not believe this sounded like a Will was ready to be signed. The court considered the rationale set out in the decision in [Estate of Young](#),¹¹ respecting evidence of “a deliberate or fixed and final expression of intention as to the disposal of the deceased’s property on death.” The court held that “It is hard to see how a draft will can meet that threshold.” Importantly, it was also noted by the court that because this was not an application under [section 21.1\(1\)](#), the court did not need to decide if the new unsigned, unreviewed, draft Will or the solicitor’s notes are an effective Will-equivalent.¹²

The Endorsement of the court included some thoughts for consideration on the development of the law. Particularly, the court questioned whether [section 9](#) of the [Estates Act](#),¹³ a section designed to help beneficiaries find and obtain a deceased person’s Will, could apply as well to a document that one hopes might qualify as a will-equivalent under [section 21.1\(1\)](#). The court also commented that the availability of a pre-lawsuit discovery order requires an argument based on research and that, “in light of the novelty of [section 21.1\(1\)](#), the relief requested may have a far broader reach than just this case”.¹⁴

The court ordered the disclosure of the Draft Will, as well as the Deceased’s solicitor records regarding her estate planning. There was evidence confirming the existence of the Draft Will, and that the Deceased’s lawyer had attempted to share the Draft Will with the Deceased a few days prior to her death, following her hospitalization. The court also found that the Applicant had met the minimum evidentiary threshold.¹⁵

The court noted the decision did not widen the scope of [section 21.1\(1\)](#) to permit the disclosure of a lawyers’ files in the hope of finding a previously unknown document subject to a [section 21.1\(1\)](#) claim. In other words, [section 21.1\(1\)](#) cannot be used to “encourage fishing expeditions or to foster litigation that may be brought by a disgruntled relative”.¹⁶

Vojska v. Ostrowski¹⁷

In [Vojska v. Ostrowski](#), the deceased died on September 9, 2022. Prior to this, a will was prepared on

11 *Estate of Young*, [2015 BCSC 182 \(CanLII\)](#).

12 *White* at [paras 16-19](#).

13 *Estates Act*, [RSO 1990, c E.21](#) at [section 9](#).

14 *White* at [paras 33-39](#).

15 The ‘minimal evidentiary threshold’ is discussed in further detail in Chapter 8.

16 *White*, at para [63](#).

17 *Vojska v. Ostrowski*, [2023 ONSC 3894](#).

October 7, 2011. The deceased and her husband attended a lawyer’s office on this day to sign new wills and powers of attorney. Each spouse signed a will and two power of attorney documents. A lawyer and a law clerk witnessed the signing ceremony. The lawyer, however, amongst the six documents to be signed, failed to sign the deceased’s will.

The court held that the will was valid and remarked how “it is hard to imagine a more textbook example of a case for which the new power was intended.”

Groskopy v. Rogers et al. ¹⁸

[*Groskopf v. Rogers et al.*](#) concerned a Will document of Ms. Liscombe (the “**Deceased**”), who died on February 11, 2022, with no spouse or children. The Deceased was survived by her three siblings, Judith, David, and Michael (the “**Respondents**”).

Sometime in 2004, the Deceased completed a fill-in-the blanks style document in her own handwriting (the “**Will document**”). The Will document was propounded by the Deceased’s friend, Ms. Groskopf (the “**Applicant**”). In pre-printed text, the Will document began by stating “This is the Last Will and Testament”, was signed but not dated and there were no attesting witnesses. However, the Will document did name both an estate trustee (the Applicant) and an alternate (the Respondent Judith) and provided for specific bequests and the division of the residue of her estate.¹⁹

The purported Will document was discovered in a lock box in the home where the Deceased was living at the time of her death alongside other handwritten notes and instructions to the estate trustee on how to deal with the distribution of the estate. A document titled “Estate Planning and Inventory” was also found.²⁰

The Deceased’s brother Michael, the Respondent, was not provided for in the Will document. The Respondent argued that the Will document did not represent the Deceased’s fixed and final expression of intention given the document is not dated or witnessed, moreover, the Deceased had a history of employment of lawyers and accountants, and she would have been aware that a Will without witnesses is not valid.²¹ The court noted that the document titled. ‘Estate Planning and Inventory’ indicated that the Deceased believed she had made a Will and was found in the same lock box as the Will document. This constituted adequate corroboration of the Applicant’s evidence that the Deceased had written a Will and stored it for safekeeping.

Despite the argument that the purported Will document was merely a draft which did not represent

18 *Groskopf v. Rogers et al*, [2023 ONSC 5312 \(CanLII\)](#).

19 *Ibid* at [paras 4-7](#).

20 *Ibid* at [paras 8-10](#).

21 *Ibid* at [para 21](#).

a fixed and final expression of intention on the part of the Deceased, the court held that the Will document should be validated as the Will of the Deceased.²²

Estate of Harold Franklin Campbell (Re)²³

In [*Estate of Harold Franklin Campbell \(Re\)*](#), the deceased executed a Will following the death of his wife (the “**Will**”). The Will provided for his estate to be distributed between his two children, Christopher, and Lisa. Later, the deceased remarried, the effect of which invalidated his Will under [section 19](#) of the *SLRA*.

Subsequently, the deceased made two handwritten notes providing for certain distributions to Christopher, and the handling of his remains (the “**Notes**”). The Notes were then stapled to the inside of the Will. Despite the Notes being considered valid holograph codicils under section 6 of the *SLRA*, Christopher asked the court to determine whether the Notes revived the Will by virtue of the technical requirements contained in the *SLRA* or the authority provided by [section 21.1\(1\)](#).

The court determined that rather than proceeding under [section 21.1\(1\)](#), the Will could be found valid under [section 19\(1\)\(b\)](#) of the *SLRA* which provides that a Will is revived where a valid codicil has been made showing an intention to give effect to a revoked Will or part of a Will.

The court then addressed the basis for not relying on [section 21.1\(1\)\(b\)](#) in their finding. First, [section 19\(1\)\(b\)](#) of the *SLRA* was determined to be sufficient to resolve the issue. Further, no authority was found to demonstrate that [section 21.1\(2\)](#) could be interpreted so as to read into a document, an intention to revoke, alter, or revive a Will. Instead, interpreting [section 21.1\(1\)](#) within the context of the statute, the court found that the section allows for validating documents that fail to strictly comply with requirements for execution, but does not authorize reading in intentions that are not already set out or clearly inferable from extrinsic evidence.

Reference was then made to [*Barsoski Estate v. Wesley*](#)²⁴ and [*Ross v. Canada Trust Company*](#),²⁵ for the principle that when interpreting testamentary instruments or documents, the testator’s intentions must be given effect based on the contents of the instruments or extrinsic evidence available (the “**armchair rule**”). The court found that nothing in the Notes referred to revocation, or renewal, or provided a basis for such to be reasonably inferred; nor, was extrinsic evidence advanced to demonstrate or infer that the deceased knew the Will had been revoked.

²² *Ibid* at [para 29](#).

²³ *Estate of Harold Franklin Campbell (Re)*, [2023 ONSC 431](#).

²⁴ *Barsoski Estate v Wesley*, [2022 ONCA 399](#).

²⁵ *Ross v Canada Trust Company*, [2021 ONCA 161](#).

Salmon v. Rombough²⁶

In [Salmon v. Rombough](#), a bound notebook found in the desk drawer of the deceased was admitted as a valid and fully effective codicil to a last will and testament pursuant to [section 21.1\(1\)](#).

On April 14, 2012, Garnet Rombough (the “**Deceased**”) executed a Will (the “**2012 Will**”). On January 15, 2022, the Deceased died. Approximately a week after his death, the Deceased’s appointed estate trustee discovered a bound notebook, dated December 31, 2021 (the “**2021 Document**”) in the Deceased’s desk drawer in his home.

The 2021 Document purported to amend the residual clause of the Deceased’s 2012 Will by removing the nieces and nephews and providing them with specific cash gifts while bequeathing his home to the Applicant. The 2021 Document, consisted of excerpts from the 2012 Will, photocopied and pasted into the notebook together with handwritten annotations. The 2021 Document is signed at the end and dated December 31, 2021.

Throughout his adult life, the Deceased was afflicted by heart function deficits. In July 2021, he was hospitalized for approximately five weeks. Upon being discharged, he returned home where he lived independently until days before his death.²⁷

Concerning the [section 21.1\(1\)](#) analysis, the court held that, “the trend is toward admitting extrinsic evidence to cure a multiplicity of wills.”²⁸ The court further stated that under the analysis, the purpose is to, “frame the testator’s point of view when he or she drafted the will,” by looking to the particular circumstances of the deceased to determine the plain intention behind the document.

The court cited the British Columbia decision in [Estate of Sharone Young](#),²⁹ which summarized the post-1995 Manitoba jurisprudence. In that case, Justice Dickson held that two principal issues for consideration emerged from these authorities:

1. The threshold issue of whether the document is authentic; and
2. The core issue of whether the non-compliant document represents the deceased’s testamentary intentions.³⁰

In *Young*, Justice Dickson held that, “the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased’s testamentary intention.”³¹

26 *Salmon v. Rombough*, [2024 ONSC 1186](#) [*Salmon*].

27 *Ibid* at para 21.

28 *Salmon*, *supra* at para 100.

29 *Estate of Sharone Young*, [2015 BCSC 182](#) [*Young*].

30 *Young*, *supra* note 14 at para 34; cited in *Salmon*, at para 115.

31 *Ibid* at para 37.

The court also cited the Ontario Superior Court decision in [Kertesz v. Kertesz](#),³² where the court confirmed that the chain of possession of the subject Will coupled with lay witness recognition of the deceased's handwriting left no real doubt that the document was his and is authentic.³³

The court recognized that the Deceased had executed a solicitor-drafted and witnessed Will in 2012. His Honour was of the view that under different circumstances, the Deceased would have taken his bound notebook to his solicitor like he had done in the past. However, by mid-December, the Deceased's physical health was failing. Justice Leroy also recognized that this was a time of year notorious for office closures and was during the height of the COVID-19 pandemic.

The court in *Salmon* reviewed affidavit evidence for the application deposed by a bank manager confirming the signature and handwriting of the Deceased, by members of the Salmon family and by a close friend. The Applicant also recognized the handwritten portion of the 2021 Document as the Deceased's writing. Further, "[s]he said that the attention to detail, including the precise cutting and pasting is consistent with Garnet's practice."³⁴ While visiting the Deceased with her mother on his birthday, the Deceased showed her the 2021 Will and confirmed that these were his last instructions.

The court held that one interpretation of the 2021 Document is that the Deceased intended to revoke the whole residue clause from the 2012 Will. Here, the court looked to the circumstances of the Deceased to determine the plain intention behind the document. In considering all the extrinsic evidence in relation to the Deceased's point of view in drafting the 2021 Document, the court found that the Deceased would not have intended to create an intestacy in relation to the residue of his estate. Rather, he intended that the two documents were to be read together.

The court in *Salmon* held that the 2012 Will was effectively amended by a codicil in writing, signed by the Deceased and dated December 31, 2021, just 15 days before he died of heart failure. The Deceased left the 2021 Document in his desk drawer. The court held that "[t]he date noted with his signature reflects the veracity and reliability of the [Applicant's] evidence."³⁵ The court ordered that the 2012 Will together with the 2021 are together valid and fully effective as the Wills of the Deceased as if properly executed and witnessed or made.³⁶

Marsden v. Hunt³⁷

In [Marsden v. Hunt](#), the court considered [section 21.1\(1\)](#) with a Will executed by the deceased, who died in 2023. The Will was signed by the deceased but missed a signature of a witness. The intended

32 [2023 ONSC 7055](#).

33 *Salmon*, *supra* note 1 at para 128.

34 *Salmon*, *supra* at para 55.

35 *Salmon*, *supra* note 1 at para 142.

36 *Salmon*, *supra* note 1 at para 145.

37 *Marsden v. Hunt et al.*, [2024 ONSC 1711](#).

witness was a former law clerk of the law firm that drafted the Will. Moreover, the law clerk swore an affidavit affirming that the deceased signed the Will and that she witnessed its execution. The Applicant acknowledged that the Will did not comply with the formalities under [section 4](#) of the SLRA but sought its validation under [section 21.1\(1\)](#).

The court highlighted the two-part test that governs the application of [section 21.1\(1\)](#) of the SLRA:

- 1) First, is the document authentic? In this respect, “absent any concerns about the validity of her signature, the document can be accepted as authentic, and even the complete absence of witnesses can be overlooked”: *McCarthy Estate (Re)*, [2021 ABCA 403](#), para. [14](#).
- 2) Second, does the document set out the “testamentary intentions” of the deceased? In *George v. Daily*, [1997 CanLII 17825 \(MB CA\)](#), [1997] 3 W.W.R. 379, [1997] M.J. No. 51, paras. [62-65](#), the Manitoba Court of Appeal stated that for a document to set out the testamentary intentions of the deceased, the document must reflect a “fixed and final intention” as to the disposal of their property on death.³⁸

The court considered the unchallenged and sworn evidence from the law clerk who failed to sign the Will and found no indication that the signature on the document was not that of the deceased. Moreover, given the document was titled, “This is the Last Wil land Testament of me, Janice Kay Hunt’, the court found it set out the testamentary intentions of the deceased. For these reasons, the court used its power under [section 21.1\(1\)](#) to validate the Will.

CONCLUDING COMMENTS ON SECTION 21.1(1)

Other Canadian jurisdictions have developed the common law treatment of validating provisions with some degree of predictability. In Ontario, *Grattan* and subsequent decisions predominantly considered cases from British Columbia, rather than jurisdictions with similar legislation like Alberta or Manitoba.

Since its introduction, there have now been several cases that have applied [section 21.1\(1\)](#). The approach Ontario courts will take when considering existing case law from other Canadian jurisdictions in future [section 21.1\(1\)](#) will be interesting to watch since the law surrounding these provisions continues to develop and we are still in early days of legislative change.

38 *Ibid* at [para 6](#).

CHAPTER 3: HOLOGRAPH WILLS

INTRODUCTION

A Holograph Will is one written entirely in the testator/testatrix's own handwriting and is signed by them.¹ Holograph Wills are provided for in the [Succession Law Reform Act](#) ("SLRA")² by virtue of [section 6](#), and [section 7](#) which legislation reads as follows:

Holograph wills

6 A testator may make a valid will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation, or signature of a witness.

Position of signature

7(1) In so far as the position of the signature is concerned, a will, whether holograph or not, is valid if the signature of the testator made either by him or her or the person signing for him or her is placed at, after, following, under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will.

In [Bennett v. Gray](#)³, the Supreme Court of Canada stated that to be a valid holographic Will, the person propounding the document must satisfy the court that it contains "a deliberate or fixed and final expression of intention as to the disposal of property upon death" and that the propounder may rely on extrinsic evidence:

a holographic paper is not testamentary unless it contains a *deliberate or fixed and final expression of intention* as to the disposal of property upon death, and that it is incumbent upon the party setting up the paper as testamentary to show, by the contents of the paper itself or by extrinsic evidence, that the paper is of that character and nature.⁴

1 *Oosterhoff on Wills* (Thomson Reuters: 9th ed), at page 303.

2 *Succession Law Reform Act*, RSO 1990, c S.26.

3 *Bennett v. Gray*, [1958 CanLII 49 \(SCC\)](#).

4 *Ibid* at page 396.

COURT TREATMENT OF HOLOGRAPH WILLS

McGrath v. Joy.⁵

In *McGrath v. Joy*, the court had to determine whether a suicide note constituted a valid holograph Will. On July 13, 2019, Mr. Joy (the “**Deceased**”) died by suicide and according to the evidence, “he spent the day before his death working on his boat, drinking alcohol, and smoking hash oil cigarettes”⁶. When he was found, a handwritten two-page note which he signed, was discovered on his person (the “**Suicide Note**”). The Deceased had previously executed two Wills in 2014 and 2016. The main beneficiary under the Deceased’s prior Wills was his partner Ms. Joy, who he does not name in his Suicide Note as a beneficiary. Instead, the Suicide Note explicitly excluded her.⁷

The requirements for a holograph Will in Ontario are set out in [section 6](#) of the *SLRA* which holds that, “a testator/testatrix may make a valid will wholly by his or her own handwriting and signature, without formally, and without presence, attestation or signature of a witness.”⁸

At first instance, the application judge held that the Suicide Note met the requisite formalities for a valid holograph Will. Given the Deceased died before January 1, 2022, the court could not consider [section 21.1\(1\)](#) of the *SLRA*, which provides them with the power to deem a testamentary document valid despite its non-compliance with the requisite formalities. Notwithstanding, the court found that the Suicide Note met the requisite formalities for a holograph Will pursuant to [section 6](#) of the *SLRA*.

However, it determined that because of the Deceased’s consumption of alcohol and drugs a day prior, the propounder of the Will had not met the evidentiary burden of establishing the Deceased’s testamentary capacity and the court at first instance dismissed the application.⁹

On appeal, the Court of Appeal concluded that the Deceased had a “sound disposing mind” when he wrote the Suicide Note. The Court of Appeal relied on an expert report submitted by Dr. Sinyor, a psychiatrist and an expert on suicidality. The expert was not able to make a definitive statement on whether the deceased was intoxicated by alcohol, by cannabis, or both when he wrote the Suicide Note or whether the potential intoxication might have meant that he lacked testamentary capacity.¹⁰

The Court of Appeal found that the Deceased had a sound disposing mind because the Suicide Note demonstrated that he understood the nature and effect of a Will; recollected the nature and extent

5 *McGrath v. Joy*, [2022 ONCA 119 \(CanLII\)](#) (“*Joy*”).

6 *Ibid* at [para 4](#).

7 *Ibid* at [paras 5-8](#).

8 *Succession Law Reform Act*, [R.S.O. 1990, c. S.26](#) at [section 6](#): “A testator may make a valid will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.”

9 *McGrath v. Joy*, [2020 ONSC 7454 \(CanLII\)](#).

10 *Joy* at [paras 79-81](#).

of his property; understood the extent of what he was giving under the Will; remembered the people that might be expected to benefit under his Will; and, understood the nature of the claims that might be brought by Ms. Joy, a person excluded from the Will.¹¹

Given the legitimate questions involved and the ambiguity caused by the Deceased's Suicide Note, the Court of Appeal ordered that the Estate cover a portion of all the parties' costs at a fixed amount.¹²

McKenzie v. Hill¹³

[McKenzie v. Hill](#) concerned a dispute over whether a handwritten document was a valid holograph Will. On April 29, 2020, Ms. Hillman (the "**Deceased**") died at the age of 88 years old. The Deceased was predeceased by her husband, and she had no children. The Deceased was survived by her brother, Mr. McKenzie (the "**Applicant**"). The Applicant sought to propound a handwritten document dated October 28, 2014, as the Deceased's holograph Will (the "**Handwritten Document**").¹⁴

The Handwritten Document was entirely in the Deceased's handwriting, signed by her and purportedly witnessed by a friend, Ms. Logan. The Handwritten Document read as follows:

An Agreement to Transfer Property

I Joyce B. Hillman residing at The Red Woods Seniors Retirement (sic) do solemnly state (sic) that I wish to transfer my property at 12 Clarence Street, number 12 unit, Ottawa, Ontario, K1N 5P3 to my Brother Cecil McKenzie to be the sole owner. He can sell it at any time he wishes to do so without any interference by anyone. I have appointed him guardian and to be in full control of my finances. I set my hand this 28th day of October two thousand & fourteen and sign this agreement.

Signed Joyce B. Hillman

Witness: Audrey E. Logan¹⁵

The court noted that to find a valid holographic Will there must be "a deliberate or fixed and final expression of intention as to the disposal of property upon death" and that the propounder may rely on extrinsic evidence. Not every handwritten document purporting to be testamentary in nature is necessarily a Will. Importantly, it is required that the testator/testatrix intended for the document to be testamentary.¹⁶

11 Joy at [paras 66-69](#).

12 Joy at [para 109](#).

13 *McKenzie v. Hill*, [2022 ONSC 4881 \(CanLII\)](#) ("**McKenzie**").

14 *Ibid* at [paras 1-5](#).

15 *Ibid* at [para 14](#).

16 *Ibid* at [paras 23-24](#).

In the court’s analysis, it considered the language used in the Handwritten Document. The court commented that in some respects the Handwritten Document read like a Will, using language such as “I Joyce B. Hillman” and “I set my hand”, both associated with typical language in a Will. The Applicant also stated that the Deceased told him it was a Will. However, the Handwritten Document is titled, ‘An Agreement to Transfer Property’ and is referred to as ‘this agreement’ in the document.¹⁷

The Applicant claimed that the Deceased told him that he was to have her condo and property upon her death. The court found that the Applicant’s claim was inconsistent with the Handwritten Document itself, which does not refer to her other property or suggest that the transfer of the condo to the Applicant was intended to be triggered by her death. Moreover, the Applicant’s evidence was uncorroborated and was therefore precluded pursuant to [section 13](#) of the [Evidence Act](#)¹⁸. Therefore, the court found that the Handwritten Document failed to demonstrate the Deceased’s deliberate or fixed and final expression of their intention to dispose of their property and that it was not a valid holograph Will.¹⁹

CONCLUDING COMMENTS

A Holograph Will must be executed by a testator who possesses the requisite testamentary capacity and is not unduly influenced. The testator must also know and approved of the Will’s contents, comply with the formalities in sections [6](#) and [7](#) of the SLRA and there must not be evidence of fraud or forgery. Moreover, the court must be satisfied that the Holograph Will demonstrates the “fixed and final intention” of the deceased.

¹⁷ *Ibid* at [para 28](#).

¹⁸ *Evidence Act*, [R.S.O. 1990, c. E.23; section 13](#): In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

¹⁹ *McKenzie* at [paras 33; 45](#) and [50](#).

CHAPTER 4: ESTATE CLAIMS

INTRODUCTION

In addition to the five grounds upon which a Will can be challenged, there are several other claims that can be relevant, considered and advanced in the context of an Estate. These include:

- Dependant Support Claims pursuant to Part V of the [Succession Law Reform Act](#)¹ (“**SLRA**”);
- An Election and ancillary Application pursuant to [sections 5](#) and [6](#) of the [Family Law Act](#)² (“**FLA**”);
- Fiduciary accounting proceedings pursuant to [Rules 74.15-74.18](#) of the Ontario [Rules of Civil Procedure](#)³; and,
- Various claims based in equity as will be particularized within.

DEPENDANT SUPPORT CLAIMS

If a deceased of a certain relationship has not left adequate and proper support for a dependant, that dependant may make a dependant support claim against the estate. In order to do so, one must meet the definition of a dependant and the test and criteria prescribed under Part V of the *SLRA*, specifically [sections 57](#) to [79](#).

A dependant support claim can be commenced by issuing a Notice of Application pursuant to the *SLRA* and [Rules 14.05](#), [74.15](#), and [75.06](#) of the Ontario [Rules of Civil Procedure](#) with supporting affidavit evidence from the dependant claimant. A support claim brought by one dependant is adjudicated on the date it is heard respecting all dependants.

[Section 61](#) of the *SLRA* provides that an application for dependant’s support must be made within 6 months from the issuance of the Certificate of Appointment of Estate Trustee.

Notwithstanding the six-month limitation period, [section 61\(2\)](#) of the *SLRA* also provides that the court, at its discretion, may allow an application to be made at any time with respect to any portion

1 *Succession Law Reform Act*, [RSO 1990, c. S.26](#) (“**SLRA**”).

2 *Family Law Act*, [RSO 1990, c. F.3](#) (“**FLA**”).

3 *Rules of Civil Procedure*, [RRO 1990, Reg. 194](#) (the “**Rules**”).

of the estate that remains undistributed at the date of the application. Accordingly, an application technically may be made beyond the six-month period if estate assets still exist, and if leave is granted.

STAGE 1: QUALIFYING AS A ‘DEPENDANT’

A determination as to who qualifies and meets the criteria of a “dependant” must be made in accordance with a two-part test set out in [section 57](#) of the *SLRA*. For the purposes of Part V and an application for support, [section 57](#) of the *SLRA* defines a ‘dependant’ as:

- (a) the spouse of the deceased,
- (b) a parent of the deceased,
- (c) a child of the deceased, or
- (d) a brother or sister of the deceased,

to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death.

[Section 1](#) of the *SLRA* addresses the definition of ‘spouse’ to include two persons who are married to each other, or who have entered a marriage that is voidable or void, and two persons who have cohabitated continuously for not less than 3 years or cohabited in a relationship of some permanence, if they are the natural or adoptive parents of a child. With respect to the definition of ‘child’, it includes a grandchild and anyone else the deceased has demonstrated a settled intention to treat as a child of the family. There is no age restriction on children who are eligible to apply for support for the estate of their parents.

It is important to note that the [All Families Are Equal Act](#)⁴ (the “**AFAEA**”) amended various sections of the *SLRA*. [Section 71 \(1-5\)](#) of the *AFAEA* amended the definitions of ‘child’, ‘issue’, ‘parent’ and ‘spouse’ found in [section 1\(1\)](#) of the *SLRA* to include children *conceived posthumously* via assisted reproduction, and to broaden the definition of parent to include arrangements other than that of one father and one mother. Therefore, this amendment changes who may bring a dependants’ support application and who may share in the deceased’s estate. The *AFAEA* also amended the *SLRA* to outline detailed conditions under which a posthumously born infant may be legally recognized as the child of a deceased. These amendments provide for a posthumously born child to bring an application for support as a dependant of a deceased parent’s estate and creates a presumption that the child is a legitimate heir to the estate.

⁴ [All Families Are Equal Act \(Parentage and Related Registrations Statute Law Amendment\), 2016, SO 2016, c 23 \(Bill 28\)](#).

The definitions apply to an individual's Will, drafted after January 1, 2017, unless a contrary intention is clearly expressed. A lawyer arguably ought to inquire if their client or their children or other beneficiaries under their Will have stored or intend to store any reproductive material and whether they want posthumously conceived children and issue to inherit under their Will.

'Support' includes financial, physical, and moral support as set out in the case law concerning dependant support claims. The 1994 Supreme Court of Canada case [Tataryn v. Tataryn](#),⁵ and the 2001 Ontario Court of Appeal in [Cummings v. Cummings](#),⁶ affirmed that moral considerations are a relevant factor for courts to consider in determining a dependants' support claim. *Tataryn* articulated a two-stage test which focuses first on legal duties and then second on moral duties that the deceased owed to the dependant applicant. *Cummings* affirmed moral considerations are a relevant factor for Ontario courts to consider in dependant support claims. Notably, moral claims are provided for under the 19 enumerated criteria under [section 62](#) of the SLRA.

In short, when examining all the circumstances of an application for dependants' support, the court must consider:

1. what legal obligations would have been imposed on the deceased had the question of provision arisen during their lifetime; and,
2. what moral obligations arise between the deceased and their dependants' because of society's expectations of what a judicious person would do in the circumstances.

In [Morassut v. Jaczynski Estate](#),⁷ the court followed the principles set out in *Tataryn* and *Cummings*, finding that there was both a legal and a moral obligation on the testatrix to continue to support her common law spouse after her death. The spouse was awarded sole ownership of a property that he and the testatrix had built together; a yearly sum for the rest of his life; and a smaller payment every five years so that he could buy a new automobile. The estate's appeal of this decision was dismissed.

The deceased must have been providing support *immediately* before death or must have been under a legal obligation to provide support either through statute court order or at common law.

STAGE 2: QUANTIFYING SUPPORT

If an applicant meets the definition of 'dependant', [section 58](#) of the SLRA provides that a court must then evaluate what has been given under the terms of the Will, or on an intestacy, and then determine what it considers adequate to be made payable out of the estate for their proper support.

⁵ *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807.

⁶ *Cummings v. Cummings*, (2004), 69 O.R. (3d) 398 (C.A.).

⁷ *Morassut v. Jaczynski Estate*, 2013 ONSC 2856 (CanLII).

To establish what constitutes proper and adequate support, a factual inquiry is required based upon the circumstances of everyone's case and in accordance with the guiding *SLRA factors*. The courts should consider legislative guidance pursuant to [section 62](#) of the *SLRA* and the enumerated non-exhaustive factors, which include: (a) the dependant's current assets and means; (b) the assets and means that the dependant is likely to have in the future; (c) the dependant's capacity to contribute to his or her own support; (d) the dependant's age and physical and mental health; and (e) the dependant's needs, in determining which the court shall also have regard to the dependant's accustomed standard of living. [Section 62](#) provides further specific factors to assist the court when the dependant is a child or was a spouse of the deceased. The court, in considering what constitutes adequate and/or proper support, have identified that the provision made by the deceased must not only be adequate today, but adequate in the future.

[Section 63](#) of the *SLRA* sets out where an order for payment of support can be drawn from. The court can order payment from either income or capital of the estate, or both, and the court has broad powers to impose such conditions and restrictions as it deems appropriate with respect to such payments.

[Section 72](#) of the *SLRA* permits a claim for support being satisfied by certain listed assets including life insurance, a group policy of insurance, joint property with rights of survivorship and gifts *mortis causa*. [Section 72](#) has the effect of clawing back certain types of assets which are deemed by the court to be part of the estate and as such are subject to being considered in the application for support.

[Section 67](#) of the *SLRA* provides for the freezing of the distribution of the assets of the estate until determination of the dependant support claim. [Section 61](#) of the *SLRA* provides that an application for dependant support must be made within 6 months from the issuance of the Certificate of Appointment of Estate Trustee.

An example of a successful dependant support claim was in *Shafman v. Shafman*,⁸ where the court found that an applicant was a dependant of the deceased and provided an award of support. In this case, the deceased was survived by her three adult sons and during her live she believed her third son (the "**Applicant**") could not be trusted with money. The deceased's estate was valued at in or around \$3 million and in her Will was divided between two of her sons, leaving out the Applicant. Instead, the deceased purchased an annuity and directed that her other sons contribute towards the Applicant's living costs, equating to approximately \$1,700 per month. The Applicant made a claim for dependant support, asserting that this sum was insufficient to support his needs.

8 *Shafman v. Shafman*, 2023 ONSC 1391 (CanLII).

The court found evidence that the Applicant was being supported by the deceased immediately prior to the deceased's death. This included through the purchased annuity and consistent transfers of money. Moreover, the deceased permitted the Applicant to live at her condominium and provided him with meals various nights a week. The court provided a helpful summary on the meaning of 'providing support', for the purposes of a dependant's support claim:

In my view, "providing support", for the purposes of [s. 57\(1\)](#) of the [SLRA](#), means more than periodic monetary transfers or gifts, made sporadically, and disconnected from the need to support or sustain the recipient's well-being or shelter. The hallmark of these sporadic transfers is that they are more in the nature of gifts than sustenance. Rather, "providing support" for the purposes of establishing a relationship of dependency under the [SLRA](#) requires an ongoing, systematic provision of money or money's kind, including food, shelter, or the funding of expenses, to support or sustain a recipient where the recipient is otherwise unable to support themselves.

The court found that the Applicant was a dependant of the deceased, and that the \$1,700 per month provided, fell short of his needs. In determining the quantum of support, the court considered guidance from *Tatayrn* which provided that the testator's choice of support should be disturbed only where it does not fall within "the wide range of options, any one of which might be considered appropriate in the circumstances".⁹ It also considered *Re Duranceau*,¹⁰ which provides that in determining whether a testator has made adequate provision for a dependant, the court must ask "is the provision sufficient to enable the dependant to live neither luxuriously nor miserably, but decently and comfortably according to his or her station in life?".

Following a consideration of the relevant factors in the *SLRA*, including the moral obligations of the deceased, the court concluded that the Applicant be entitled to the income stream of \$1,700 per month for the remainder of his life. This sum would be increased slightly to ensure the Applicant is able to make necessary expenditures and be indexed for inflation.

For further information on dependant support claims, see [WEL on Dependants' Support](#).¹¹

FAMILY LAW ACT ELECTIONS

A surviving spouse has an important and timely decision to make on the death of a married spouse, such that the surviving spouse must elect to either:

⁹ *Ibid* at [para 72](#).

¹⁰ *Re Duranceau*, [1952 CanLII 102 \(ON CA\)](#), [1952] O.R. 584 (C.A.).

¹¹ WEL on Dependants' Support, accessible at <https://welpartners.com/resources/WEL-on-dependants-support.pdf>.

- a) take the gifts in the deceased spouse's Will or, if applicable, the entitlement on an intestacy or partial intestacy; or,
- b) receive an equalization of net family property under the *FLA*.

Notably, in order to file an election and commence an application under [section 5](#) and [section 6](#) of the *FLA*, the surviving spouse will need to know the value of the deceased spouse's estate and have a valuation of their own assets to evaluate whether an election is lucrative or appropriate. The calculation of the quantum of an *FLA* election requires consultation with a family law lawyer.

The equalization payment made pursuant to the *FLA* is one-half of the difference in the value of net family properties of the deceased spouse and the surviving spouse. The valuation date for purposes of calculating net family property is the day before death. The specific provision is set out in [section 5\(2\)](#) of the *FLA*, which states that:

Death of spouse

(2) When a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them.¹²

An *FLA* election and corresponding claim is made by way of filing an election and Notice of Application. Once the election and application are made to receive entitlement under the *FLA*, the gifts to the spouse in the deceased's spouse's Will are revoked and the Will is interpreted as if the surviving spouse had died before the other. The election and corresponding application strictly must take place within 6 months of the spouse's death unless the court grants an extension of that time.¹³

Only a surviving spouse can elect to receive an equalization of net family property. It is a personal claim. "Spouse" is defined in the *FLA* as either of two persons who are married to each other or have together entered a marriage that is voidable or void, in good faith on the part of the surviving spouse.¹⁴ A guardian of property, or attorney for property of a surviving spouse can elect on behalf of the surviving spouse.¹⁵

The surviving spouse must begin an application for equalization and serve notice on the estate trustee to engage the protections under [section 6\(15\)](#) of the *FLA* that restrict distributions from the estate. Neither filing an election, giving notice of an intention to file an election, nor giving notice of an

¹² *FLA* at [section 5\(2\)](#).

¹³ *FLA* at [section 6\(10\)](#).

¹⁴ *FLA* at [section 1\(1\)](#).

¹⁵ *Substitute Decisions Act*, [1992, SO 1992, c30](#) at [section 31\(1\)](#); *Yamada v. Zolad*, [2007 CanLII 4328 \(ONSC\)](#).

intention to commence an application are sufficient notice for the purpose of [section 6\(15\)](#).¹⁶

If an application is made for an equalization payment, then the surviving spouse and the personal representative of the deceased spouse must each deliver a sworn financial statement in [Form 13.1](#) and a Net Family Property Statement disclosing:

- a) the party's property and debts and other liabilities,
 - i. as of the date of the marriage,
 - ii. as of the valuation date, and,
 - iii. as of the date of the statement;
- b) the deductions that the party claims under the definition of "net family property";
- c) the exclusions that the party claims under [subsection 4\(2\)](#) of the *FLA*; and
- d) all property that the party disposed of during the two years immediately preceding the making of the statement, or during the marriage, whichever period is shorter.¹⁷

The equalization payment between a surviving spouse and the deceased spouse is calculated in the same manner as for separated spouses under the *FLA*. Generally, an equalization payment is one-half of the difference between the *net family properties* of the spouses. The spouse with the higher net family property pays the equalization payment to the spouse with the lower net family property.¹⁸

A spouse's *net family property* is the value of all of that spouse's property on the valuation date after deducting the spouse's liabilities on the valuation date and the value of property that the spouse owned on the date of marriage, other than a matrimonial home, and after excluding the value of excluded property, which includes certain property received during the marriage including a gift from a third-party other than a matrimonial home, an inheritance and life insurance proceeds.¹⁹

The valuation date, for the purposes of an election, is the earliest of:

- the date before the date of death of the first spouse;
- the date the spouses separated; or,
- the date the spouses divorced, or the marriage was declared a nullity.²⁰

¹⁶ *Paola v. Paola Estate*, [1997 CanLII 24454 \(ON SC\)](#) at paras 40 to 42.

¹⁷ *FLA* at s. 8; *Family Law Rules*, [O. Reg. 114/99](#), at [Rule 13](#).

¹⁸ *FLA* at [section 5\(1\)](#).

¹⁹ *FLA* at [sections 4\(1\) and \(2\)](#).

²⁰ *FLA* at [section 4\(1\)](#).

Importantly, a spouse's entitlement to an equalization payment under [section 5](#) has priority over an order made against the estate for dependant support under Part V of the *SLRA*, except as it relates to an order in favor of a child of the deceased's spouse.²¹ Notably, a surviving spouse may make both an election under the *FLA*, and, may simultaneously commence a dependant's support claim under the *SLRA*.

FIDUCIARY ACCOUNTINGS

An application to pass accounts is a formal procedure, governed by statute, for court approval of the accounts of a fiduciary, including estate trustees, for the relevant period of administration or property management. An application by a fiduciary to pass accounts is not strictly, in legal terms, a mandatory requirement. Rather, the fiduciary may choose to pass its accounts, or alternatively, may be compelled to do so by those legally entitled to request a passing. There is a distinction between the requirement of a fiduciary to account which exists independent of a formal passing of accounts application.

A fiduciary, which includes an estate trustee, guardian or attorney for property and de facto fiduciaries *de son tort* is accountable in managing the property affairs of another and must account for their stewardship when asked, or when a court orders them to do so. A fiduciary may be asked to commence an application to pass their accounts before a court in accordance with [Rules 74.15–74.18](#) of Ontario's [Rules of Civil Procedure](#).

The jurisdiction of the estate trustee to pass accounts arises from [section 23\(1\)](#) of the [Trustee Act](#)²²:

Filing of accounts

23 (1) A trustee desiring to pass the accounts of dealings with the trust estate may file the accounts in the office of the Superior Court of Justice, and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the court.

The jurisdiction of the court, as it extends to specific powers of inquiry on an application to pass accounts, also arises from [section 49](#) of the [Estates Act](#)²³:

Powers of judge on passing accounts

(2) The judge, on passing the accounts of an executor, administrator, or trustee under a will

²¹ *FLA* at [section 6\(12\)](#).

²² *Trustee Act*, [R.S.O. 1990, c. T.23](#) at [section 23\(1\)](#).

²³ *Estates Act*, [RSO 1990, c E.21](#) at [section 49](#).

of which the trustee is an executor, has jurisdiction to enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and its administration and disbursement.

The court can receive accounts passed by guardians, making a full inquiry and accounting of the estate, once accounts are passed, inquire into any complaints, or claims by persons interested in the conduct and administration of the estate, and making an order for payment of damages or otherwise as the judge considers proper. However, orders made under these provisions are subject to appeal.

A judge also has the power to order, a trial of an issue, or, any complaint or claim under [subsection 49\(3\)](#) of the *Estates Act*, and make all necessary directions in connection with the issue. [Subsections 49\(8\)](#) and [\(9\)](#) of the *Estates Act*, require service of notice of accounts upon the Office of the Public Guardian and Trustee in certain circumstances, such as where the estate includes charitable donations, where the deceased dies intestate, and the administration is granted to someone who is not the deceased's next of kin or if a beneficiary is under disability.

The court also has the power to require the appointment of an accountant or other skilled person for assistance, where the accounts submitted to the judge of the Superior Court of Justice are an intricate or complicated.

As noted, there is no automatic requirement on the part of an administrator or estate trustee to pass accounts. [Section 50\(1\)](#) of the *Estates Act* provides:

At whose instance executors or administrators compellable to account

[50 \(1\)](#) An executor or an administrator shall not be required by any court to render an account of the property of the deceased, otherwise than by an inventory thereof, unless at the instance or on behalf of some person interested in such property or of a creditor of the deceased, nor is an executor or administrator otherwise compellable to account before any judge.

PROCEDURE

The procedure and format for a passing of accounts is set out in the Ontario *Rules of Civil Procedure* at [Rule 74.15](#) through to [74.18](#). [Rule 74.18](#) addresses the process of filing an application to Pass Accounts.

[Rule 74.16](#) of the Ontario *Rules of Civil Procedure* provides that [Rules 74.17](#) and [74.18](#) apply to accounts of estate trustees and, with necessary modifications, to accounts of trustees other than estate trustees, persons acting under a power of attorney, guardians of the property of mentally

incapable persons, guardians of the property of a minor and persons having similar duties who are directed by the court to prepare accounts relating to their management of assets or money.

[Rule 74.17\(1\)](#) provides the proper form of account filed with the court, must contain the following:

- i. A statement of the original assets at the start of the accounting period;
- ii. An account of all money received by the estate;
- iii. An account of all money disbursed by the estate;
- iv. Where the estate trustee has made investments, an account detailing said investments;
- v. An account of unrealized assets at the end of the accounting period;
- vi. A list of investments at the end of the accounting period;
- vii. A statement of all liabilities of the estate at the end of the accounting period; and,
- viii. A statement of compensation claimed by the estate trustee.

[Rule 74.15\(1\)\(h\)](#) gives any individual having a financial interest in an estate, such as a beneficiary or third-party creditor, the ability to compel a passing of accounts by an estate trustee.

The application is accompanied by the accounts, verified by affidavit, a copy of the Certificate of Appointment of Estate Trustee (or Probate) and a copy of any previous judgment on passing. The procedure, service and notice requirements are set out at [Rule 74.18](#). [Rule 74.18\(4\)](#) requires the applicant on an application to pass accounts also serve the Notice of Application and file proof of service on all interested parties with the Court at least 60 days before the hearing date specified in the Notice of Application. The statements required, in accordance with the form of the accounts, include a list of the assets, capacity and revenue receipts, capital and revenue disbursements, the investment account, unrealized assets, closing statements with respect to money investments, liabilities and finally a statement of the compensation proposed or claimed by the estate trustee (or another fiduciary).

PROCEDURE ON THE TORONTO ESTATES LIST

The Estates List is the specialized list for all estates and trust matters in the Toronto Region. The Estates List also has its own [Practice Direction](#) to assist practitioners in procedural matters.

The [Practice Direction](#) requires that once an Application for a passing of accounts has been issued, the applicant must contact the Trial Coordinator to obtain a hearing date. On the Estates List, this initial hearing is a 9:30am scheduling appointment, which is a 10-minute appointment to primarily deal with scheduling.

The [Practice Direction](#) provides further guidance to parties on what should be included in any draft orders giving directions on a passing of accounts hearing:

Where a hearing will be held on a passing of accounts, orders giving directions proposed by the parties should address the following issues, where applicable:

- a. the timing and conduct of a mediation session;
- b. the issues to be tried and each party's position on each issue;
- c. the timing and scope of relevant disclosure;
- d. the witnesses each party intends to call, the issues each witness intends to address, and the anticipated length of each witness' testimony (examination-in-chief and cross-examination); and,
- e. the procedure to be followed at the hearing, including the method of adducing evidence-in-chief.

[Rule 74.18\(7\)](#) provides that when served with a Notice of Application to pass accounts, the recipient may serve and file a Notice of Objection at least 35 days before the hearing date specified in the Notice of Application.

UNCONTESTED PASSINGS OF ACCOUNTS

Where there is an uncontested passing of accounts and an unopposed order is sought, in many instances no court attendance is required before a judge as long as all of the requirements under [Rule 74.18](#) have been complied with and there are no Notices of Objection to the accounts filed. The court may grant a judgment on passing accounts without a hearing if, at least 5 days before the hearing date of the application, the applicant files with the court a record containing the precise materials set out at [Rule 74.18\(9\) and \(1\)](#), including any request for increased costs, and the corresponding forms, as amended, for an unopposed order on a passing of accounts.

CONTESTED PASSINGS OF ACCOUNTS

Where there is an objection and a contested hearing for a passing of accounts, [Rules 74.18\(11.5\) through \(13\)](#) apply. The court has authority to order a trial and provide direction with respect to its conduct at the hearing of the application to pass accounts. [Sub-rule 74.18\(11.5\)](#) provides that an applicant must file at least 10 days before the hearing date of the application, a consolidation of all the remaining notices of objection to accounts and a reply to notice of objections to the accounts.

If the application to pass accounts proceeds to a hearing, the applicant must at least 5 days before

the hearing date file with the court, a record containing certain documents set out in [Rule 74.18\(11.7\)](#) including, the application to pass accounts, any responses to the reply, a copy of any notice of withdrawal of objection, any request for costs or increased costs, and a draft order for directions or judgement sought, as the case may be.

Anyone who serves a notice of objection, which has not been withdrawn, may file an alternative draft order at least 3 days before the hearing date (or at the hearing with leave of the court) if that person does not agree to the terms of the applicant's draft order.

For further information on fiduciary accountings, see [WEL on Fiduciary Accounting](#).²⁴

CLAIMS UNDER THE *ESTATES ACT* (CREDITOR CLAIMS OR MONETARY CLAIMS)

Sections [44](#) and [45](#) of the [Estates Act](#)²⁵ deal with contestation of claims or demands against an estate and involve liquidated and unliquidated claims. These provisions afford an estate trustee the opportunity to force/expedite, the process of potential claims against an estate.

Where a trustee/administrator becomes aware of a "claim or demand", a Notice of Contestation can be served on the claimant as notification of the claim.

Upon being served with a Notice of Contestation, the claimant then has 30 days to apply to the Ontario Superior Court of Justice for an order to proceed with the claim. If the claimant fails to act within the 30-day period, he/she will be deemed to have abandoned the claim. The Court does have the jurisdiction to extend the 30-day deadline by a period of three months.

In [Omicuolo Estate v. Pasco](#)²⁶, the Ontario Court of Appeal discussed the meaning of "claim or demand," under these provisions and held that the terms, "claim or demand" in such circumstances refer to third party claims by creditors for payment. The Court further stated that a claim for dependant's support under the *SLRA* would fall outside of these provisions. As such, sections 44 and 45 cannot serve to accelerate a claim for support.

Note that the above provisions should be read in conjunction with the *Rules of Civil Procedure*. [Rule 75.08](#) of the [Rules of Civil Procedure](#) which requires a Notice of Contestation to be submitted using form 75.13, which contains the following wording:

²⁴ *WEL on Fiduciary Accounting*, accessible online at <https://welpartners.com/resources/WEL-on-fiduciary-accounting.pdf>.

²⁵ *Estates Act*, [RSO 1990, c E.2](#).

²⁶ *Omicuolo (Estate Trustee of) v Pasco*, [2008 ONCA 241](#).

You may apply to this court at *(insert address of court office)* for an order allowing your claim and determining its amount. If you do not apply within 30 days after receiving this notice, or within 3 months after that date if the judge on application so allows, you shall be deemed to have abandoned your claim and your claim shall be forever barred.

CONCLUDING COMMENTS

This chapter has highlighted some additional claims that may be considered respecting an estate. It is important to be mindful of requisite limitation periods applicable to claims against an estate and all associated cost consequences.

CHAPTER 5: EQUITABLE ESTATE CLAIMS

INTRODUCTION

Where common law and statute do not provide an appropriate remedy, claims in equity may do so. A summary of the more common equitable claims appropriate in the estate and trust context include for example:

1. Unjust Enrichment;
2. *Quantum Meruit*/Claims for Services;
3. Constructive Trust;
4. Resulting Trust;
5. Proprietary Estoppel;
6. The defense of Promissory Estoppel; and,
7. The interplay of equitable remedies such as:
 - a) The doctrine of unconscionability; unconscionable procurement; lack of independent legal advice; and, *Non Est Factum*.

UNJUST ENRICHMENT

The three elements necessary to establish an unjust enrichment claim were articulated in [Rothwell v. Rothwell](#),¹ and later by the Supreme Court of Canada in [Pettkus v. Becker](#)² as follows:

1. An enrichment to the defendant/respondent by the plaintiff;
2. A corresponding deprivation of the plaintiff/applicant; and,
3. The absence of a 'juristic reason' for the enrichment.

Where a court finds there has been an unjust enrichment, it will either order a monetary award (*quantum meruit*) or a proprietary award (constructive trust). In [Peter v. Beblow](#)³, the Supreme Court

1 [Rothwell v. Rothwell](#), [1978] 2 S.C.R. 436 (SCC).

2 [Pettkus v. Becker](#), [1980] 2 S.C.R. 834.

3 [Peter v. Beblow](#), 1993 CanLII 126 (SCC), [1993] 1 S.C.R. 980.

of Canada highlighted what the appropriate remedy should be where unjust enrichment is found:

Where a monetary award is sufficient, there is no need for constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact that the claimant's efforts have given her a special link to the property in which case a constructive trust arises...I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed.⁴

In [Garland v. Consumers Gas Co.](#),⁵ the Supreme Court of Canada reiterated the three-part test in determining a claim for unjust enrichment and formulated a new two-part 'juristic reason' analysis as follows:

In the first part, the plaintiff must show the absence of a juristic reason from certain established categories including:

- a) the presence of a contract;
- b) a disposition of law;
- c) a donative intent;
- d) a common law, equitable or statutory obligation to confer the benefit in question;

and, in the second part of the test, the onus shifts to the defendant to demonstrate that there is another reason to deny the plaintiffs recovery of the enrichment as follows:

- a) the reasonable expectations of the parties at the time the benefit was conferred; and,
- b) any public policy considerations.

The seminal decision of the Supreme Court of Canada in [Kerr v. Baranow; Vanasse v. Seguin](#),⁶ not only expanded the available remedies of unjust enrichment to co-habiting spouses but also confirmed that "the courts 'should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases'.⁷

The major development in [Kerr v. Baranow; Vanasse v. Seguin](#) was the endorsement of a third remedy: a monetary remedy for "value survived." Where the spouses were engaged in a "joint family venture"

4 *Ibid* at page 997.

5 *Garland v. Consumers Gas Co.*, [2004] S.C.J. 21 (S.C.C.).

6 *Kerr v. Baranow; Vanasse v. Seguin*, 2011 SCC 10, [2011] 1 S.C.R. 269. ("**Kerr**")

7 *Kerr* at para. 34; citing *Peter v. Beblow*, 1993 CanLII 126 (SCC).

and, upon breakdown of the relationship, one of the parties is left with a disproportionate share of the jointly held assets, the court will reapportion the wealth between the parties. The Court identified the following non-exhaustive list of factors to assist in making a determination:

- i. the mutual effort of the parties and whether they worked collaboratively towards common goals;
- ii. economic integration of the couples' finances;
- iii. actual intent or choice of the parties to not have their economic lives intertwined, whether such is expressed or inferred; and,
- iv. whether the parties have given priority to the family or there is detrimental reliance on the relationship, by one or both of the parties, for the sake of the family.⁸

Once a spouse has proven the existence of a joint family venture, the Court will determine the award, which is not restricted to a fee-for-services approach. Rather, where it can be shown that the joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth, the remedy “should be calculated on the basis of the share of those assets proportionate to the claimant’s contributions,”⁹ taking into consideration the respective contributions of the parties. The court was clear that this calculation should not result in a “minute examination of the give and take of daily life.”¹⁰ Rather, it should remain a broad and flexible approach.

The law of unjust enrichment is equally available to a surviving spouse against the estate of a deceased spouse as it is to a living spouse.¹¹ There is a wealth of case law applying [Kerr v. Baranow](#); [Vanasse v. Seguin](#), and the cases are very much driven by the unique facts in each. The difficulty for the surviving spouse will be in proving the existence of a joint family venture without the evidence of the deceased spouse. There is the strategic and practical challenge of deciding which claim or combination of claims to bring on behalf of a surviving spouse, including dependents’ support, unjust enrichment, and other equitable claims.

The joint family venture analysis also applies to married spouses. The Ontario Superior Court of Justice decision, [Barrett v. Barrett](#),¹² dealt with the issue of who benefited from the increase in value of the matrimonial home from the date of separation to the date of trial. The Court applied the principles set out in [Kerr v. Baranow](#) to the married spouses.

8 *Kerr* at [paras. 89-100](#).

9 *Ibid* at [para. 100](#).

10 *Ibid* at [para. 102](#).

11 *Hillier Estate v. McLean*, [2011 NLTD 86 \(CanLII\)](#) at [para 20](#).

12 *Barrett v Barrett*, [2014 ONSC 857](#).

Another important case on unjust enrichment is the Ontario Court of Appeal decision in [Granger v. Granger](#).¹³ The case involved a dispute between a brother and sister over their late mother's property. The sister had transferred the subject property to herself and her mother as joint tenants under a Continuing Power of Attorney for Property.

The brother who had lived with the mother for thirty years on the understanding that he would have an interest in her house after her death, brought a claim seeking a declaration that he had an interest in the mother's property. He also sought declaration that the power of attorney under which the property had been transferred was invalid. The trial Judge dismissed his claim.

The Court of Appeal found that the trial judge had erred in denying the brother's claim based on unjust enrichment. The Judge had failed to properly allocate the burden of proof. The Court followed Justice Cromwell's reasoning in *Kerr*, which held that in most cases involving claims for a "fee for services" should not be considered at the juristic reason stage of analysis, but only at the defense or remedy stage.

QUANTUM MERUIT

The classic case of an unjust enrichment leading to a *quantum meruit* award is the decision of the Supreme Court of Canada, in [Deglman v. Guarantee Trust Company of Canada](#),¹⁴ which held that a nephew of the deceased was entitled to the value of the services which he performed for the deceased, and confirmed that the right to recovery did not arise from contract, but was imposed by law, as to do otherwise would have resulted in an unjust enrichment to the deceased's estate. Three specific problems often arise in *quantum meruit* claims against the deceased's estate:

1. Determining the manner in which the services are to be quantified;
2. Issues relating to unjust enrichment and the absence of a juristic reason for the enrichment. The relationship between the parties in determining whether the claimant reasonably expected to be reimbursed for the benefit that was provided to the estate; and,
3. The requirement of corroboration that is imposed on the claimant pursuant to [section 13](#) of the [Evidence Act](#).¹⁵

¹³ *Granger v. Granger*, [2016 ONCA 945](#), reversing [2015 ONSC 1711](#), [9 E.T.R. \(4th\) 281](#), and [2015 ONSC 6238](#).

¹⁴ *Deglman v. Guarantee Trust Company of Canada*, [1954 CanLII 2 \(SCC\)](#), [\[1954\] SCR 725](#).

¹⁵ *Evidence Act*, [R.S.O. 1990, c. E.23](#) at [section 13](#).

In *Re Brown*,¹⁶ the Ontario Superior Court of Justice determined that there must be an evidentiary foundation to support a *quantum meruit* claim for compensation related to personal care services. The Court also concluded that in determining the “reasonableness” of a claim for compensation related to personal care services, it should consider the following:

- The need for services;
- The nature of the services provided;
- The qualifications of the person providing the services;
- The value of such services; and,
- The period over which the services were furnished.

In *Tarantino v. Galvano*,¹⁷ a daughter brought a *quantum meruit* claim for personal care services rendered to her deceased mother. The daughter lived with and provided extensive care to the deceased for 26 years before her death. In the final four years of the deceased’s life, her care needs increased, and the daughter was required to close her business and worked full time as a personal carer. The court accordingly found that the deceased’s estate had been unjustly enriched and awarded the daughter the sum of \$273,039.54.

CONSTRUCTIVE TRUST

The declaration of constructive trust is the proprietary remedy that a court can utilize to redress an unjust enrichment. The court will make a declaration that the estate trustee of the estate holds, and the deceased held, a specific property in whole or in part in trust for the plaintiff/claimant in constructive trust.

The Supreme Court of Canada has confirmed that there must be a clear link between the contribution made and the disputed asset before the court will grant a proprietary remedy of constructive trust.¹⁸ In other words, the deprivation by the plaintiff must be sufficiently linked to the property they wish to assert a constructive trust over.

In *Bell v. Bailey*¹⁹, the Ontario Court of Appeal discussed the fundamental approach to be taken to the award of damages as opposed to a constructive trust. The Court of Appeal stated that the proprietary

16 *Re Brown* (1999) 31 ETR (2d) 164.

17 *Tarantino v. Galvano*, [2017 ONSC 3535 \(CanLII\)](#).

18 *Sorochan v. Sorochan*, [1986 CanLII 23 \(SCC\)](#).

19 *Bell v. Bailey*, [2001 CanLII 11608 \(ON CA\)](#).

remedy of a constructive trust is limited to those cases where a monetary award is inadequate and once the trial judge concluded that a monetary award was adequate, the issues of constructive trust should have left the table.

In the case of [Perilli v. Foley Estate](#),²⁰ the court imposed an unjust enrichment award and declined to impose a constructive trust because of the lack of a strong causal link between the services rendered and the property owned by the deceased.

In [Dale v. Salvo](#),²¹ the court imposed a constructive trust over a matrimonial property in favor of a common law wife. During their marriage, the wife contributed towards the maintenance of the property including making mortgage payments, decorating the home, improving the garden and otherwise attending to the domestic services.

In [Sun v. Quan](#),²² the court found that a wife was a beneficial owner of a property that she lived in with her husband and children. For many years the mother had contributed towards the property including mortgage payments, maintenance and living expenses as well as the care of the children. Given the link between contribution and the property, the court ordered that the husband held a 50% interest in the property on constructive trust for the wife.

RESULTING TRUST

A resulting trust arises when legal or equitable title to a property is in one party's name, but that party is required to return the property to the original owner. The property is held on a resulting trust. Resulting trusts occur in situations wherein the property holder did not give any value for the property they acquired or in instances where the property owner is a trustee, and no beneficial entitlement was conferred to them.²³

[Pecore v. Pecore](#),²⁴ is the decision that clarified the concept of the resulting trust in Canada. This case addressed the legal ramifications of gifts, gratuitous transfers of real property, joint accounts, and other joint holdings as between a parent and an adult child. The majority of the Court, per Rothstein J., held that the presumptions of advancement and of resulting trust “continue to have a role to play in disputes over gratuitous transfers,”²⁵ although the presumption of advancement was in future to be limited to cases of transfers to minor children.

20 *Perilli v. Foley Estate*, [2006 CanLII 3285 \(ON SC\)](#).

21 *Dale v. Salvo*, [2005 CanLII 25893 \(ON SC\)](#).

22 *Sun v. Quan*, [2022 ONSC 7024 \(CanLII\)](#).

23 DWM Waters, *The Law of Trusts in Canada*, 5th ed (Toronto: Carswell, 2021).

24 *Pecore v. Pecore*, [2007 1 SCR 795](#) (“**Pecore**”); see also: *Madsen Estate v. Saylor*, [\[2007\] SCC 18 \(CanLII\)](#).

25 *Ibid* at [para 23](#).

The key findings of the case include that the presumption of resulting trust applies to *inter vivos* gifts and beneficiary designations, it does not apply to testamentary dispositions. It also stands for the proposition that in estate cases, clear evidence of intention appears to be provided mostly by third party professionals. Making it even more important for lawyers to keep clear and contemporaneous notes.

Following *Pecore*, Canadian courts have consistently held that transfers of property from a parent to an adult child for nominal consideration create the presumption of resulting trust. Although legal title may vest in an adult child, circumstances are often such that the parent retains the beneficial ownership.

In 2020, the law regarding beneficiary designations received controversial treatment. In the decision of [Calmusky v. Calmusky](#),²⁶ Justice R.A. Lococo applied the presumption of resulting trust for a registered retirement income fund (“RIF”), contrary to the text of the actual instrument designating the beneficiary. In *Calmusky*, a dispute arose between two brothers over the assets in joint bank accounts and a RIF left by their late father. In 2014, the father made one of the sons a joint holder of his bank accounts and designated him as the beneficiary under his RIF. Justice Lococo concluded that there was no basis to find that the presumption would apply to the gratuitous beneficiary designation.

In 2021, the *Calmusky* decision was effectively overturned by the decision of [Mak Estate v. Mak](#),²⁷ where Justice McKelvey held that cases which involved *inter vivos* gifts, such as that in *Pecore*, were in fact, distinguishable from cases concerning beneficiary designations where the purpose of such designations is to state what should become of the asset upon death. This was followed in Nova Scotia in the decision in [Fitzgerald Estate v. Fitzgerald](#),²⁸ where Justice Murray of the Nova Scotia Supreme Court concurred with the decision in [Mak Estate](#), holding that the presumption of resulting trust has no application to beneficiary designations.

EVIDENCE OF ADEQUATE INTENTION

For a gift to be valid, it must be established that there was a donative intent. Intention is at the heart of a gift. Where there is a gratuitous transfer between a parent and an adult child, the presumption of resulting trust assumes there was no intent to gift. Equity presumes bargains and not gifts.²⁹ Therefore, a person holding the asset is presumed to be holding it on resulting trust for the transferor. In other words, someone has received an asset at the expense of another person and the resulting trust causes the beneficial ownership of that asset to be returned to that other person.

26 *Calmusky v. Calmusky*, [2020 ONSC 1506](#).

27 *Mak Estate v. Mak*, [2021 ONSC 4415](#).

28 *Fitzgerald Estate v. Fitzgerald*, [2021 NSSC 355 \(CanLII\)](#).

29 *Pecore* at para 24.

It appears, however, that courts have been unsettled in the approach respecting the role of intention in bringing about the resulting trust. The common belief is that parents do not intend to make gifts to (non-dependent) adult children – the intent is rather, that adult children will manage their assets or “facilitate the free and efficient management of that parent’s affairs” as was noted by Rothstein J. in *Pecore*.³⁰

Justice Abella, however, opined that parents are still affectionate towards their adult children and a gift can still be intended since parents naturally care about their children both young and old.³¹ So what role does personal affection play, if any, in the determination of a parent’s intention?

In *Pecore*, Rothstein J. examined the evidence that a Court may consider when determining the intent of the transferor. The following is a non-exhaustive list of the type of evidence considered:

1. Evidence: Evidence of the deceased’s intention at the time of the transfer, including, where admissible; and evidence subsequent to the transfer (as long as it is relevant to the intention of the transferor at the time of the transfer);
2. Bank documents: The clearer the wording in the bank documents evincing the deceased’s intention, the more weight that evidence might attract;
3. Control and use of the funds in the account: The circumstances must be carefully reviewed and considered to determine the weight given to this factor, since control can be consistent with an intention to retain ownership, yet it is also not inconsistent with an intention to gift the assets in certain circumstances;
4. Granting a Power of Attorney: The court should consider whether a power of attorney constitutes evidence, one way or another, of the deceased’s intention; and,
5. Tax treatment of joint accounts: This is another circumstance which might shed light on the deceased’s intention since, for example, a transferor may have continued to pay taxes on the income earned in the joint account evincing intent to have the assets form part of their estate. The weight to be placed on tax-related evidence in determining a transferor’s intent should be left to the discretion of the trial judge.³²

Who holds this evidence and where will it come from? Adult children are often present during the opening of any joint account and so too, they are often involved in the parents’ financial affairs. As such, the adult children may be in a better position than the estate to find and present the evidence

30 *Pecore* at para. 36.

31 *Ibid* at paras 100-103.

32 *Ibid* at paras 55-70

(unless adult children were not aware of the joint account).³³ Also consider the role that financial institutions themselves play. Some court decisions have relied heavily on investment advisor, or bank teller testimony as well as the testimony of lawyers or notary publics involved in the gratuitous transfer.³⁴

In cases involving estates, where the transferor/giftor has died, the most persuasive evidence often comes from third party witnesses such as financial advisors, bank tellers, lawyers or notaries involved in the transfer or opening of accounts.

In estate cases, clear evidence of intention appears to be provided mostly by third party witnesses such as drafting solicitors and financial advisors. This is a good reminder to drafting solicitors to keep clear, contemporaneous notes of any discussion regarding such transfers, especially if the transferor is an older adult and the transferee an adult child. Obtaining testimony from relevant financial institutions is also critical early on to preserve evidence of intention.

JOINT ACCOUNTS AND RESULTING TRUSTS

The use of joint accounts and shared investment accounts between an adult child and an ageing parent is often seen in modern society, but it also comprises of an unlimited source of contentious litigation.³⁵ Often, joint account planning is simply designed so an adult child can assist in managing their parents' financial matters. In *McLear v. McLear Estate*,³⁶ the court characterized these situations as the “present social conditions”³⁷ between elderly parents and their adult children yet criticized reasons for the creation of joint accounts which can irrationally include minimizing probate fees and simplifying estate transfers. Joint accounts simply cause unnecessary confusion respecting the intent of the parent in both living and deceased circumstances. The question becomes whether the parent's intent, was for their funds to result back to them solely to form a part of their estate after death, or was the intent of the parent to gift the adult child the account by rights of survivorship.³⁸ *Pecore*, citing Dickson J. in *McLear*, provides an interesting analysis on the court's rationale for treating joint transfers on resulting trust principles, and a rationale for why the presumption of advancement is not applied:³⁹

Given these social conditions, it seems to me that it is dangerous to presume that the elderly parent is making a gift each time he or she puts the name of the assisting child on

33 See *Doucette v. McInnes*, [2009 BCCA 393](#).

34 See *Van De Keer Estate Re*, [2012 MBCA 109](#), *Lorintt v. Boda*, [2014 BCCA 354](#), *Foley (Re)*, [2015 ONCA 382](#), *Laski v. Laski*, [2016 ONCA 337](#), *Fuller v. Harper*, [2010 BCCA 421](#).

35 *Pecore* at para 34.

36 (2000), 33 E.T.R. (2d) 272 (Ont. S.C.J.) [*McLear*].

37 *Pecore*, *supra* note 8 at para 34.

38 *Ibid* at para 45.

39 *Ibid*.

an asset. The presumption that accords with this social reality is that the child is holding the property in trust for the ageing parent, to facilitate the free and efficient management of that parent's affairs. The presumption that accords with this social reality is, in other words, the presumption of resulting trust.⁴⁰

In [Laski v Laski](#),⁴¹ an Ontario Court of Appeal decision, a father (the “**Deceased**”) held bank accounts jointly with one of his daughters (the “**Responding Party**”), excluding his two other children. After the Deceased passed away, his son (the “**Moving Party**”) claimed the funds in the joint account. The Moving Party contended that the funds in the joint account between the Deceased and the Responding party were held by the estate of the Deceased on resulting trust. The Responding party was able to provide the court with “overwhelming” evidence indicating that the Deceased intended to gift her the money in the joint accounts, for her sole use. Evidence included the following:

1. A clause in the Deceased's will stating that the any assets jointly held with the moving party would be gifted to her upon his death;⁴²
2. The Deceased's lawyers and investment advisors provided some evidence that the Deceased wanted to ensure his daughter was taken care of after his death;⁴³ and
3. Proof that the Deceased understood how joint accounts and rights of survivorship worked.⁴⁴

Laski demonstrated that the Responding Party, who was the transferee, was able to successfully rebut the presumption of resulting trust by submitting sufficient evidence to the court of the Deceased's intention.

A decision which demonstrates a transferee's failure to rebut the presumption of resulting trust can be considered in [Renwick Estate and Miller v. Stanberry](#).⁴⁵ In this decision, the Deceased's daughter, Betty (the “**Applicant**”) and her stepsister (the “**Respondent**”) were both named as co-executors of their mothers' estate. A Certificate of Appointment was granted in, 2019, after the death of the Deceased on September 3, 2018. The issuance of the Certificate of Appointment was neither contested by the Applicant, nor the Respondent. At the Deceased's death, she held seven joint accounts with the Applicant, totaling \$128,241.41. Most of these accounts were set up jointly in 2015.

Each joint account contained a signature card that had been initialed by the Deceased and the

40 *Ibid* at para 34.

41 [2016 ONCA 337](#) [*Laski*].

42 *Laski*, *supra* note 122 at [para 13](#).

43 *Ibid* at [para 14](#).

44 *Ibid* at [para 15](#).

45 [2023 ONSC 5970](#) [*Renwick*].

Applicant. The Applicant contended this demonstrated the Deceased's approval in creating joint accounts with rights of survivorship. Additionally, a financial services agreement had been registered with each account having been in existence since 2011, and, updated in 2016. The agreement explained the terms and conditions of creating joint accounts.

The court found that neither, the financial services agreement, nor the signature cards sufficiently demonstrated the Deceased's intention to leave the funds to the Applicant, rather than the estate:

There is no direct evidence in the record as to what was specifically discussed between TD Bank and the Deceased regarding: (a) the meaning and effect of the signature card;(b) the terms regarding joint accounts in the financial services agreement; (c) the differences between a joint account with or without survivorship; and (d) the Deceased's specific intention in checking off the survivorship option on the signature cards (for example, whether the intention in doing so may only have been an attempt to avoid probate fees).⁴⁶

In [Lowe Estate v. Lowe](#),⁴⁷ a dispute arose concerning a joint bank account held by the deceased and his nephew. In the deceased's Will, he appointed his wife as his estate trustee and residual beneficiary and his son as the alternate. Several years before his passing, the deceased separated from his wife and became estranged from his son, instead going to live in Florida with his sister. He then became close with his nephew and opened a joint account with him with a right of survivorship. At that time, he advised his nephew that he wanted half the proceeds from the joint account to be given to his *alma mater* university and his granddaughter and the remaining half to his son. The son brought an application arguing that the joint account formed part of the residue of the estate. The court found that the evidence, including written instructions, confirmation to his nephew and lack of evidence that the funds were to be treated as estate funds, were sufficient to rebut the presumption of resulting trust and deceased's intent was to gift the joint account funds.

Prior to his death, the Deceased signed a direction prepared by his investment advisor to transfer his securities into the joint account with Wendi with right of survivorship. The transfer of bonds by the deceased was challenged by his son Wayne, who argued that Wendi held the proceeds of the joint account on resulting trust. The Court of Appeal concurred with the decision of the Superior Court and found the evidence demonstrated that the Deceased intended for the Wendi to receive the joint account proceeds as a gift. As such, Wendi was able to rebut the presumption of resulting trust.

In [Foley \(Re\)](#),⁴⁸ the deceased made three transfers of money to his daughter and a bequest to her of his savings bonds. The deceased's transfers were challenged by his son who purported that the

46 *Ibid* at para 11.

47 *Lowe Estate v. Lowe*, [2014 ONSC 2436](#).

48 *Foley (Re)*, [2015 ONCA 382](#).

daughter unduly influenced him and that he lacked the requisite capacity to make the gifts. The Court of Appeal upheld the decision at first instance and found that the Deceased was capable of the gifts and not unduly influenced. Accordingly, the transfers of money and the saving bond were bequeathed to the daughter.

For a more detailed discussion, see Kimberly Whaley's [paper](#) and [chart](#) on *Pecore v. Pecore*,⁴⁹ and its impact on subsequent resulting trust decisions in Canada.⁵⁰

PROMISSORY ESTOPPEL

Promissory estoppel is an equitable defense and responds to detrimental reliance. The party asserting the doctrine must establish that:

- 1) the parties were in a legal relationship at the time of the promise or assurance;
- 2) the promise or assurance, by words or conduct, must be intended to affect that relationship and to be acted on; and,
- 3) the other party in fact relied on the promise or assurance.⁵¹

Promissory estoppel seeks to protect against the “inequity of allowing the other party to resile from his statement where it has been relied upon to the detriment of the person to whom it was directed”.⁵²

In Canada, promissory estoppel can operate only as a shield and not as a sword. In other words, promissory estoppel cannot create a new cause of action where none existed before.⁵³

The intent of the promisor in promissory estoppel must be interpreted by the court objectively, based upon their words or conduct. A promise is intended to be binding when it would be reasonable for the promisee to interpret it in that manner. This approach considers whether, viewed objectively considering the full context and including all the facts that the promisor knew or reasonably can be taken to have known, the promisor intended to alter legal rights.⁵⁴

49 *Pecore*, supra note 8.

50 “*Pecore v. Pecore: A discussion 10 years later*”, Kimberly Whaley 2017, accessible online at: <https://welpartners.com/resources/WEL-Pecore-10-Years-Later-PEI.pdf>; “*Pecore Last 10 years – Review of Appellate Decisions citing Pecore*”, Kimberly Whaley 2017, accessible online at: <https://welpartners.com/resources/WEL-CHART-2017-Pecore-Last-10-Years-Survey-of-Appellate-Case-Law.pdf>.

51 *Maracle v. Travellers Indemnity Co. of Canada*, [1991 CanLII 58 \(SCC\)](#), [\[1991\] 2 S.C.R. 50](#) at para 13; *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, [2021 SCC 47 \(CanLII\)](#).

52 *Fort Frances v. Boise Cascade Canada Ltd.*, [1983 CanLII 47 \(SCC\)](#), [1983] 1 S.C.R. 171, at page 202.

53 *Anderson v. Anderson*, [2010 BCSC 911 \(CanLII\)](#) at [para 198](#); citing *Romfo v. 1216393 Ontario Inc.*, [2007 BCSC 1375](#).

54 *Owen Sound Public Library Board v. Mial Developments Ltd.* (1979), [1979 CanLII 1624 \(ON CA\)](#), 26 O.R. (2d) 459.

The party asserting promissory estoppel must adduce evidence of prejudice, inequity, unfairness, or injustice before courts will give hold a promisor to its promise or assurance.⁵⁵

PROPRIETARY ESTOPPEL

Proprietary estoppel is concerned with a promise with respect to land or property. It is an increasingly used tool to remedy and to protect a person who detrimentally relied on a property owner's promises, actions, or inaction that caused the person to believe that he or she was the true owner of the property and where it would be unjust to permit the owner to later turn around and assert title.

In [Schwark v. Cutting](#)⁵⁶ in 2010, the Ontario Court of Appeal confirmed the well-settled test for proprietary estoppel:

- (i) An equity arises where:
 - (a) the owner of land induces, encourages or allows the claimant to believe that he has or will enjoy some right or benefit over the owner's property;
 - (b) in reliance upon this belief, the claimant acts to his detriment to the knowledge of the owner; and
 - (c) the owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive.

[...]

- (iv) The relief which the court may give may be either negative, in the form of an order restraining the owner from asserting his legal rights, or positive, by ordering the owner to either grant or convey to the claimant some estate, right or interest in or over his land, to pay the claimant appropriate compensation, or to act in some other way.⁵⁷

The remedy of proprietary estoppel is potentially a powerful tool that can be used to reclaim a proprietary interest in certain property after death in instances where such an interest was not reflected in a Will. Several Canadian cases have since followed the [Schwark v. Cutting](#) decision on proprietary estoppel.⁵⁸

55 *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, [2021 SCC 47 \(CanLII\)](#) at [para 51](#).

56 *Schwark v Cutting*, [2010 ONCA 61](#) at [para 34](#).

57 *Ibid* at [para 23](#).

58 See *Arias v. Brennan*, [2020 ONSC 1603](#) at [para 58](#); *Grasso v. Bhatt*, [2019 ONSC 746](#) at [para 99](#); *Lauder Industries Inc. v. Reid*, [2018 ABQB 568](#) at [paras 79-80](#); *Visnjic v. Town of LaSalle*, [2017 ONSC 2082](#) at [para 118](#).

In the case of [Cowper-Smith v. Morgan](#),⁵⁹ the Supreme Court of Canada reconsidered the equitable doctrine of proprietary estoppel and arguably expanded its scope.

The facts involved an assurance made by a sister to her brother that if the brother moved back home with their ailing mother, the brother would be able to live in the home, and the sister would allow the brother to acquire her 1/3 interest in the property once it passed to her under the mother's Will. The brother moved back in with his mother holding his sister to her promise. The Court at first instance decided in favour of the brother.

However, at the time the sister made the promise, she had no interest in the property. This created a problem at the British Columbia Court of Appeal. The Court of Appeal allowed the appeal on the basis that proprietary estoppel can only operate where the person making assurances giving rise to the estoppel actually possesses an interest in the property at the time the assurances are made.

The issue before the Supreme Court was whether the trial judge erred in concluding that proprietary estoppel operates to enforce the sister's promise. Specifically, the Supreme Court was asked to decide whether the sister's lack of ownership in the property defeated the brother's claim and if it did not, what was the appropriate remedy.

The Supreme Court was unanimous in finding that the trial judge did not err in concluding that proprietary estoppel operated to enforce the sister's promise. Chief Justice McLachlin, writing for the majority, held that: "Equity enforces promises that the law does not". She explained that an equity arises where:

1. A representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over the property;
2. The claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and,
3. The claimant suffers detriment because of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word.⁶⁰

When the party responsible for the representation or assurance possesses an interest in the property sufficient to fulfill the claimants' expectation, the court found that proprietary estoppel may give effect to the equity by making the representation or assurance binding. Proprietary estoppel avoids the unfairness or injustice that would result to one party if the other were permitted to break her

⁵⁹ [Cowper-Smith v. Morgan](#), [2017 SCC 61 \(CanLII\)](#).

⁶⁰ *Ibid* at [para 15](#).

word and insist on her strict legal rights. Moreover, proprietary estoppel can do what other estoppels cannot – it can found a cause of action, meaning it can be used as a sword and not just a shield. The brother’s “equity” arose not at the time when the sister received her 1/3 entitlement under the Will, but rather at the time the assurances were made – before the mother died.⁶¹

The majority of the court directed the sister, in her capacity as estate trustee of her mother’s estate to affect a transfer of her 1/3 interest in the other’s house directly to the brother *in specie*. This shows that once the requirements for proprietary estoppel are satisfied a court has considerable discretion in determining a remedy.

The Supreme Court did not decide whether proprietary estoppel may attach to an interest in property other than land – although by leaving the question open the suggestion is that it may. Importantly, however, the Court held that proprietary estoppel may prevent an inequity where a claimant has reasonably relied on an expectation that he or she will enjoy a right or benefit over property, even in circumstances where the party responsible for that expectation did not own an interest in the property at the time of the claimant’s reliance.

DOCTRINE OF UNCONSCIONABILITY

The doctrine of unconscionability is typically used to set aside a contract that offends the conscience of a court of equity. However, unconscionability is not restricted to the law of contracts. And, while unconscionability is closely related to undue influence, it is separate and distinct. A claim of undue influence attacks the sufficiency of consent.

Unconscionability on the other hand, arises when unfair advantage is gained by an unconscientious use of power by a stronger party against a weaker. To be successful, such a claim will need proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker party, which resulted in the victim under the power of the stronger party and proof of substantial unfairness of the bargain. This creates a presumption of fraud which the stronger party must rebut by proving that the bargain was fair, just, and reasonable.⁶²

The test for unconscionability in Canada was established in the Supreme Court of Canada decision of [Uber Technologies Inc v. Heller](#).⁶³ In *Uber Technologies*, a two-step test was affirmed and held to apply when deciding whether a contract should be set aside. The test requires:

61 *Ibid* at [para 36](#).

62 *Morrison v. Coast Financial Ltd.*, [1965 CanLII 493 \(BC CA\)](#) at page 713. See also the case of *Smith v. Croft*, [2015 CanLII 3837 \(ONSCSM\)](#) where the Ontario Small Claims Court set aside a transaction as unconscionable where a neighbour purchased an antique truck valued at \$18,000 from an elderly neighbour with dementia for \$2000.00.

63 *Uber Technologies Inc. v. Heller*, [2020 SCC 16 \(CanLII\)](#), [\[2020\] 2 SCR 118](#).

1. Inequality of bargaining position; and,
2. Proof of an improvident bargain.

In other words, the court requires for there to be circumstances where the contractual term is *per se* unreasonable *and* the unreasonableness stems from the inequality of bargaining power.⁶⁴

In [*Sanders v. Canada's Choice Investments Inc.*](#),⁶⁵ the Ontario Superior Court of Justice held that an inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process and that unequal bargaining power can be established even if the legal requirements of contract formation are otherwise met.

UNCONSCIONABLE PROCUREMENT

The doctrine of unconscionable procurement has re-emerged as a remedy in Canada and has the effect of rendering a transfer of wealth voidable. For unconscionable procurement to apply, the objector must demonstrate:

1. A significant benefit; and,
2. The active involvement of the person receiving the benefit in the arrangement of the transfer.

If the objector demonstrates the two criteria, then there is a presumption that the donor of the gift did not truly understand what she was doing in making the transaction. The court is to look at the impugned transactions with its moral sense awakened and with a view to determining whether it would be unconscionable to allow the transaction to stand. This equitable doctrine does not require proof of incapacity or undue influence.⁶⁶

As Chief Justice Mulock explained in *Kinsella v. Pask*:⁶⁷

In every case where a person, to his own advantage, but to the prejudice of the giver, obtains by donation some substantial benefit, he is bound to prove clearly, not only that the gift was made, but that it was the voluntary, deliberate, well-understood act of the donor, and that the donor was capable of fully appreciating and did fully appreciate its effect, nature, and consequence.

64 See *Hunter Engineering Co. v Syncrude Canada Ltd*, [1989 CanLII 129 \(SCC\)](#).

65 *Sanders v. Canada's Choice Investments Inc.*, [2023 ONSC 195 \(CanLII\)](#).

66 *Gefen Estate v. Gefen*, [2019 ONSC 6015](#) at [para 159](#).

67 *Kinsella v. Pask*, 1913 CarswellOnt 781, 12 D.L.R. 522, 28 O.L.R. 393 (Ont. C.A.) (*Kinsella*).

Unconscionable procurement was considered and applied by the Ontario Court of Appeal in [Gefen Estate v. Gefen](#).⁶⁸ *Gefen* concerned the *inter vivos* transfer of \$8 million, from a mother to one of her children, Harvey, which was challenged on the basis of unconscionable procurement. This transfer of wealth equated to half of the mother's total assets and the evidence demonstrated that she did not fully understand or appreciate what she was doing. Moreover, Harvey was actively involved in the receiving of the money. The Superior Court of Justice granted the unconscionable procurement claim and ordered that Harvey held the \$8 million in trust for his mother or her estate. The Ontario Court of Appeal dismissed the appeal and upheld the lower court's decision.

LACK OF INDEPENDENT LEGAL ADVICE

In general terms, Independent Legal Advice (“**ILA**”), is provided by an independent lawyer who is unrelated to the client's matter, associate parties, or the lawyer, and who does not have a conflicting interest. The role of a lawyer providing ILA is to provide legal advice that is objective and unbiased regarding a decision the individual is facing. The outside lawyer, therefore, is only retained for the limited purpose of providing ILA so that the individual appreciates the nature and consequences of a decision to be made.

Typically, the need for ILA arises because a lawyer is in a conflict of interest. The Ontario lawyers' [Rules of Professional Conduct](#) outline circumstances in which a lawyer should or must recommend or require that a client obtain ILA.⁶⁹

In [Gold v. Rosenberg](#),⁷⁰ the court noted that:

Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to decide according to their own will. **The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence.**⁷¹

Accordingly, the benefit of ILA can help dispel any allegations of undue influence in the provision of *inter vivos* or testamentary gifts. In [Cowper-Smith v. Morgan](#),⁷² the British Columbia Court of Appeal considered when the donor had received sufficient ILA to dispel undue influence when she transferred legal title to her property into joint tenancy. In that case, the Court of Appeal found that the ILA

68 *Gefen Estate v. Gefen*, [2022 ONCA 174 \(CanLII\)](#).

69 See Law Society of Ontario, “Independent Legal Advice versus Independent Legal Representation” 2022, [Law Society of Ontario](#), accessed online: [Independent Legal Advice Versus Independent Legal Representation - Lawyer | Law Society of Ontario \(lso.ca\)](#).

70 *Gold v. Rosenberg*, [1997 CanLII 333 \(SCC\)](#), [\[1997\] 3 SCR 767](#). [emphasis added]

71 *Ibid* at [para 85](#). [emphasis added]

72 *Cowper-Smith v. Morgan*, [2016 BCCA 200 \(CanLII\)](#).

received by the donor was not sufficient to rebut her undue influence by her daughter.

The decision in *Inche Noriah v Shaik Allie Bin Omar*⁷³ is the authority for the proposition that, in providing ILA, a lawyer must not only explain the nature and effect of a guarantee (or other contract) to the client, but must also have a broader understanding of the client's assets, the risk of the transaction and any alternatives for accomplishing the transaction without risk.

NON EST FACTUM

The equitable principle of *non est factum*, Latin for “it is not [my] deed”, is a defense available to someone who has been misled into executing a deed or signing a document which is fundamentally different from that which he intended to execute or sign.⁷⁴ It is part of a “special category of the law of mistake and is extremely narrow in scope”⁷⁵. The mistake must have been as to the essential nature of the transaction, rather than as to its terms, “a mistake as to the legal effect of those terms by the signatory or by his legal adviser will not suffice”.

The Supreme Court of Canada's decision of, [Marvco Color Research Ltd. v. Harris](#)⁷⁶ is the governing authority in Canada on *non est factum*.

In *Marvco*, the question before the Court was which of two parties was to bear the burden of the fraud of a third. The Court concluded that as between an “innocent” third party and one who is careless in the execution of a document, the careless party should bear any loss resulting from his or her own carelessness. In that case, the respondents signed a security agreement, in favour of the appellants, securing the performance of another transaction. The respondents did not read the document. They relied upon misrepresentations as to its nature made to them by one of the covenantors whose performance was being guaranteed by the document in question. Relying on that document, the appellants released one of the covenantors from liability under a mortgage he had given to them.⁷⁷

The principles of *non est factum*, as formulated in the weight of the authorities, can be summarized as follows:

1. The burden of proving *non est factum* rests with the party seeking to disown their signature. For a person of full capacity, the application of the doctrine must be kept within narrowly prescribed limits.

73 [1929] AC 127 (PC) at p.614.

74 Andrews & Millet, *Law of Guarantees*, (4th ed) (London: Sweet & Maxwell, 2001) at 104.

75 *Ibid.*

76 [1982 CanLII 63 \(SCC\)](#).

77 *Farrell Estates Ltd. v. Win-Up Restaurant Ltd.*, [2010 BCSC 1752](#) at [para. 85](#).

2. The person who seeks to invoke the remedy must show that the document signed is fundamentally different from what the person believed he or she was signing.
3. Even if the person shows such a fundamental difference, the court must examine whether the signer was careless in failing to take reasonable precautions in the execution of the document. The court must also consider the conduct of the party relying on the document and whether they qualify as an innocent party, in order to determine which party, by application of reasonable care, was in the better position to avoid the loss.⁷⁸

CONCLUDING COMMENTS

In summary, there are several equitable claims that can be considered in estate matters, we have included a few for consideration and for example purposes. The inclusions are not exhaustive.

While these equitable claims do not directly challenge the validity of a Will, they can be considered where a party seeks to ascertain an interest/ownership of an otherwise considered estate asset. These claims are fact and evidence driven and must be substantiated and corroborated and brought within two years of the date of death.

78 *Ibid* at [para 100](#).

CHAPTER 6: LITIGATION PROCESS AND PROCEDURE

INTRODUCTION

In the process of advancing a Will challenge in Ontario, the complex litigation scheme involved can appear prohibitively difficult without some form of further guidance and direction.

An overview of the essential steps and materials involved in bringing a will challenge will be set out here, along with a brief explanation of the intended purposes therein, and the procedural requirements that must be strictly adhered to throughout the process.

In Ontario, most estate related proceedings are commenced as an Application under [Rules 74](#) and [75](#) of the [Rules of Civil Procedure](#). While [Rule 74](#) deals primarily with administrative matters, [Rule 75](#) deals with “Contentious Estate Proceedings” and provides the appropriate vehicle for most contested estate litigation. [Rule 75.06](#) enables a moving party with a financial interest in an estate, defined as the “Applicant”, to move for the Opinion, Advice, and Directions of the court in respect of several estate related issues:

Application or Motion for Directions

[75.06 \(1\)](#) Any person who appears to have a financial interest in an estate may apply for directions or move for directions in another proceeding under this rule, as to the procedure for bringing any matter before the court. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 18 (1).

...

Order

(3) On an application or motion for directions, the court may direct,

- (a) the issues to be decided;
- (b) who are parties, who is plaintiff and defendant and who is submitting rights to the court;
- (c) who shall be served with the order for directions, and the method and times of service;

(d) procedures for bringing the matter before the court in a summary fashion, where appropriate;

(e) that the plaintiff file and serve a statement of claim (Form 75.7);

(f) that an estate trustee be appointed during litigation, and file such security as the court directs;

(g) such other procedures as are just. O. Reg. 484/94, s. 12; O. Reg. 290/99, s. 1; O. Reg. 193/15, s. 13 (1).¹

In tandem with [Rule 75.06](#), [Rule 75.01](#) allows an individual to bring an Application for a testamentary instrument to be proven:

Formal Proof of Testamentary Instrument

75.01 An estate trustee or any person appearing to have a financial interest in an estate may make an application under rule 75.06 to have a testamentary instrument that is being put forward as the last will of the deceased proved in such manner as the court directs. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 15.²

PRE-LITIGATION APPROACH

CORRESPONDENCE REQUESTING RELIEF BEFORE COMMENCING COURT PROCEEDINGS

Prior to commencing litigation, it makes sense to attempt resolution before resorting to court proceedings. A letter setting out what is requested and the rationale for why may be helpful, if appropriate and where early resolution is desired.

The purpose of such correspondence is to advise potential respondents of contentious issues, set out the potential Applicant(s)' understanding of the relevant facts, and to request necessary evidentiary disclosure or consent to obtaining such disclosures.

The approach is designed for example to permit requests for copies, consent, or preparation of documents including:

- Release of solicitor records/files;

¹ *Rules of Civil Procedure*, [R.R.O 1990, Reg 194, Rule 75.06 \(1\) - \(3\)](#) (the "**Rules**").

² *Ibid* at [Rule 75.01](#).

- Release of testamentary documents;
- Release of attorney documents;
- Request and obtain fiduciary accountings;
- Release of medical documents;
- Release of financial documents; and
- Release of advisor statements.

Such an approach can and often does permit the parties to participate in dispute resolution initiatives, such as attending mediations or in person meetings supported by counsel.

Further to the benefits of enabling the parties to potentially mitigate their disputes and reduce the need for litigation, a less contentious initial approach serves as a valuable resource when seeking legal costs from the court should a matter proceed to litigation in certain circumstances.

PRELIMINARY PROCEEDINGS

NOTICE OF OBJECTION/MOTION FOR DIRECTIONS

Should initial dispute resolution techniques/strategies prove unsuccessful, immediate steps can too, be taken to prevent an estate trustee from being appointed in respect of a contested estate, and potentially to further preserve the assets of the estate from being dissipated.

Under [Rule 75.03\(1\)](#), any person who appears to have a financial interest in an estate can object to the issuing of a Certificate of Appointment of Estate Trustee (“**CAET**”) by filing a [Form 75.1](#) Notice of Objection with the courts.³ Under [Rule 75.03\(2\)](#), the Notice of Objection can remain registered with the courts for a period of up to three years.⁴

While the Notice of Objection remains registered, any person who applies for a CAET must proceed through the following required steps prior to receiving an appointment as estate trustee:

THE NOTICE TO APPLICANT

Under [Rule 75.03\(3\)](#), where a Notice has been filed, any individual who applies for a CAET in respect of the impugned estate will be notified of the Notice of Objection by the local court registrar through a [Form 75.2](#) Notice to Applicant.⁵

³ *Ibid* at [Rule 75.03 \(1\)](#).

⁴ *Ibid* at [Rule 75.03\(2\)](#).

⁵ *Ibid* at [Rule 75.03 \(3\)](#).

THE NOTICE TO OBJECTOR

Under [Rule 75.03\(4\)](#), any individual who receives a [Form 75.2](#) must then serve on the objector a Notice to Objector ([Form 75.3](#)) and file a copy of the notice and proof of service with the court.⁶ Where the objector does not serve and file a notice of appearance ([Form 75.4](#)) within 20 days after service of the Notice to Objector, pursuant to [Rule 75.03\(5\)](#) the application shall proceed as if the Notice of Objection had not been filed.⁷

Under [Rule 75.03\(6\)](#), if the Applicant does not move for directions within 30 days after service of the Notice of Appearance, the objector may move for directions.⁸

APPLICATIONS FOR ADVICE & DIRECTIONS

THE NOTICE OF APPLICATION

Turning to the more comprehensive procedure of bringing an Application for the Opinion, Advice, and Directions of the court to challenge a testamentary instrument under [Rule 75.06](#), [Rules 14.01](#) and [14.05](#) provide that the commencing document to be filed with the court, defined as the “originating process”, is the Notice of Application ([Form 14E](#), [14E.1](#), [68A](#) or [73A](#)):

Applications — By Notice of Application or Application for Certificate

[14.05 \(1\)](#) The originating process for the commencement of an application is, as applicable,

- (a) a notice of application ([Form 14E](#), [14E.1](#), [68A](#) or [73A](#)); or
 - (b) an application for a certificate of appointment of estate trustee ([Form 74A](#) or [74J](#)), small estate certificate ([Form 74.1A](#)) or amended small estate certificate ([Form 74.1E](#)).
- O. Reg. 383/21, s. 3; O. Reg. 709/21, s. 2.

...

Application under Rules

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

⁶ *Ibid* at [Rule 75.03 \(4\)](#).

⁷ *Ibid* at [Rule 75.03 \(5\)](#).

⁸ *Ibid* at [Rule 75.03 \(6\)](#).

- (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
- (b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;
- (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;
- (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;
- (f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;
- (g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;
- (g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or
- (h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. R.R.O. 1990, Reg. 194, r. 14.05 (3); O. Reg. 396/91, s. 3; O. Reg. 537/18, s. 2.⁹

The essential purpose behind the Notice of Application is to inform the court of the relief being sought, the facts supporting the Application, and the evidence to be relied upon therein, as further detailed below:

The requested relief portion of the Notice of Application sets out any Orders, Declarations, or Determinations that can or will be appropriately requested from the court by the Applicant.

Care and diligence should be taken to consider the issues in dispute, the relief being sought, and the extent of any disclosure or productions required. Where specific relief is omitted from the Notice of

⁹ *Ibid* at [Rules 14.05 \(1\) and \(3\)](#).

Applications, Parties may be unable to secure related orders without obtaining further leave from the court.

In setting out the grounds section of the Notice of Application, non-contentious facts must be provided to advise the courts of the relevant grounds supporting the requested relief. The grounds cannot contain disputed facts, argument, or advocacy, and must instead portray the commonly understood events that can be agreed upon between the Parties.

Where Parties are unable to agree on such basic facts and there is good reason to do so, the matter may be converted to an Action by way of [Rule 38.10](#) in order for, amongst other things, live evidence to be tendered by the Parties and witnesses:

Disposition of Application

[38.10 \(1\)](#) On the hearing of an application the presiding judge may,

(a) grant the relief sought or dismiss or adjourn the application, in whole or in part and with or without terms; or

(b) order that the whole application or any issue proceed to trial and give such directions as are just. R.R.O. 1990, Reg. 194, r. 38.10 (1).

(2) Where a trial of the whole application is directed, the proceeding shall thereafter be treated as an action, subject to the directions in the order directing the trial. R.R.O. 1990, Reg. 194, r. 38.10 (2).

(3) Where a trial of an issue in the application is directed, the order directing the trial may provide that the proceeding be treated as an action in respect of the issue to be tried, subject to any directions in the order, and shall provide that the application be adjourned to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 38.10 (3).¹⁰

The court must be informed of the evidence that will be relied upon to support the requested relief and facts set out in the grounds. Often, this will include an affidavit by the Applicant, a draft order giving directions, and any other materials deemed relevant or necessary.

PROCEDURAL REQUIREMENTS

In accordance with [Rule 14.07](#), the Notice of Application must be issued by the courts prior to taking effect. For an originating process to be issued, it must first be filed with the courts in accordance with the process set out by [Rule 4.05.2\(1\)](#).

¹⁰ *Ibid* at [Rules 38.10 \(1\) - \(3\)](#).

How Originating Process Issued

[14.07 \(1\)](#) An originating process is issued by the registrar's act of dating, signing and sealing it with the seal of the court and assigning to it a court file number. R.R.O. 1990, Reg. 194, r. 14.07 (1).

(2) A copy of the originating process shall be filed in the court file when it is issued. R.R.O. 1990, Reg. 194, r. 14.07 (2); O. Reg. 248/21, s. 14.¹¹

Civil Submissions Online Portal

[4.05.2 \(1\)](#) In this rule,

“Civil Submissions Online Portal” means the software authorized by the Ministry of the Attorney General for the purposes of this rule and that is available on the internet under the name “Civil Submissions Online Portal” in English...

Documents That May be Filed

(2) Any document that may or must be filed under these rules, other than a document listed under [subrule 4.05.1 \(2\)](#) or that is filed for the purposes of [rule 60.07](#), may be filed electronically by submitting the document through the Civil Submissions Online Portal, if the Civil Submissions Online Portal provides for the electronic filing of the document. O. Reg. 248/21, s. 1 (1).

Registrar's Acceptance Required

(3) A document submitted for filing through the Civil Submissions Online Portal is filed only if it is accepted by the registrar. O. Reg. 248/21, s. 1 (1).

Confirmation

(4) If the registrar accepts the document for filing, the registrar shall send confirmation of the filing by e-mail. O. Reg. 441/20, s. 2.

Filing Date

(5) A document filed under subrule (3) is considered to have been filed on the day indicated in the confirmation sent by the registrar. O. Reg. 441/20, s. 2.

11 *Ibid* at [Rules 14.07 \(1\) and \(2\)](#).

Documents That May be Issued

(6) Any document that may or must be issued under these rules, other than a document listed under [subrule 4.05.1 \(7\)](#) or that is issued for the purposes of rule 60.07, may be issued electronically by submitting the document through the Civil Submissions Online Portal, if the Civil Submissions Online Portal provides for the electronic issuance of the document. O. Reg. 248/21, s. 1 (1).¹²

Further to being issued, Rule 38.06 provides that the Notice of Application must be served on the Parties within the following prescribed periods:

Service of Notice***Generally***

[38.06 \(1\)](#) The notice of application shall be served on all parties and, where there is uncertainty whether anyone else should be served, the applicant may make a motion without notice to a judge for an order for directions. R.R.O. 1990, Reg. 194, r. 38.06 (1).

...

Minimum Notice Period

(3) The notice of application shall be served at least ten days before the date of the hearing of the application, except where the notice is served outside Ontario, in which case it shall be served at least twenty days before the hearing date. R.R.O. 1990, Reg. 194, r. 38.06 (3).

Filing Proof of Service

(4) The notice of application shall be filed with proof of service at least seven days before the hearing date in the court office where the application is to be heard. R.R.O. 1990, Reg. 194, r. 38.06 (4); O. Reg. 171/98, s. 15; O. Reg. 438/08, s. 39.¹³

Under [Rule 38.07](#), any Party who receives a Notice of Application must proceed to file a Notice of Appearance ([Form 38A](#)) to remain informed of the litigation:

Notice of Appearance

[38.07 \(1\)](#) A respondent who has been served with a notice of application shall forthwith deliver a notice of appearance ([Form 38A](#)). R.R.O. 1990, Reg. 194, r. 38.07 (1).

¹² *Ibid* at [Rules 4.05.2 \(1\) - \(6\)](#).

¹³ *Ibid* at [Rules 38.06 \(1\), \(3\), and \(4\)](#).

- (2) A respondent who has not delivered a notice of appearance is not entitled to,
- (a) receive notice of any step in the application;
 - (b) receive any further document in the application, unless,
 - (i) the court orders otherwise, or
 - (ii) the document is an amended notice of application that changes the relief sought;
 - (c) file material, examine a witness or cross-examine on an affidavit on the application;
or
 - (d) be heard at the hearing of the application, except with leave of the presiding judge. O. Reg. 351/94, s. 3.
- (3) Despite subrule (2), a party who is served with a notice of application outside Ontario may make a motion under [subrule 17.06 \(1\)](#) before delivering a notice of appearance and is entitled to be served with material responding to the motion. O. Reg. 351/94, s. 3.¹⁴

THE AFFIDAVIT

Further to the filing of the Notice of Application, [Rule 38.09](#) provides that Parties must swear an affidavit under oath to complete the Application Record.

Material for Use on Application

Application Record and Factum

[38.09 \(1\)](#) The applicant shall,

- (a) serve an application record...

...

(2) The applicant's application record shall contain, in consecutively numbered pages arranged in the following order,

- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
- (b) a copy of the notice of application;

¹⁴ *Ibid* at [Rules 38.07 \(1\), \(2\), and \(3\)](#).

- (c) a copy of all affidavits and other material served by any party for use on the application;
- (d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and
- (e) a copy of any other material in the court file that is necessary for the hearing of the application. R.R.O. 1990, Reg. 194, r. 38.09 (2).¹⁵

[Rules 39.01 \(1\) and \(5\)](#) then further prescribe the evidentiary requirements for the affidavit, and the fashion in which evidence should be communicated:

Evidence by Affidavit

Generally

[39.01 \(1\)](#) Evidence on a motion or application may be given by affidavit unless a statute or these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 39.01 (1).

...

Contents – Applications

(5) An affidavit for use on an application may contain statements of the deponent's information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit. R.R.O. 1990, Reg. 194, r. 39.01 (5).¹⁶

The essential purpose of preparing an Affidavit is to provide a deponent's/affiants' sworn evidence in the form of written testimony, supported by independent corroboration where possible, as sworn evidence to be relied upon during the proceedings. Such Affidavits can be prepared by the Parties themselves and by third party witnesses with relevant evidence.

The format, structure, and content of the Affidavit should endeavor to present the evidence in a concise, factual, and corroborated manner. Where independent materials are available to corroborate statements or facts, reference should be made to these items by inclusion as alphabetically sequential Exhibits.

When drafting the Affidavit, great care should be taken to avoid exaggerations in the document and ensure matters deposed are truthful, accurate and supported by evidence. Parties will have an opportunity to both examine for discovery and to cross-examine and impeach a deponent on the

¹⁵ *Ibid* at [Rules 38.09 \(1\) and \(2\)](#).

¹⁶ *Ibid* at [Rules 39.01 \(1\) and \(5\)](#).

contents of their Affidavit.

PROCEDURAL REQUIREMENTS

In accordance with [Rules 38.09](#) and [39.01](#), the Application Record, along with an accompanying Factum of law, must adhere to the following procedural requirements:

Material for Use on Application

Application Record and Factum

[38.09 \(1\)](#) The applicant shall,

(a) serve an application record, together with a factum consisting of a concise argument stating the facts and law relied on by the applicant, at least seven days before the hearing, on every respondent who has served a notice of appearance; and

(b) file the application record and factum, with proof of service, at least seven days before the hearing, in the court office where the application is to be heard. R.R.O. 1990, Reg. 194, r. 38.09 (1); O. Reg. 171/98, s. 17 (1); O. Reg. 206/02, s. 9 (1); O. Reg. 438/08, s. 40 (1, 2).¹⁷

Evidence by Affidavit

Service and Filing

[39.01\(2\)](#) Where a motion or application is made on notice, the affidavits on which the motion or application is founded shall be served with the notice of motion or notice of application and shall be filed with proof of service in the court office where the motion or application is to be heard at least seven days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (2); O. Reg. 171/98, s. 18 (1); O. Reg. 394/09, s. 17 (1).

(3) All affidavits to be used at the hearing in opposition to a motion or application or in reply shall be served and filed with proof of service in the court office where the motion or application is to be heard at least four days before the hearing. R.R.O. 1990, Reg. 194, r. 39.01 (3); O. Reg. 171/98, s. 18 (2); O. Reg. 394/09, s. 17 (2).¹⁸

THE FACTUM

The Factum, in essence, is a key document summarizing the facts, issues in dispute, and law that will

¹⁷ *Ibid* at [Rule 38.09 \(1\)](#).

¹⁸ *Ibid* at [Rules 39.01\(2\) and \(3\)](#).

be relied upon in the proceedings.

Attention should be paid to ensuring that reference is made to any relevant laws, regulations, or jurisprudence that will be required to successfully litigate the issues. The legal authorities referenced in the Factum should then be concisely applied to the specific facts of the issue to demonstrate the merits of any relief being sought.

RESPONDING FACTUM AND APPLICATION RECORD

Upon being served with an Application Record, the Respondent must prepare, file, and serve a Responding Factum, and may further do same for a Responding Record in accordance with the following procedural requirements:

Material for Use on Application

Respondent's Application Record and Factum

38.09 (3) The respondent shall serve on every other party, at least four days before the hearing, a factum consisting of a concise argument stating the facts and law relied on by the respondent. O. Reg. 171/98, s. 17 (2); O. Reg. 206/02, s. 9 (2); O. Reg. 14/04, s. 21; O. Reg. 438/08, s. 40 (3).

(3.1) If of the opinion that the application record is incomplete, the respondent may serve on every other party, at least four days before the hearing, a respondent's application record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the respondent on the application and not included in the applicant's application record. O. Reg. 171/98, s. 17 (2); O. Reg. 438/08, s. 40 (4).

(3.2) The respondent's factum, and the respondent's application record, if any, shall be filed with proof of service in the court office where the application is to be heard, at least four days before the hearing. O. Reg. 171/98, s. 17 (2); O. Reg. 438/08, s. 40 (5).¹⁹

¹⁹ *Ibid* at [Rule 38.09 \(3\)](#).

THE ORDER GIVING DIRECTIONS

As a matter of practice, prior to attending any hearing before the courts, any party or person affected by an order may prepare a Draft Order setting out the relief being requested of the courts:

Preparation and Form of Order

Preparation of Draft Order

[59.03 \(1\)](#) Any party or person affected by an order may prepare a draft order and send it to all parties who participated in the hearing or conference for approval of its form and content. O. Reg. 689/20, s. 39.

Approval

(2) If all the parties who participated in the hearing or conference approve the draft order, the party or other person who prepared the draft order may request that it be issued by the registrar by filing,

(a) the draft order; and

(b) evidence that the parties have approved the draft order. O. Reg. 689/20, s. 39.²⁰

More specifically, the [Consolidated Practice Direction](#) Concerning the Estates List in the Toronto Region (the “**Toronto Practice Directions**”) further prescribe the contents to be addressed in the Draft Order, which include:

45. Draft orders giving directions should address, where applicable, the following matters:

- a) the issues to be decided;
- b) who the parties are – who is propounding the will(s), who is challenging the will(s), and who is submitting rights to the court;
- c) whether there is any party under disability, who requires representation, and if so, whether notice to the Public Guardian and Trustee or the Office of the Children’s Lawyer should be directed;
- d) whether an estate trustee during litigation should be appointed, and the amount of security, if any, such an estate trustee should post;

²⁰ *Ibid* at [Rules 59.03 \(1\) and \(2\)](#).

- e) who shall be served with the order for directions, and the method of and time for service;
- f) whether the parties should exchange pleadings or put before the court their respective positions and the material facts upon which they rely by some other means;
- g) procedures for bringing the matter before the court in a summary way;
- h) the timing and conduct of a mediation session under Rule 75.1, including (i) whether the mediator should provide any report to the court on procedural issues, (ii) the desirability of multiple mediation sessions, and (iii) when a pre-trial conference should be held if the mediation session does not result in a settlement of the proceeding;
- i) any other pre-hearing steps to be undertaken, including documentary disclosure, obtaining medical, accounting or legal records, examinations for discovery, and the availability of a motion for summary judgment;
- j) the timing for the delivery of any expert report and the utility of a pre-hearing meeting between experts to narrow the issues in dispute;
- k) the timing of a pre-trial conference, including how long after an unsuccessful mediation session the pre-trial conference should be held; and,
- l) the procedure to be followed at the hearing, including the method of adducing evidence-in-chief.²¹

The parties should engage in good faith efforts to attempt consent to terms that can be presented to the court in the form of a draft consent order giving directions.

Alternatively, each respective Party should file their own draft order setting out the relief being sought from the court, as set out in Paragraph 24 of the [Toronto Practice Directions](#):

24. If notices of objection are received and not withdrawn and if the parties cannot agree on an order for directions prior to the initial return date, the parties should file, at least two days in advance of the initial return date, copies of their respective draft orders giving directions, including timetables for each pre-hearing step and proposed hearing dates. If the dispute about directions can be resolved during the 10-minute appointment on the initial return date, the judge can issue an order giving directions, including a timetable for pre-hearing steps and a hearing date. If the argument about the terms of an order giving directions will require longer than the 10-minute appointment on the

²¹ Consolidated Practice Direction Concerning the Estates List in the Toronto Region at paragraph 45 [Toronto Practice Directions] accessible at <https://www.ontariocourts.ca/scj/practice/regional-practice-directions/estates/>.

initial return date, the judge can schedule a date for the hearing of a contested motion for directions.²²

While such draft orders are not specifically mandated by the *Rules*, their preparation will assist the court in providing the Parties with appropriate orders. For example, Paragraph 61 of the [Toronto Practice Directions](#) specifically addresses the benefits provided by draft orders:

61. The prior preparation of draft orders for consideration by the court at the end of a hearing will greatly expedite the issuance of orders.²³

While draft orders afford Parties with the flexibility to request relief from the courts as they deem appropriately fit, [Rule 59.03](#) prescribes specific form and criteria that must be adhered to:

General Form of Order

[59.03 \(3\)](#) A draft order must be in [Form 59A](#) (order), [Form 59B](#) (judgment) or [Form 59C](#) (order or certificate on appeal) and must contain,

- (a) the name of the judge, associate judge or officer who made the order;
- (b) the date on which the order was made;
- (c) a recital of the particulars necessary to understand the order, including the date of the hearing or conference, the parties who participated in the hearing or conference and those who did not, and any undertaking given by a party as a condition of the order; and
- (d) if the order is for the payment of money on which post judgment interest is payable, the rate of interest and the date from which interest is payable. O. Reg. 689/20, s. 39; O. Reg. 383/21, s. 15.

(4) The operative parts of an order shall be divided into paragraphs, numbered consecutively. R.R.O. 1990, Reg. 194, r. 59.03 (4).²⁴

The Estates List Users' Committee in the Toronto Region has developed a series of [model Orders](#) to assist lawyers in the issuance of Orders. These include for Will challenges, Dependant's Support claims, Passing of Accounts and Power of Attorney /Guardianship Disputes.²⁵

22 *Ibid* at para 24.

23 *Ibid* at para 61.

24 The *Rules* at [Rule 59.03 \(3\), \(4\)](#).

25 The Toronto Estates List model orders are accessible at: https://www.ontariocourts.ca/scj/practice/regional-practice-directions/toronto/#Estates_List_Forms.

SCHEDULING AND SECURING HEARING DATES

Once a Notice of Application has been issued by the local court registrar and assigned a court file number, the parties may move to secure a hearing date before the court.

While each region prescribes unique practice directions setting out the procedures to be followed therein, for the purposes of this chapter, the Toronto Practice Directions will be briefly set out and addressed.

Under the [Toronto Practice Directions](#), Parties may secure hearings before the Toronto Estates List in respect of the following:

Part III: Matters heard on the Estates List

3. The Estates List hears the following matters:

- a) all matters arising under [Rules 74](#) and [75](#) of the *Rules of Civil Procedure*;
- b) applications under [Rule 14.05](#) regarding estates, wills and trusts, including applications for advice under [section 60](#) of the *Trustee Act*;
- c) applications relating to inter vivos trusts, whether under [Rule 14.05](#), the [Variation of Trusts Act](#), or otherwise;
- d) proceedings involving the proof or validity of wills, including lost wills;
- e) proceedings concerning the administration of estates;
- f) summary procedures for claims against estates pursuant to the [Estates Act](#), ss. [44](#) and [45](#);
- g) passing of accounts applications by estate trustees or any other person acting in a fiduciary capacity, including guardians and those acting under powers of attorney;
- h) applications under the [Succession Law Reform Act](#);
- i) proceedings under the [Substitute Decisions Act](#), 1992, including proceedings under that Act involving powers of attorney;
- j) applications for the appointment of a guardian of property of a child under [s. 47](#) of the [Children's Law Reform Act](#), if brought in the Superior Court of Justice;

- k) proceedings under the [Declarations of Death Act, 2002](#) or [Absentees Act](#);
- l) proceedings under the [Charities Accounting Act](#), [Charitable Gifts Act](#) or [Religious Organizations' Lands Act](#);
- m) applications for the extension of time to make an election under [s. 6\(1\)](#) of the [Family Law Act](#) regarding the interest of a spouse under [section 5\(2\)](#) of that Act; and,
- n) such other matters concerning estate, trust or capacity law as a judge may direct be heard on the Estates List. In considering whether to make such a direction, the judge may take into account the current and expected case load of matters on the Estates List.²⁶

When scheduling any such hearings before the Toronto Estates List, the [Practice Direction](#) further provides guidelines and criteria regarding the types of hearings that should be scheduled for specific matters, and the appropriate processes for doing so:

Part V: Scheduling Matters on the Estates List

A. The Daily List 9:30 Appointments and the Hearing List

11. The daily list of matters heard by a judge sitting on the Estates List consists of two parts:
 - (i) the hearing of 9:30 Appointments of 10-minutes each, immediately followed by (ii) the hearing of contested matters or unopposed matters that require some time for a judge to review (“Hearing Matters”). 9:30 Appointments take place in chambers and deal with minor and/or unopposed matters. Counsel are not required to gown. Contested matters and application or motions are conducted in open court commencing 10:00 a.m.
12. Booking dates for a 9:30 Appointment or a Hearing Matter can be done by completing the [RequestForm](#) and emailing it to toronto.estateslist@ontario.ca.
13. 9:30 Appointments will be booked for no more than 10 minutes for each matter booked and must be booked at least two days in advance. Any materials required for a 9:30 Appointment should be filed no later than 12 noon the day before the appointment.
14. If a party fails to appear at a 9:30 Appointment, the court may set a timetable and hearing date for the matter in the party’s absence.
15. To ensure the most efficient use of court time and to enable contested matters to be heard at the earliest reasonable date, procedures for booking time on the Estates List

²⁶ *Toronto Practice Directions*, at para 3.

for the hearing of a proceeding vary according to the type and length of proceeding as described below.

[...]

C. Applications involving Wills where an Order giving Directions is required

26. Where a notice of objection has been filed to the issuance of a certificate of appointment of estate trustee and an application for directions is required, the applicant, or other person applying for directions, should book an initial 10 minute 9:30 Appointment for the initial return date of the application for directions.

27. If prior to their attendance at the 9:30 Appointment, the parties can agree on the terms of a consent order giving directions, including a timetable for each pre-hearing step agreed upon, the judge at the 9:30 Appointment may issue a consent order giving directions.

28. If the parties cannot agree on an order giving directions prior to the 9:30 Appointment, the parties should file, at least two days in advance of the 9:30 Appointment, copies of their respective draft orders giving directions, including timetables for each pre-hearing step. If the dispute about directions can be resolved during the 10-minute 9:30 Appointment, the judge may issue the order giving directions, including a timetable for pre-hearing steps. If the argument about the terms of an order giving directions will require longer than the 10-minute 9:30 Appointment, the judge can schedule a date for the hearing of a contested application for directions.

[...]

E. Any other type of Application or Motion brought on the Estates List

Matters that will require less than one hour to argue on the merits

31. For other matters heard on the Estates List where the applicant or moving party realistically estimates that the argument of the matter by all parties involved will take less than one hour, an appointment may be booked on the list for Hearing Matters, through the Estates Office, for a hearing of up to one hour by emailing toronto.estateslist@ontario.ca.

Matters that will require more than one hour to argue on the merits

32. Where an application or a motion will require more than one hour to argue on the merits, the applicant or moving party, on notice to all other parties, shall request a 10-minute 9:30 Appointment for the court to set a timetable for pre-hearing steps and a hearing date for the application or motion to be argued on the merits by sending the [Request Form](#) to toronto.estateslist@ontario.ca and copying all other parties.

F. Other matters that can be dealt with at a Case Conference

33. Apart from the circumstances described above, there may be other occasions during a proceeding when the parties may wish to book a case conference to obtain the assistance of the court in setting timetables for further steps in the proceeding, including steps required to ready the matter for trial. On notice to other interested parties, such case conferences may be booked on by emailing the [Request Form](#) to toronto.estateslist@ontario.ca.²⁷

EXAMINATION FOR DISCOVERY

[Rule 31](#) provides for examination for discovery, which are out-of-court examinations wherein the parties to an action are questioned on their evidence. Before examination for discovery can occur, the parties must complete the documentary discovery process through the exchange of affidavits of documents.

[Rule 31.02](#) provides the form of examination for discovery as follows:

Form of Examination

[31.02 \(1\)](#) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the court. R.R.O. 1990, Reg. 194, r. 31.02 (1).

(2) Where more than one party is entitled to examine a person, the examination for discovery shall take the form of an oral examination, unless all the parties entitled to examine the person agree otherwise. R.R.O. 1990, Reg. 194, r. 31.02 (2).

[Rule 31.04](#) permits each party in examination for discovery to examine every other people they are opposed to in the litigation.

Examination of Plaintiff

²⁷ *Ibid* at paras 11-15, 26-28, and 31-33.

[31.04 \(1\)](#) A party who seeks to examine a plaintiff for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after delivering a statement of defence and, unless the parties agree otherwise, serving an affidavit of documents. R.R.O. 1990, Reg. 194, r. 31.04 (1).

Examination of Defendant

(2) A party who seeks to examine a defendant for discovery may serve a notice of examination under rule 34.04 or written questions under rule 35.01 only after,

- (a) the defendant has delivered a statement of defence and, unless the parties agree otherwise, the examining party has served an affidavit of documents; or
- (b) the defendant has been noted in default. R.R.O. 1990, Reg. 194, r. 31.04 (2).

The *Rules* state that the person being examined is required to answer, to the best of their knowledge and belief, all proper questions relevant to the issues:

Scope of Examination

General

[31.06 \(1\)](#) A person examined for discovery shall answer to the best of his or her knowledge, information and belief, any proper question relevant to any matter in issue in the action or to any matter made discoverable by subrules (2) to (4) and no question may be objected to on the ground that,

- (a) the information sought is evidence;
- (b) the question constitutes cross-examination, unless the question is directed solely to the credibility of the witness; or
- (c) the question constitutes cross-examination on the affidavit of documents of the party being examined. R.R.O. 1990, Reg. 194, r. 31.06 (1); O. Reg. 438/08, s. 30 (1).

CROSS-EXAMINATIONS AND EXAMINATIONS OF NON-PARTIES

Once the parties have obtained and exchanged evidence relevant to the matter in issue, [Rule 39.02](#) provides that any individual who has served an affidavit that will be relied upon may be cross-examined:

On a Motion or Application

[39.02 \(1\)](#) A party to a motion or application who has served every affidavit on which the party intends to rely and has completed all examinations under [rule 39.03](#) may cross-examine the deponent of any affidavit served by a party who is adverse in interest on the motion or application. R.R.O. 1990, Reg. 194, r. 39.02 (1).

(1.1) Subrule (1) does not apply to an application made under [subsection 140 \(3\)](#) of the [Courts of Justice Act](#). O. Reg. 43/14, s. 11.

(2) A party who has cross-examined on an affidavit delivered by an adverse party shall not subsequently deliver an affidavit for use at the hearing or conduct an examination under [rule 39.03](#) without leave or consent, and the court shall grant leave, on such terms as are just, where it is satisfied that the party ought to be permitted to respond to any matter raised on the cross-examination with evidence in the form of an affidavit or a transcript of an examination conducted under rule 39.03. R.R.O. 1990, Reg. 194, r. 39.02 (2).²⁸

PROCEDURAL REQUIREMENTS

In securing, scheduling, and conducting cross-examinations, [Rule 34](#) further provides several steps that must be adhered to:

Application of the Rule

[34.01](#) Rules [34.02](#) to [34.19](#) apply to,

- (a) an oral examination for discovery under [rule 31](#);
- (b) the taking of evidence before trial under rule 36.01, subject to [rule 36.02](#);
- (c) a cross-examination on an affidavit for use on a motion or application under [rule 39.02](#);
- (d) the examination out of court of a witness before the hearing of a pending motion or application under [rule 39.03](#); and
- (e) an examination in aid of execution under rule 60.18. R.R.O. 1990, Reg. 194, r. 34.01.²⁹

²⁸ The Rules at [Rules 39.02 \(1\) - \(2\)](#).

²⁹ *Ibid* at [Rule 34.01](#).

How Attendance Required

Party

[34.04 \(1\)](#) Where the person to be examined is a party to the proceeding, a notice of examination ([Form 34A](#)) shall be served,

(a) on the party's lawyer of record; or

(b) where the party acts in person, on the party, personally or by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (1); O. Reg. 739/94, s. 2 (1); O. Reg. 575/07, s. 20 (1).

...

Deponent of Affidavit

(3) Where a person is to be cross-examined on an affidavit, a notice of examination shall be served,

(a) on the lawyer for the party who filed the affidavit; or

(b) where the party who filed the affidavit acts in person, on the person to be cross-examined, personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (3); O. Reg. 739/94, s. 2 (2); O. Reg. 575/07, s. 1.

Others

(4) Where the person to be examined,

(a) is neither a party nor a person referred to in subrule (2) or (3); and

(b) resides in Ontario,

the person shall be served with a summons to witness (Form 34B), personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (4).³⁰

...

Person to be Examined to be Sworn

[34.08 \(1\)](#) Before being examined, the person to be examined shall take an oath or make an affirmation and, where the examination is conducted in Ontario, the oath or affirmation

³⁰ *Ibid* at [Rules 34.04 \(1\), \(3\), \(4\)](#).

shall be administered by an official examiner or by a person authorized to administer oaths in Ontario. R.R.O. 1990, Reg. 194, r. 34.08 (1).

(2) Where the examination is conducted outside Ontario, the oath or affirmation may be administered by the person before whom the examination is conducted, a person authorized to administer oaths in Ontario or a person authorized to take affidavits or administer oaths or affirmations in the jurisdiction where the examination is conducted. R.R.O. 1990, Reg. 194, r. 34.08 (2).³¹

...

Production of Documents on Examination

Interpretation

34.10 (1) Subrule **30.01 (1)** (meaning of “document”, “power”) applies to subrules (2), (3) and (4). R.R.O. 1990, Reg. 194, r. 34.10 (1).

Person to be Examined Must Produce Required Documents and Things

(2) The person to be examined shall produce for inspection at the examination,

(a) on an examination for discovery, all documents in his or her possession, control or power that are not privileged and that subrule 30.04 (4) requires the person to produce; and

(b) on any examination, including an examination for discovery, all documents, and things in his or her possession, control or power that are not privileged and that the notice of examination or summons to witness requires the person to produce. O. Reg. 248/21, s. 6 (1).

Notice or Summons May Require Documents and Things

(3) Unless the court orders otherwise, the notice of examination or summons to witness may require the person to be examined to produce for inspection at the examination,

(a) all documents and things relevant to any matter in issue in the proceeding that are in his or her possession, control or power and are not privileged; or

(b) such documents or things described in clause (a) as are specified in the notice or summons. R.R.O. 1990, Reg. 194, r. 34.10 (3); O. Reg. 438/08, s. 31; O. Reg. 248/21, s. 6 (2).

³¹ *Ibid* at [Rules 34.08 \(1\), \(2\)](#).

Duty to Produce Other Documents

(4) Where a person admits, on an examination, that he or she has possession or control of or power over any other document that is relevant to a matter in issue in the proceeding and is not privileged, the person shall produce it for inspection by the examining party forthwith, if the person has the document at the examination, and if not, within two days thereafter, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 34.10 (4); O. Reg. 453/09, s. 2.³²

Re-examination***On Examination for Discovery***

[34.11 \(1\)](#) A person being examined for discovery may be re-examined by his or her own lawyer and by any party adverse in interest to the examining party. R.R.O. 1990, Reg. 194, r. 34.11 (1); O. Reg. 575/07, s. 3.

On Cross-Examination on Affidavit or Examination in Aid of Execution

(2) A person being cross-examined on an affidavit or examined in aid of execution may be re-examined by his or her own lawyer. R.R.O. 1990, Reg. 194, r. 34.11 (2); O. Reg. 575/07, s. 3.

Timing and Form

(3) The re-examination shall take place immediately after the examination or cross-examination and shall not take the form of a cross-examination. R.R.O. 1990, Reg. 194, r. 34.11 (3).³³

[Rule 34.04\(1\)\(4\)](#) provides for the mechanism to examine non-parties to the litigation. In a Will challenge, non-parties that are examined are most commonly drafting lawyers, accountants, doctors, capacity assessors. Given one party wishes to rely on their evidence, the other parties will sometimes test the strength of their evidence.

To secure the cross-examination of a deponent, [Rule 34.04](#) provides the following forms and service requirements:

Person Examined on Behalf or in Place of Party

[34.04 \(2\)](#) Where a person is to be examined for discovery or in aid of execution on behalf

32 *Ibid* at [Rules 34.10 \(1\) - \(4\)](#).

33 *Ibid* at [Rules 34.11 \(1\) - \(3\)](#).

or in place of a party, a notice of examination shall be served,

(a) on the party's lawyer of record; or

(b) on the person to be examined, personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (2); O. Reg. 575/07, s. 20 (2).

Deponent of Affidavit

(3) Where a person is to be cross-examined on an affidavit, a notice of examination shall be served,

(a) on the lawyer for the party who filed the affidavit; or

(b) where the party who filed the affidavit acts in person, on the person to be cross-examined, personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (3); O. Reg. 739/94, s. 2 (2); O. Reg. 575/07, s. 1.

Others

(4) Where the person to be examined,

(a) is neither a party nor a person referred to in subrule (2) or (3); and

(b) resides in Ontario,

the person shall be served with a summons to witness ([Form 34B](#)), personally and not by an alternative to personal service. R.R.O. 1990, Reg. 194, r. 34.04 (4).³⁴

MEDIATION AND MANDATORY MEDIATION JURISDICTIONS

Unlike many other civil proceedings, [Rule 75.1.02\(1\)](#) provides for mandatory mediations in estate proceedings in certain jurisdictions as follows;

Scope

[75.1.02 \(1\)](#) This Rule applies to proceedings,

(a) that are commenced in,

(i) the City of Toronto on or after September 1, 1999,

³⁴ *Ibid* at [Rules 34.04 \(2\) - \(4\)](#).

- (ii) Revoked: O. Reg. 193/15, s. 14 (1).
 - (iii) the City of Ottawa on or after January 1, 2001, or
 - (iv) the County of Essex on or after January 1, 2005; and
- (b) to which any of the following applies,
- (i) [rule 74.18](#) (application to pass accounts), if the application is contested,
 - (ii) [rule 75.01](#) (formal proof of testamentary instrument), [75.03](#) (objection to issuing certificate of appointment), [75.05](#) (return of certificate) or [75.08](#) (claims against an estate),
 - (iii) Part V of the [Succession Law Reform Act](#),
 - (iv) the [Substitute Decisions Act](#), 1992,
 - (v) the [Absentees Act](#), the [Charities Accounting Act](#), the [Estates Act](#), the [Trustee Act](#) or the [Variation of Trusts Act](#),
 - (vi) subrule 14.05 (3), if the matters at issue relate to an estate or trust, or
 - (vii) subsection 5 (2) of the [Family Law Act](#). O. Reg. 290/99, s. 2; O. Reg. 132/04, s. 14; O. Reg. 193/15, s. 14 (1); O. Reg. 111/21, s. 10; O. Reg. 383/21, s. 12.

(2) The fact that an estate or trust is a party to a proceeding, by virtue of an order to continue under [Rule 11](#) or otherwise, is not sufficient to bring the proceeding under this Rule. O. Reg. 290/99, s. 2; O. Reg. 193/15, s. 14 (2).³⁵

At the same time, [Rule 75.1.04](#) sets out that the court may provide an order dispensing with such mandatory mediation:

Exemption from Mediation

[75.1.04](#) The court may make an order, on a party's motion or of its own motion, exempting the proceeding from this Rule. O. Reg. 290/99, s. 2; O. Reg. 193/15, s. 16.³⁶

Where a mediation date is secured and the Parties intend to proceed, the court must, upon a motion made by the Applicant, provide directions in respect of the mediation being conducted:

³⁵ *Ibid* at [Rules 75.1.02 \(1\) - \(2\)](#).

³⁶ *Ibid* at [Rule 75.1.04](#).

Directions for Conduct of Mediation

Motion for Directions

[75.1.05 \(1\)](#) The applicant shall make a motion, in the same way as under [rule 75.06](#), seeking directions respecting the conduct of a mediation to which this Rule applies. O. Reg. 193/15, s. 17 (1).

...

Exception

(3.1) Subrule (1) does not apply if the court has already given directions for the conduct of the mediation under clause [74.18 \(13.2\) \(a\)](#) or [75.06 \(3.1\) \(a\)](#), unless the court orders otherwise. O. Reg. 193/15, s. 17 (2).

...

Directions

(4) On the hearing of the motion under this rule, the court may direct,

- (a) the issues to be mediated;
- (b) who has carriage of the mediation and who shall respond;
- (c) within what times the mediation session shall take place;
- (d) which parties are required to attend the mediation session, the method of attendance and the manner of service;
- (e) whether notice is to be given to parties submitting their rights to the court under rule 75.07.1;
- (f) how the cost of the mediation is to be apportioned among the designated parties; and
- (g) any other matter that may be desirable to facilitate the mediation. O. Reg. 290/99, s. 2; O. Reg. 526/21, s. 4.³⁷

37 *Ibid* at [Rules 75.1.05 \(1\), \(3\), \(4\)](#).

PROCEDURAL REQUIREMENTS

Under [Rule 75.1](#), the notice of motion for directions respecting the conduct of a mediation must be served in accordance with the following prescribed period:

Directions for Conduct of Mediation

Motion for Directions

[75.1.05 \(2\)](#) The notice of motion shall be served within 30 days after the last day for serving a notice of appearance. O. Reg. 290/99, s. 2.

(3) The motion may be combined with a motion under [rule 75.06](#). O. Reg. 290/99, s. 2.³⁸

In addition to the notice of motion, [Rule 75.1.08](#) further provides that the Parties must also prepare and provide copies of a [Form 75.1C](#):

Procedure before Mediation Session

Statement of Issues

[75.1.08 \(1\)](#) At least seven days before the mediation session, every designated party shall prepare a statement in [Form 75.1C](#) and provide a copy to every other designated party and to the mediator. O. Reg. 290/99, s. 2.

(2) The statement shall identify the factual and legal issues in dispute and briefly set out the position and interests of the party making the statement. O. Reg. 290/99, s. 2.

(3) The party making the statement shall attach to it any documents that the party considers of central importance in the proceeding. O. Reg. 290/99, s. 2.

Non-Compliance

(4) If it is not practical to conduct a mediation session because a designated party fails to comply with subrule (1), the mediator shall cancel the session and immediately file with the court a certificate of non-compliance ([Form 75.1D](#)). O. Reg. 290/99, s. 2.³⁹

RULE 75.2 COURT-ORDERED ESTATES MEDIATION

Beyond the court's authority to direct mediations under, [Rule 75.2](#) further provides the court with

38 *Ibid* at [Rules 75.1.05 \(2\), \(3\)](#).

39 *Ibid* at [Rules 75.1.08 \(1\) - \(4\)](#).

additional powers to order that the Parties attend mediation on the court's own initiative, and without the consent of the Parties, even in jurisdictions where the mandatory mediation rules do not apply.⁴⁰

PRE-TRIAL CONFERENCE

For proceedings that are heard under the Toronto Estates List, paragraphs 42 to 44 of the [Toronto Practice Directions](#) further require the Parties to attend a pre-trial conference in accordance with the following criteria:

Pre-trial conference

C. Pre-Trial Conference and Trial Dates

42. Pre-trial conferences must be held in all matters proceeding to trial. Dates for pre-trial conferences and trials should be obtained from the Estates Office at the time the proceeding is set down for trial.

43. Normally, two hours will be assigned for a pre-trial conference. If the parties think that a longer pre-trial conference would be appropriate in the circumstances of their case, they may book a 9:30 Appointment to secure a date for a longer pre-trial conference. If the parties are unable to agree upon a pre-trial conference date, trial date, the length of time for the trial, or any other matter concerning the conduct of the trial, a party may book a 9:30 Appointment to determine such matters.

44. At least five days prior to the date of a pre-trial conference, each party must serve and file with the Estates Office an Estates List [Pre-Trial Conference Form](#).⁴¹

Finally, should all other steps be unable to resolve the matter, the Parties shall then proceed to a full hearing of the issues as scheduled in the litigation timetable endorsed by the court.

CONCLUDING COMMENTS

The legal process for a Will challenge is established in Ontario's *Rules of Civil Procedure* and the court's practice directions. A more in-depth discussion of the legal procedure and the specific rules in estate litigation can be found in the [Civil Procedure and Practice in Ontario](#) on CanLII.⁴² A valuable

⁴⁰ *Ibid* at [Rule 75.2](#).

⁴¹ *Toronto Practice Direction* at paras 42-44.

⁴² *Civil Procedure and Practice in Ontario*, accessible online at: <https://canlii.ca/en/commentary/81787/>.

resource too, can be consulting the Court Services Division's Estates Procedure Manual.

Notably, all regional jurisdictions within Ontario do not necessarily follow similar or the same procedures and directions as Toronto. It is trite to say that guidance, rules, and local practice directions from the court that proceedings are commenced must be consulted for applicable practice and procedure to be followed.

CHAPTER 7: MEDIATION AND ALTERNATE DISPUTE RESOLUTION

INTRODUCTION

Estate litigation involves some of the most emotionally fraught disputes. Litigating parties, or even individuals who find themselves in a dispute at the pre-litigation stage, are often grieving the loss of a loved one, or perhaps trying to remedy an abuse perpetrated by a fiduciary, family member or other. These disputing parties are often individuals who are closely related, either through blood or marriage.

For these reasons, estate disputes often benefit from mediation, a form of alternative dispute resolution. The use of mediation to resolve estate disputes has grown considerably and is mandatory in some jurisdictions. The focus of this chapter is on estate mediation rules and procedures in the province of Ontario; however, all provinces and territories have their own corresponding mediation rules and procedures.

WHAT IS MEDIATION?

Mediation is a process in which parties agree to an impartial third party, known as a mediator, to assist them in reaching a voluntary settlement of the issues in dispute. The mediator does not have the authority to serve as an adjudicator, or in other words, try the issue as a judge would in a court. Rather, the role of the mediator is to assist the parties efficiently negotiate and communicate their disputes. This may include raising issues that parties will turn a blind eye to, as well as outline the potential litigation risks of each party. If a voluntary settlement is reached it only becomes binding on the parties upon signing a formal settlement agreement, often in the form of Minutes of Settlement and corresponding Releases.

Mediation is a highly effective, successful, and often less costly (though in itself not inexpensive), alternative or addition to an adversarial dispute. Estate mediation is more generally “interest-based” as it explores solutions that meet the needs and interests of the parties, rather than “rights-based” litigation which focuses more on the parties’ rights, or rules and the law.

MANDATORY MEDIATION

Whether or not to mediate an estate dispute in Ontario is an easy question to answer if the dispute arises in Toronto, Ottawa, or Essex County (Windsor area). Pursuant to [Rule 75.1.02\(1\)\(a\)](#) of the Ontario [Rules of Civil Procedure](#)¹, estate disputes are subject to mandatory mediation in those areas unless such requirement is waived by the Court.

Mandatory mediations are governed by [Rule 75.1](#) which sets out the procedure, including details of the mediation attendance, confidentiality, and remedies for non-compliance. [Rule 75.1.02 \(1\)\(b\)](#) provides that mandatory mediation applies to the following disputes:

- formal proof of testamentary instruments;
- contested passing of accounts applications;
- objections to issuing a certificate of appointment of estate trustee;
- claims against an estate;
- proceedings under Part V of the [Succession Law Reform Act](#);²
- proceedings under the [Substitute Decisions Act](#);³
- proceedings under the [Absentees Act](#),⁴ the [Charities Accounting Act](#),⁵ the [Estates Act](#)⁶, the [Trustee Act](#)⁷ or the [Variation of Trusts Act](#);⁸
- applications under [Rule 14.05\(3\)](#) whether the matters at issue relate to an estate or trust; and,
- proceedings under [s.5\(2\)](#) of the [Family Law Act](#)⁹

Ontario courts will only dispense with mandatory mediation where there is a clear reason. In the Toronto decision, [Sheard Estate](#),¹⁰ the court dismissed a motion for an order dispensing with mandatory mediation in a contested passing of accounts dispute. The beneficiaries of the estate argued that as their primary complaint was over estate trustee compensation, the “quarrel was not really among

1 [Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194 (the “**Rules**”).

2 [Succession Law Reform Act](#), [RSO 1990, c S 26](#) (“**SLRA**”).

3 [Substitute Decisions Act](#), [1992, SO 1992, c 30](#) (“**SDA**”).

4 [Absentees Act](#), [RSO 1990, c A 3](#).

5 [Charities Accounting Act](#), [RSO 1990, c C 10](#).

6 [Estates Act](#), [RSO 1990, c E 21](#).

7 [Trustee Act](#), [RSO 1990, c T 23](#).

8 [Variation of Trusts Act](#), [RSO 1990, c V 1](#).

9 [Family Law Act](#), [RSO 1990, c F 3](#).

10 [Sheard Estate](#), [2013 ONSC 7729](#).

family members, and thus is less amenable to mediation”.¹¹ The beneficiaries also argued that mediation should be dispensed with as the amount in dispute was “small”. Justice Mesbur however, disagreed, noting that:

Mediation is helpful in narrowing issues, focusing cases, and, where possible, settling them. Mediation is useful in every kind of litigation before our courts. Its efficacy is not limited to “family relationship” disputes... I hardly view [\$100,000.00] as a “small” amount.¹²

The grandchildren also argued that the settlement had already been explored and failed. Justice Mesbur rejected this argument:

Often, parties need an independent third party to help them see past their respective positions and arrive at a resolution that is in the interests of all, without expending further resources. The parties have not had the benefit of this kind of third-party intervention. It is extremely beneficial. It could resolve this case.¹³

Justice Mesbur concluded that there was no reason for her to exercise her discretion to dispense with mediation.

In [*Horbaczyk v. Horbaczyk*](#)¹⁴, a Court ordered mediation pursuant to [rule 75.06\(3.1\)](#). In *Horbaczyk*, the challenger of a Will sought relief directing the parties to participate in mediation, however, he failed to request that relief in his motion for directions. Justice Emery made the following comment: “Fortunately, rule 75.06(3.1) provides that the Court may order that a mediation session take place under rule 75.2, with power to give the necessary directions. Therefore, this Court makes an order that the parties attend a mediation”.¹⁵

MEDIATION CONFIDENTIALITY AND SETTLEMENT PRIVILEGE

Confidentiality and settlement privilege remain the most common reasons for choosing mediation. The application of settlement privilege applies as a rule of evidence that protects communications exchanged by the parties as attempts are made to settle a dispute.¹⁶ The Supreme Court of Canada observed, “[t]he privilege wraps a protective veil around the efforts parties’ make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.”¹⁷

The purpose of settlement privilege is to encourage and promote settlement by allowing full and

11 *Ibid* at [para 40](#).

12 *Ibid* at [para 40](#).

13 *Ibid* at [para 43](#).

14 *Horbaczyk v. Horbaczyk*, [2017 ONSC 6666](#).

15 *Ibid* at [para 13](#).

16 *Union Carbide Canada Inc. v Bombardier Inc.*, [2014 SCC 35](#) (“*Union Carbide*”) at [para 31](#).

17 *Sable Offshore Energy v Ameron International Corp.*, [2013 SCC 37](#) (“*Sable*”) at [para 2](#).

frank discussions between the parties. There is a *prima facie* presumption that any communication made in furtherance of settlement is inadmissible. However, this presumption can be displaced. The trigger for settlement privilege is the intent to settle (not simply adding the words “without prejudice”). Settlement privilege applies regardless of whether a settlement is ultimately reached.¹⁸ Settlement privilege applies even in the absence of contractual provisions providing for confidentiality.

Notably, there is an exception to the common law settlement privilege, which permits parties to produce evidence of confidential communications to prove the existence or the scope of a settlement agreement.

The Ontario [Rules of Civil Procedure](#) stipulate, “all communications at a mediation session and the mediator’s notes and records shall be deemed to be without prejudice settlement discussions.”¹⁹ While mediation is intrinsically confidential, care should be taken to specify the confidentiality of the process by considering the inclusion of a confidentiality clause in the agreement to mediate. Often these clauses require the parties to keep anything that transpires at the mediation confidential. A confidentiality clause in an agreement to mediate differs from settlement privilege since the former is not a rule of evidence, but rather, a matter of contract.

In 2014, the Supreme Court of Canada weighed in on the interaction between settlement privilege and confidentiality clauses in mediation in the case of [Union Carbide Canada Inc. v Bombardier Inc.](#)²⁰ The Supreme Court considered whether an absolute confidentiality clause in a mediation contract trumped the exception to settlement privilege, allowing disclosure of confidential communications to prove the existence or scope of an agreement. The Supreme Court held that it is open to parties to contract for greater confidentiality than that provided by settlement privilege, but that doing so requires a clear and unequivocal statement of the parties’ intention to oust the common law.²¹ A standard mediation confidentiality clause would not have this effect. A contract purporting to oust the law of settlement privilege must be clear and unequivocal. If parties desire absolute confidentiality in the mediation process, they can contract to override the common law in an express provision to this effect. Whether or not to do so will be a strategic decision based on the specific facts of the case.

TIMING OF THE MEDIATION

The timing of a mediation can be strategic. It is often not worthwhile to conduct mediation unless and until relevant documents are exchanged, reviewed, or otherwise ordered (by way of a court order for

18 *Sable* at [para 17](#).

19 [Rule 75.1.11](#) of the *Rules*.

20 *Union Carbide*.

21 *Ibid* at [para 51](#).

disclosure), and circulated amongst the parties.

For example, Will challenges tend to be heavily document and fact driven. As such, after obtaining disclosure of the drafting lawyer's records, financial records, and medical records, a mediation session can be, and most often is, conducted without having to conduct expensive examinations-for-discovery, or cross-examinations.

Seeking an Order Giving Directions stating specifically that the mediation be conducted prior to examinations-for-discovery or cross-examinations may be preferable in some instances. Insisting that examinations be conducted prior to attending a mediation session is in many circumstances cost prohibitive, unnecessary, and often more appropriate to other civil litigation matters. The costs of mediation are typically shared between the parties at first instance, given the facilitative nature of the process.

CHOOSING A MEDIATOR

[Rule 75.2.04](#) requires a court ordered mediation to be conducted by a “person agreed to by the designated parties”.²² Mediators are typically experienced lawyers in the Estates and Trusts field or are retired judges. It is good practice for the parties and their counsel to suggest mediators to act and for the mediator to be agreed upon in good time.

The parties should consider the “style” of the mediation that the proposed mediator will conduct. The two more common styles of mediation are facilitative and evaluative, or a combination of both.

A **facilitative** mediator is a neutral person who assists the parties in taking ownership of the issues and solving the dispute amongst themselves. The role of the facilitative mediator is to manage the process and guide the parties to a mutually agreeable resolution by facilitating discussion, asking open questions, communicating settlement offers, and digging into the real issues below the surface. Both parties are involved in the mediation's outcome, unlike a judicial outcome where the decision is ultimately in the hands of a third-party decision maker. In mediation, the parties tend to have the influence on decisions made, rather than the parties' lawyers.

One of the benefits of facilitative mediation is that it empowers parties to take responsibility for the outcome of the dispute. Occasionally however, such an approach may not work and more so, where there is a clear power imbalance between the parties. Facilitative mediation may be more time consuming as there is often considerable time spent on non-legal issues.

²² [Rule 75.02.04](#) of the Rules.

An **evaluative** mediator will give an evaluation of the strengths of the parties' cases. Generally, this type of mediation will be concerned more with the legal rights of the parties, rather than their underlying interests. The mediator will evaluate the parties' legal rights and positions, may push parties towards settlement, develop and/or propose the basis for settlement, predict an outcome in court and educate each party on their strengths and weaknesses. For evaluative mediation to work, the mediator should have substantive expertise in the subject matter. Careful management of the parties such that there is no appearance of a winner, and a loser is important to the process, especially where the mediator concludes that one party has the stronger case. This approach demands that the parties be prepared for possible negative feedback on their legal position.

In many situations there is room for both approaches. For example, parties could have the mediator start out as facilitative and progress towards evaluative, or when the parties request, provide an opinion on, or evaluate, the legal rights of the parties and the process.

If a lawyer acts as a mediator in Ontario, [Section 5.7](#) of the [Rules of Professional Conduct](#)²³ sets out specific obligations by which that lawyer must abide. [Section 5.7-1](#) states:

A lawyer who acts as a mediator shall, at the outset of the mediation, ensure that the parties to it understand fully that:

- (a) the lawyer is not acting as a lawyer for either party but, as mediator, is acting to assist the parties to resolve the matters in issue; and
- (b) although communications pertaining to and arising out of the mediation process may be covered by some other common law privilege, the communication will not be covered by the solicitor-client privilege.

The commentary to this Rule reminds lawyers that in acting as a mediator, generally a lawyer should not give legal advice to the parties during the mediation process. This does not preclude the mediator from giving legal information on the consequences if the mediation fails. Further, neither the lawyer-mediator nor a partner or associate of the lawyer-mediator should render legal representation or give legal advice to either party to the mediation, bearing in mind the provisions of the rules in [Section 3.4](#) of the [Rules of Professional Conduct](#) that deal with "Conflicts" and its commentaries and the common law authorities.

23 *Rules of Professional Conduct* (Law Society of Ontario) accessible at: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct>.

THE MEDIATION BRIEF

In Ontario, the parties are required to exchange mediation briefs which include a statement of the issues to be mediated. It is wise to use the mediation brief as an opportunity and a tool to assist in settlement. Mediation briefs provide an opportunity to tell the parties' story in a compelling and persuasive manner in an attempt to convince the opposing parties on the merits of settlement. The goal, in part, is to educate the mediator on the relevant information necessary to assist in settling the matter.

[Rule 75.1.08](#) of the [Rules of Civil Procedure](#) provides that a mediation brief is required for all mandatory mediations and must be provided to all parties and the mediator at least seven days before the mediation. [Form 75.1C](#) provides the outline of a mediation brief and what should be included (statement of issues) however, it can be modified. [Form 75.1C](#) sets out three sections: 1) Factual and Legal Issues in Dispute; 2) Party's Positions and Interests (what the party hopes to achieve); and 3) Attached Documents. A well-written and documented brief will assist in achieving successful mediation for the parties involved.

DOCUMENTS FOR USE AT MEDIATION

Lawyers should have all the documents their clients need to make informed decisions about the legal issues in dispute and that are required to reach a possible settlement. As such, counsel should consider including the following documents:

- A family tree;
- The testamentary documents (wills, codicils, deeds);
- A chart or list of the estate assets and liabilities, including a list of jointly held assets and any assets that passed outside of the estate ([section 72](#) assets). Include account opening documents for joint accounts. Include insurance designations insurance policies;
- Relevant marriage or domestic contracts, separation agreements;
- In a Will challenge scenario, consider including the drafting lawyer's notes;
- If capacity is an issue, include relevant medical records;
- Consider the value of an expert's report;

- If there is a family business involved, it may help to have an organizational chart including the business structure, shareholder interests, etc.:
- Relevant financial records;
- Consider including pleadings or affidavits or witness will-say statements;
- Obtain real estate valuations/opinions of value; and
- Consider tax issues and outcomes.

PREPARING FOR MEDIATION

Mediation can work when all parties are prepared and understand the goal of mediation. In so far as is possible, settlement should be reached with the benefit of information and transparency to ensure the best forum for understanding the issues involved, rather than having one party left in the dark and unable to make an informed decision. Lawyers should prepare their clients for the process, underscoring the importance of confidentiality, and explaining that this is a chance to step away from or to avoid an adversarial court process.

The parties should be as prepared for the day of mediation. The day of mediation may be the first time that opposing lawyers will meet the opposing party. A properly prepared and presented client may cause opposing lawyers and clients to reevaluate their case, and sometimes re-evaluate what their clients have been saying about your client.

The parties should be familiar with the process of mediation: What will happen? When? Where? How long will the process take? What are realistic expectations? What are the various potential outcomes? What if settlement is achieved, next steps?

Anything that is said or admitted during a mediation cannot be used against the parties at a later stage. The fact that there is no public record of the proceeding may provide some clients with the comfort to say things that might otherwise not be said. In addition, clients can be advised that any information a client provides to the mediator to help the mediator understand their position better can remain confidential and that the mediator will not disclose any information unless expressly authorized by the clients.

Having the opportunity to participate in open and frank discussions may be the key to resolving outstanding issues that might otherwise be addressed in the litigation process. Often estate mediations will take a full day, or several days. The parties should be prepared to spend significant time at the mediation.

MINUTES OF SETTLEMENT AND RELEASES

If the parties are successful in attaining a mediated settlement with Minutes of Settlement drafted and executed, the agreement is a legally binding contract, and the parties will be bound by its terms. Minutes of Settlement outline the final resolutions of the dispute, and once fully drafted, must be sent to each party to review and sign. The Minutes of Settlement are usually drafted by counsel and signed by the parties on the day of the mediation. The settlement agreement should encompass how the settlement will be executed, such as terms of payment or any litigation that has taken place in the mediation.

It is also typical for parties to sign Releases. The effect of these Releases is to indemnify all the parties from all related legal claims in respect of the matter. For instance, Releases in a Will challenge would prevent any of the parties from challenging the Will following the mediation and settlement.

If an individual under disability is one of the parties, [Rule 7.08](#) of the [Rules of Civil Procedure](#) provides that court approval must be sought for the proposed settlement.²⁴

[Rule 75.1.12 \(4\)](#) of the [Rules of Civil Procedure](#), provides that if the settlement agreement resolves all the issues in dispute, the party with carriage of the mediation shall file a notice to that effect with the court: (a) in the case of an unconditional agreement, within 10 days after the agreement is signed; and, (b) in the case of a conditional agreement, within 10 days after the condition is satisfied. In practice, such notice is rarely ever filed.

CONCLUDING COMMENTS

While there is no guarantee that an estate dispute will be settled at a mediation, an estate mediation has proven to be a highly successful alternative to the expensive, emotive, and lengthy court processes involved in these types of disputes. If lawyers and clients put in the effort and necessary preparation before and during a mediation session, the chances of a successfully mediated outcome increases substantially.²⁵ Notably, there are indeed other forms of alternative dispute resolution which may be considered, including med-arb, and arbitration.

For further discussion, please see Kimberly Whaley's [paper](#) on estate mediations which was published in The Advocates' Quarterly.²⁶

²⁴ [Rule 7.08](#) of the *Rules*.

²⁵ For further information on mediation and other forms of Alternative Dispute Resolution, please see Kimberly Whaley's paper with the International Academy of Estate and Trust Law, "Resolution of Estates and Trusts disputes: Mediation and Alternative Dispute Resolution in Canada", accessible at <https://welpartners.com/resources/WEL-Trust-and-Trustee-Vol-28-No-7-Resolution-of-Estate-and-Trust-Dispute.pdf>.

²⁶ "THE ESSENTIAL GUIDE TO ESTATE DISPUTE MEDIATIONS: UNIQUE CHALLENGES AND CREATIVE SOLUTIONS FOR LAWYERS", The Advocates' Quarterly, Kimberly Whaley 2019, accessible online at <https://welpartners.com/resources/WEL-Dispute-Mediations-Adv-Quarterly-October-2019.pdf>.

CHAPTER 8: EVIDENCE

INTRODUCTION

Chapter 1 explored the five principal grounds for challenging a Will in Ontario. These grounds are fact and evidence-driven given the complex interplay of factors including of capacity and undue influence. This chapter will address the various types of evidence used in a Will challenge and evidentiary concerns.

EVIDENTIARY ISSUES

CORROBORATION

Corroboration of evidence is of fundamental importance in estate litigation to protect the testator/testatrix's intentions. This is given the obvious disadvantage faced by the dead: they cannot tell their side of the story or respond to the living's version of events.¹ As such, the court is assisted by [section 13](#) of the [Evidence Act](#)² which provides as follows:

Actions by or against heirs, etc.

13 In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

[Section 13](#) assists courts in their gatekeeping function to ensure the reliability of evidence and displaces the evidentiary rule that the testimony of a single witness, if believed to the requisite degree of certainty, is a sufficient basis for deciding in a civil case.³

Corroboration is generally defined as independent, third-party evidence that demonstrates that a party's evidence on a material issue is true. Not every particular of a party's evidence needs to be corroborated, only the most important issues. For instance, if a party challenges a Will based on

1 *Orfus Estate v The Samuel and Bessie Orfus Family Foundation*, [2013 ONCA 225](#), citing *Burns Estate v Mellon*, [2000 CanLII 5739 \(ONCA\)](#).

2 *Evidence Act*, [RSO 1990, c E.23](#).

3 *Waters Estate v. Henry*, [2022 ONSC 5485 \(CanLII\)](#) citing *Radford v. MacDonald*, 18 OAR 159.

undue influence and adduces evidence to this effect, they must also provide corroborating evidence that materially enhances the probability of the truth of their evidence.

The corroborating evidence can be either direct or circumstantial. It can consist of a single piece of evidence, or several pieces considered cumulatively.⁴ It is not required that the evidence be given a certain weight, but only that it strengthens or make more certain the statements of the party on a material issue.⁵

THE DEEMED UNDERTAKING RULE

A principle that is relevant to how disclosed evidence may be used in civil litigation is the ‘deemed undertaking’ rule. The deemed undertaking rule is codified in [Rule 30](#) of Ontario’s [Rules of Civil Procedure](#) and provides that:

Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.⁶

This Rule applies to evidence obtained through the process of documentary discovery, examinations for discovery, inspection of property, medical examination, or examinations for discovery by written questions.⁷ The Rule applies to both parties and their counsel.

The deemed undertaking rule prevents the recipient of the information from revealing it to third parties (including for instance, the media) or making use of the information in a proceeding other than the one in which it was obtained. This means, for instance, that financial records obtained in a Will challenge cannot be used in another proceeding, unless an exception applies.

Once the evidence is filed or otherwise introduced to court via cross-examination or affidavit evidence, the rule no longer applies as the evidence becomes a matter of public record.⁸

The deemed undertaking rule seeks to promote the due administration of justice in the conduct of civil litigation in two ways. First, it encourages full and frank disclosure on discovery by the parties. It does so by prohibiting, except with the court’s permission, the subsequent use of the disclosed

4 *Burns Estate v Mellon*, [2000 CanLII 5739 \(ONCA\)](#), at [para 29](#); *Orfus Estate v The Samuel and Bessie Orfus Family Foundation*, [2013 ONCA 225](#), at [para 16](#), aff’d 2013 ONCA 225, 86 E.T.R. (3d) 6.

5 *John Hrycko v. Justin Booth, Estate Trustee of the Estate of Olga Miller*, [2014 ONSC 6676 \(CanLII\)](#).

6 [Rule 30.1.01\(3\)](#) of the Rules.

7 [Rule 30.01.01\(1\) \(a\)](#) of the Rules.

8 [Rule 30.1.01\(2\)](#) of the Rules.

material by the party obtaining that disclosure for any purpose outside of the litigation in which the disclosure was made. Second, the implied undertaking accepts that the privacy interests of litigants must, subject to legitimate privilege claims, yield to the disclosure obligation within the litigation, but that those interests should be protected in respect of matters other than the litigation.⁹

Exceptions to the deemed undertaking rule are found in [Rule 30.1.01](#) and include:

- When the person who disclosed the evidence consents to its use;
- Evidence filed with the court, given or referred to during a hearing or obtained from documentary discovery;
- Evidence obtained to impeach the testimony of a witness in another proceeding; or
- If a court is satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, it may order that the Rule does not apply to the evidence or to information obtained from it and may impose such terms and give such directions as are just.¹⁰

THE MINIMAL EVIDENTIARY THRESHOLD

In Ontario, a person challenging the validity of a Will is required to meet a ‘minimal evidentiary threshold’ before the courts will grant orders that the testamentary instrument be proven in solemn form (for its validity). This requirement was firmly established in the Ontario Court of Appeal decision of [Neuberger v. York](#).¹¹

The minimal evidentiary threshold applies to a party challenging the validity of a Will under [Rule 75](#) of the Ontario [Rules of Civil Procedure](#). [Rule 75.01](#) states:

Formal Proof of Testamentary Instrument

75.01 An estate trustee or any person appearing to have a financial interest in an estate may make an application under rule 75.06 to have a testamentary instrument that is being put forward as the last will of the deceased proved in such manner as the court directs.

In *Neuberger*, the Court of Appeal provided guidance on how the court is to exercise their role under [Rule 75](#), stating:

9 *Kitchenham v. Axa Insurance Canada*, [2008 ONCA 877 \(CanLII\)](#) citing Richard B. Swan, “The Deemed Undertaking: A Fixture of Civil Litigation in Ontario” (Winter 2008) 27 *Advocates’ Soc. J.*, No. 3, at p. 16.

10 [Rule 30.1.01](#) of the *Rules*.

11 *Neuberger v. York*, [2016 ONCA 191 \(CanLII\)](#) (“*Neuberger*”).

An interested person must meet some minimal evidentiary threshold before a court will accede to a request that a testamentary instrument be proved. In the absence of some minimal evidentiary threshold, estates would necessarily be exposed to needless expense and litigation. In the case of small estates, this could conceivably deplete the estate. Furthermore, it would be unfair to require an estate trustee to defend a testamentary instrument simply because a disgruntled relative or other potential beneficiary makes a request for proof in solemn form.¹²

What is meant exactly by the ‘minimal evidentiary threshold’? The Court of Appeal provides that the estate trustee or interested person must “adduce, or point to, some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded”.¹³ In other words, for a testamentary instrument to be proven in solemn form, a litigant must produce enough evidence for the court to bring it into question. When there is a lack of medical, solicitor or financial evidence to corroborate a challenge, a challenger must provide enough evidence to a court to meet the minimal evidentiary threshold. In this instance, the court will then order for the disclosure of all available records.

Thus, in *Neuberger* the Court of Appeal clarified that just because someone has an interest in an estate, it does not give them the *prima facie* right to have a testamentary instrument proved in solemn form. It is a matter of judicial discretion: “the court has a discretion whether to order that a testamentary instrument be proved as well as a discretion over the manner in which the instrument is proved”¹⁴.

Justice Myers provided further comment on the meaning of the ‘minimal evidentiary threshold’ in [Seepa v. Seepa](#).¹⁵

At [the] preliminary stage, the issue is not whether the applicant has proven his or her case but whether he or she ought to be given tools, such as documentary discovery, that are ordinarily available to a litigant before he or she is subjected to a requirement to put a best foot forward on the merits.¹⁶

Moreover, the court stated, “the court ought to measure the evidence adduced by the applicant challenger against the evidence answered by the proponent of the Will and assess what, if any, processes are required to resolve any conflicts that the court cannot fairly resolve on the record

12 *Neuberger* at [para 88](#). [emphasis added]

13 *Ibid* at [para 89](#).

14 *Ibid* at [para 87](#).

15 *Seepa v. Seepa*, [2017 ONSC 5368 \(CanLII\)](#).

16 *Ibid* at [para 35](#). [emphasis added]

before it”.¹⁷ In so doing, the court must fashion a process which provides fair and just resolution, and that meets the goals of efficiency, affordability and proportionality.¹⁸

The minimal evidentiary threshold is in part fulfilled by judicial discretion and guided by public policy considerations. The aim is to protect estates from needless expense and litigation, yet too, to uphold the special responsibility the court must provide to protect the testator/testatrix’s intentions.

ADMISSIBILITY OF EXPERT EVIDENCE

Expert evidence is opinion evidence of a scientific, or technical nature or otherwise specialized with the matter and provided by a person with specialized knowledge, experience, or training. The Supreme Court of Canada succinctly explained the role of an expert witness in *R. v. Howard*,¹⁹ when it stated “experts assist the trier of fact in reaching a conclusion by applying a particular scientific skill not shared by the judge or the jury to a set of facts and then by expressing an opinion as to what conclusions may be drawn as a result.”²⁰

The Supreme Court of Canada in *R. v. Mohan*,²¹ established a four-part threshold test to deal with the potential dangers of expert evidence and set out the following structure relating to the admissibility of expert opinion evidence. The structure has two main components.

First, there are four threshold requirements that the proponent of the evidence must establish for proposed expert evidence to be admissible:

- 1) Relevance;
- 2) Necessity in assisting the trial of fact;
- 3) Absence of any exclusionary rule; and
- 4) A properly qualified expert.

The second component established by *Mohan* refers to the gatekeeping function of the trier of fact to exclude expert evidence because its probative value is overborne by its prejudicial effect. The judge has a residual discretion to exclude evidence based on a cost-benefit analysis, namely that the expert evidence is “sufficiently beneficial to the trial process to warrant its admission despite the potential

17 *Ibid* at [para 39](#).

18 *Ibid* at [para 39](#).

19 *R. v. Howard*, [1989] 1 S.C.R. 1337 (S.C.C.).

20 *Ibid* at page 1348.

21 *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 SCR 9.

harm to the trial process that may flow from the admission of the expert evidence”.²²

Duties of an Expert

The Ontario [Rules of Civil Procedure](#) prescribe the duties of an expert in [Rule 53.03](#). In preparing a report, or in giving evidence, the *Rules* require that:

- evidence be fair, objective and non-partisan; and
- evidence be confined to those matters that are within your area of expertise.

The *Rules* also set out that an expert’s overall duty is to assist the court and that duty to the court prevails over any litigant in a proceeding. Accordingly, experts in Ontario are required to attest to their understanding of their role and duty to the court by completing a [Form 53](#) statement when producing expert evidence. [Rule 53.03](#) provides as follows:

Expert Witnesses

Experts’ Reports

[53.03 \(1\)](#) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48; O. Reg. 170/14, s. 17.

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1). O. Reg. 438/08, s. 48.

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert’s name, address and area of expertise.
2. The expert’s qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.

22 *White Burgess Langille Inman v. Abbott and Haliburton Co*, [2015 SCC 23 \(SCC\)](#) at [para 24](#).

4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
 - i. a description of the factual assumptions on which the opinion is based,
 - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
 - iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty ([Form 53](#)) signed by the expert. O. Reg. 438/08, s. 48.

TYPES OF EVIDENCE

There are various types of evidence that are commonly required in estate litigation and specifically in Will challenges, including:

- 1) Affidavit evidence of litigants;
- 2) Medical, Solicitor, and Financial Records;
- 3) Expert evidence;
- 4) Examination evidence; and
- 5) Lay person evidence.

AFFIDAVIT EVIDENCE

In Ontario, a Will challenge is commenced by an Application pursuant to [Rule 75](#) of the [Rules of Civil Procedure](#)²³. Applications differ from Actions, which are defined in the *Rules of Civil Procedure* as a proceeding that is not commenced by an Application but involves a Statement of Claim, Notice of

²³ *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194](#) at [Rule 1.03](#).

Action and/or Counter Claim.²⁴ The distinction is important as evidence since Applications are chiefly presented by affidavit.²⁵

An affidavit is a written statement by a party or witness to a proceeding who is known as the ‘affiant’. The affiant must swear or affirm that their statement is true, and an affidavit is used to adduce various types of evidence. An affidavit can provide the affiant’s own witness evidence. In a Will challenge, this typically includes a parties’ testimony and observations regarding the capacity of the testator/testatrix, knowledge and approval, due execution as well as indications of undue influence.

Third party and non-party witnesses are often affiants in a Will challenge, and these include family members, friends, neighbours, or family doctors and/or lawyers and estate planning professionals. For instance, it is well established that in a civil case lay witnesses, such as family or friends, may express an opinion on the issue of a person’s testamentary capacity.²⁶ In fact, if a lay person has observed the testator over a lengthy period, such evidence may be given greater weight than expert testimony.²⁷

MEDICAL, SOLICITOR, AND FINANCIAL RECORDS

Key types of evidence in Will challenges include medical, solicitor and financial records relating to the Deceased. Each provide an important role in the factual determination of the relevant issues in dispute.

Financial records: In a Will challenge, financial records can be used to ascertain estate assets, demonstrate payments made, reveal patterns of behaviour or financial abuse. For instance, the records may demonstrate the testator/testatrix or an attorney/guardian unexplained payment to a beneficiary prior to their passing.

Medical records: Medical records typically provide the most informative evidence of a testator/testatrix’s capacity. Given capacity is a medical-legal analysis such records are persuasive but not necessarily determinative and the court must consider all types of evidence relevant to the circumstances of the matter.

As the British Columbia Supreme Court noted in [Laszlo v Lawton](#)²⁸, with respect to testamentary capacity:

24 *Ibid* at [Rule 1.03\(1\)](#).

25 In accordance with [Rule 39](#) of the Rules.

26 *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed., by Alan W. Sopinka, Sidney N. Lederman & Michelle K. Fuerst (Markham: LexisNexis Canada Inc., 2009), at page 784.

27 *Re Chrustie; Chrustie et al. v. Chrustie et al.*, [2015 MBQB 25 \(CanLII\)](#) at [para 43](#).

28 *Laszlo v Lawton*, [2013 BCSC 305](#).

[It] is not a medical concept or a diagnosis; it is a legal construct. Accordingly, scientific, or medical evidence, while important and relevant, is neither essential, nor, conclusive in determining its presence or absence. Indeed, the evidence of lay witnesses often figures prominently in the analysis. Where both categories of evidence are adduced, it is open to the court to accord greater weight to the lay evidence than to the medical evidence or reject the medical evidence altogether.²⁹

Solicitor records: A Will is typically drafted by a solicitor, who we hope keeps accurate and detailed records in their files. Case law requires that a drafting solicitor ascertain a testator/testatrix's testamentary capacity by all available means.³⁰ Moreover, best practices include a solicitor taking extensive notes of their observations and meetings with their clients.³¹

Accordingly, a drafting solicitor's notes and records can be of considerable assistance and weight in determining issues of capacity, undue influence and if the testator/testatrix knew and approved of the Will's contents. The court can place considerable reliance on solicitor's notes in reaching a decision.³² In [Driscoll v. Driscoll](#),³³ the evidence of the drafting lawyer who had many dealings with the testator was preferred over the retrospective capacity assessment of a clinical neuropsychologist who opined that the testator lacked testamentary capacity, notwithstanding the judge's criticism of the drafting lawyer for failing to make good notes or carry out a detailed inquiry when taking instructions for the Will.

EXAMINATION EVIDENCE

Since estate litigation is Application-based, a litigant may be examined on their affidavit evidence and be examined for discovery. As such, careful consideration should be given to what is included in one's affidavit. Cross-examinations on affidavit evidence can be helpful for two main reasons: to determine the strengths and weaknesses of a party's case, and, to weigh insight from third parties.

In estate litigation, typical third parties/non-parties that are subject to examination for discovery, or cross-examination include drafting solicitors, family doctors and capacity assessors. An examination gives the litigants an opportunity to examine these parties on their evidence. For instance, if a drafting solicitor's file indicates that they did not sufficiently probe the testator/testatrix's testamentary capacity, the party challenging the Will may examine their evidence to attack the weight to be given to their records.

29 *Ibid.* at [para 198](#).

30 *Hall v. Estate of Bruce Bennett*, [2003 CanLII 7157 \(ON C.A.\)](#) at [para 22](#), citing *Murphy v. Lamphier*, (1914), [31 O.L.R 287](#) at para 23.

31 *Scott v. Cousins* [2001] O.J. No. 19.

32 *Palahnuk v. Palahnuk Estate*, [2006 CanLII 13570 \(ON SC\)](#).

33 *Driscoll v. Driscoll*, [2016 ONSC 4628](#).

EXPERT EVIDENCE

A common type of expert evidence used in a Will challenge is evidence of capacity of a task or decision made, which is either contemporaneous or retrospective capacity. Capacity assessments are a vital tool to aid litigators and the court in navigating issues of capacity. In this regard, the Court of Appeal have stated, in [Orfus Estate](#),³⁴ that it prefers contemporaneous rather than retrospective capacity assessments to decide testamentary capacity, but this is not always possible.

Increasingly courts have given due weight to retrospective evidence of capacity and retrospective capacity assessments have been accepted. In [Slover v. Rellinger](#),³⁵ the court held a *voir dire* and considered the admissibility of a retrospective capacity assessment. Before trial, the plaintiff had retained the services of Dr. Kenneth Shulman (“**Dr. Shulman**”) to provide a retrospective of the deceased testator’s testamentary capacity. The defendant argued that Dr. Shulman’s retrospective capacity assessment was inadmissible given it was based on “novel science”. The trial judge rejected the defendant’s argument, specifically noting that “many types of medical psychiatric opinions offered in trials are retrospective in nature”. Accordingly, Dr. Shulman’s retrospective assessment was accepted into evidence.

In Ontario, capacity assessments can be completed by an assessor certified by the Government Ministry of the Attorney General which maintains a list of qualified capacity assessors, available on the Ministry’s website.

When conducting a retrospective assessment, the capacity assessor will review the medical records compiled from any number of sources together when considering the observations of the witnesses, as well as considering the solicitor’s notes from the relative time as at the date of instructions for and then execution of the Will. They will do so with reference to the applicable legal criteria for testamentary capacity as in [Banks v. Goodfellow](#),³⁶ which is usually provided by a lawyer.

To have the best chance of convincing the trier of fact that an expert’s opinion should be preferred over the other side’s expert, is important to spend considerable time educating them about the case. The expert needs to access all relevant information and documentation available that may shed light on capacity such as the clinical notes and records of treating physicians, pleadings and affidavits filed, any available transcripts of examinations for discovery or cross-examinations, access to witnesses who knew the deceased, the drafting lawyer’s file, and notes, if available.

In estate litigation, it is not uncommon for each party to retain their own capacity assessor in support

34 [Orfus Estate v. The Samuel and Bessie Orfus Family Foundation](#), [2013 ONCA 225 \(CanLII\)](#).

35 [Slover v. Rellinger](#), [2019 ONSC 6497 \(CanLII\)](#).

36 [Banks v Goodfellow](#), (1870) LR 5 QB 549.

of their position. As such, it is not unusual to see two diametrically opposed opinions from two qualified experts. This was the case in [Adler v. Gregor](#)³⁷, wherein a dispute arose between two sisters over the validity of their 90-year-old mother's power of attorney documents.

During the proceedings, each sister obtained capacity assessments supporting their positions and assertions of their mother's capacity. Ultimately the court rejected both assessments because they were deemed unreliable and susceptible to bias and interference. The court reviewed the Guidelines for capacity assessments and found that capacity assessments were not designed to be used as weapons in highly contentious litigation such as this. The sisters conduct included "providing biased or incomplete histories and background to the assessors. [and] [...] Both parties interfered with, and had a hand in drafting, the final assessment reports"³⁸. For these reasons the court deemed the parties' conduct improper, and the capacity assessments were rejected.

CONCLUDING COMMENTS

Evidence is one of the chief considerations in a well strategized, and supported Will challenge. Without cogent corroborative evidence demonstrating that a Will was not validly executed, a challenge is unlikely to succeed. A Court requires that a Will challenger to, 'put their best foot forward,' and make their best case at the commencement of a claim, including with the best available evidence.

37 *Adler v. Gregor*, [2019 ONSC 3037 \(CanLII\)](#).

38 *Ibid* at [para 52](#).

CHAPTER 9: FIDUCIARY ROLES

INTRODUCTION

An estate trustee is tasked with administering and defending the estate of a deceased. In exercising its power, the estate trustee has duties dictating how it is to act both pursuant to legislation and common law. This is because an estate trustee is a fiduciary and is accountable to the beneficiaries.

An estate trustee has a:

- Duty to comply with the terms of the Will;
- Duty to avoid conflicts of interest;
- Duty to not delegate tasks of the estate trustee;
- Duty to be even-handed as between beneficiaries, as directed by the terms of the Will/trust;
- Duty to account;
- Duty to keep the beneficiaries reasonably informed; and
- Duty to administer the estate in a timely manner – receive, administer, and distribute the estate.

SPECIFIC DUTIES OF AN ESTATE TRUSTEE

STANDARD OF CARE

The standard of care of an estate trustee generally, as referenced in [Widdifield on Executors and Trustees](#), is as follows:

Assuming that the trustee acts within the scope of the powers conferred upon him the exercise of his discretion will be subject to the general standards and rules which the courts have developed to control the actions of trustees. While it is an intangible thing to describe, there is law relating to the mental processes of the trustee in coming to conclusions and decisions in his administration. **The trustee cannot be criticized for lack of training or experience, but the court will try to enforce good faith, proper motives, and a minimum**

of good judgment. The law requires that the trustee turn his mind to his various tasks and exhibit the same degree of diligence in the exercise of his discretion as would be expected from a man of ordinary prudence in the management of his own affairs. The test is whether “a reasonable and honest man might have come to the same conclusion rather than whether the judge would have handled the matter otherwise.”¹

Estate trustees are given a broad discretion to act, and their decisions are often brought into scrutiny by the beneficiaries of an estate. When the court assesses the conduct of an estate trustee, it will determine if they have acted within the bounds of ‘reasonable judgment’. The following circumstances may be relevant:

1. the extent of discretion intended to be conferred upon the trustee by the terms of trust;
2. the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee’s conduct can be judged;
3. the circumstances surrounding the exercise of the power;
4. the motives of the trustee in exercising or refraining from exercising the power; and
5. the existence or non-existence of an interest in the trustee with that of the beneficiaries.²

it is, however, important to note that while estate trustees are permitted to exercise their discretion broadly, they can still be found in breach of their duties constituting negligence. As the court stated in [Levine v. Samberg](#):³

It is a well-known principle that extensive discretionary powers and broad liability exclusions in favour of administrators do not authorize negligence or gross negligence. They also do not provide shelter to administrators acting in contradiction with the intention of the testator or against the interests of the beneficiaries.⁴

DUTY TOWARDS THE BENEFICIARIES

An estate trustee has a general duty of loyalty towards the beneficiaries of an estate and must act exclusively for their benefit. An element of the duty of loyalty is that estate trustees must avoid conflicts between their own interests and those of the beneficiaries. For instance, an estate trustee is

1 *Widdifield on Executors and Trustees*, (6th edition) at 2.3 (emphasis added); citing *Learoyd v. Whiteley* (1887), 12 App. Cas. 727 (U.K. H.L.); *Tabor v. Brooks* (1878), 10 Ch.D.273 (Eng. Ch. Div.); *Bell, Re* (1923), 23 O.W.N. 698 (Ont. H.C.).

2 *Scott on Trusts*, 3rd ed., p. 1501; [Eve v. Brook, 2016 ONSC 1496](#).

3 [Levine v. Samberg, 2013 QCCS 3389 \(CanLII\)](#).

4 *Ibid.*

not permitted, directly or indirectly, to purchase estate property for themselves.

If an estate trustee acts in a way that is contrary to his or her duties, then he or she may be in a conflict of interest, and either the beneficiaries or a co-estate trustee or any person with a financial interest in the estate may apply to the court to have that estate trustee removed pursuant to [section 37](#) of the [Trustee Act](#)⁵, which states:

Removal of personal representatives

37 (1) The Superior Court of Justice may remove a personal representative upon any ground upon which the court may remove any other trustee and may appoint some other proper person or persons to act in the place of the executor or administrator so removed.

In [Zimmerman v. McMichael Estate](#),⁶ the court found that the applicant, who had acted as Attorney for Property and then as estate trustee, had breached their duty as a fiduciary and was required to repay \$450,000 in pre-taken compensation. Specifically, the court found that the applicant was “grossly indifferent to his duty to account”, that the accounts presented to the beneficiaries were “manifestly inaccurate, incomplete and false,” and that he mingled Trust property with his own property and used the two for his own purposes.

Estate trustees have a duty to provide beneficiaries with regular and accurate information regarding the estate and its administration. In [Cranston Estate v. Cranston](#)⁷, the court stated that “the estate trustee has a general duty to keep the beneficiaries informed when requested”. Importantly, this includes making any Wills or codicils of the testator/testatrix available to beneficiaries of the Estate.

TIMELY ADMINISTRATION OF THE ESTATE

The administration of an estate can generally be split into three key stages:

1. Collecting in the assets of the estate;
2. Paying any debts and liabilities owing by the Estate; and
3. Distributing the assets of the estate in accordance with the Will or on an intestacy basis.

Pursuant to Ontario’s [Estates Administration Act](#),⁸ all real and personal property of the deceased devolve to their estate trustee. They are given the legal right to deal with said property and title is

⁵ [Trustee Act, R.S.O. 1990, c T23](#).

⁶ [Zimmerman v. Zimmerman Estate, 2010 ONSC 2947](#).

⁷ [Cranston Estate v. Cranston, 2021 ONSC 1347 \(CanLII\)](#) at [para 66](#).

⁸ [Estates Administration Act, R.S.O, c. E. 22](#) at [section 2](#).

derived from the Will.⁹ Estate trustees have a duty to take inventory of the estate's assets as part of their fiduciary duties. This is not a task that can be delegated, but assistance of lawyer can be sought.¹⁰

Estate trustees must administer the estate in a timely manner and must not cause unreasonable delays. While no definitive rule provides for the timeframe an estate trustee must act in, generally it should not take longer than the 'executor's year'.¹¹ The executor's year is a common law rule providing that the estate trustee is given a year to administer an estate of the testator/testatrix's death. This includes collecting in the assets of the deceased, paying off the estate debts and converting the remaining assets to enable bequests and legacies to be distributed according to the Will, and then doing so.¹²

DUTY TO MAINTAIN AN EVEN HAND

An estate trustee is required to remain impartial (or to 'maintain an even hand') between all the beneficiaries and to not favor one of more beneficiaries over others.¹³ The duty to maintain an even hand has particular importance in circumstances where a Will has beneficiaries separately entitled to income and capital. For instance, a Will may provide that the testator/testatrix's spouse is designated as an income beneficiary with a life interest in the assets of the estate whereas their children are capital beneficiaries, entitled to the residue. Issues with the duty to maintain an even hand usually occur when an estate trustee makes investments of or encroaches on trust assets.

In [Edell v. Sitzer](#),¹⁴ the Ontario Superior Court of Justice considered and refused to interfere with the discretionary power of a trustee to vary the terms of a trust. In *Edell v. Sitzer*, trusts were established for two children, Jodi, and Michael, both of which included shares in a family business. While Michael participated in the running of the family business, Jodi did not. Moreover, Jodi had an acrimonious relationship with the rest of the family. The trustee decided to use their powers of encroachment to give all the shares in the family business to Michael, citing concern for the future of the business and to preserve the assets of the trust. The court found that this was a legitimate use of trustee discretion. The court highlighted how the duty of impartiality cannot preclude the exercise of trustee discretion even where the result is an outcome that appears to favor one beneficiary over another:

Properly understood, the so-called duty to act impartially . . . is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary

9 *Widdifield on Executors and Trustees*, (6th edition) at 2.1.

10 *Ibid.*

11 *Trost v. Cook* (1920) 48 O.L.R. 278 (Ont H.C).

12 *Rivard v. Morris*, [2018 ONCA 181 \(CanLII\)](#).

13 *DWM Waters, The Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) at page 112.

14 *Edell v. Sitzer*, [2001 CanLII 27989 \(ON SC\)](#).

power: **that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant.** If . . . trustees do that, they cannot be criticized if they reach a decision which appears to prefer the claims of one interest . . . over others. The preference will be the result of a proper exercise of the discretionary power.¹⁵

The duty to be impartial or maintain an even hand can be overridden by the express terms of the Will or trust document.¹⁶ An estate trustee may also be exempt provided they obtain the consent of all the beneficiaries to the proposed action.

DUTY TO ACCOUNT

Common law imposes a duty on all trustees, including estate trustees, to keep accurate and fulsome accounts. A trustee must keep a complete record of their activities and be always able to prove that they administered the estate prudently and honestly. The estate trustee must have the accounts ready and give full information whenever required.¹⁷

An estate trustee who cannot satisfactorily account for estate property will be chargeable with them.¹⁸ An estate trustee's compensation will also reflect his or her administration and accounting of the assets. If an estate trustee causes expense through neglect or refusal to furnish their accounts, then they must bear that expense personally.¹⁹

Accounting

An application by a fiduciary to pass accounts is not strictly, in legal terms, a mandatory requirement. Rather, the fiduciary may choose to pass its accounts, or alternatively, may be compelled to do so by those legally entitled to request a passing. The legal duty is in the maintenance of the accounts as fiduciaries. The right to compel an accounting is not an absolute right, regardless of the circumstances, rather it remains within the discretion of the court to either grant or refuse such an order.

Where the beneficiary of an estate or trust is a minor or incapable person, and particularly in circumstances where compensation is being sought by the fiduciary, the policy of the Ontario Children's Lawyer and the Ontario Public Guardian and Trustee generally, mandate for accounts to be passed.

15 *Ibid* at [para 173](#) citing *Edge v. Pensions Ombudsman* at p. 627 Ch. (emphasis added)

16 *The Canada Trust Company v. Russell Browne et al.*, [2011 ONSC 731 \(CanLII\)](#).

17 *Zimmerman v. McMichael Estate*, [2010 ONSC 2947 \(CanLII\)](#) at [para 31](#).

18 *Chisholm v. Barnard* (1864), 10 Gr. 479 (U.C. Ch.) at 481; *Saunders v. Vautier*; *Trost v. Cook* (1920), 48 O.L.R. 278 (Ont. H.C.); *Zurosky Estate, Re*, [1992] O.J. No. 1292 (Ont. Gen. Div.).

19 *E.E. Gillese, The Law of Trusts* (Concord: Irwin Law, 1997) at page 52.

The jurisdiction of that estate trustee to pass accounts arises from [section 48](#) of the *Estates Act*²⁰, as follows:

Accounting by executor trustee

48. Every executor who is also a trustee under the will may be required to account for their trusteeship in the same manner as they may be required to account in respect of their executorship.

An estate trustee shall only be required by a court to render an account if requested by someone with an interest in the estate, such as a beneficiary or creditor. [Section 50\(1\)](#) of the *Estates Act* states as follows:

At whose instance executors or administrators compellable to account

50 (1) An executor or an administrator shall not be required by any court to render an account of the property of the deceased, otherwise than by an inventory thereof, unless at the instance or on behalf of some person interested in such property or of a creditor of the deceased, nor is an executor or administrator otherwise compellable to account before any judge.²¹

The procedure and form for estate trustee accounts is set out in the Ontario [Rules of Civil Procedure](#)²², specifically [Rule 74.16](#) to [Rule 74.18](#). [Rule 74.14\(1\)](#) states that estate trustees must keep accurate records of the assets and transactions in the estate. Pursuant to this Rule, estate trustee accounts filed with the court must contain the following:

- i. A statement of the original assets at the start of the accounting period;
- ii. An account of all money received by the estate;
- iii. An account of all money disbursed by the estate;
- iv. Where the estate trustee has made investments, an account detailing said investments;
- v. An account of unrealized assets at the end of the accounting period;
- vi. A list of investments at the end of the accounting period;
- vii. A statement of all liabilities of the estate at the end of the accounting period; and

²⁰ *Estates Act*, [R.S.O. 1990, c. E.21](#) at [section 48](#).

²¹ *Ibid* at [section 50\(1\)](#).

²² *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194](#) (the “*Rules*”).

viii. A statement of compensation claimed by the estate trustee.

DUTY TO CONTINUE OR COMMENCE LITIGATION

An estate trustee is bound by the same contracts that the deceased was bound by during his/her lifetime. It is the duty of an estate trustee to perform all contracts of his testator/testatrix or intestate, as the case may be, that can be enforced against him or her, whether by way of specific performance or otherwise.²³

An estate trustee steps into the “shoes” of the deceased so that any cause of action against a person existing as at the date of death, including the right to continue that action or start new proceedings devolves to the estate trustee. Note, the below provision of the [Trustee Act](#)²⁴:

Actions by executors and administrators for torts

38. (1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but, if death results from such injuries, no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the Family Law Act.

DUTY NOT TO DELEGATE

As a rule, estate trustees cannot delegate any of their powers or duties. The estate trustee is under a duty not to delegate acts that they themselves can reasonably be required personally to perform.²⁵ The court has recognized there are certain situations where the delegation of tasks by an estate trustee is necessary. Delegation is permitted in the following circumstances:

- a) If expressly authorized by statute or the trust instrument;
- b) If the powers or duties are not required to be performed personally;
- c) If it is clearly necessary; and
- d) If it would be prudent, in the ordinary course of affairs, for a person to delegate certain

²³ *Newlands Estate*, [2017 ONSC 7111 \(CanLII\)](#).

²⁴ Trustee Act, [RSO 1990, c T.23](#) at [section 38\(1\)](#).

²⁵ *Clowater Estate, Re*, [1993 CanLII 15269 \(NB KB\)](#).

duties.²⁶

It is understandable that certain acts will be outside the expertise of a typical estate trustee. For instance, assistance in estate administration by a solicitor or the investment in securities by a registered stockbroker. In the English case of *Speight v. Gaunt*²⁷, the House of Lords held that trustees may delegate where it would be normal practice for a reasonably prudent person carrying out that task.

When an estate trustee is permitted to delegate, they must do so prudently. This generally provides that:

- The estate trustee selects the agent;
- The matter the agent is selected for is within their expertise; and
- The agent's activity is supervised with reasonable care.²⁸

Even when agents are permitted, the estate trustee remains ultimately responsible for decision-making. Proper delegation requires that an estate trustee carefully select and supervise their agents. An estate trustee that places estate assets in the hand of agents and then takes no steps to ensure those assets are properly dealt with will have breached their duty to supervise.²⁹

ESTATE TRUSTEE DURING LITIGATION OR TRUSTEE DURING LITIGATION

An Application against an Estate such as with a Will challenge may often necessitate obtaining an order appointing an Estate Trustee During Litigation (“**ETDL**”). An ETDL is appointed to manage and preserve the assets of an estate for its beneficiaries during the litigation process. An ETDL has no powers to distribute the assets of an estate.

For instance, if an appointed estate trustee, who is also a beneficiary, wishes to pursue a claim against the estate they must resign or refuse to act. Otherwise, they will be placed in a conflict of interest between their fiduciary role as estate trustee and their personal capacity as a beneficiary. In this circumstance an ETDL may need to be appointed by the court to oversee the estate.

The court has inherent authority to appoint an ETDL pursuant to [section 28](#) of the *Estates Act* or [rule 75.06\(3\)\(f\)](#) of the *Rules of Civil Procedure*. If appointed, the ETDL will act until the final resolution or

²⁶ *Oosterhoff on Trusts* (Thomson Reuters: 9th Ed) at pages 910-911.

²⁷ *Speight v. Gaunt* (1883), 22 Ch. D 727 per Lord Fitzgerald.

²⁸ See *Ex parte Belchier* (1754). Amb, 218, 27 E.R 144 (Eng. Ch); and *Speight v. Gaunt* (1883), 22 Ch. D 727.

²⁹ *Oosterhoff on Trusts* (Thomson Reuters: 9th Ed) at pages 911, citing *Low v. Gemley* (1980) 18 S.C.R 685.

settlement of the litigation and/or Order of the court.

The ETDL may ascertain the estate assets, attend to payment of liabilities, make interim distributions, and/or liquidate assets to be made available for distribution later. The ETDL may not administer the assets of the estate. In [Mayer v. Rubin](#),³⁰ a trust company was appointed as ETDL in place of co-estate trustees who were in litigation regarding the dissipation of estate assets. The court stated that the goal in appointing an ETDL is “to bring independent, transparent, and accountable stewardship to [an] estate while the questions raised between the parties are being resolved ... to protect the estate and its beneficiaries.”³¹ The court further reasoned that “the court must protect the level playing field. Neither side should be able to use their control over the estate to benefit themselves or to prejudice the other”³².

CONCLUDING COMMENTS

In summary, there are various duties that estate trustees and ETDL’S/TDL’S must adhere to in discharging their fiduciary role appropriately, and within the parameters of the law and their appointment. The central duty of both is to act honestly, diligently, and as they would in conducting their own affairs.

30 *Mayer v Rubin*, [2017 ONSC 3498](#).

31 *Ibid* at [para 2](#).

32 *Ibid* at [para 36](#). *Dempster v Dempster*, 2008 CanLII 59588 at para. 24 (ON SC).

CHAPTER 10: LIMITATION PERIODS

INTRODUCTION

Limitation periods are a necessary component of our legal system. This chapter provides an overview of limitation periods before providing an analysis of limitation periods applicable Will and estate claims and challenges.

Limitation periods can be viewed as a ‘time clock’ in a legal matter. Specifically, limitation periods form and prescribe the amount of time that a party has to commence a claim in a court of law. The purpose of a limitation period is to ensure that litigation is brought before the court in a timely manner. This ensures fairness in the legal process by protecting defendants from being blindsided by a legal claim that arises out of events that took place many years ago. This purpose is grounded in the fact that public policy in Canada demands that justice is carried out and served with a certain level of closure.

Limitation periods, therefore, help by reducing the cost of record keeping in the normal course of business. Over time, evidence may erode, documents may be lost or destroyed, and witnesses may forget material facts (or they may die), providing strong reasons to have limitation periods. A claim that has been or will be denied due to a limitation period that has lapsed is commonly referred to as being ‘statute barred.’

LEGISLATION

GENERAL LIMITATION PERIODS IN ONTARIO

Limitation periods in Ontario are governed by legislation, mainly the [Limitations Act](#)¹(the “**Limitations Act, 2002**”) and through other applicable acts including the [Real Property Limitations Act](#)², R.S.O. 1990, c.L.15 (“**RPLA**”) and in the case of Will challenges, the [Succession Law Reform Act](#) (“**SLRA**”).³

Under the [Limitations Act, 2002](#) there is a basic two (2) year limitation period. This period is subject to the principle of discoverability which is discussed in depth in this chapter.

[Section 4](#) of the [Limitations Act, 2002](#) states that:

- 1 [Limitations Act, 2002 c.24, Sch. B.](#) (“**Limitations Act, 2002**”).
- 2 [Real Property Limitations Act, R.S.O. 1990, c.L.15.](#)
- 3 [Succession Law Reform Act, https://canlii.ca/t/2qI](#)R.S.O. 1990, c. S.26.

Basic Limitation Period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the **second anniversary of the day on which the claim was discovered.** 2002, c. 24, Sched. B, s. 4. [emphasis added]

Under the [Limitations Act, 2002](#), a “claim” is defined as “claim to remedy an injury, loss or damage that occurred as a result of an act or omission.”⁴ Therefore, generally, this includes challenges made to the validity of a Will and other related claims including equitable claims.

LIMITATIONS WITH RESPECT TO MINORS AND PERSONS UNDER DISABILITY

[Section 6](#) of the [Limitations Act, 2002](#) states that the basic two-year limitation period established by section 4 does not run during any time in which the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim.

Similarly, [section 7](#) of the [Limitations Act, 2002](#) states that the limitation period established by [section 4](#) does not run during any time in which the person with the claim is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental, or psychological condition and is not represented by a litigation guardian in relation to the claim.

An extension of the limitations period as it applies to incapable persons is set out under [subsection 7\(3\)](#) of the [Limitations Act, 2002](#). According to this provision, if the running of a limitation period is suspended because of the incapacity of a party and the limitation period has less than six months to run when the suspension ends, then the limitation period is extended to include the day that is six months after the day in which the suspension ends.

The [Limitations Act, 2002](#) provides for an extension of the limitation period until the minor has either reached the age of majority or is represented by a litigation guardian.⁵ The limitation period will not run against incapable persons until they are represented by a litigation guardian⁶ (a person is, however, presumed to be capable of commencing a proceeding unless proven otherwise.)⁷

DISCOVERABILITY OF A CLAIM BY A LITIGATION GUARDIAN

[Section 8](#) of the [Limitations Act, 2002](#) states that if a person is represented by a litigation guardian in relation to the claim, [section 5](#) applies as if the litigation guardian were the person with the claim.

⁴ [Limitations Act, 2002, c. 24, Sch. B](#), at [section 1](#).

⁵ [Limitations Act, 2002](#), at [section 6](#).

⁶ [Limitations Act, 2002](#), at [section 7 \(1\)](#).

⁷ [Limitations Act, 2002](#), at [section 7 \(2\)](#).

ULTIMATE LIMITATION PERIOD

[Subsection 15\(1\)](#) of the [Limitations Act, 2002](#) sets out the general rule that no proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

DISCOVERABILITY OF A CLAIM

We know that limitation periods represent the amount of time that a party has, to commence their claim. But when does that clock start running? To assist litigants in determining their basic and ultimate limitation periods, courts will often turn their focus to the common law principle of discoverability. This principle generally will not allow the limitation period to run before the plaintiff **knows they have a claim**. The determination of **when** a plaintiff has or should have discovered a claim under this principle is a contextual question which considers the plaintiff’s knowledge of the most relevant and important facts.

One of the new features of the [Limitations Act, 2002](#) was the expression of the discoverability principle in statutory language. This expression can be found in [section 5](#) of the statute which provides a rebuttable presumption that a claim is discovered on the day the act or omission on which the claim is based took place.”⁸

The role that the common law principle of discoverability plays in the application of provincial limitations statutes was clarified by the Supreme Court of Canada (“**SCC**”) in the 2021 decision in [Grant Thornton LLP v. New Brunswick](#).⁹ In that decision, the SCC affirmed that a claim is discovered when a plaintiff has knowledge, either actual or constructive, of the most important and relevant facts upon which a reasonable inference of liability on the defendant’s part can be drawn.¹⁰ The SCC, referencing the text, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*¹¹ held that a “plausible inference” of liability is one that gives rise to a “permissible fact inference.”¹²

The Court went on to say that this standard requires *more than mere suspicion or speculation but does not rise to the point of requiring certainty of liability*. In other words, a plaintiff does not need to know the exact type of harm they have suffered or the extent or cause of their injury for the limitation period to begin. In *Grant Thornton LLP*, the SCC affirmed that a limitation period will start to run when the plaintiff ought to have discovered the material facts by exercising *reasonable diligence*.

8 *Limitations Act, 2002*, at [section 5](#).

9 *Grant Thornton LLP v. New Brunswick*, [2021 SCC 31](#) (“**Grant Thornton LLP**”).

10 *Ibid* at [para 3](#).

11 Alan W. Bryant, Michelle Fuerst, Sidney N. Lederman, and John Sopinka, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 3rd edition (LexisNexis, Toronto: 2009).

12 *Grant Thornton LLP* at [para 45](#).

Unfortunately, the decision did not elaborate on what amounts to reasonable diligence.

[Section 5](#) of Ontario's [Limitations Act](#), 2002, states that:

5.(1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

2002, c. 24, Sched. B, s. 5 (1).

The provision found in [section 5\(1\)\(a\)\(iv\)](#) of the [Limitations Act](#), 2002 is defined as the Appropriate Means doctrine and suggests that the limitation period is effectively triggered when the Plaintiff has knowledge of two important facts:

1. They have suffered some form of loss; and
2. That a proceeding in a court of law is “an appropriate means to seek to remedy it.”

Some guidance on the meaning of the term “appropriate” can be found in the 2012 Ontario Court of Appeal decision in [Markel Insurance Company of Canada v. ING Insurance Company of Canada](#).¹³ In that decision, Sharpe J.A. held that the word “appropriate” must mean legally appropriate and that:

To give “appropriate” an evaluative gloss, allowing a party to delay the commencement of proceedings for some tactical or other reason beyond two years from the date the claim is fully ripened and requiring the court to assess the tone and tenor of communications in

13 [Markel Insurance Company of Canada v. ING Insurance Company of Canada](#), [2012 ONCA 218](#).

search of a clear denial would, in my opinion, inject an unacceptable element of uncertainty into the law of limitation of actions.¹⁴

In the 2019 Ontario Court of Appeal decision in [Sosnowski v. MacEwan Petroleum Inc.](#)¹⁵ the Court clarified that “appropriate” means whether it is legally appropriate to bring an action and does not include an evaluation of whether a civil proceeding will be successful.¹⁶

In the 2020 Ontario Court of Appeal decision in [Clarke v. Sun Life Assurance Company of Canada](#),¹⁷ the Court of Appeal considered when a “proceeding would be an appropriate means to seek to remedy it.” In its decision, the Court of Appeal held that the determination requires a court to consider the four elements contained in [section 5\(1\)\(a\)](#) and make two findings of fact:

1. The court must determine the “day on which the person with the claim first knew” all four of the elements. In making this first finding of fact, the court must have regard to the presumed date of knowledge established by s. 5 (2): “A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved”; and
2. The court must also determine “the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known” of the four elements identified in s. 5 (1)(a).¹⁸

The decision in *Clarke*, citing [Nasr Hospitality Services Inc. v. Intact Insurance](#)¹⁹ went on to hold that, “[a]rmed with those two findings of fact, [section 5\(1\)](#) then requires the court to compare the two dates and states that a claim is discovered on the earlier of the two dates.²⁰

While the two-year limitation period will not commence until the claim is discovered, this does not mean that plaintiffs have an unlimited amount of time to bring their claim if it is not discovered. The [Limitations Act, 2002](#), therefore, provides an ultimate limitation period of 15 years.²¹ If 15 years have passed, no claim can be brought regardless of when the act or omission that would give rise to a claim was discovered.

14 *Ibid* at [para 34](#).

15 *Sosnowski v. MacEwan Petroleum Inc.*, [2019 ONCA 1005](#) [“*Sosnowski*”].

16 *Sosnowski* at [para 19](#).

17 *Clarke v. Sun Life Assurance Company of Canada*, 2020 ONCA 11 [“*Clarke*”].

18 *Clarke* at [para. 20](#).

19 *Nasr Hospitality Services Inc. v. Intact Insurance*, [2018 ONCA 725](#), 142 O.R. (3d) 561, at [paras. 34-35](#).

20 *Clarke*.

21 *Limitations Act, 2002*, at [section 15](#).

LIMITATION PERIODS: WILL CHALLENGES

The [Limitations Act, 2002](#) does not present a conclusive limitation period for Will challenges, and arguably the courts still not have conclusively dealt with the issue of whether or not there is a limitation period which applies to Will challenges.

The Ontario Superior Court appeared to present a clarification to this issue in the 2014 case of [Leibel v. Leibel](#),²² wherein it concluded that in general, the two-year limitation period for a Will challenge begins to run on the date of death.²³ The decision was not appealed. The Ontario Court of Appeal briefly referred to Justice Greer's findings in [Neuberger v York](#).²⁴

In [Birtzu v. McCron](#),²⁵ Justice Bloom concluded that a two-year limitation period applied to Will challenges and that it could start to run from the date of death, but it could be extended depending on whether the Plaintiff knew or ought to have known that a claim existed. Justice Bloom noted:

Once the Plaintiffs were aware that the 2006 Will denied them any gift and that the deceased suffered from dementia, as reasonable persons they ought to have known of their claim . . . It may well be that the limitation period commenced running on the death of [the father] as envisaged in *Leibel v. Leibel, supra*, but in my analysis, I have reviewed the matter in a more favorable light to the Plaintiffs. Based on either view, the action is statute barred.²⁶

In a decision which referenced the authority laid out in the *Leibel* and *Birtzu* decisions, the 2020 Ontario Court of Appeal decision in [Piekut v. Romoli](#)²⁷ dealt with the distinction between consequential relief and declaratory relief in determining whether a claim was statute-barred.²⁸

In *Piekut*, a couple died in June and July of 2008, leaving behind a Will which provided that, upon both of their deaths, their estate would be divided equally among their three children. One of their three children asserted that the parents had executed codicils to their wills which provided that she was to inherit two of the five properties they owned. She did not tell her siblings about the purported codicils until after both parents had died.

Another sister brought an application seeking determination as to whether the codicils were valid.

22 *Leibel v. Leibel*, [2014 ONSC 4516](#).

23 *Ibid.*

24 *Neuberger v York*, [2016 ONCA 191](#).

25 *Birtzu v McCron*, [2017 ONSC 1420](#).

26 *Ibid* at para 50.

27 *Piekut v. Romoli*, [2020 ONCA 26](#) [*"Piekut"*].

28 Consequential relief is what an applicant is generally seeking when bringing an action in court. They seek an order that something will happen; payment of damages, an injunction being granted, or an award of support. Declaratory relief on the other hand is when an applicant presents a legal question to the court seeking only a declaration with respect to the parties' rights.

The sister seeking to propound the codicils brought a motion for summary judgment, seeking the dismissal of her sister's claim against the codicils on the basis that it was statute-barred pursuant to the [Limitations Act, 2002](#). The motion judge held that the application on the validity of the codicils was not barred by the [Limitations Act, 2002](#) (holding that the question was restricted to declaratory relief) and also, that the purported codicils were invalid.

The sister seeking to propound the codicils appealed the decision to the Ontario Court of Appeal. She relied on the decisions in *Leibel* and *Birtzu*, arguing that her sister commenced her claim more than three years outside the two-year statutory period.

The Court did not accept this submission and distinguished the *Leibel* and *Birtzu* decisions, holding that in those cases, the *Limitations Act* did not apply because the applicants had clearly sought consequential relief in addition to a determination of the validity of the Will. In addition, the Court held that in *Leibel* the primary will of the deceased had been probated and that *Birtzu* had a similar fact pattern.

In contrast to those decisions, in *Piekut*, the sister challenging the codicils sought none of this consequential relief. The Court also noted that no one had done anything to propound the Will. In fact, it sat there for seven years, presumably because the siblings were all trying to work out their disagreements. Under those circumstances, the challenging sister was entitled to seek declaratory relief, simply to establish the validity, or lack thereof, of the codicils in order to define the rights of the parties in order to avoid future disputes.

Similar to the ruling in *Piekut*, in [Bristol v. Bristol](#),²⁹ the Ontario Superior Court of Justice released a decision which dealt with the question of what constituted a "proceeding" pursuant to the [Limitations Act, 2002](#).

In that case, the Respondent brought a motion to dismiss a Notice of Application as well as an ancillary Notice of Objection on the grounds that the Application was statute-barred. The Applicant stated that the Objection and the accompanying Notice of Appearance were considered a "proceeding", which was filed within the limitation period.

In determining when the limitation period began to run, the Court reviewed the [Limitations Act, 2002](#), looking specifically at [section 4](#) (dealing with the basic limitation period of two years), and [section 5](#) (dealing with the discovery of a claim and the presumption that a person shall be assumed to have known of the claim on the day the act or omission took place).

29 *Bristol v. Bristol*, [2020 ONSC 1684](#).

There was no dispute that the Applicant knew of the contents of the 2004 Will by at least December 7, 2016, and certainly by the date of filing the Notice of Objection on December 30, 2016. As a result, the Court held that the Applicant's claims were discoverable as early as December 7 and as late as December 30, 2016, placing her in a position to move forward with her claims during the two-year limitation period.

In reaching its determination, the court looked at what constituted a "proceeding" within the meaning of the [Limitation Act](#), 2002, holding that [rule 1.03](#) of the [Rules of Civil Procedure](#),³⁰ defines a "proceeding" as either an action or an application. As a result, the Court found that the Application could not stand for a claim of declaratory relief as the relief sought by the Applicant was truly substantive and consequential.

EXTENSION OF THE LIMITATION PERIOD DUE TO FRAUD

In [Ntakos Estate v. Ntakos](#),³¹ the Ontario Court of Appeal dealt with an appeal of a motion judge's dismissal of two actions and an application pursuant to a motion for summary judgment. The motion judge found the proceedings were an abuse of process but also, that the appellants had previously released their claims against the respondents, and that the claims were barred by statutory limitation periods. The decision is important for it takes a close look at whether the limitation period could be extended due to discoverability of fraudulent concealment.

On appeal, the appellants argue that the motion judge erred by failing to consider recently discovered evidence of fraud. The Court of Appeal, however, determined that the motion judge made no errors but rather, carefully reviewed the history of the proceedings between the parties and found that there was no evidence that prior settlements or releases were obtained by fraud.

The motion judge correctly found that the Estate Action was barred by the limitation period in [section 38\(3\)](#) of the [Trustee Act](#)³², which runs for "two years from the death of the deceased", which was two years after the date of the Deceased on October 5, 2004. The motion's judge also acknowledged that while fraudulent concealment could toll the limitation period, the Estate had not pleaded or put forward any evidence of fraudulent concealment.³³

In [Shannon v. Hrabovsky](#),³⁴ Justice Wilton-Siegel of the Ontario Superior Court of Justice held that the

30 *Rules of Civil Procedure*, [R.R.O. 1990, Regulation 194](#).

31 *Ntakos Estate v. Ntakos*, [2022 ONCA 301](#).

32 *Trustee Act*, [R.S.O. 1990, c. T.23](#).

33 See *Zeppa v. Woodbridge Heating & Air-Conditioning Ltd.*, [2019 ONCA 47](#), at [paras. 61-64](#), leave to appeal refused, [2019] S.C.C.A. No. 91.

34 *Shannon v. Hrabovsky*, [2018 ONSC 6593](#).

discoverability principle applies, and that the limitation period does not necessarily run from the date of death:

Accordingly, I conclude that each of *Leibel v. Leibel* and *Birtzu v. McCron* reach the conclusion that, while the limitation period in respect of a Will challenge is presumed to commence on the date of death of a testator/testatrix for the purposes of s. 4 of the Act, the “discoverability principle” is not ousted if the presumption is rebutted. The fact that a Will speaks from the date of death – that is, that the act upon which a Will challenge is based occurred on the date of death in the form of the effectiveness of the Will – does not necessarily imply that a claimant will have all the facts upon which such a Will challenge is based as of such date. Section 5(2) of the Act establishes a presumption which, if rebutted, brings in the operation of the “discoverability principle”.

I would add that, insofar as Greer J. addressed the date of death as the commencement of the limitation period under the Act, she appears to have done so in response to the applicant’s argument in *Leibel v. Leibel* that there was no limitation period whatsoever applicable to a Will challenge, rather than with a view to excluding the operation of the “discoverability principle”.³⁵

In 2024, the Ontario Court of Appeal dismissed an appeal from Justice Wilton-Seigel’s 2018 decision in *Shannon v. Hrabovsky*. The Court of Appeal considered [section 5](#) of the [Limitations Act](#), which provides that a claim is not discovered until the litigant first knew the nature of the loss suffered. The decision suggests that the applicant must have knowledge of both the existence of a Will and its contents before the two-year limitation period starts. The Court of Appeal stated that “*it would not have been reasonable for [the applicant] to commence litigation to challenge the validity of a will that she had never seen, and that might not exist.*”³⁶

Therefore, it cannot be said with certainty that there is a strict two-year limitation period (from the date of death) for all Will challenges. We will have to wait and see what our Ontario Court of Appeal says on this matter. Notwithstanding, it is generally prudent to bring a Will challenge in advance of the basic two-year limitation period.

EXCLUSIONS AND EXCEPTIONS

In addition to the ultimate limitation period and the treatment of minors and incapable persons, the

³⁵ *Ibid.* at [para 67](#).

³⁶ *Shannon v. Hrabovsky*, [2024 ONCA 120 \(CanLII\)](#) at [para 45](#).

[Limitations Act](#), 2002 features notable exclusions and exceptions. Having said that, the [Limitations Act](#), 2002 applies to all claims except those that are listed in [section 2](#) of the Act and where the limitation period is preserved by other statutes set out in the schedule to [section 19](#) of the Act.

[Section 2](#) of the [Limitations Act](#), 2002 states:

Application

[2. \(1\)](#) This Act applies to claims pursued in court proceedings other than,

- (a) proceedings to which the *Real Property Limitations Act* applies;
- (b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court;
- (c) proceedings under the *Judicial Review Offences Act*;
- (d) proceedings to which the *Provincial Offences Act* applies;
- (e) proceedings based on the existing aboriginal and treaty rights of the aboriginal peoples of Canada which are recognized and affirmed in section 35 of the *Constitution Act, 1982*; and
- (f) proceedings based on equitable claims by aboriginal peoples against the Crown. 2002, c. 24, Sched. B., s. 2 (1).

[Section 19](#) of the [Limitations Act](#), 2002 addresses the other statutes which contain limitation periods and how they should be applied. According to the section, unless a specific limitation period in another piece of legislation is set out in the Schedule, it will have no force and effect and the two (2) year limitation period and the ultimate 15-year limitation period will prevail.

The Schedule to the [Limitations Act](#), 2002 lists the following legislation that is applicable in the estates context and which will override the basic two-year limitation period:

- [Section 38\(3\)](#) of the [Trustee Act](#);³⁷
- [Sections 44\(2\)](#) and [47](#) of the [Estates Act](#);³⁸

37 *Trustee Act*, R.S.O. 1990, c. T.23; [Section 38 \(3\)](#) of the *Trustee Act* provides for a two-year limitation period from the date of the deceased's death for an estate trustee to sue for all torts or injuries to the deceased person or to the property of the deceased.

38 *Estates Act*, R.S.O. 1990, c. E.21; [Section 47](#) of the *Estates Act* provides that the limitation period in the *Trustee Act* will not apply where notice of a claim is provided to the estate trustee at any time prior to the date upon which the claim would be barred by the *Trustee Act*. Where an estate trustee has notice that a claim or demand has been made against the estate, sections 44 (liquidated claim) and 45 (unliquidated claim) permits the estate trustee to serve a Notice of Contestation of the Claim.

- [Section 17\(5\)](#) of the [Estates Administration Act](#),³⁹
- [Sections 6\(10\)](#) and [7\(3\)](#) of the [Family Law Act](#),⁴⁰ and
- [Section 61](#) of the SLRA.

RELATED ESTATE CLAIMS

It is important to note that there are different limitation periods for different claims against an estate, including for dependant's support under the SLRA and [Family Law Act](#) elections.

For dependant's support claims, [section 61](#) of the SLRA provides that an application must be made within 6 months from the issuance of the Certificate of Appointment of Estate Trustee. Notwithstanding the six-month limitation period, [section 61\(2\)](#) of the SLRA also provides that the court, at its discretion, may allow an application to be made at any time with respect to any portion of the estate that remains undistributed at the date of the application. Accordingly, an application technically may be made beyond the six-month period if estate assets still exist, and with leave.

For elections under the [Family Law Act](#), [section 6\(10\)](#) provides that the election and corresponding application strictly must take place within 6 months of the spouse's death, unless the court grants an extension of that time.

LIMITATION PERIODS AND EQUITABLE CLAIMS

Before the arrival of the [Limitations Act, 2002](#), there was no limitation period in which to bring equitable claims. The 2012 Ontario Court of Appeal decision in [Boyce v. Toronto Police Services Board](#),⁴¹ held that the [Limitations Act, 2002](#), includes actions in equity.

Since the decision in *Boyce*, there have been several cases that have applied the two-year limitation period to equitable claims. This limitation period was confirmed by the Court of Appeal in the case of [McConnell v. Huxtable](#)⁴² where the court noted that the various sections of the legislation point "unequivocally" to the Legislature's intent to apply the Act to equitable claims, "unless the claim falls within one of the exceptions." For example, [section 2\(1\)](#) excludes proceedings to which the [Real](#)

39 [Estates Administration Act, R.S.O. 1990, c. E.22](#); [Section 17](#) of the [Estates Administration Act](#) governs the powers of estate trustees for selling and conveying real estate and governs the limitation period for distribution of the estate by court order.

40 [Family Law Act, R.S.O. 1990, c. F.3](#); Section 7 (3) of the [Family Law Act](#) sets out a 6-month limitation period (commencing with the other spouse's date of death) for the surviving spouse to make an election.

41 [Boyce v Toronto Police Services Board, 2012 ONCA 230](#), leave to appeal dismissed [2012 CanLII 66225](#) [**"Boyce"**].

42 [McConnell v. Huxtable, 2014 ONCA 86](#).

[Property Limitations Act](#)⁴³ applies.

The Ontario Court of Appeal concluded that:

[a] claim for equitable relief, including a claim based on unjust enrichment, fits within the broad definition of “claim” in [s.1](#) of the [Limitations Act, 2002](#) as a “claim to remedy an injury, loss or damage that occurred as a result of an act or omission”. Since equitable claims are covered by the Act, there is no statutory gap. Thus, s. 4 of the Act applies and a proceeding “shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered”.

The Ontario Court of Appeal stated that there is a general two-year limitation period in the [Limitations Act, 2002](#) that applies to equitable claims.⁴⁴

The exception to this two-year limitation period are equitable claims against real property. The limitation period for equitable claims against real property is ten-years from the date of discovery, and is contained in the [Real Property Limitations Act](#):

Refusing relief because of acquiescence or otherwise

2 Nothing in this Act interferes with any rule of equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring an action is not barred by virtue of this Act.

Limitation where the subject interested

4 No person shall make an entry or distress, or bring an action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom the person making or bringing it claims, or if the right did not accrue to any person through whom that person claims, then within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to the person making or bringing it.

In [McConnell v. Huxtable](#), the Ontario Court of Appeal stated:

The plain words of the section, “action to recover any land”, seem to apply comfortably to the applicant’s claim in this case. The rest of the *Real Property Limitations Act* talks about various kinds of claims other than trust claims but does not indicate any intention

⁴³ *Real Property Limitations Act*, [RSO 1990, c L.15](#).

⁴⁴ *Alguire v The Manufacturers Life Insurance Company (Manulife Financial)* [2018 ONCA 202](#) at [para 26](#).

that constructive trust claims are not properly within the meaning of section 4 [...] **A ten year period for constructive trust claims seeking ownership of land is not inconsistent with the rest of the *Real Property Limitations Act* or with the general scheme of the *Limitations Act, 2002*, which expressly defers to the *Real Property Limitations Act*.**

The decision in [McConnell v. Huxtable regarding the ten-year limitation period for equitable claims against real property was](#) followed by the Ontario Superior Court in [Wilkinson v. The Estate of Linda Robinson](#).⁴⁵

TOLLING AGREEMENTS

Ontario's limitation laws are particularly strict. While there is some flexibility in discoverability, sometimes there is simply not enough time to adequately bring a legal claim. Often this is because the parties need more time to prepare or because they are attempting to resolve their dispute through negotiations or with the help of an independent third party. When this occurs, lawyers may often pursue the ability to create a standstill agreement to 'stop the clock' and preserve a client's right to bring a legal action.

These agreements, often referred to as 'tolling agreements' can serve to suspend the running of the limitation period as provided by [sections 11](#) and [22](#) of the [Limitations Act, 2002](#). Parties entering into these types of agreements, however, must exercise great care and caution. These agreements require clear language about the parties' mutual intentions and the agreements intended effect on limitation periods. Lawyers drafting a tolling agreement must also be aware of the specifics of [sections 11](#) and [22](#) of the [Limitations Act, 2002](#).

The 2012 Ontario Court of Appeal decision in the case of [Hamilton \(City\) v. Metcalfe & Mansfield Capital Corp.](#)⁴⁶ provides a helpful analysis of what constitutes an agreement to toll a limitation period.

In *Mansfield*, the Court of Appeal held that if a party is entering into an agreement to temporarily suspend the limitation period, the agreement must be bilateral, it must provide for an exchange of consideration (in the case of a mere promise to forbear),⁴⁷ and it must be clear in expressing its intent to suspend the limitation period. To achieve such an agreement, the Court noted three ways in which a limitation period may be suspended by an agreement:

45 [Wilkinson v. The Estate of Linda Robinson, 2020 ONSC 91 \(CanLII\)](#).

46 [Hamilton \(City\) v. Metcalfe & Mansfield Capital Corp, 2012 ONCA 156](#).

47 A forbearance agreement is an acknowledgment that a lender has the right to enforce its security at a time when a borrower has defaulted under the terms of a credit agreement but will 'forbear' (or refrain from doing so) for a period of time, based on the considerations laid out in the forbearance agreement.

1. Through the application of the common law: a tolling agreement is enforceable in a typical creditor-debtor situation where consideration provided by the debtor in exchange for the creditor's promise to forbear from bring a legal action;
2. Pursuant to [section 11](#) of the [Limitations Act, 2002](#): this provision provides that parties may enter into an agreement to suspend the limitation period while an **independent third party attempts to resolve the claims**; and
3. Pursuant to [section 22](#) of the [Limitations Act, 2002](#): this provision provides that parties may enter into a specific agreement to suspend the limitation period.

In the 2013 Ontario Court of Appeal decision in [Sandro Steel Fabrication Ltd. v. Chiesa](#),⁴⁸ the Court dismissed an appeal of a Superior Court of Justice ruling that an agreement to mediate the claims suspended the running of a relevant limitation period as provided by [section 11](#) of the [Limitations Act, 2002](#). The Court was careful, however, not to endorse what the appellant felt was a suggestion, by the motions court, that a [section 11](#) suspension of the limitation period would apply even where the existence of an agreement to mediate was “ambiguous.” As previously discussed in Chapter Four, mediation is not only a significant aspect of Estate litigation but also, mandatory in in Toronto, Ottawa, or Essex County (Windsor area) pursuant to [Rule 75.1.02\(1\)\(a\)](#) of the [Rules of Civil Procedure](#).

The Ontario Court of Appeal decision in [PQ Licensing S.A. v. LPQ Central Canada Inc.](#)⁴⁹ weighed in on an appeal in which the appellant argued that an arbitrator erred when finding that a mediation provision in a contract “tolled” the applicable limitation period pursuant to [section 22](#). The Court of Appeal, in dismissing the appeal, held that:

Although the arbitrator used the term “tolling” on more than one occasion in his discussion of when the claim was discovered and the limitation period began to run, it is clear from his reasons that he was not applying s. 22 of the Limitations Act, nor was he invited to do so. Rather, his conclusion was that mediation was a condition precedent to litigation that had the effect of “suspending” (para. 164) or “tolling” (para. 140) the running of the limitation period under s. 5(1)(a)(iv).⁵⁰

The relevant sections of the [Limitations Act, 2002](#):

Attempted resolution

11 (1) If a person with a claim and a person against whom the claim is made have agreed

48 [Sandro Steel Fabrication Ltd. v. Chiesa](#), [2013 ONCA 434](#).

49 [PQ Licensing S.A. v. LPQ Central Canada Inc.](#), [2018 ONCA 331](#) [PQ Licensing S.A.].

50 *Ibid* at [para 41](#).

to have an independent third party resolve the claim or assist them in resolving it, the limitation periods established by sections 4 and 15 do not run from the date the agreement is made until,

- (a) the date the claim is resolved;
- (b) the date the attempted resolution process is terminated; or
- (c) the date a party terminates or withdraws from the agreement. 2002, c. 24, Sched. B, s. 11.

Limitation periods apply despite agreements

22 (1) A limitation period under this Act applies despite any agreement to vary or exclude it, subject only to the exceptions in subsections (2) to (6). 2006, c. 21, Sched. D, s. 2.

Exception

(2) A limitation period under this Act may be varied or excluded by an agreement made before January 1, 2004. 2006, c. 21, Sched. D, s. 2.

Same

(3) A limitation period under this Act, other than one established by section 15, may be suspended or extended by an agreement made on or after October 19, 2006. 2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (1).

Same

(4) A limitation period established by section 15 may be suspended or extended by an agreement made on or after October 19, 2006, but only if the relevant claim has been discovered. 2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (1).

Same

(5) The following exceptions apply only in respect of business agreements:

1. A limitation period under this Act, other than one established by section 15, may be varied or excluded by an agreement made on or after October 19, 2006.
2. A limitation period established by section 15 may be varied by an agreement made on or after October 19, 2006, except that it may be suspended or extended only in accordance with subsection (4). 2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L,

s. 4 (1).

Definitions

(6) In this section,

“business agreement” means an agreement made by parties none of whom is a consumer as defined in the *Consumer Protection Act, 2002*; (“accord commercial”)

“vary” includes extend, shorten and suspend. (“modifier”)

2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (2).

CONCLUDING COMMENTS

Not all relevant limitation periods can be found in one place. Therefore, it is important the lawyers and clients alike are aware of all possible sources for limitation periods.

Historically, limitation periods in estates and trusts litigation were relatively unimportant. The amendment to the [Limitations Act, 2002](#), however, significantly altered this understanding and cast new light on the importance of immediately assessing every case from the perspective of limitations.

Best practices include establishing which apply, and diarizing all potential limitations when the file is opened. Counsel defending a claim must also be aware of potential defenses based on a missed limitation period. Given the uncertainty as to some of applicable limitation periods, the best course of action will usually be to commence a claim or enter into a tolling agreement if appropriate in the circumstances and cautiously consider same within 2 years of the date of death.

CHAPTER 11: COSTS

INTRODUCTION

Estate litigation can and does, involve complex facts, situations, and emotions and parties can quickly get caught up in the “blame game.” Sometimes, the costs of pursuing expensive litigation can be overlooked in the heat of the moment. However, with the evolving law surrounding costs in estates, they should be top of mind for both clients and lawyers throughout an estate dispute. The conduct of the parties and the steps taken can have an impact on how costs are apportioned once a decision is rendered.

This chapter will provide an overview of costs in estate litigation and related litigation by starting with a summary of the historical approach to costs, followed by the modern approach, applicable case law, and other cost considerations (such as the impact of Rule 49 Offers and Rule 57).¹

THE HISTORICAL APPROACH

Dating back to the 1800’s, the historical practice of English courts was to award costs of all parties to an estate litigation matter payable out of the assets of the estate. This practice developed due to the public policy consideration for English courts to give effect to valid Wills that reflected the intentions of a competent testator/testatrix. The English courts awarded the costs of all parties to be paid out of the estate where the litigation arose as a result of: (1) an ambiguity or omission in the testator/testatrix’s Will, or other conduct; or (2) there were reasonable grounds upon which to question the Will’s validity.

The policy concerns for this approach evolved from a testator/testatrix’s own actions which gave rise to the litigation. It seemed fair for the testator/testatrix to be responsible for the costs and as such they were ordered payable out of the estate, rather than borne by the parties. Additionally, the courts have always had the responsibility to ensure that estates are properly administered and that only valid Wills are admitted to probate. However, as estate litigation has evolved, so too has the approach to costs. With the guarantee that a litigant’s costs would be paid through the assets of the estate, there was no incentive for parties to act reasonably or proportionately. Therefore, to deter improper behaviors, courts have taken a “modern approach” to costs in estate litigation by implementing the usual “loser pays” approach in civil litigation.

¹ *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194, Rule 49, Rule 57](#) (the “**Rules**”).

THE MODERN APPROACH

The change began with the decision of the Ontario Court of Appeal in [McDougald Estate v. Gooderham](#).² In that decision, Gillese J.A., clarified on behalf of the Ontario Court of Appeal that the “historical approach” to costs awards in estate litigation has been displaced by the “modern approach.”

Gillese J.A., explained that the modern approach correctly permitted courts at first instance to scrutinize the litigation and, unless the court found that one or more of the public policy considerations applied, costs rules in civil litigation would follow. Public policy considerations include instances where:

- Disputes arise out of ambiguity, omissions in a testator/testatrix’s will or other conduct from the testator/testatrix; or
- There are reasonable grounds to question the will’s validity.³

The modern approach assists the court in ensuring that only valid Wills executed by a competent testator/testatrix are propounded and that estates are protected from depletion by unwarranted litigation. Lastly, Her Honor affirmed that “[g]one are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation”.⁴

In [Salter v. Salter Estate](#)⁵, Brown J. (as he then was) was not impressed that the parties were treating the assets of the estate “as a kind of ATM bank machine for which withdrawals automatically flow to fund litigation.”⁶ His Honor further explained that the “loser pays” principle of civil litigation brings needed discipline to the parties and that “given the charged emotional dynamics of most pieces of estate litigation, an even greater need exists to impose the discipline of the general costs principle of ‘loser pays’ in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes.”⁷

Shortly thereafter, Strathy J., (as he then was), held in [Zimmerman v. Fenwick](#),⁸ that the following principles were appropriate in determining the issue of costs sought by the objectors to the conduct of the estate trustee’s administration of the estate:

1. pursuant to [s. 131](#) of the [Courts of Justice Act](#), the costs of a proceeding are in the discretion of the court and the court may determine by whom and to what extent costs

2 [McDougald Estate v. Gooderham](#), [2005 21091 ONCA \(CanLII\)](#) (“**McDougald Estate**”).

3 This includes the main grounds for a will challenge including undue influence and lack of testamentary capacity.

4 [McDougald Estate](#) at [para 85](#).

5 [Salter v. Salter Estate](#), [2009 CanLII 28403 \(ON SC\)](#) (“**Salter Estate**”).

6 *Ibid* at [para 6](#).

7 *Ibid* at [para 6](#).

8 [Zimmerman v. Fenwick](#), [2010 ONSC 3855](#) (“**Zimmerman**”).

should be paid;

2. estate litigation, like any form of civil litigation, operates subject to the general civil litigation costs regime;
3. as a general proposition, the principle that the “loser pays” applies to estate litigation;
4. in the determination of costs, the court must have regard to the factors set out in [Rule 57](#) of the [Rules of Civil Procedure](#), R.O. 1990, Reg. 194, but, at the end of the day, the court’s responsibility is to make an award that is fair and reasonable, having regard to all the circumstances, including the reasonable expectations of the parties;
5. the court’s discretion to award costs on a full indemnity basis is preserved by [Rule 57.01\(4\)\(d\)](#); and,
6. full indemnity costs are reserved for those exceptional circumstances where justice can only be done by complete indemnity.⁹

In [Sawdon Estate v. Sawdon](#),¹⁰ Gillese J.A., with Strathy J.A., concurring, combined the decisions in *McDougald Estate* and *Zimmerman*, respectively, to further clarify the modern approach to costs in estate litigation. The following was stated by the Court of Appeal:

... the court is to carefully scrutinize the litigation and, unless it finds that one or more of the relevant public policy considerations apply, it shall follow the costs rules that apply in civil litigation. That is, the starting point is that estate litigation, like any other form of civil litigation, operates subject to the general civil litigation costs regime established by [section 131](#) of the [Courts of Justice Act](#), R.S.O. 1990, c. C.43 and [Rule 57](#) of the [Rules of Civil Procedure](#), R.R.O. 1990, Reg. 194, except in those limited circumstances where public policy considerations apply.

The public policy considerations at play in estate litigation are primarily of two sorts: (1) the need to give effect to valid wills that reflect the intention of competent testator/testatrix; and (2) the need to ensure that estates are properly administered.¹¹

Gillese J.A., also noted in the decision of *Sawdon Estate* that there was nothing in the jurisprudence that would prevent a court from making a “blended costs” order from both the unsuccessful party and the estate.¹² The court noted that the availability of a blended costs order gives the court the

⁹ *Zimmerman* at [para 4](#).

¹⁰ *Sawdon Estate v. Sawdon*, [2014 ONCA 101](#) (“**Sawdon Estate**”).

¹¹ *Ibid* at [para 84](#).

¹² *Ibid* at [para 93](#).

ability to respect the public policy considerations that may be involved and to maintain the discipline of which *Brown J.* clarified in *Salter Estate*.¹³

With the modern approach, a shift has emerged with an increase in cost consequences being borne by the parties (or even counsel in some cases) and the estate being shielded from payment of costs in certain situations.

The 2020 decision of [Magnotta v. Magnotta](#),¹⁴ exemplifies the modern approach taken by courts regarding cost awards. In *Magnotta*, the deceased passed away leaving behind his wife and his mother. The deceased died intestate, and his entire estate passed to his wife, and she applied for a Certificate of Appointment of Estate Trustee without a Will. The mother objected to the certificate on the basis that the wife was threatening to exhume the remains of the deceased from the family crypt. The mother subsequently withdrew her Notice of Objection. The court found there had been no reason to file a Notice against the wife and awarded costs personally against the mother rather than out of the estate of the deceased.

WHEN SHOULD THE ESTATE PAY COSTS?

Even with the new modern approach to costs in estate litigation, the courts still have discretion to award costs out of the estate, especially when the problems giving rise to litigation were caused by the testator/testatrix.

In cases where the testator/testatrix caused the dispute by ambiguous drafting or careless reading of the will, or by making bequests that are calculated to cause conflict among beneficiaries, it can be appropriate to require the estate to bear the costs of resolving the conflict.¹⁵ Otherwise, estate trustees might decline to accept appointment, or might avoid legal proceedings that are needed to ensure that the estate is properly administered.¹⁶

If there are reasonable grounds to question the execution of the Will, or to question whether the testator/testatrix had testamentary capacity when making the Will, it would be in the public's interest to resolve this question without cost to those questioning the Will's validity.¹⁷ Costs have also been awarded out of the estate where the testator/testatrix destroyed his Will, but it was not clear whether it was done intentionally or accidentally.¹⁸

13 *Ibid* at [para 97](#).

14 *Magnotta v. Magnotta*, [2020 ONSC 316 \(CanLII\)](#).

15 *Arvanitis v. Levers*, [2017 ONSC 3758](#), at [para 80](#).

16 *Arvanitis*, *supra*, citing *Penney Estate v. Resetar*, [2011 ONSC 575 \(CanLII\)](#), at [para 19](#).

17 *Sawdon Estate*.

18 *Barry v. Estabrooks Estate*, [2015 NBBR 131](#).

Another example of costs attributable to the testator/testatrix's actions, which contributed to the necessity of the litigation, includes where the testator/testatrix did not execute a Will until terminally ill in hospital. The court has stated that if the testator/testatrix knows the consequences of not making a Will but still procrastinates until extremely ill and in hospital, the testator/testatrix should understand the circumstances could lead to an understandable Will challenge.¹⁹

In dependant's support claims under the [Succession Law Reform Act](#),²⁰ where a court has concluded that a dependant is entitled to support, costs of the dependant and perhaps others may be ordered to be paid out of the estate.²¹

Generally, estate trustees are entitled to be indemnified for all reasonably incurred costs, including legal costs of an action, to the extent that they are not recovered from another party.²² That general principle is subject to the overriding proviso that the estate trustees have acted reasonably. Where they have acted unreasonably, the trustees may well not recover their costs from the estate.²³

BLENDING COSTS ORDERS

Again, in *Sawdon Estate*, the Court of Appeal for Ontario suggested that there was nothing in the jurisprudence that would prevent a court from making a "blended costs" award from both the unsuccessful party and the estate. The court ordered that a beneficiary, who unsuccessfully objected to the estate trustee's passing of accounts, was liable to pay the estate trustee's partial indemnity costs and the estate was liable to indemnify the estate trustee for his costs not recovered from the unsuccessful beneficiary.

In [Bank of Nova Scotia v Kuklis](#),²⁴ the court interpreted the process outlined in *Sawdon* as a three-step process for costs awards in estate litigation:

1. The first step is to determine which, if any, individual is personally liable for the costs of the estate trustee.
2. The second step is to determine the scale and quantum of costs to which the estate trustee is entitled and the apportionment of those costs as between the individuals adverse to the estate trustee.
3. The final step is to determine whether the circumstances warrant a blended order. If so,

¹⁹ *Babchuk v. Kutz*, [2007 ABQB 88 \(CanLII\)](#).

²⁰ *Succession Law Reform Act*, [R.S.O. 1990, c. s. 26](#) ("**SLRA**").

²¹ *Morassut v. Jaczynski Estate*, [2015 ONSC 502](#).

²² *Sawdon Estate* at [para 82](#).

²³ *Brown v. Rigsby*, [2016 ONCA 521](#) at [para 14](#).

²⁴ *Bank of Nova Scotia v Kuklis*, [2017 ONSC 3069](#).

then the difference, if any, between the estate trustee's full reasonable costs and the costs awarded against one or more of the individuals adverse to the estate are to be paid from the estate.²⁵

A "blended costs" order was made in, the [Estate of Irmgard Burgstaler \(disability\)](#).²⁶ Full indemnity costs were awarded to the winning party in the estate litigation. The structure of payment was such that the losing party was ordered to pay partial indemnity costs to the winning party and the difference was to be paid out of the assets of the estate. The court explained that blended costs awards can give sufficient recognition to the general cost principle of "loser pays" and the "discipline" that the general principle is intended to encourage.

STATUTORY GUIDANCE: RULE 57 FACTORS

In addition to common law, cost awards are a product of legislation. In Ontario, [section 131\(1\)](#) of the [Courts of Justice Act](#)²⁷ and [Rule 57](#) of the [Rules of Civil Procedure](#) bestow discretion upon the court to determine by whom, and to what extent the costs of a proceeding shall be paid:

Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the cost shall be paid.²⁸

In the determination of costs in civil proceedings, including estate litigation, the court may have regard to the factors enumerated in [Rule 57](#), listed as follows:

- (a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- (c) the amount claimed and the amount recovered in the proceeding;
- (d) the apportionment of liability;
- (e) the complexity of the proceeding;
- (f) the importance of the issues;

²⁵ *Ibid.*

²⁶ *In The Estate of Irmgard Burgstaler (disability)*, [2018 ONSC 4725 \(CanLII\)](#).

²⁷ *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#).

²⁸ *Ibid* at [s.131](#).

- (g) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (h) whether any step in the proceeding was,
 - (i) improper, vexatious or unnecessary, or
 - (ii) taken through negligence, mistake or excessive caution;
- (i) a party's denial of or refusal to admit anything that should have been admitted;
- (j) whether it is appropriate to award any costs or more than one set of costs where a party,
 - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
 - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;
- (k) whether a party unreasonably objected to proceeding by telephone conference or video conference under [rule 1.08](#); and
- (l) any other matter relevant to the question of costs.²⁹

PROPORTIONALITY

Proportionality is codified in the [Rules of Civil Procedure](#):

In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.³⁰

In other words, in the cost context, proportionality relates to the amount of costs sought relevant to the issue at stake in the litigation. Many of the factors in Rule 57 inform and influence the overall concept of proportionality.

The Toronto Estates List [Practice Direction](#) also refers to “proportionality”³¹ under the “Part II: Principle Guiding the Estates List”:

2.a. The time and expense devoted to a proceeding should be proportionate to what is at

²⁹ [Rule 57.01 \(1\)](#) of the *Rules*.

³⁰ [Rule 1.04\(1\) \(1.1\)](#) of the *Rules*.

³¹ Consolidated Practice Direction Concerning the Estates List in the Toronto Region: accessible at <https://www.ontariocourts.ca/scj/practice/regional-practice-directions/estates/>.

stake in the proceeding.³²

Case law has addressed proportionality of costs in estate litigation. In [Grier \(Litigation Guardian of\)](#),³³ the court stated that, by definition, proportionality balances two factors: the issue at stake; and the resources expended. In the case of, [Grieve v. Parsons](#),³⁴ the Ontario Superior Court of Justice stated the following when assessing proportionality in costs:

The total costs must be proportional to the amount awarded but costs may exceed the award of damages in appropriate circumstances. “Proportionality should not override other considerations, and determining proportionality should not be a purely retrospective inquiry based on the award”: *Doyle v. Zochem Inc.*, [2017 ONSC 920](#) at [para 26](#).³⁵

PARTIAL INDEMNITY, SUBSTANTIAL INDEMNITY OR FULL INDEMNITY?

PARTIAL INDEMNITY

[Rule 1.03\(1\)](#) defines “partial indemnity costs” as “costs awarded in accordance with Part I of Tariff A”.³⁶ Tariff A provides that costs will be considered using the factors enumerated in [Rules 57.01.1](#) from the discretion awarded by the court under the [Courts of Justice Act](#).³⁷ The “normal rule” according to [Neuberger v York](#)³⁸ is when the courts award a successful party costs on a partial indemnity basis. Thus, legal issues that cause “sufficient novelty to warrant a departure from the normal rule” would be awarded costs on a greater scale than partial indemnity.³⁹ In the [Estate of Diane Tsialtas v. Munroe](#),⁴⁰ it was stated that exact percentages regarding full indemnity cost awards are not outlined in the [Rules of Civil Procedure](#), however, the figure ranges from more than 50% but less than 100%. According to the Ontario Superior Court, partial indemnity rates are “generally considered to be in the range of 55 to 60% of reasonable actual rates”.⁴¹

The 2023 decision, [Canada v. Bowker](#),⁴² engages in an interesting discussion regarding partial indemnity rates:

“Traditionally partial indemnity costs fall closer to 50% while according to another text

32 *Ibid.*

33 *Grier (Litigation Guardian of)*, [2016 ONSC 6329](#).

34 *Grieve v. Parsons*, [2018 ONSC 1905](#).

35 *Ibid.*

36 [Rule 1.03\(1\)](#) of the Rules.

37 *Ibid* at Tariff A.

38 *Neuberger v. York*, [2016 ONCA 303 \(CanLII\)](#) at [para 18](#).

39 *Ibid* at [para 16](#).

40 *Estate of Diane Tsialtas v. Munroe*, [2022 ONSC 1207 \(CanLII\)](#).

41 *Sabeen v. Aikman*, [2016 ONSC 7010 \(CanLII\)](#) at [para 18](#) (“*Sabeen*”).

42 *Canada v. Bowker*, [2023 FCA 133 \(CanLII\)](#) at [para 19](#).

– Linda S. Abrams & Kevin Patrick McGuinness, *Canadian Civil Procedure Law*, 2nd ed. (Markham, Ontario: LexisNexis Canada, 2010), the range of partial indemnity in the Ontario courts falls between 40% and 60% of solicitor-client costs: Decision at para. 28. It can be seen from this that there is no consensus in the field as to the breadth of the range, particularly at the upper end.”⁴³

The difficulty in finding a precise or consistent percentage of partial indemnity costs in precedents may fall to the fact that courts must consider a myriad of factors under Rule 57 when fixing costs.

SUBSTANTIAL INDEMNITY

Costs on a substantial indemnity scale are generally appropriate in two circumstances:

- (1) where there has been an offer to settle under [Rule 49.10](#) (where an award of substantial indemnity costs are explicitly authorized); or
- (2) where the unsuccessful party has engaged in behavior worthy of sanction.⁴⁴

“Substantial indemnity costs” are defined as “costs awarded in an amount that is 1.5 times what would otherwise be awarded in accordance with Part I of Tariff A.”⁴⁵ The court in, [Sabean v Aikman](#),⁴⁶ commented that the “starting point for determining whether costs should be awarded on an elevated scale is that substantial indemnity costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct” by one of the parties.⁴⁷ Additionally, substantial indemnity costs are “generally considered to be in the range of 85% of reasonable actual rates.”⁴⁸

FULL INDEMNITY

[Rule 57.01\(4\)\(d\)](#) provides for the court to award costs in an amount that represents a full indemnity.⁴⁹ “Full indemnity costs” is not a defined term but is generally considered to be a complete reimbursement of all amounts a client has had to pay their lawyer in relation to the litigation. In assessing full indemnity costs, the court must still consider the overriding principles that a costs award must be fair and reasonable, and that the reasonable expectations of the unsuccessful party are one of the factors in determining what is fair and reasonable.

43 *Ibid* at [para 19](#).

44 *Davies v. Clarington (Municipality) et al.*, [2009 ONCA 722](#).

45 Morden & Perell – *The Law of Civil Procedure in Ontario*, 4th Edition.

46 *Sabean*.

47 *Young v. Young*, [1993 SCC 34 \(CanLII\)](#).

48 *Ibid*.

49 [Rule 57.01\(4\)\(d\)](#) of the *Rules*.

The 2023 decision, [Taetz v. Mikolajewski](#),⁵⁰ involved the respondent, who in his position as estate trustee, used \$2,500 of the estate's funds for personal use. The court found that the estate trustee did not act reasonably and thus failed to honor his fiduciary duty to the estate. On this basis, the courts awarded the applicant her costs on a full indemnity basis.

The decision of [Fuhgeh v. Stewart](#),⁵¹ addresses the important distinction between substantial indemnity costs and full indemnity costs:

There is a significant and important distinction between full indemnity costs and substantial indemnity costs. An award of costs on an elevated scale is justified in only very narrow circumstances – where an offer to settle is engaged or where the losing party has engaged in behavior worthy of sanction: *Davies v. Clarington (Municipality)* [citations omitted] at para. 28. Substantial indemnity costs is the elevated scale of costs normally resorted to when the court wishes to express its disapproval of the conduct of a party to the litigation. It follows that conduct worthy of sanction would have to be especially egregious to justify the highest scale of full indemnity costs.

SECURITY FOR COSTS

Under [Rule 56](#) of the *Rules*, the court may make an order of security for costs. An order of security for costs will be made where:

- a) the plaintiff or applicant is ordinarily resident outside Ontario;
- b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
- c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain unpaid in whole or in part;
- d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;
- e) there is good reason to believe that the action or application is frivolous and vexatious, and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

⁵⁰ [Taetz v. Mikolajewski, 2023 ONSC 5143 \(CanLII\)](#).

⁵¹ [Fuhgeh v. Stewart, 2014 ONSC 2912 at para 12](#).

- f) a statute entitles the defendant or respondent to security for costs.

The party against whom the order of security for costs is made will be required to deposit security to the court to proceed in the litigation unless the court orders otherwise. The court retains a discretion to vary the amount of security at any time.

RULE 49 OFFERS TO SETTLE AND COST CONSEQUENCES

[Rule 49](#) applies to estate litigation proceedings and it can have significant cost consequences. Under the [Rule 49](#) regime, if a party to a proceeding makes an offer to settle that meets the formal requirements and the offer is rejected by the opposing party, costs consequences will likely follow depending upon the result of the proceeding as measured against the terms of the offer. According to the *Rules of Civil Procedure*, an offer made under [Rule 49](#):

- i. Must be in writing;
- ii. Must be served;
- iii. Must be made after the commencement of proceedings and at least seven days before the commencement of the hearing;
- iv. Must not be withdrawn and must not expire before the commencement of the hearing.

Whether or not specific “[Rule 49](#)” offers are made, if reasonable attempts at settlement are rejected by the opposite party, the court may be inclined to consider such conduct unreasonable and penalize the party with liability for costs. Therefore, if a lawyer is of the view that the position of the opposite party has little merit, the lawyer should advise the opposite party that if they continue the meritless litigation, an order will be sought directing the costs of the proceedings to be paid by that party.

In [Singh v Singh](#),⁵² the court asserted it may not view a non-severable offer made between multiple plaintiffs as a reasonable attempt to settle under [rule 49](#). The rationale being it would be “unfair to impose cost consequences on a plaintiff who was unable to accept the offer because their co-plaintiffs will not and the defendant has not allow[ed] for severability.”⁵³ Thus, such an offer does not qualify under [rule 49](#), and adverse cost consequences are not engaged for the plaintiffs, as supported by [Yelland v. Sunrise et al.](#)⁵⁴

In [Dewaele v. Roobroeck](#),⁵⁵ three siblings, one daughter (the “**Applicant**”) and two sons (the

52 [Singh v Singh](#), 2022 ONSC 4763 (CanLII).

53 Mary Simms “*There is no such uncertainty as a sure thing*”: The shifting focus of Rule 49 jurisprudence CANLII at page 8.

54 [Yelland v. Sunrise et al.](#), 2019 ONSC 2842 (CanLII).

55 [Dewaele v. Roobroeck](#), 2020 ONSC 7534 (“**Dewaele**”).

“**Respondents**”) were the sole beneficiaries and co-estate trustees of their late parents’ estate. The parties were unable to agree on the value of the estate assets, as well as how they should be distributed, despite the Applicant having obtained an appraisal. The Respondents disagreed with the valuation given to a collection of firearms. The Applicant sought an appraisal order after the Respondents refused to sign the Application for a Certificate of Estate Trustee with a Will (“**CAET**”), due to their disagreements on the value of the firearms. The court stated it was “unfair and unreasonable to ask the Applicant, without a complete list and valuation, to simply accept what she was being told either in her capacity as a co-trustee or as a beneficiary”.⁵⁶ Ultimately, the Respondents were ordered to sign the cheque for the estate administration tax and removed as co-estate trustees.

As per costs, the Applicant calculated her costs on the following basis:

- a) full indemnity costs of \$78,802.63, comprised of fees of \$66,057.50, plus disbursements and HST;
- b) substantial indemnity costs of \$71,335.13, (90% of the full indemnity fees), plus disbursements and HST; and
- c) partial indemnity costs of \$48,496.77 (65% of the full indemnity fees) plus disbursements and HST.

The Applicant sought an order that her costs be made payable on a full indemnity basis. The court made a blended cost award, ordering that the respondents pay \$60,000, and the remaining \$18,000 be payable by the estate. The court stated that the Respondents “deliberately interfered with the Applicant’s ability to complete the administration of the estates. But for the conduct of the respondents, no litigation would have been necessary.”⁵⁷ Citing, [Davies v. Clarington](#),⁵⁸ and, [Young v. Young](#).⁵⁹ the court found that such reprehensible behavior from the losing party could involve elevated cost awards. The court, in the Reasons, found that the respondents, to the detriment of the beneficiaries of the estate, had:

- i. not fulfilled their obligations as co- estate trustees;
- ii. preferred their own self-interest;
- iii. failed to comply with court orders, even orders made on consent;
- iv. refused to take any meaningful steps to facilitate the realization of the estate; and,

56 *Ibid* at [para 67](#).

57 *Dewaele v. Roobroeck*, [2021 ONSC 1604](#), at [para 21](#).

58 *Davies v. Clarington (Municipality) et al.*, [2009 ONCA 722 \(CanLII\)](#).

59 *Young v. Young*, [1993 CanLII 34 \(SCC\)](#), [1993] 4 SCR 3.

- v. by their conduct, brought the administration of the estate to a standstill. For those and other reasons set out in the Reasons, the respondents were removed as estate trustees.⁶⁰

In [Avdeeva v. Khousehaeh](#),⁶¹ [the court](#), awarded a portion of costs in the amount of \$135,242.58 against an estate trustee personally. The estate trustee’s conduct was labelled by the court as “scandalous and outrageous,”⁶² thus justifying a cost award on a substantial indemnity basis. The trustee exemplified this behavior on several occasions. First, the trustee asserted to the pre-trial judge that her documentary productions were complete. Thereafter, the trustee additionally submitted 147 documents and then refused to be examined on them, resulting in an adjournment of the trial.⁶³ Second, the trustee stated that she failed to produce such documents in a timely manner because “she did not know the issues in the action to enable her to determine relevance.”⁶⁴ The court rejected the trustee’s excuse. Third, the trustee failed to answer any questions during her examinations on the 147 documents. The courts frowned upon this behavior by stating this litigation tactic was not permitted. Lastly, the trustee raised issues that had already been dismissed by appeal and were thus considered *res judicata*. The actions conducted by the trustee were considered an abuse of process by the court.

As a public policy concern, the courts are weary of awarding costs to an estate trustee on a personal basis. Potential personal liability could disincentive individuals from accepting such a role. The court, citing [Moodie v. Toronto Transit Commission](#),⁶⁵ commented it will not make personal costs awards based on the rationale, “where a trustee began an action and prosecuted it in his or her own interest as a beneficiary under the will.”⁶⁶

The court carries the discretion to award costs personally where the estate trustee demonstrates reprehensible behavior or fails to act in the best interest of the estate.⁶⁷ Citing, [Craven v. Osidacz](#),⁶⁸ the court ruled that an; “executor was held personally liable because it advanced speculative and groundless defenses”. The estate trustee in *Avdeeva*, exhibited the same reprehensible behavior, and the court commented:

“If the Trustee is not held personally liable, she will have been able to litigate with impunity, taking no risk of loss or consequences for her actions in circumstances where she was

60 *Dewaele* at [para 20](#).

61 *Avdeeva v Khousehabeh*, [2023 ONSC 6402 \(CanLII\)](#) at [para 6](#).

62 *Ibid* at [para 21](#).

63 *Ibid* at [para 33](#).

64 *Ibid* at [para 34](#).

65 *Ibid* at [para 47](#).

66 *Ibid* at [para 47](#).

67 *Ibid* at [para 51](#).

68 *Craven v. Osidacz and Osidacz; and Craven v. Osidacz*, [2017 ONSC 4396 \(CanLII\)](#).

seeking to obtain a personal benefit for herself.”⁶⁹

The courts ordered costs against the estate trustee personally since their actions and behavior were against the best interest of the estate.

In [Di Nunzio v. Di Nunzio](#),⁷⁰ an appellant was able to successfully appeal a partial indemnity cost award of \$111,000 that was ordered against her by the application judge. Ms. Di Nunzio (the “**Deceased**”) had two daughters, the applicant, and the respondent. The deceased passed away from cancer in 2018, but less than one year before her death, the deceased executed a will in 2017 (the “**Will**”). The Deceased named the respondent as the sole trustee and beneficiary of her estate. The applicant sought to set aside the Will based on lack of requisite testamentary capacity to create a will, and undue influence. The application judge found in favor of the respondent. The court found that the Deceased had various reasons to exclude the applicant from her Will. This included the tumultuous relationship the deceased had with the applicant, as well as the applicant’s history of drug and alcohol abuse.

Given the success of the respondent, the court ordered costs of \$111,000 against the applicant on a partial indemnity basis. Additionally, the costs were to be paid by the applicant personally. Citing [McDougald Estate Gooderham](#),⁷¹ the court commented that unless a public policy consideration flowed from the application, costs were not payable by the estate. The court explained that it was following the modern approach of costs in estate litigation, where costs are no longer, by default, payable out of the estate. However, if the dispute emerged out of a public policy consideration, such as ambiguity in the testator/testatrix’s Will, are sufficient grounds to grant costs out of the deceased’s estate and there was no such public policy consideration regarding the current application.

The applicant appealed this cost decision. The applicant stated that the costs ought to be payable from the Deceased’s estate, as she raised issues involving valid public policy considerations. The court ruled in her favor, but not on the basis that her issues involved public policy considerations. Rather, the court asserted that the respondent raised triable issues warranting court scrutiny on the basis that the Deceased disinheriting her daughter raised potentially suspicious circumstances. Additionally, the court did not find that the applicant’s grounds were frivolous. The appellate court ordered that the applicant’s costs were paid personally, while the respondent’s costs were payable out of the estate.

69 *Ibid* at [para 54](#).

70 *Di Nunzio v. Di Nunzio*, [2022 ONCA 889](#).

71 *McDougald Estate v. Gooderham*, [2005 CanLII 21091 \(ON CA\)](#).

CONCLUDING COMMENTS

The prudent approach to estate litigation requires that the litigation be viewed not as one action, but as a series of investigations, considerations and decisions made by the parties. The inquisitorial approach directs the conduct in estate related applications. The court should consider whether, because of the information known by the litigants at each stage of investigation, a particular party should have proceeded to the next stage, thereby causing the incurrence of costs by both parties. The inherent nature of estate litigation means, often several claims are brought without the benefit of having been able to fully investigate the circumstances of the last will and testament of a deceased person. For this reason, many claims are not advanced or, alternatively, settled very early on. Estate litigation is a practice area which lends itself well to a mediated settlement.

Since the courts in Ontario have adopted the “modern approach” to estate litigation, clients should never expect that all costs, or indeed any, will be paid out of the assets of the estate. An order that costs of litigation are to be paid out of the assets of the estate is now more likely the exception. Stated best by our Ontario Court of Appeal in *McDougald Estate*: “Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.”⁷²

72 *Ibid* at [para 85](#).

APPENDIX 1: WEL RESOURCES

WEL PARTNERS BOOKS

WEL Partners have authored books which explore some of the specific topics discussed in this book. These publications have been updated for 2024 and can be found on our website in PDF format and are available as E-books on Apple Books, Amazon Kindle, and Kobo.

Visit our website resource centre to download a copy or find specific links to E-book sources:

<https://welpartners.com/resources/books>

1. Whaley Estate Litigation Partners on Elder Law
2. Whaley Estate Litigation Partners on Dependants' Support
3. Whaley Estate Litigation Partners on Powers of Attorney
4. Whaley Estate Litigation Partners on Guardianship
5. Whaley Estate Litigation Partners on Fiduciary Accounting



welpartners.com/resources/books

CHECKLISTS AND CHARTS

Additionally, WEL Partners have created several checklists and charts which can be found in our website resource centre: <https://welpartners.com/resources/practicechecklists>



welpartners.com/resources/practicechecklists