WILL CHALLENGES
&
RELATED ESTATE CLAIMS

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WEL PARTNERS
WHALEY ESTATE LITIGATION PARTNERS

WILL CHALLENGES AND RELATED ESTATE CLAMS

Contents

1. Estate Challenges

Rule 75 (Estates: Contentious Proceedings) and Rule 74 (Estates: Non-Contentious Proceedings)

A challenge to the validity of a Will is a legal proceeding which, in Ontario involves well established procedures set out in Rule 75 of the *Rules of Civil Procedure* (the *"Rules")*.[1]

Rule 75 provides the forum for: the formal proof of a testamentary instrument that is being put forward as the Last Will & Testament of the deceased person, proved in such manner as the court directs (rule 75.01); the proof of a lost or destroyed Will (Rule 75.02); and, the different methods of objecting to the issuance of a "Certificate of Appointment of Estate Trustee With or Without a Will", known as probate.

Rule 75 also provides for the procedure concerning claims against an estate, and the bringing of an application or a motion for directions. This rule is supplemented by the Practice Direction relevant to the applicable jurisdiction (ie., the Toronto Region).[2]

A note on **Practice Directions and Policies**: The Ontario Superior Court of Justice has enacted a number of practice directions that govern how proceedings in the OSCJ are conducted. A lawyer should always confirm what court practice and procedure applies in any particular area. The Ontario Court website should be reviewed together with the corresponding court practice and procedure for the particular judicial region in which any will challenge is brought. The regions are Central East, Central South, Central West, East, Northeast, Northwest, Southwest and Toronto. Both province-wide and region-specific practice directions are listed on the website (also listed are notices, guides and region-specific forms relevant to proceedings in each region). Where proposed filings are not compliant with these practice directions and policies, they may be rejected by counter staff/registrars.

Under the *Rules*, Estates disputes are subject to mandatory mediation in Toronto, Ottawa and Essex County (Windsor) unless such requirement is waived by a Judge. However,

[1] *Rules of Civil Procedure*, RRO 1990, Reg 194.
[2] Consolidated Practice Direction Concerning the Estates List in the Toronto Region, July 1, 2014 (most recently amended June 15, 2018).

as of January 1, 2016, Rule 75.2, provided the Courts with the power to order the parties to a mediation, on their own initiative, and without the consent of the parties, even in jurisdictions where the mandatory mediation rules do not apply.

By contrast, Rule 74 of the *Rules of Civil Procedure* deals with non-contentious proceedings concerning Estates.

Rule 74.15 provides for an Order for Assistance. An Order for Assistance is a type of order that a Court can make in an estate claim including: an order to accept or refuse an appointment of an estate trustee;[3] an order to consent or object to a proposed appointment;[4] an order to file a statement of assets of the estate;[5] an order for further particulars;[6] an order to a beneficiary witnesses (requiring a beneficiary or the spouse of a beneficiary who witnessed the will or codicil, or who signed the will or codicil for the testator, to satisfy the court that the beneficiary or spouse did not exercise improper or undue influence on the testator);[7] issue an order to a former spouse;[8] make an order to pass accounts;[9] or, an order for any other matters.[10]

An Order for Assistance may be brought by way of motion pursuant to Rule 74.15 (1)(a-i) (2) (3) or (4) and in accordance with Section 9 of the *Estates Act.*[11] Any person who appears to have a financial interest in an Estate may move for an Order for Assistance in respect of the enumerated categories set out in Rules 74.15(1) (a-i). Such a motion may be brought without notice, except for an order for further particulars which requires 10 days' notice to the Estate Trustee.[12]

Rule 74 of the *Rules of Civil Procedure* also addresses the *Passing of Estate Accounts* under Sub-Rules 74.16 through to 74.18. Please note that there have also been further

[3] Rule 74.15 (1)(a-b).
[4] Rule 74.15 (1)(c).
[5] Rule 74.15 (1)(d).
[6] Rule 74.15(1)(e).
[7] Rule 74.15 (1)(f).
[8] Rule 74.15 (1)(g).
[9] Rule 74.15 (1)(h).
[10] Rule 74.15 (1)(i).
[11] *Estates Act,* RSO 1990 c E 21, Section 9.
[12] Rule 74.15(2).

changes to these rules as of January 1, 2016. These rules will be addressed more particularly under the heading: "Passing of Estate Accounts" below. Notably, Rules 74.16 through 74.18 apply to accounts of the Estate Trustee, other Trustees', Attorneys', under Powers of Attorney and Court Appointed Guardians. The form of the accounts and the Application to pass accounts are governed by Rule 74. These proceedings can be contentious; nevertheless, they are set out under the non-contentious *Rules* of the court.

2. Objecting before the Certificate of Appointment is issued

Where possible, it is most efficient and convenient to raise potential objections to the Will, or to the issuance of a Certificate of Appointment of Estate Trustee With or Without a Will, before probate or a certificate of appointment has been granted.

Rule 75.03 is the rule which allows a Notice of Objection to be filed in the format set out in Form 75.1 of the *Rules of Civil Procedure* which is filed with the Estate Registrar for Ontario in order to prevent a certificate of appointment from issuing.

The Notice of Objection must be signed by the person objecting, or by the person's lawyer and must state the nature of the interest of the Objector and the grounds for the objection. A precedent Notice of Objection is included within.[13]

It is in the interests of the Objector, in other words, the person challenging the Will, to advance the objection quickly, thereby removing any risk that probate issues in the interim, and as an effort to stop the administration of the estate.

Once the assets of the Estate are distributed, any challenge to the validity, or invalidity, as the case may be, of the Will is likely to be a difficult exercise particularly when attempting to trace, or recover distributed assets.

Be aware that a Certificate of Appointment of Estate Trustee With or Without a Will (probate) is not always required. Many estates may be administered without the necessity of making an Application for a Certificate of Appointment of Estate Trustee, in which case the filing of a Notice of Objection will not be a certain remedy to stop the administration.

[13] Notice of Objection, Appendix I

The purpose of probate however, is twofold: to give effect to the testator`s true testamentary intentions, and, to declare to the world that the estate trustees holds good title and lawful authority to administer the estate, establishing transactional certainty.[14]

In these circumstances, it would be important to notify the named Estate Trustee, supposing you know who the named Estate Trustee is under the Will, and or bring an Application for an Order for Assistance. In particular, the Challenger/Objector to the Will may apply pursuant to Rule 74.15(1), on a without notice basis for an Order requiring the Estate Trustee to accept or refuse the appointment. This process therefore provides for advancing legitimate issues before the court, and for a potential Will challenge to be brought before the court.

Rule 75.03(1)–(6) deals with the specific technical requirements concerning the Notice of Objection and the timing for the motion for directions.

Notice to Objector

Once a Notice of Objection has been filed, the next step is the filing of the Notice to Objector, and thereafter the filing of a Notice of Appearance.[15]

The Notice of Objector is a form that is served by the Estate Trustee notifying the Objector that an application for Certificate of Appointment of an Estate Trustee has been made and that the Objector must file a Notice of Appearance, otherwise the application will proceed as if the Objector never filed a Notice of Objection. Reference should be made to the *Rules of Civil Procedure*[16] for detailed guidance on this procedure.

The next step would be for either the propounder/defender of the Will to bring a Motion or Application for Directions within 30 days following the filing of a Notice of Appearance by the Objector, and/or otherwise next steps are determined between the lawyers for the parties. Either party may apply to the court for directions and to obtain an Order Giving Directions. In either case, the lawyer who does not have control of the drafting of the

[14] R. Hull & I. Hull, Macdonell, Sheard and Hull on Probate Practice, 4th ed. (Toronto, Carswell, 1996) at p.185
[15] *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, Rule 75.03(5) and Form 75.4
[16] *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, Rule 75.03

Motion or Application and Order Giving Directions[17] should insist on reviewing and considering the drafting prior to issuance.

Special note should be made of the rules for service of the motion for directions on all those "appearing to have" a financial interest in the Estate.[18]

Where there are minors, unborn, or unascertained children involved, service must be made on the Office of the Children's Lawyer, to the Children's Lawyer for Ontario.

Where a beneficiary is a charity and/or there is a financial interest of a person who is incapable, or there are unknown unrepresented potential heirs, service must be made upon the Office of the Public Guardian and Trustee, to the Public Guardian and Trustee for Ontario.

3. Objecting after the Certificate of Appointment is issued

Rule 75.04 addresses the provisions for revocation of a Certificate of Appointment. Again, the person appearing to have a financial interest in an estate is the one who may apply for such relief on the grounds set out in Rule 75.04(a-c).

Additionally, Rule 75.05 provides for the return of a Certificate of Appointment pursuant to a Motion.

Practical Obstacles:

As mentioned, in many instances a Certificate of Appointment of Estate Trustee With or Without a Will need not be applied for, in which case the filing of a Notice of Objection may be inconsequential to the desired effect. The appointed Estate Trustee under a Will may be administering the Estate without having had the need to apply for probate and/or Certificate of Appointment of Estate Trustee With or Without a Will.

[17] Sample Order Giving Directions, see Appendix II
[18] *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, Rule 75.06(2), Rules 14, 38

Accordingly, practical steps should be taken to notify the Estate Trustee, or if known, the estate lawyer in writing of the Objection and potential claim, perhaps also pursuing preservation orders, and injunctive relief to prevent depletion and disposal of assets.

4. Application or Motion for Directions & Order Giving Directions

The Application or Motion for Directions is in effect the commencement of the Will challenge. Rule 75.06 permits any person having a financial interest in an estate to apply for directions.

If there has been a court proceeding already, for instance if probate has been obtained, or a Notice of Objection filed and a court file number issued, then the Directions may be brought by way of Motion as opposed to Application.

Where no court file number exists, an Application must be issued for directions as opposed to a Motion.

Note, however, that some types of relief ancillary to directions may require you to bring an actual application, regardless of a court file number existing, and in that regard, you must look at the rules upon which you rely, or statute to ascertain whether or not the relief you seek must specifically be brought by way of application. In some instances, pleadings in the form of a Statement of Claim, and Defense may be ordered, or may otherwise be prudent.

Often if the nature of the relief warrants it, a Statement of Claim may be filed simultaneously with a Notice of Application, even if the relief sought is identical. It is possible to suspend the Statement of Claim, and still preserve certain rights which are not readily available on an Application. Where appropriate, the court may direct, or a lawyer may seek directions concerning the Statement of Claim served in accordance with Rule 75.07.

Rule 75.07.1 provides for the circumstances where a person may file a statement of submission of rights with the court. These rules should be reviewed carefully as they are

not always understood, particularly in terms of what the person whose rights are being submitted is entitled to on settlement.

Additionally, as will be set out in further detail below claims against an Estate may be brought by way of Notice of Contestation of Claim in accordance with Rule 75.08 (Form 75.13) and under sections 44 & 45 of the *Estates Act.*[19]

Rule 75.06 requires notice by way of Service of at least 10 days before the hearing of the Application or Motion (see Rules 14 and 37 further for Timing for Service).

Orders Giving Directions

On a Motion or Application for directions, the court may direct as follows:

a) the issues to be decided;
b) who are parties, applicants/respondents, 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; and
g) such other directions/procedures as are just.[20]

In addition to the above, as of January 1, 2016, Rule 75.06 (3.1) allows for the following issues to be addressed:

(a) directions under subrule 75.1.05 (4), in the case of a proceeding that is subject to mandatory mediation;

[19] *Estates Act,* R.S.O. 1990 c. E 21, Sections 44 and 45
[20] *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, Rule 75.06 (3).

(b) An order that a mediation session be conducted in accordance with Rule 75.2, and, any direction that may be given under subrule 75.1.05 (4). O. Reg. 193/15, s. 13 (2).

Rule 75.06 states that an **Order Giving Direction** shall be in accordance with Form 75.5, or 75.6.

A Draft Order Giving Directions containing various usual orders is included at Appendix II. Some common terms found in an Order Giving Directions or potential relief sought include:

a) An order appointing an Estate Trustee During Litigation ("ETDL");
b) An order for the examination of non-parties such as non-party witnesses;
c) An order for examinations for discovery to be conducted;
d) An order for a formal or informal accounting;
e) An order for a Certificate of Pending Litigation;
f) A declaration that the deemed undertaking rule (Rule 30.1.01(3)) will not apply;
g) An order for non-dissipation of estate assets and injunction;
h) An order for the preservation of rights under the *Family Law Act*;
i) An order for the production of all of the deceased's financial records;
j) An order for the production of all of the deceased's medical records;
k) An order for the production of all of the drafting lawyer's related records, notes and files;
l) If there was a real estate transfer, an order for the production of the real estate lawyer's related files and documents; and
m) An order setting out the scheduling: i.e. dates for service of responding affidavit, mediation, examinations etc.[21]

Orders Giving Directions in part, are often obtained on consent. However, it should be noted, that in the case of *Seepa v Seepa*, 2017 ONSC 5358, Justice F. L. Myers declined to sign a consent Order Giving Directions. Of concern to Justice Myers was the

[21] See precedent Orders Giving Directions at Appendix II for sample clauses.

evidentiary threshold that must be met in order to secure a conventional Order Giving Directions and the potential for possible fishing expeditions by disappointed beneficiaries in seeking to review personal medical records and otherwise privileged legal files.

Justice Myers quoted Justice Gillese in *Neuberger v York*, 2016 ONCA 191 where she stated at paragraph 88 that it was her view that an interested person "must meet some minimal evidentiary threshold before a court will acceded to a request that a testamentary instrument be proved." Justice Myers noted that the Court of Appeal did not give specific direction on what the "minimum evidentiary threshold" should look like in terms of standard of proof. He concluded that:

> The question is whether the applicant ought to be able to put the estate and the beneficiaries to the burden of proof, expense, and delay by requiring proof-in-solemn-form and, if so, what process of proof in solemn form will best achieve that outcome, be consonant with the goals of the civil justice system, and recognize the particular concerns that are to be balanced in the estates litigation context.[22]

Reactions have been mixed to the *Seepa* case within the estate bar with some concern that this case would have a significant effect on Will challenges. However, in her paper "Orders Giving Directions in Will Challenge Cases – One Year after *Seepa v Seepa*" Lou-Anne Farrell noted "that *Seepa* has yet to effect a drastic change in practice".[23] In fact, every request for directions is unique and cannot be approached in a uniform way. As a matter of public policy, a function of the court of probate is to ensure the validity of Wills of a deceased person who can no longer give evidence. The testator`s interest and the public interest are at the heart of this purpose. The Court is endowed with a special role in probate proceedings. Unlike in other civil litigation matters which are for the most part adversarial, the court`s jurisdiction in probate proceedings is inquisitorial and operates *in rem.*[24]

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[22] *Seepa v Seepa* 2017 ONSC
[23] Lou-Anne Farell, "Orders Giving Directions in Will Challenge Cases – One Year after *Seepa v Seepa*", 21st Annual Estates and Trusts Summit, Law Society of Ontario, October 10, 2018.
[24] *Otis v Otis*, 2004 CanLII 311, 2004, CarswellOnt 1643 (S.C.J.) per Justice Cullity at paras 23-24

Only two reported decisions related to Will challenges have cited *Seepa.* In *Martin Estate v Martin* 2018 ONSC 1840, after reviewing *Neuberger* and *Seepa,* Justice Pattillo held that the threshold for maintaining the objection was low, however, more was needed than a mere suspicion. Justice Patillo found that the objector met the low threshold required at this stage to obtain documentary discovery and ordered the production of the medical and legal documents. Further the parties were to return to court for further directions after the receipt of the documents.

In *Campbell v Campbell*, 2018 ONSC 6336, the propounder of the Will submitted that the evidentiary threshold required for an order for directions had not been met. Relying on both *Neuberger* and *Seepa*, Justice Shaw disagreed and found that there was some evidence, which if accepted would call the validity of the Will into question and the minimal evidentiary threshold had been established. Counsel agreed to a draft order during the hearing.

Despite the concern that arose after *Seepa*, it appears that there have been no significant changes in how courts are approaching motions for directions and the granting of orders giving directions.

5. Mediation

Rule 75.1, 75.2 and 75.06 (3.1) address mandatory mediation in Estates, Trusts, and *Substitute Decisions Act*, *1992*, matters.

In jurisdictions where there is no mandatory mediation for Estates, Rule 75.06 assists the parties in seeking a mediation session in any event, either on consent, or on a contested basis before the court. Mediation is mandatory in estate proceedings commenced in Toronto, Ottawa, and the County of Essex (Windsor).

A mediation Order is often sought on a Motion or Application for directions. The conduct of the mediation, the choice of mediator and the mediation details, are generally set out in the Order. Note also that Rule 75.1.04 deals with the court making an order for the exemption from mediation.

As of January 1, 2016, the Court has the power to direct the parties to attend mediation in an Order Giving Directions under Rule 75.06 (3.1) (b) or on a contested Application to pass accounts under Rule 74.18 (13.2) (b), even in cases where Rule 75.1 does not apply (i.e. where mediation is not mandatory). Court-ordered mediations are governed under Rule 75.2.

As of the date of this update, there is only one reported decision, *Horbaczyyk v Horbacczyk* 2017 ONSC 6666 where the Brampton court ordered mediation pursuant to section 75.06(3.1). In that case the challenger of the Will sought relief directing the parties to participate in mediation, however, he failed to request that relief in his motion for directions. Justice Emery noted that: "*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*". The decision does not mention whether the propounder of the Will consented or objected to participating in a mediation.

The mediation Order obtained within an Order Giving Directions generally includes the issues to be mediated which often mirror the issues for trial as set out in the Order Giving Directions, or the issues raised in the application, or as agreed between the parties.

Even where mediation is not mandatory, it is wise where seeking a Mediation Order to set out the issues to be mediated as well as directions respecting the conduct of the proceedings, to avoid a dispute over the intention, nature and extent of the Mediation Session.

The timing of a mediation can be strategic.

It is often not worthwhile to conduct a mediation unless and until all of the relevant documents are exchanged, reviewed, or otherwise ordered, by way of a court order for disclosure, and the documents circulated amongst the parties.

Often Will challenges are document and fact driven. After obtaining the relevant solicitor records, financial records, and medical records, a mediation session can be, and most often is, conducted without having to conduct expensive examinations-for-discovery.

If it is my intent to proceed in this manner, I seek an Order Giving Directions stating specifically that the mediation be conducted prior to examinations-for-discovery. Often, I have had opposing counsel insist that examinations for discovery be conducted prior to attending a mediation session which is in many circumstances cost prohibitive, and unnecessary, and often more appropriate to other civil litigation matters. Avoid the fight if possible and clarify your Orders from the outset.

6. Preparing your Client for Mediation

The day of mediation may be the first time that opposing counsel will meet your clients. Accordingly, your client should be as prepared for the day of mediation, as for a day of discovery. A properly prepared and presented client may cause opposing counsel to re-evaluate their case, and sometimes re-evaluate what their clients have been saying about your client.

Prepare for mediation as though you were preparing for trial or for discovery. Since mediation usually occurs early in the litigation, sometimes Counsel have not fully researched the nature and extent of the client's case, in the same way that they would have done by discovery or trial. Be aware of the risk that a mediation may be a 'fishing expedition', and in that event, will likely not result in a settlement. Regardless, mediation of estate matters is often very effective in reaching resolution of an estate dispute.

7. Offers to Settle

As with any type of litigation, Rule 49[25] addresses mandatory costs consequences of serving an Offer to Settle.

In Estate cases, a Rule 49 Offer to Settle forces the recipient to seriously consider the contents of the Offer and advise the client on the costs consequences and risks as a result of the Offer to Settle.

[25] Rule 49, *Rules of Civil Procedure* RRO1990, Reg. 194

The recent costs decision of *Newlands Estate* 2018 ONSC 2952 where Justice Spies canvasses the case law on offers to settle and Rule 49 consequences is noteworthy in this regard.

8. Practical Considerations

Practically speaking, there are many approaches and strategy to consider before and during litigation. One strategy is the use of a comprehensive **"**Letter Before Action**"** which, in my view, is a good first step to consider in enticing early resolution to Estate litigation matters, or at the very least future protection on costs. Obviously, this consideration is a matter of strategy, and is dependent on the circumstances of a particular claim and the parties and counsel.

A "Letter Before Action" together with voluntary mediation as agreed upon by the participating parties, may bring early resolution to a particular matter.

An effective "Letter Before Action" should set out in as much detail as possible the allegations made by the client, the basis for the allegations, the evidence known to date to substantiate the position taken and be as persuasive as possible.

Estate litigation should always be approached and considered on a step by step basis, by that I mean, constantly reviewing and assessing the evidence obtained, the exposure to costs in the matter, and the likelihood of success.

Determination by the client at each stage of whether or not to continue is crucial, based on the lawyer's review of the case as a whole, advice given, reporting letters and instructions. If the evidence simply is not there to support a claim, it is important to address the merits, or the client may face a swift dismissal of the objection and a costs award. For example, in *Smith Estate v. Rotstein*, 2010 ONSC 2117, the daughter of a testator objected to probate, alleging lack of knowledge and/or approval by the testator and undue influence. The propounders of the Will brought a summary judgment motion to dismiss the daughter's Notice of Objection. Justice D.M. Brown granted the motion, finding that there was no evidentiary foundation for the daughter's objection. The Ontario Court of Appeal affirmed that decision, observing that there was not "a scintilla of evidence that

the [challenged Will and Codicils] are invalid": 2011 ONCA 491, 106 O.R. (3d) 161, at para. 36, leave to appeal refused [2011] S.C.C.A. No. 441.

9. Limitation Periods

Will Challenges

The *Limitations Act*, *2002* does not present a conclusive limitation period for Will challenges, and arguably nor have the Courts 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,* wherein it concluded that in general, the two-year limitation period for a Will challenge begins to run on the date of death.[26] The decision was not appealed. The Ontario Court of Appeal briefly referred to Justice Greer's findings in *Neuberger v York.*[27]

In *Birtzu v McCron,*[28] 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 favourable light to the Plaintiffs. Based on either view, the action is statute barred.[29]

[26] *Leibel v Lewis*, 2014 ONSC 4516
[27] *Neuberger v York*, 2016 ONCA 191
[28] *Birtzu v McCron*, 2017 ONSC 1420
[29] *Birtzu v McCron*, 2017 ONSC 1420 at para 50.

And most recently in *Shannon v Hrabovsky*,[30] Justice Wilton-Siegel of the Ontario Superior Court of Justice held that the 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 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".[31]

Therefore, it cannot be said with certainty that there is a strict two-year limitation period (from the date of death) for Will challenges. We will have to wait and see what our Ontario Court of Appeal says on this matter.

Equitable Claims

Importantly, there have been a number of cases however 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* 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, s. 2(1) excludes proceedings to which the *Real Property Limitations Act* applies.

The Ontario Court of Appeal concluded that a:

[30] *Shannon v Hrabovsky*, 2018 ONSC 6593.
[31] *Shannon v Hrabovsky* 2018 ONSC 6593 at para 67.

"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".

Recently the Ontario Court of Appeal re-confirmed that the two-year limitation period in the *Limitations Act, 2002* applies to equitable claims in *Alguire v The Manufacturers Life Insurance Company (Manulife Financial*).[32]

See also: *Bouchan v. Slipacoff*, 2010 ONSC 2693 and *Schneider v. State Farm Mutual Automobile Insurance Co.*, 2010 ONSC 4734. This court's decision in *Placzek v. Green,* 2009 ONCA 83, 307 D.L.R. (4th) 441, would also seem to support the view that the Act was intended to cover equitable claims.

10. Costs in Estate Matters

Rule 57 deals with the awarding and fixing of costs as between parties to litigation.

The Courts have broad discretion in determining by whom and to what extent costs shall be paid as is set out in s. 131 of the *Courts of Justice Act.* Notably, section 131 is expressly made subject to the *Rules*, and Rule 57.01 lists numerous factors that a court may take into consideration in awarding costs. Most of these factors are familiar, but particular note should be taken of the prominence given to any "offer to settle made in writing".

There have been significant revisions to the costs regime over the years. On July 1, 2005, Rule 57 was amended to abolish the "costs grid" (which had been introduced on January 1, 2002).

The new *Rules* introduced Form 57B (Costs Outline), as well as several other changes. In addition to abolishing the costs grid, the list of factors in rule 57.01(1) was expanded

[32] *Alguire v The Manufacturers Life Insurance Company (Manulife Financial)* 2018 ONCA 202 at para 26.

to include the principle of indemnity (Rule 57.01(1)(0.a) and the reasonable expectations of the unsuccessful party (Rule 57.01(1)(0.b). Also, Rule 57.01(4) was amended to make it clear that a court may award costs in an amount which represents full indemnity (Rule 57.01(4)(d) and may award costs to a party acting in person (Rule 57.01(4)(e)).

In addition, case law has moved estates cases towards the "loser pays" approach, traditionally seen in civil litigation cases where the successful party is awarded costs in a discretionary manner.

Costs terminology: In Rule 1.03(1) the definition of partial indemnity costs was amended to delete the reference to the partial indemnity scale of costs contained in the 2002 "costs grid". More significantly in Rule 1.03(1) the definition of "substantial indemnity costs" was amended to be 1.5 times the amount of "partial indemnity costs". The term "partial indemnity costs" and "substantial indemnity costs" had been introduced in 2001 to replace the former terms "party-and-party costs" and "solicitor-and-client costs" respectively.

Costs Outline: Although the costs grid was abolished, the former itemized tariff was not re-introduced. Rather, Part 1 of Tariff A has been amended to simply provide costs are to be determined in accordance with s. 131 of the *Courts of Justice Act* and the factors set out in Rule 57.01(1), which rule has been expanded. Costs will continue to be fixed in most cases (Rule 57.01(3)) and the court is directed (Rule 57.01(7)) to adopt the simplest, least expensive most expeditious process to fix costs, including use of written submissions. Parties seeking costs are required by Rule 57.01(6) to file a Costs Outline (Form 57B) at the hearing. The Costs Outline includes a brief description of the fee items, the lawyers and others involved, the hours spent, the partial indemnity rate, and the actual rate being charged to the client. Costs of contested motions will generally be fixed and ordered paid within 30 days: Rule 57.03. The overall objective of the process continues to be to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant: *Boucher v Public Accountants Council (Ontario)*.[33]

[33] *Boucher v Public Accountants Council* (Ontario) (2004), 71 OR (3d) 291(CA).

In *Canadian National Railway v. Royal & Sun Alliance Insurance Co. of Canada,*[34] the court compared the defendants' fees to those of the plaintiff when considering a reasonable expectation criteria for awarding costs. The fixing of costs by a judge is not an item-by-item assessment, rather a review of the factors in rule 57.01(1) as referenced in, *Noble v. Noble.*[35]

In 2005, the "Civil Rules Committee's Costs Subcommittee" prepared its report that led to changes in fixing costs, and the "2005 Costs Grid". The 2005 Costs Grid has advisory status only, but parties and the courts still refer to it for guidance in determining appropriate hourly rates to be used for costs award determinations.[36] The 2005 Costs Grid sets out the maximum hourly rates expected:

Law Clerks	Maximum of $80.00 per hour
Student-at-law	Maximum of $60.00 per hour
Lawyer (less than 10 years)	Maximum of $225.00 per hour
Lawyer (10 or more but less than 20 years)	Maximum of $300.00 per hour
Lawyer (20 years and over)	Maximum of $350.00 per hour

More recent decisions have expressed that the maximums set out in the guidelines are fast becoming outdated. Indeed I am unaware of any Toronto lawyers in this practice area charging such low rates since the cost of doing business does not permit such low rates.

In *Construction Distribution & Supply Co. v King Packaged Materials,*[37] Justice Faieta, declined to apply the maximums set out in the guideline and instead accepted counsel's actual hourly rate. The Court noted that the guidelines were not only outdated but not binding on the Court, as they do not form part of the *Rules of Civil Procedure* and are not issued pursuant to the *Courts of Justice Act*. The decision was appealed but the parties

[34] *Canadian National Railway v. Royal & Sun Alliance Insurance Co. of Canada* (2005), 77 O.R. (3d) 612
[35] *Noble v. Noble* (2003), 17 C.P.C. (6th) 46, 2003 CarswellOnt 6744 (S.C.J. Commercial List).
[36] *Mayer v. 1474479 Ontario Inc.*, 2014 ONSC 2622 at para. 32.
[37] *Construction Distribution & Supply Co. Inc. v. King Packaged Materials Company*, 2017 ONCA 200

reached a settlement before the hearing.[38] Notably, cost orders are difficult to challenge since costs orders are discretionary and a great deal of deference is afforded to the court.

This sentiment that the guidelines are outdated was also referenced by the Ontario Court of Appeal in *Inter-Leasing, Inc. v Ontario.*[39] See also *Little v. Floyd Sinton Limited*,[40] where the costs under the 2005 Costs Grid were adjusted for inflation.

Specific costs provisions in Rule 57: Several of these provisions are noteworthy. In order to discourage unnecessary motions, Rule 57.03 provides that on the hearing of a contested motion, the court is to fix the costs and order them to be paid within 30 days, unless the court is satisfied that a different order would be more just. Historical case law held more often than not, that in disposing of interlocutory motions the court will generally fix costs and order for them to be paid forthwith: *Axton v. Kent*[41]*.*

Specific provision is made for costs to be assessed where a settlement provides for the recovery but does not fix them: Rule 57.04.

Importantly, when acting for a litigation guardian, note that Rule 57.06 permits the court to limit the liability of a successful party to pay the costs of a litigation guardian who acted for an unsuccessful defendant.

The courts' power to order a solicitor to pay costs *personally* is largely codified in Rule 57.07. See *Ford v. F. Hoffman-LaRoche Ltd*.[42] where a solicitor counselled a client to proceed with an unmeritorious motion alleging fraud and deceit to be jointly and severally liable for costs along with the losing party.[43] The Supreme Court of Canada recently considered the principles applicable when a request is made for a lawyer to

[38] *Ibid.*
[39] *Inter-Leasing, Inc. v. Ontario (Minister of Revenue)*, 2014 ONCA 683
[40] *Little v Floyd Sinton*, 2018 ONSC 3165.
[41] *Axton v Kent* (1991), 2 OR (3d) 797 (Div. Ct.)
[42] *Ford v F. Hoffman-LaRoche Ltd.* (2005), 24 CPC (6th) 247 (Ont Div Ct).
[43] Ontario Civil Practice 2008, Practice Direction, Professor Watson, Q.C. ThomsonCarswellOnt; Pages 1091-1092.

be personally responsible for costs. In *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*[44] at paragraph 18, Justice Gascon stated that:

> [The] awarding of costs against lawyers personally flows from the right and duty of the courts to supervise the conduct of lawyers who appear before them and to note, and sometimes penalize, any conduct of such a nature as to frustrate or interfere with the administration of justice. . . .As officers of the court, lawyers have a duty to respect the court's authority. If they fail to act in a manner consistent with their status, the court may be required to deal with them by punishing their misconduct.

The most significant components of Rule 57 are:

1. The court is directed to factors that it should consider in exercising its discretion under s. 131 of the *Courts of Justice Act* to award costs. These factors include the results in the proceeding, any offer to settle, the complexity of proceedings, the importance of the issues, and the conduct of any party that tended to lengthen the proceeding and the administration.

2. When the court awards costs, it is the court that is to fix them, in exceptional circumstances the court may refer costs for assessment under Rule 58.

3. In addition to "partial indemnity" costs, the court is authorized to order costs on a "substantial indemnity basis" or "full indemnity basis". A party who is awarded costs is required to serve a bill of costs (Form 57A) on the other Parties and file it. If the issue of costs is to be argued at a hearing, then in addition to the bill of costs, the party seeking costs is to file a costs outline (Form 57B).

Evolution of Costs in Estates: "Loser Pays" Principle

A common misconception about estate litigation is that the assets of an estate are used to fund the costs of the litigation to all parties involved. This leads many to wrongly believe that if an estate holds valuable assets then those persons with a financial interest in the

[44] 2018 SCC 26.

estate, or those who administer it, do not need to worry about assessing the potential risks and associated losses attributed to the litigation.

The historical practice of English courts in estate litigation which was adopted in Canada would often see costs awarded to the successful party, and ordered payable out of the Estate based on the premise that the resulting litigation was primarily the responsibility of the deceased person who arguably left their affairs so as to cast doubt on the testamentary dispositions made.

Ontario courts have stopped the practice of easily looking to the assets of the Estate to satisfy the costs of litigation for all parties. As indicated above, the Courts have adopted the Civil Litigation's "loser pays" approach in Estate cases. It is important to advise the client that the costs are ultimately at the discretion of the court, more specifically, the judge, at the end of the day.

In *McDougald Estate v. Gooderham*[45] the Court of Appeal specifically noted that the traditional approach has been displaced with the modern "loser pay" principle subject to any public policy consideration which may tip the scale towards the traditional view on costs.

The "loser pays" approach in Estates cases was further emphasized by Justice Brown in *Salter v. Salter Estate*, wherein he stated:

> … Consequently, the general costs rules for civil litigation apply equally to estates litigation – the loser pays, subject to a court's consideration of all relevant factors under Rule 57, and subject to the limited exceptions described in *McDougald Estate*. Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation. The "loser pays" principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion. There is no reason why such discipline should be absent from

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

> estate litigation. Quite the contrary. Given the charged emotional dynamics of most pieces of estates 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.[46]

The basis for all rules regarding costs, rests upon the degree of blame to be imputed to the respective parties.[47] It is important to remember that the Court determines by whom and to what extent costs shall be paid.[48]

Strathy J., as he then was, held in *Zimmerman v McMichael Estate*[49] 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:

i. Pursuant to section 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 should be paid;
ii. Estate litigation, like any form of civil litigation, operates subject to the general civil litigation costs regime;
iii. As a general proposition, the principle that the "loser pays" applies to estate litigation;
iv. In determination of costs, the court must have regard to the factors set out in Rule 57 of the Rules of Civil Procedure, 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;
v. The court's discretion to award costs on a full indemnity basis is preserved by Rule 57.01(4)(d); and

[46] *Salter v. Salter Estate*, 2009 CanLII 28403 (ONSC) at 5-6.
[47] *Fox v. Fox, supra*
[48] *Court of Justice Act* R.S.O. 1990, c. C.43, s. 131
[49] *Zimmerman v McMichael Estate* 2010 ONSC 3855.

vi. Full indemnity costs are reserved for those exceptional circumstances where justice can only be done by complete indemnity.[50]

In *Sawdon Estate v Watch Tower Bible and Tract Society of Canada*, Gillese J.A. with Strathy J.A. concurring, plainly combined her and Strathy J.'s (as he then was) decisions in *McDougald Estate* and *McMichael Estate*, respectively, to further clarify the modern approach to costs in estates litigation. The following was stated by the Court of Appeal in *Sawdon Estate*:

> The court is to carefully scrutinize the litigation and. Unless, it finds that the 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*, RSO 1990, c C 43 and Rule 57 of the Rules of Civil Procedure, SO 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 testators; and (2) the need to ensure that estates are properly administered.[51]

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. The court noted that the availability of a blended costs order gives the court the ability to respect the public policy considerations that may be involved and to maintain the discipline of which Justice Brown clarified in *Salter Estate*.[52]

In *Sawdon*, the Ontario Court of Appeal ordered that a beneficiary, who unsuccessfully objected to the estate trustee's passing of accounts, was liable to pay the estate trustee's

[50] *Zimmerman v McMichael Estate* 2010 ONSC 3855 at paras 84-85.
[51] *Sawdon Estate*, 2014 ONCA 101 at paras 84-85
[52] *Sawdon* at para 97.

partial indemnity costs and that the estate was liable to indemnify the estate trustee for his costs not recovered from the unsuccessful beneficiary.

Most recently, a blended costs award was made in *The Estate of Imgard Burgstaler (disability)*. This decision was on the costs of a passing of accounts by an attorney for property. In his decision, Shaw J., applied *Sawdon Estate* by balancing those factors in Rule 57.01 of the Rules of Civil Procedure with the public policy considerations for ensuring that the estate is properly administered. This led Shaw J,. to award full indemnity costs to the objectors but by use of a blended payment structure. The attorney for property was to pay the parties indemnity costs to the objectors and the difference was to be paid out of the assets of the estate. The court acknowledged that this structure is "fair and reasonable" and gave sufficient recognition to the general costs principle of "loser pays" and the "discipline" that the principle is intended to encourage.

In *Sabetti v. Jimenez,*[53] for example the Court used its discretion to order substantial indemnity costs against a husband who brought a meritless application to challenge his late wife's Will. In doing so, the Court noted that the applicant husband had conducted himself as if he was "playing with the house's money" which is "precisely the sort of approach that the discipline of a loser pay costs regime is intended to discourage."

The Ontario Court of Appeal in *Smith Estate v. Rotstein,*[54] upheld the costs award on a full indemnity scale but required the motion judge to reassess the quantum of fees. The ruling affirmed the principle in *Davies v. Clarington (Municipality)*[55] that reprehensible conduct on the part of a party can invite elevated costs. The Court of Appeal upheld the full indemnity award noting that the objector's conduct was reprehensible.

Importantly, appellate courts require substantial grounds in order to overturn a costs order: "*A court should set aside a costs award on appeal only if the trial judge has made*

[53] *Sabetti v. Jimenez*, 2018 ONSC 4727
[54] *Smith Estate v. Rotstein*, 2011 ONCA 491 (CanLII)
[55] *Davies v. Carlington (Municipality),* (2009), 100 O.R. (3d) 66 (C.A.)

an error in principle or if the costs award is plainly wrong."[56] In exercising its discretion, the Court may consider Rule 57 of the Ontario *Rules of Civil Procedure.*[57]

Careful review of the costs consequences of Will challenges should be conducted with the client and continued as an ongoing process throughout the litigation.

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 and, in particular, the client. The court should consider whether or not, as a result of the information known by the litigants at each particular stage of investigation, a particular party should have proceeded to the next stage, thereby causing the incurrence of costs by both parties.[58]

The inherent nature of Estate litigation means that a number of claims are brought without the benefit of having been able to fully investigate the circumstances of the Last Will & Testament of a deceased person. For this reason, many claims are not advanced, or alternatively, settle very early on. Estate litigation is a practice area which lends itself well to a mediated settlement.

More recently, Justice Dunphy, reiterated the importance of making early and reasonable offers to settle or suffer the costs consequences, in *Manufacturers Life Insurance Co. v Sorozan Estate.*[59] The case involved a dispute between the son and the spouse of the deceased over insurance proceeds. Justice Dunphy found in favour of the spouse. When it came to the issue of costs, the Court noted that the spouse had made two offers to settle, one of which was made prior to the commencement litigation. Despite the fact that the offer did not strictly conform to the requirements of Rule 49, Justice Dunphy noted that the offer deserved some weight in deciding costs.

Whether or not specific rules of civil procedure exist with regard to offers to settle, and costs consequences flowing from a rejection of the offer, and whether or not such rules

[56] *Hamilton v. Open Window Bakery Ltd.* [2004] 1 S.C.R. 303 at para. 27
[57] *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, Rule 57
[58] *Schweitzer v. Piasecki* (1998) 20 E.T.R. (2d) 233 (O.C.G.D.)
[59] *Manufacturers Life Insurance Co. v Sorozan Estate*, 2016 ONSC 3805

are applicable to a challenge to the validity of a Will if reasonable overtures of settlement are rejected by the opposite party in a Will contestation, the court will be inclined to consider such conduct unreasonable and penalize the party with liability for costs. Therefore, where the solicitor for parties propounding, or challenging a Will is of the view that the position of the opposite parties has little merit, the solicitor should advise the opposite party of that assessment and that an order will be sought from the court directing the costs of the proceedings to be paid by that party if they persist. I would strongly advise doing so in such circumstances.

An informal or formal offer to settle, will further enhance the position of the party offering the settlement, and place the opposite party at greater risk as regards the disposition of costs. An uncooperative attitude, in addition to activities by a party that are viewed by the court to inhibit even non-prejudicial aspects of the administration of the estate, or the conduct of the proceedings, will increase the likelihood of an unfavorable order for costs against such a party.

To conclude on costs, it is clear that the courts in Ontario have moved away from the historical approach to costs in estate litigation, as previously adopted by the English courts. As stated best by Gillese J. "[*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*".[60] That said, the public policy consideration of giving effect to valid Wills that reflect the intention of the competent testator is still good law in Ontario. As evidenced in, *The Estate of Imgard Burgstaler (disability),* however, the courts of first instance in Ontario will attempt to make a cost award that is fair and reasonable in the circumstances while also giving effect to the discipline that underlies the "loser pays" principle of civil litigation. This has moved the courts away from ordering that all costs of an estate litigation are to be paid from the assets of an estate to either a complete loser pays or blended structure. It will be interesting to watch the difference in approaches and

[60] *Sawdon* at para 85.

to see how the modern approaches and results to the treatment of costs of estate and related litigation throughout Canada continue to develop[61].

Assessment of an Award of Costs?

Rule 58 of the *Rules* governs the assessment of costs where a rule or order provides that a party is entitled to the costs of all, or part of a proceeding and the costs have not been fixed by the court. Under such circumstances, an assessment officer will make the costs determination.

Security for Costs

Under Rule 56.01 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 (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 in order to proceed in the litigation, unless the court orders otherwise. The court retains a discretion to vary the amount of security at any time.

Notably, security for costs motions and orders are not usual in estates and related proceedings, but in the right circumstances, such orders can be made[62].

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[61] For further information: http://welpartners.com/resources/courtcostsand http://welpartners.com/blog/2011/02/costs-discretion-proportionality-access-to-justice-and-other-considerations/ .

[62] See *Jones v. Jones*: http://www.welpartners.com/resources/Jones2013_CarswellOnt_49877.pdf at para 18

11. The Legal Basis for Challenging a Will

The grounds for challenging a Will are as follows:

a) failure to comply with the statutory requirements for **due execution** of a testamentary document;

b) lack of **testamentary capacity** of the testator;

c) the presence of **undue influence**;

d) lack of **knowledge and approval** of the contents of the Will; and

e) **fraud or forgery**.

Suspicious circumstances are not a ground for challenge, but rather an evidentiary consideration.

The validity of a Will being challenged on the basis of fraud or forgery is not seen as often, but, 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 which are tantamount to fraud.[63]

It should be noted that the onus is on the propounder of a Will (again, the person who wishes to prove the validity of the last Will) to prove, on a balance or probabilities, in open court upon notice to all parties having a financial interest in the estate, that the Will was duly executed, the testator had the requisite testamentary capacity and that the testator had knowledge and approved of the contents of the Will.[64] The Will must be duly executed in compliance with the formalities as set out in the provisions of the *Succession Law Reform Act*[65] (the "SLRA").

There is a presumption of capacity, if the requisite formalities under the SLRA are complied with however, this presumption is rebuttable, and it is exhausted where "suspicious circumstances" are found to exist, therefore causing the propounder to

[63] See *Di Battista v Wawanesa Mutual Insurance Company*, 2005 CanLII 41985 (ON SC) at para. 5.
[64] *Neuberger v York* 2016 ONCA 191 at para 77 citing R. Hull & I. Hull, *Macdonell, Sheard and Hull on Probate Practice*, 4th ed., (Toronto: Carswell, 1996), at p. 315.
[65] *Succession Law Reform Act*, R.S.O. 1990, c. S.26

reassume the burden of proving that the testator had knowledge and approved of the contents of the Will.

(i) Due Execution

Section 4 of the SLRA sets out the legal requirements and formalities for a duly executed testamentary document. Formal Wills are governed by Sections 3, 4, and 7 of the SLRA. Section 5 sets out the requirements for a duly executed Will of a member of the Canadian Forces.

Concerning Holograph Wills and their validity, the requirements are set out in Sections 6 and 7 of the SLRA. 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.

For cases specifically on Holograph Wills, see the following: *Bennett v. Gray* [1958] S.C.R. 392; *Re Kinahan* (1981), 9. E.T.R. 392; *Dilts v. Roman Catholic Episcopal Corp of the Diocese of London in Ontario*. Ont Ct. (Gen.Div.) April 15, 1998; *Re Austin* (1967), 61 D.L.R. (2d) 582; *Re Philip* (1979) 100 D.L.R. (2d) 582; *Re Forest* (1979) 5 E.T.R. 144; *Re Forest* (1981) 8 E.T.R. 232; *Laframboise v Laframboise* 2011 ONSC 7673; *Niziol v Allen* 2011 ONSC 7457; *Eissmanm v Kuntz* 2018 ONSC 3650

The onus or proof regarding due execution falls to the propounder of the Will. The SLRA sets out a number of formalities that must be observed when executing a Will:

- The Will must be in writing;[66]
- The Will must be signed by the testator at the end after it has been completed;[67]
- The testator must sign the Will or acknowledge a signature in the presence of two or more attesting witnesses present at the same time;[68] and
- The witnesses must also sign the Will in the presence of the testator.[69]

[66] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 3
[67] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 4 (1) (a)
[68] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 4(1)(b)
[69] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, s. 4(1)(c)

Special note to be taken of the concept of "substantial compliance" which although **not** legislated in Ontario *per se*, has been referenced in Ontario case law.[70]

Other cases to reference due execution are as follows:

(i) **In Writing**

Murray v Haylow (1927) 60 O.L.R. 535

(ii) **Signed at End** "by the testator or by some other persons in his or her presence and by his or her direction"

Re White [1948] 1 D.L.R. 572

Re Deeley and Green (1929) 64 O.L.R. 535

Clarke Estate (Re) 2008 CanLII 45541 (ON SC) (where Brown J., found that a paraplegic using a stamp with his name was the same as signing his name)

(iii) **Attestation**

Chesline v Hermiston (1928). 62 O.L.R. 575

Smith v Smith (1866), 1 P. & D. 143

Brown v Skirrow [1902] P.3

Re Brandrick and Cockle (1999) 146 D.L.R. (4th) 113

Re Brandrick and Cockle (1999) 23 E.T.R. (2d) 233 (C.A.)

Re Chalcroft [1948] P. 222

(iv) **Witnesses**

Re Trotter [1899] 1 Ch 764

Thorpe v Bestwick (1881) 6 Q.B.D. 311

Re Ray's Will Trusts [1936] 1 Ch. 521

Sisson v Park Street Baptist Church (1999) 24 E.T.R. (2d) 18

[70] *Sisson v. Park Street Baptist Church* (1998), 24 E.T.R. (2d) 18 (Ont. Gen. Div.)

Sills v Daley 2003 CanLII 72335 (ON SC)

Zerbinati v Zerbinati, 2013 CanLII 86428 (ON SC)

(ii) Testamentary Capacity

Generally, it is important to note that there is no single definition of capacity, nor is there a general "test" or criteria to apply for establishing capacity, mental capacity, or competency, rather, there are determining factors to consider in assessing capacity regarding the specific task or decision undertaken. For example, someone may have the requisite decisional capacity to marry, yet not have the requisite decisional capacity to execute a power of attorney.

Capacity is decision-specific, time-specific and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted. Determining whether a person is or was capable of making a decision is a legal determination or a medical/legal determination depending on the decision being made and/or assessed.

The criteria to be applied in assessing requisite *testamentary* capacity have been set out in a number of cases. A checklist concerning decisional capacity in estates in general with reference to the applicable case law is included in as an Appendix to this paper.[71]

The question of testamentary capacity is almost wholly a question of fact. The assessment or applicable criteria for determining requisite testamentary capacity to grant or revoke a Will or testamentary document, requires that the testator has the ability to understand the following:

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

[71] Capacity Checklist, Appendix III

c) The claims of persons who would normally expect to benefit under the Will)or testamentary document)[72]

The case of *Banks v. Goodfellow*[73] is often cited in Will challenges and referred to as the "classic statement" setting out the test of testamentary capacity:

> It is essential to the exercise of such a power that a testator 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 disposal of it which should not have been made otherwise.

Further elements of the criteria applied for determining requisite testamentary capacity that the testator 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 person(s) 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 of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property.[74]

It is important to note that it is not only the terms of the Will that the deceased must be capable of appreciating, but also the facts of the general situation in which the Will is

[72] *Banks v Goodfellow* (1870) LR 5 QB 549 (Eng QB).
[73] *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549
[74] See *Murphy v Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v Schwartz*, 10 DLR (3d) 15, 1970 CarswellOnt 243, [1970 2 OR 61 (CA); *Hall v Bennett Estate* (2003) 64 OR (3d) 191 (CA); *Bourne v Bourne Estate* (2003) 32 ETR (2d) 164 (Ont. SCJ); *Key v Key* [2010] EWHC 408 (ch,)

made. The deceased must have had a clear apprehension of the meaning of the Will submitted to her, she may have approved of it, and yet if she was at the time, through infirmity or disease, so deficient in memory that she must have been oblivious to the claims of her relations, and if that forgetfulness was an inducing cause of her making the decisions made, then the Will must be set aside. In other words, the testator must have been capable of understanding on her own initiative and of her free volition the nature of and extent of her testamentary dispositions.

It is important to review the vast amount of case law in the particular area of testamentary capacity to ascertain the parameters within which the court adheres to be able to make a finding of lack of testamentary capacity.

The legal burden of proving capacity is on the propounder of the Will, assisted by a rebuttable presumption of capacity described in *Vout v Hay*:

> 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.[75]

Notably, the court recently opined on delusions and the effect on testamentary capacity finding their existence alone is not sufficient to determine testamentary capacity but are a relevant consideration under the rubric of suspicious circumstances.[76]

While the onus of proving testamentary capacity is on the propounder of the Will, the Challenger may raise evidence of suspicious circumstances calling into question testamentary capacity, meaning that the propounder must in any event prove capacity, notwithstanding any existing rebuttable presumption.

While discussed in more detail below under “Knowledge, Approval and Suspicious Circumstances,” the Supreme Court of Canada expanded the application of suspicious circumstances to any case where a lack of knowledge, approval or capacity could be found. If there was due execution, it will generally be presumed that the testator knew

[75] *Vout v Hay*, [1995] 2 SCR 876 at p. 227.
[76] *Laszlo v Lawton* 2013 BCSC 305.

and approved the contents of the Will and had the necessary testamentary capacity. However, where suspicious circumstances are present, that presumption is considered to be spent and the propounder of the Will reassumes the legal burden of establishing testamentary capacity.[77]

In other words, in cases where there are suspicious circumstances, the presumption of capacity is rebuttable to an extent and the propounder of the Will must provide evidence confirming capacity. In essence, there is a shifting of the burden of proof where suspicious circumstances are prevalent.

The lawyer would want to consider judgments involving cases of testamentary capacity when obtaining and analyzing medical evidence when gathered through the discovery process. Testamentary capacity is often assessed on a case by case basis and concerning task specific, time specific and situation specific basis.

A reference list of some leading cases Will Challenge decisions based on lack of testamentary capacity are included as follows: *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549; *Parker v. Felgate* (1883), L.R. 8 P. & D.; *Wingrove v. Wingrove* (1885) 11 P.D. 81; *Leger v. Poirier* [1944] S.C.R . 152; *O'Neil v The Royal Trust Company* [1946] S.C.R. 623; *Wintle v. Nye* [1959} 1 W.L.R. 284; *Re Davis* [1963] 2 O.R. 666; *Re Worrell* [1970] 1 O.R. 184; *Eady v.Waring* (1974) 2 O.R. (2d) 627; *Eady v. Waring* (1974) 2 O.R. (2d) 627 (C.A.); *Dynna v. Grant* (1980), 6 E.T.R. 175 (Sask. C.A.); *Russell v. Fraser (*1981) 118 D.L.R. (3d) 733; *Re: Bradshaw Estate* (1988), 30 E.T.R. 276 (N.B.P.C.); *Vout v. Hay* [1995] 2 S.C.R *; Ostrander v. Black* [1996] O.J. No. 1372 (Gen. Div.); *Calvert (The Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 appeal dismissed see *Calvert v. Calvert*, 37 O.R. (3d) 221 (Ont. C.A.) leave for appeal refused Supreme Court of Canada [1998] C.C.C.A. No. 161; *Sloven v. Ball* (1997), 14 E.T.R. (2d) 309 (Ont. Gen. Div.); *Re: Koch* (1997), 33 O.R.(3d) 485 (Ont. Court-General Division) – (a leading case in determining capacity); *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Gen. Div.); *Scott v. Cousins* (2001) 37 E.T.R. (2d) 113 (Ont. S.C.J.); *Sullivan v. Bellows* [2002] O.J. No. 273 (S.C.J.); *Masterman-Lister v. Jewell & Ors* [2002] W.T.L.R. 563 Q.B.D.;

[77] *Vout v Hay*, [1995] 2 SCR 876.

Masterman-Lister v. Brutton & Co. & Ors [2003] W.T.L.R. 259 C.A.; *Tait v. Wedgwood and Tait* [2003] W.T.L.R.; *Palahnuk v. Palahnuk,* 2006 CanLII 44262 (ON SC); *Laszlo v. Lawton*, 2013 BCSC 305; *Orfus Estate v The Samuel and Bessie Orfus Family Foundation*, 2013 ONCA 225; *Stekar v Wilcox,* 2017 ONCA 1010.

To successfully challenge a Will on the grounds of lack of testamentary capacity, substantial and persuasive medical evidence must be obtained substantiating the allegations of lack of testamentary capacity.

Evidentiary requirements would also include the contacting of witnesses as to fact (neighbours, acquaintances, friends, relatives) to substantiate the medical evidence of 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 together with 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.

The evidence obtained either through medical reports or expert witness evidence must be reliable in the context of the testator's entire set of circumstances.

Accurate medical evidence is the foundation to any Will challenge proceeding and, in particular, medical evidence should form the basis of the evidence for which the propounders of the Will rely on.

The Future?

In a recent article by called "Banks v. Goodfellow 1870: Time to Update the Test for Testamentary Capacity,"[78] the authors propose an updated and modern interpretation of

[78] Dr. Kenneth Shulman, Susan Himel, Ian Hull, Carmelle Peisah, & Courtney Barnes "Banks v Goodfellow 1870: Time to Update the Test for Testamentary Capacity" (2017) Can Bar Rev.

the Banks criteria, based largely on clinical experience. The updated proposal requires that the testator be:

1. Capable of understanding the act of making a will and its effects;

2. Capable of understanding the nature and extent of their property relevant to the disposition;

3. Capable of evaluating the claims of those who might be expected to benefit from the estate, and able to demonstrate an appreciation of the nature of any significant conflict and or complexity in the context of the testator's life situation;

4. Capable of communicating a clear, consistent rationale for the distribution of their property, especially if there has been a significant departure form previously expressed wishes or prior wills; and

5. Free of a mental disorder, including delusions, that influences the distribution of the estate.

The proposed changes appear to be less discriminatory than the *Banks* language from 1870, avoids assumptions of incapacity based on diagnosis alone, and requires a functional assessment of whether or not someone can actually make the specific decision at hand.

It will be interesting to see if and how the factors or indicators of testamentary capacity evolve in the coming years. Further on capacity and evidence, see below "The Solicitor as Witness" and Appendix V: Checklist - "Red Flags" for Decisional Capacity in the Context of a Legal Retainer.

(iii) Testamentary Undue Influence

Issues of lack of testamentary capacity often tend to be brought alongside allegations of undue influence.

In general, the doctrine of undue influence is an equitable principle employed by the courts to set aside certain *inter vivos* gifts/wealth transfers, transactions, planning and testamentary documents, where through exertion of the influence of the mind of the donor/grantor, the mind falls short of being wholly independent. 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.[79]

Testamentary undue influence requires **coercion**. It occurs only where the will of the person who becomes coerced into doing that which he/she does not desire to do, that it is classified as undue influence. Common law has continued to apply the historical definition of undue influence, focusing on a mind "overborne" and "lacking in independence". 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 will be found.[80]

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".[81]

In *Craig v. Lamoureux*[82], the Court stated that:

> Undue influence in order 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's mind, but which really does not express his mind, but something else which he did not mean.

To allege undue influence and to be successful in a Will challenge on this ground, coercion must be proven.

[79] *Dmyterko Estate v Kulikovsky* (1992) CarswellOnt 543.
[80] *Dmyterko Estate v Kulikovsky* (1992) CarswellOnt 543.
[81] *Vout v. Hay, [1995] 2 S.C.R*
[82] *Craig v. Lamoureux* 3 W.W.R. 1101 [1920] A.C., 349

Whereas the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder of the Will, the burden of proof rests with the challenger of the planning document to prove undue influence.[83]

In considering what constitutes undue influence, the case of *Hall v. Hall,*[84] 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's judgment, discretion, or wishes is overborne, will constitute undue influence, though no force is either used or threatened.[85]

Regarding **standard of proof**, *C(R) v McDougall* 2008 SCC 53 held that there is a single standard of proof in civil cases – the balance of probabilities – and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations. One must look at all of the surrounding circumstances. Mere influence by itself is insufficient.[86]

Indirect evidence may be sufficient to prove undue influence. In the U.K. case of *Schrader v Schrader*,[87] the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator'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 to disinherit her other son of her own volition. Accordingly, the court is arguably 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. However, dependency is not always an indicator. As individuals grow older or develop health issues, it is not unusual for them to rely on others

[83] *Goodman Estate v. Geffen* (1991) 42 E.T.R. 97
[84] *Hall v. Hall* (1868) L.R. 1 P. & D.
[85] *Hall v. Hall, supra,* at page 481
[86] *Kohut v Kohut Estate* (1993), 90 Man R (2d) (Man QB) at para. 38.
[87] *Schrader v Schrader* [2013] EWHC 466 (ch).

to care for their personal well-being and finances. Family members can perform those duties without taking advantage of the relationship of trust.[88]

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 at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is 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.[89]

In cases where a client has limited mastery of the **language** used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[90] 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.[91]

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 is dependent on the beneficiary in fulfilling emotional or physical needs;
- The testator is socially isolated;
- The testator has experienced recent family conflict;
- The testator has experienced recent bereavement;
- The testator has made a new Will that is inconsistent with prior Wills; and
- The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents. [92]

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[88] See for example *Hoffman v. Heinrichs*, 2012 MBQB 133 in particular paragraph 65: a brother who was close to his sister could have accessed her fuds throughout her lifetime but did not. He was "scrupulous" in helping her manage her finances and encouraged her to buy things for herself.
[89] See for example *Kohut Estate v Kohut*, where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.
[90] See for example *Kohut Estate v Kohut*, *Nguyen Crawford v Crawford*, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[91] *Nguyen Crawford v Nguyen*, 2009 CarswellOn 1877; *Grewal v Bral,* 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.)
[92] *Gironda v. Gironda*, 2013 ONSC 4133.

In *Tate v. Gueguegirre,*[93] the Divisional Court noted that the following constituted "significant evidence suggesting that [a] Will was the product of undue influence":

- Increasing isolation of the testator, including a move from home to a new city;
- The testator's dependence on a beneficiary;
- Substantial pre-death transfers of wealth from the testator to the beneficiary;
- The testator'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;
- 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 to the lawyer to have it executed; and
- There were documented statements that the testator was afraid of the respondent.[94]

Cases which address the parameters of alleging and proving undue influence, include the following cases: *Vout v. Hay* [1995] 2.S.C.R.; *Goodman Estate v. Geffen* (1991) 42 E.T.R.; *Scott v. Cousins* (2001) 37 E.T.R. (2d) 113 (Ont. S.C.J.); *Sullivan v. Bellows* [2002] O.J. No. 273 (S.C.J.); *Gamble v. McCormic* [2002] O.J. No. 930 (S.C.J.); *Cullen Estate v. Filla* [2002] O.J. No. 1474 (S.C.J.); *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Ont. Gen. Div.); *Streisfield v. Goodman* [2001] O.J. No. 3314 (S.C.J.); *Barry v. Butlin* (1838) 2 Moo. P.C. 480 12 E.R. 1089; *Hall v. Hall* (1868) L.R. 1 P. & D. at page 481 and 482;*Wingrove v. Wingrove & Ors* (1985) 11 P.D. 81 ; *Killick v. Poultney & Another* [2000] W.T.L.R. 41; *Craig v. Lamoureux* 3 W.W.R. 1101 [1920] A.C. 349; *Dmyterko Estate v. Kulikovsky* (1992) 47 ETR; *Koncz v. Gyulay Estate* (1988), 59 Alta LR (2d) 299 (Alta. Surr. Ct.); *Eady v.Waring* (1974) 2 OR (2d) 627; *Wintle v. Nye* [1959] 1 WLR 284; *Russell v. Fraser (*1981) 118 DLR (3d) 733; *Re Worrell* [1970] 1 OR 184; *Chappus Estate (Re)* 2009 ONCA 279; *Gironda v Gironda* 2013 CarswellOnt 8612; *Walman v. Walman Estate*,

[93] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.
[94] *Tate v Gueguegirre* 2015 ONSC 844 (Div Ct) at para. 9.

2015 ONSC 185; *Tate v Gueguegirre* 2015 ONSC 844 (Div Ct); *Thorsteinson Estate v. Olson* , 2016 SKCA 134; F*oley v. McIntyre*, 2015 ONCA 382; *Morreale v. Romanino,* 2017 ONCA 359.

For further information see Appendix IV: Undue Influence Checklist.

(iv) Knowledge and Approval

As with testamentary capacity, upon establishing due execution of a Will there is a corresponding presumption that the testator had knowledge of and approved of the contents of the Will.

However, where suspicious circumstances are alleged or demonstrated, the propounder of the Will has the burden of proving, on a balance of probabilities, that the testator had knowledge of and approved of the contents of the Will.

There is a presumption of knowledge and approval, if the testator read the Will and appeared to comprehend it.[95] However, this presumption is rebuttable if the challenger of the Will successfully demonstrates that the testator did not understand the contents of the Will even after having read it or having had it read. Where there are suspicious circumstances the propounder of the Will has the burden of proving knowledge and approval. The proof is on a balance of probabilities.

Cases to consider on knowledge and approval include: *Re MacInnes.* (1935) S.C.R. 200; *Anderson v. Patton* (1948) 1 D.L.R. 848 (Alta S.C.); *Anderson v. Patton* (1948) 2 D.L.R. 202 (Alta C.A.).

(v) Suspicious Circumstances

The doctrine of "suspicious circumstances" is classically stated in the case of *Barry v. Butlin*[96] and was applied in the Supreme Court of Canada case *Vout v. Hay.*[97] In *Barry v.*

[95] *Vout v. Hay* [1995] 2 S.C.R.
[96] *Barry v. Butlin*, (1838) 2 Moo. P.C. 480 12 E.R. 1089
[97] *Vout v. Hay, supra*

Butlin[98] it is noted that: "The interrelation of suspicious circumstances, testamentary capacity and undue influence has perplexed the Courts and the litigants..."

Suspicious circumstances are not a ground for challenge, rather typically refer to any circumstances surrounding the execution and the preparation of a planning document, and may loosely involve:

(1) circumstances surrounding the preparation of the Will;

(2) circumstances tending to call into question the capacity of the testator; or,

(3) circumstances that show that the free will of the testator was over-borne by acts of coercion or fraud.[99]

Examples of suspicious circumstances include:

- physical/mental disability of the testator;
- 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;
- drastic changes in the personal affairs of the testator;
- isolation of the testator from family and friends;
- drastic changes in the testamentary plan; and
- physical, psychological or financial dependency by the testator on beneficiaries.[100]

Regarding the onus, where suspicious circumstances exist, the presumption is spent and the propounder of the Will reassumes the legal burden of proving knowledge and approval. In addition, as noted above, if the suspicious circumstances relate to capacity, the propounder of the Will reassumes the legal burden of establishing requisite testamentary capacity.

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[98] *Barry v. Butlin, supra*
[99] *Vout v. Hay, supra*, at page 226
[100] See Mary MacGregor, "2010 Special Lectures – Solicitor's Duty of Care" at 11.

Both of these issues must be proven in accordance with the civil standard. The presumption simply casts an evidentiary burden on those attacking the Will.

This burden can be satisfied by adducing or pointing to some evidence, if accepted, that would tend to negate knowledge and approval, or requisite testamentary capacity. In this event, the legal burden reverts to the propounder, and the propounder must satisfy the Court that the testamentary instrument propounded is the last Will of a free and capable testator.[101]

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 has approved the contents of the Will, the propounder of the Will reassumes the legal burden of establishing testamentary capacity; and

(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

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

Cases to consider reviewing when challenging a Will on the grounds of lack of knowledge and approval and with the interplay of suspicious circumstances include: *Vout v. Hay* [1995] 2.S.C.R.; *Eady v. Waring* (1974) 2 O.R. (2d) 627 (C.A.); *Maw v. Dickey* (1974), 6 O.R. (2d) 146 (Ont. Surr. Ct.); *Barry v. Butlin*, (1838) 2 Moo P.C. 480 12 E.R. 1089; *Sloven v. Ball* (1997), 14 E.T.R. (2d) 309 (Ont. Gen. Div.); *Alexander v. Fiedler*, [2005] C.C.S. No. 10824;*Calderaro v Meyer,* 2011 ONSC 5395 ;*Garwood v. Garwood Estate*, 2016 MBQB 113.

[101] *Barry v. Butlin, supra; Vout v. Hay, supra*; *Sloven v. Ball, supra*

A drafting solicitor has a positive duty to keep a file and properly document client instructions for a new Will.

Those who propound a Will must establish that the testator knew and approved of its contents, since such knowledge and approval is a proposition applied in the assertion that the Will was made by the testator. Furthermore, it would seem that this burden is considerably increased where the Will constitutes a marked departure from previous testamentary dispositions, and where there is evidence of cognitive impairment.

Under ordinary circumstances, the knowledge and approval of a Will by a testator is sufficiently established by proof of requisite testamentary capacity and that it was signed, but if there are circumstances in connection with the execution that raise the suspicion of the Court, more cogent evidence will be required.

(vi) Fraud and Forgery

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

The propounder of the Will must prove on a balance of probabilities that the signature of the testator on the Will document is authentic.

Allegations of forgery and fraud are serious, and the failure to substantiate such a claim by substantive evidence could lead to serious unfavourable costs consequences. Accordingly, at first recognition, whether before the discovery process or thereafter, of insufficient evidence to support allegations of this nature, then such allegations should be withdrawn by an amendment to the pleadings.[102]

It is the propounder of the Will who must prove on a balance of probabilities that the signature on the Will document is indeed the signature of the testator.

Obtaining the evidence of the two witnesses to the Will often dispels allegations of fraud.

[102] *Stewart v. MacLean* 2003 A.B.Q.B. 96

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.

Case references for consideration of issues of fraud and forgery include: *Lee v. Li* 2001 Carswell B.C. 742, 2001 B.C.S.C. 434 – Overturned on appeal (Lee v. Li [2002] B.C.J. No. 2046) based on lack of jurisdiction; *First Island Financial Services Ltd. v. Nova Star Developments* (Kelowna, Orchard Gardens) 2000 Carswell B.C. 693, 2000 B.C.S.C. 518 (1998 Carswell B.C. 2859); *Tsang v. Chang Estate* 1992 Carswell B.C. 1760; *Greveling v. Greveling* 1949 Carswell B.C. 128 (1950) 1 W.W.R. 574; *Philpott Estate (Re),* 1999 CanLII1 8982 (NLCA).

12. Relief Sought: Declaratory vs Substantive

The relief sought in estate litigation can fall into both categories of declaratory and substantive relief.

Declaratory relief refers to a judgment or decision of a court which determines the rights of parties without ordering anything be done, deciding a substantive claim, or awarding damages. By seeking a declaratory decision, the party making the request is seeking for an official declaration of the status of the matter in dispute. For example, often Will challenges involve an application for a declaration that a Will is invalid. Normally, this is also accompanied by some form of substantive relief as well.

The type of relief sought can have an effect or limitation on other aspects of the litigation including whether a court can grant the relief sought (i.e. the Small Claims Court cannot grant declaratory relief) as well as whether and what limitation period may apply, if any. For example, in *Leibel* which in part, discussed the limitation period for bringing a Will challenge, Justice Greer noted that although subsection 16(1)(a) of the *Limitation Act, 2002* states that there is no limitation period in respect of a proceeding for a declaration if no consequential relief is sought, the Will challenge in question did claim consequential relief in addition to a declaration that the Will was invalid. The applicant sought an Order

revoking the grant of a Certificate of Appointment of Estate Trustees with a Will, an Order removing the Estate Trustees, an Order requiring the Estate Trustees to pass their accounts, an Order appointing an Estate Trustee During Litigation, and an Order for damages against the lawyer. Justice Greer noted that "consequential relief is clearly sought by" the applicant. The applicant argued that the relief he sought was not "consequential" because such relief only takes place following a declaration that the Wills were not valid. Justice Greer disagreed noting that "the consequential relief he claims cannot come either before or after a declaration, as a declaration is a stand-alone Court decision."[103]

There is an interesting discussion of what constitutes declaratory relief and consequential relief in the decision of *Middlesex Condo Corp. No. 643 v. Prosperity Homes Ltd.*, 2014 ONSC 1406 (S.C.) at paras. 50-54.

13. Evidence Synopsis

It is important to obtain orders in the Order Giving Directions for the release of medical records, solicitors' records, and financial records. Failure to obtain orders of this nature will pose difficulty to the Parties trying to obtain the release of such records from financial institutions, OHIP, hospitals, doctors and solicitors for obvious reasons of confidentiality.

As early as makes practical sense in the circumstances of the court proceedings, the interviewing of witnesses should be conducted and evidence should be taken.

The Ontario *Rules of Civil Procedure,* Rule 31 should be considered regarding oral examinations-for-discovery.

Rule 31.10 entitles a party to seek leave from the court to examine for discovery a witness to a Will. The evidence of the witnesses to the Will is important to the challenger.

The examination-for-discovery stage of the witnesses and witnesses to the Will provides both the challenger and the propounder with the necessary information to be able to

[103] *Leibel v Leibel* 2014 ONSC 4516 at para 48.

assess the strengths, and, or weaknesses of the case. It may open up yet a further opportunity for settlement of the litigation.

Some of the most persuasive evidence can come from friends, relatives and neighbors, who are witnesses as to fact. These witnesses may have made independent observations with respect to events, activities and the conduct of the deceased during the relevant time period within which the Will in question was executed. These sorts of witnesses can go a long way to lending credibility to findings through the discovery process in addition to obtaining medical notes, expert's findings, solicitor's notes and other records.

The evidence of the doctor who treated the testator could be considered very persuasive evidence. It can also be extremely persuasive to have an expert provide a retrospective report based on the review of records, and conclusions from those reports.

Generally speaking, the court is traditionally inclined to approach evidentiary rules in Estate litigation on a more flexible basis. Regard should be had to evidentiary issues concerns and, in particular, reference to the authoritative text of Sopinka, Lederman and Bryant "The Law of Evidence in Canada".[104]

Hearsay evidence often is problematic in Estate litigation matters. Sopinka contends that if the mental state of an individual is directly in issue at trial, the statements of his mental state are generally admissible in proof of the fact.[105] Sopinka refers to examples of case law which support this contention, and which include: *Great West Uranium Mines Limited v. Rock Hill Uranium Mines Limited*[106]; *Thomson v. Connell*[107]; *Shanklin v. Smith*[108]; *Jozwiak v. Sadek*[109]; and *Gray v. New Augarita Porcupine Mines Limited.*[110]

The justification for the admission of such facts into evidence is based on the fact that it may be that the only means by which the Court can determine an individual's state of

[104] Sopinka, Lederman and Bryant, "*The Law of Evidence in Canada*", 2nd Edition, Butterworths June 1999
[105] Sopinka, Lederman and Bryant*, "The Law of Evidence in Canada",* p.256
[106] *Great West Uranium Mines Limited v. Rock Hill Uranium Mines Limited.* (1955), 15 W.W.R. 404
[107] *Thomson v. Connell* (1838), r. M. & w. 267
[108] *Shanklin v. Smith* (1932), 5 M.P.R. 204
[109] *Jozwiak v. Sadek* (1954), 1 All E.R. (Q.13)
[110] *Gray v. New Augarita Porcupine Mines Ltd.* (1952) 3 D.L.R. 1(P.C).

mind in the absence of any evidence of the individual's conduct. Moreover, the statement being made contemporaneously with the existence of an individual's state of mind creates some degree of reliability, and certainty.

The courts have traditionally taken a more liberal position in Will cases regarding declarations of the state of mind made by testators and have admitted post-testamentary statements of memory or belief to establish prior facts.[111]

Similarly, in *Steward v. Walker,*[112] post-testamentary statements of a testator were tendered as proof of the contents of a Will which were not produced upon his death although its execution was established.

Hearsay evidence and the many rules and considerations relevant to this body of law are beyond the scope of this paper, but it is recommended that Sopinka's text be referenced for a further discussion of the law. A consideration of the hearsay rules and the case of *Re: Khan*[113] in this regard is worthwhile for greater clarity concerning admissible hearsay.

In order for evidence to be received by the Court, the judge will first determine whether the evidence is relevant, then determine whether any exclusionary rule of the law of evidence applies, and then if the evidence is relevant (and not subject to any exclusionary rule) the judge will determine whether to exercise discretion and exclude the evidence.

Some examples of exclusionary rules: the evidence is irrelevant; immaterial; inflammatory or the "prejudicial effect outweighs the probative value; authenticity was not established; hearsay, (except where exceptions to hearsay – necessary and reliable, admissions, business records, medical records, spontaneous statement, declarations of physical, emotional or mental state, prior testimony, prior inconsistent statement, past recollection recorded) self-serving evidence, prior consistent statement; opinion (except expert opinion); lawyer/client privilege; litigation privilege; deemed undertaking rule; settlement

[111] *Sugden v. Lord St Leonards* (1870) 1 P.D. 154, 24 W.R. 860 (C.A.)
[112] *Stewart v. Walker* (1903), 6 O.L.R. 495 (C.A.)
[113] *Re: Khan* [1990] S.C.R., 531

privilege; collateral fact rule; the rule in *Browne v Dunn* (post-testimony impeachment) and failure to provide corroboration in cases where s.13 of the *Evidence Act applies*.

For a helpful summary see "Estate Litigation Evidence "Cheat Sheet"" by Angelique Moss, included herein as Appendix VII[114] or "An Evidence Cheat Sheet" by Justice Paul Perrell.[115]

14. Section 13 of the *Evidence Act*[116]

Section 13 of the Ontario *Evidence Act* provides as follows:

> in any 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.[117]

In other words, a claim on a deceased's Estate cannot succeed if the only evidence to support it is oral and unsupported by any document. Evidentiary issues which often arise in Will challenge proceedings almost always include Hearsay. Section 13 of the *Evidence Act* requires that there be corroboration of material facts alleged by an opposite or adverse party of any matter occurring before the death of the testator. This requirement exists to address the obvious disadvantage faced by the dead: they cannot tell their side of the story or respond to the livings' version of events.[118]

15. The Deemed Undertaking Rule:

Rule 30.1.01 of the *Rules of Civil Procedure* deals with the deemed undertaking rule pertaining to evidence obtained through the discovery process (documentary, examination, inspection, medical assessment). The deemed undertaking rule prevents

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[114] See Appendix VII, reprinted and included with the express permission and acknowledgement of Angelique Moss.
[115] Justice Paul Perrell, "An Evidence Cheat Sheet", *The Advocates Quarterly* (2007) Vol 33
[116] *Evidence Act*, RSO 1990, c E 23.
[117] *Evidence Act,* RSO 1990, c E 23, s. 13.
[118] *Orfus Estate v The Samuel and Bessie Orfus Family Foundation*, 2013 ONCA 225, citing *Burns Estate v Mellon* (2000), 2000 CanLII 5739 (ONCA).

parties and their counsel from using any information or evidence obtained through the discovery process in an action for the purposes of any other proceeding subject to certain exceptions.

The deemed undertaking rule does not apply to evidence used with the consent of the party who disclosed it, evidence filed in Court or given during a hearing, evidence obtained in one proceeding to impeach the testimony of a witness in another proceeding, evidence used in accordance with sub-rule 31.11(8) in a subsequent action or evidence used by Court Order.

If it is at all contemplated that there be liability on the part of the solicitor who drafted the testamentary document, consideration should be given to obtaining an order waiving the deemed undertaking rule in the Order Giving Directions. As an alternative, Rule 5 of the Ontario *Rules of Civil Procedure*[119] could be considered in joining the solicitor in the proceedings from the outset, as a Respondent.

The consideration of whether to join the solicitor in the proceedings is tactical, and somewhat strategic. The solicitor may have been negligent in the drafting of the Will document and by joining the solicitor as a party, any costs of the proceeding would be equivalent to the damages associated with a successful negligence claim. As such, the

[119] Ontario *Rules of Civil Procedure, supra*, Rule 5.03, General Rule

5.03 (1) Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding. R.R.O. 1990, Reg. 194, r. 5.03 (1).

Claim by Person Jointly Entitled

(2) A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled. R.R.O. 1990, Reg. 194, r. 5.03 (2).

Claim by Assignee of Chose in Action

(3) In a proceeding by the assignee of a debt or other chose in action, the assignor shall be joined as a party unless,

(a) the assignment is absolute and not by way of charge only; and

(b) notice in writing has been given to the person liable in respect of the debt or chose in action that it has been assigned to the assignee. R.R.O. 1990, Reg. 194, r. 5.03 (3).

Power of Court to Add Parties

(4) The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party. R.R.O. 1990, Reg. 194, r. 5.03 (4).

Party Added as Defendant or Respondent

(5) A person who is required to be joined as a party under sub-rule (1), (2) or (3) and who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent. R.R.O. 1990, Reg. 194, r. 5.03 (5).

Relief Against Joinder of Party

(6) The court may by order relieve against the requirement of joinder under this rule.

issues can be addressed within one proceeding simultaneously. An effective use of the court time and proceedings must be made.

See also the cases of *Stern v Stern*, 49 E.T.R. (2d) 129 (2003) and *Clarke v Bruce Lance & Co.* [1988] 1 ALL E.R. 364 (ENG.C.A.).

16. Other Considerations to Discuss with Your Client

- Determine from the outset that the goal of the Will Challenger is to set aside the last testamentary document being put forward in favor of the penultimate testamentary document. Clients should be aware of the consequences of setting a last Will aside and the prior Will or Wills should be reviewed with the client. If the Will is challenged and successfully set aside, the estate may consequentially pass on an intestacy, or partial intestacy; also determine with your client who the estate trustees will be and who the beneficiaries will be.
- Stress from the outset the potential, for the uncertainty of the costs in the litigation.
- Consider whether or not a "With or Without Prejudice Letter Before Action" setting out fully the circumstances, and likely outcome of court action with a view to attempting resolution or settlement prior to the commencement of litigation proceedings.
- Ask your client to draft a family tree for you as well as to provide you with a detailed chronology of particular events and relevant evidence.
- Make sure you do a Reporting Letter of advice given, information received and confirming the extent of your retainer and instructions.
- Make sure you have a comprehensive retainer.
- Make sure your client is well aware of the risks of the litigation concerning delay, possible and evidentiary difficulties.

- Make sure you consider whether or not the Public Guardian and Trustee must be served. For example, where there is a charitable beneficiary and or a person under disability or mentally incompetent, or an unascertained unrepresented heir.

- Make sure that where there are minor beneficiaries or contingent interest that the Children's Lawyer for Ontario is served with the proceedings.

- Be aware of all relevant limitation period issues.

- Know what the *Limitations Act*, 2002, S.O., 2002[120] provides concerning incapable persons, minors, and beware of Section 9 of the *Estates Administration Act*[121]*,* which has the effect of automatically vesting title in real property in the named beneficiaries on the third anniversary of the death of the testator.

- Remember to be mindful to those parties submitting their rights to the court pursuant to Rule 75.07.1 and Notice of Settlement in the prescribed form and that they are provided at the appropriate time.

- It may be that a litigation guardian needs to be appointed for a minor and or incapable person. In this regard ensure your familiarity with Rule 7 of the *Rules of Civil Procedure*.

- If representation is an issue, ensure your familiarity with Rule 10 of the *Rules of Civil Procedure.*

17. Estate Trustee During Litigation

A Motion or Application for Directions may often necessitate obtaining an Order for the Appointment of an Estate Trustee During Litigation ("ETDL"). An ETDL (formerly known as an "administrator pendente lite") is appointed to manage and preserve the assets of an estate for its beneficiaries. The ETDL may ascertain the estate assets, attend to payment of liabilities, make interim distributions, and/or liquidate assets to be made

[120] *Limitations Act*, 2002, S.O., 2002, and Death Takes a Client, Your First Estate Administration.
[121] Section 9 of the *Estates Administration Act* R.S.O.

available for distribution at a later date. In the recent case of *Mayer v Rubin*, 2017 ONSC 3498, the goal in appointing an ETDL was summarized as being "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."[122]

The power and jurisdiction of the court to make this order for assistance arises out of Rule 75.06. Section 28 of the *Estates Act* RSO 1990 c E 21 further provides jurisdiction to the court to appoint an ETDL. Section 28 reads as follows:

> Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Superior Court of Justice has jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the administrator so appointed has all the rights and powers of a general administrator, other than the right of distributing the residue of the property, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper.[123]

An appointment of an ETDL should be sought as soon after the date of death and prior to any significant steps in the administration. The material filed on such a motion or application should include the consent of the proposed ETDL, an affidavit and a compensation agreement. Compensation is a matter of the court's discretion. Any compensation paid is generally calculated and considered in accordance with the *Trustee Act*, or on a fee schedule agreed upon by the parties.

If appointed, the ETDL will be appointed pending the final resolution or settlement of the litigation and or Order of the court. The Order often requires a provision that a certificate of appointment of ETDL is to issue subject to the filing of the necessary supporting application materials. The Order should clearly set out the authority of the ETDL including any relevant limitations.

[122] *Mayer v Rubin,* 2017 ONSC 3498 at para 2.
[123] *Estates Act* R.S.O. 1990, c. E.21, Section 28.

The ETDL is an officer of the Court and has all the ordinary rights and powers of a general administrator (other than the right to distribute the residue of the estate). The ETDL's duties generally include managing assets, gathering evidence, payment of liabilities and sometimes assisting in the resolution of the litigation.

The appointment of an ETDL could be used as a strategic measure, for various reasons relevant to the circumstances of the estate, including costs implications.

In the past, Courts have often exercised the discretion and appointed ETDL'S in Will challenges under section 28 of the Estates Act. However, recently there have been cases where ETDL'S have been appointed in other contexts, confirmed by Justice Myers in the case of *Mayer v Rubin*. Although no issue regarding the validity of the Will had been raised, Justice Myers appointed an ETDL to protect the assets of the estate while litigation between the Estate Trustees continued.

It should be noted that an ETDL is a fiduciary and as such may be liable for any failure to carry out duties properly. A passing of accounts may further protect the ETDL from claims by beneficiaries that allege impropriety in how the estate has been administered. See the section on "Passing of Accounts" and see WEL on Fiduciary Accounting.

18. The Discovery Process

Remember in your Application or Motion to request relief concerning the procedural conduct of your Will Challenge as provided for generally in the *Rules of Civil Procedure*.

Your Order Giving Direction should include an Order for the discovery process both concerning documents, the exchange of affidavits of documents, and the Examinations for Discovery for the relevant parties. You may also wish to have a timetable within your Order to try to ensure timely prosecution and resolution.

19. Estate Trustee Obligation/Authority to Continue or Commence Litigation

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 in particular, the below provisions of the *Trustee Act*[124]

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.

Actions against executors and administrators for torts

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

Limitation of actions

> **38. (3)**An action under this section shall not be brought after the expiration of two years from the death of the deceased. [125]

Remember that in actions concerning pecuniary loss resulting from injury or death permits family members under Section 61(1) of the *Family Law Act*[126] to sue for their own damages, yet this is not a matter that an Estate Trustee is likely to contemplate giving advice to potential claimants on.

Removal of personal representative, section 37(1):

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[124] *Trustee Act,* RSO 1990, c T23.
[125] *Trustee Act*, R.S.O. 1990, c. T.23, s. 38.1(2) 2000
[126] *Family Law Act,* R.S.O. 1990

> 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.[127]

Additionally, section 37(3) concerning limitations states as follows:

> The order may be made upon the application of any executor or administrator desiring to be relieved from the duties of the office, or of any executor or administrator complaining of the conduct of a co-executor or co-administrator, or of any person interested in the estate of the deceased.[128]

Practically speaking, for an Estate Trustee During Litigation there are many matters to be considered in the course of an estate litigation including a cost benefit analysis on whether or not it is worthwhile to pursue a claim, the cost of the claim and what the potential beneficiaries' opinion is of that claim.

Make sure that you obtain a schedule to the Order setting out the remuneration agreement negotiated by the parties with the Estate Trustee During Litigation. It is often wise to address whether or not the Estate Trustee During Litigation is entitled to pre-take its compensation subject to perhaps the ultimate approval by the court upon the termination of the appointment. The *Estates Act* sets out the specific powers that an Estate Trustee During Litigation may exercise which are those exercised at law by an administrator.

Case law concerning Section 38 dates back to the Supreme Court of Canada case in *Smallman v. Moore*.[129]

Note that in accordance with the *Roth v. Weston* Estates[130] that a breach of personal fiduciary duty is indeed caught by subsection 38(3) of the *Trustee Act* thereby making a

[127] *Trustee Act*, R.S.O. 1990, c. T.23, s. 37 (1); 2000, c. 26, Sched. A, s. 15 (2).
[128] R.S.O. 1990, c. T.23, s. 37 (3).
[129] *Smallman v. Moore* [1948.C.R.295]
[130] *Roth v. Weston Estates* (1997), 36 O.R (3d) 515 (CA)

strong argument that the *Trustee Act* includes actions for contracts. The Court here relied on the Ontario Court of Appeal's decision in *Smallman*.

Concerning limitation periods, the two-year limitation period is important considering the Court of Appeal for Ontario decisions and the discoverability principle pursuant to *Wasckowski v. Hopkins Estate (2000).*[131]

20. The Solicitor as Witness

Since Will Challenges are usually based upon allegations that a testator lacked testamentary capacity, did not know or approve of the contents of the Will, or was unduly influenced, the evidence of the drafting solicitor becomes very crucial. The notes, records and files of the drafting lawyer will be very important to the court.

In the case of *Babchuk v. Kutz,*[132] the Court considered the evidence of the solicitor as being far more important than medical evidence concerning capacity. The evidence of Jones, the solicitor, and the student-at-law accompanying Jones was set out in over four pages of the Judgment of the trial Judge, Moen, J..The Court found that the evidence of the solicitor was forthright.

The drafting lawyers' evidence on ascertaining and substantiating capacity will be very important. Therefore, all those engaged in estate planning practice should include in their planning checklists, a method for assessing capacity and documenting their file so as to avoid future costly litigation and liability.

Keep in mind solicitor and client privilege exists as between the drafting solicitor and the testator, which privilege does not end upon death. The privilege then passes to the Estate Trustee. This was confirmed by the court in *Hicks Estate v Hicks*.[133] The power to waive privilege on behalf of the deceased following their death falls to the Estate Trustee. The Estate Trustee steps into the shoes of the deceased and can compel the release of the drafting lawyer's file. However, in the circumstances of a Will challenge, the validity of the

[131] *Waschowski v. Hopkins* Estate 2000, 47 O.R. (3d) 370 (Ont. C. A.)
[132] 2006 ABQB 422; upheld 2009 ABCA 144.
[133] [1987] OJ No 1426 (SCJ)

very instrument that appoints the individual as Estate Trustee is being challenged. Therefore, should the notes and file of the drafting lawyer be required, a Court Order is often required expressly waiving privilege and the duty of confidentiality before they may be produced.

In other words, the drafting solicitor has a duty to assert privilege and should not produce a copy of the file unless under court order or direction from the estate trustee. LawPro should be consulted if you are considering releasing your file without a court order. It is not generally recommended. Ethically, if requesting the release of a lawyer's file, my best practices include placing the other lawyer on notice to report to their insurer.

21. A Summary of other Types of Potential Estate Challenges

A summary of some other grounds and equitable claims to consider concerning Will Challenges:

1. Dependants' Support Claims pursuant to Part V of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 ("SLRA");
2. Unjust Enrichment Claims;
3. Constructive Trust Claims;
4. Resulting Trust Claims;
5. *Quantum Meruit* Claims;
6. *Family Law Act Election* pursuant to s. 5(2) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended;
7. *Inter Vivos* Undue Influence (see checklist Appendix IV);
8. Claims pursuant to s. 44 (liquidated claim) and s.45 (un-liquidated claim) of the *Estates Act*, R.S.O. 1990, c. E21, as amended;
9. Solicitor's Negligence Claims arising from will drafting: drafting errors, improper witnessing of a will, failure to ascertain and document testamentary capacity, and completing the will instructions in a timely manner.
10. Promissory/Proprietary Estoppel

(i) Dependants' Support Claims

A Dependant Support Claim is a claim made against the estate of a deceased person by a dependant who meets the definition of a dependant and the test under Part V of the *Succession Law Reform Act* (the "SLRA").

A determination as to who qualifies and meets the test of a "dependant" must be made in accordance with a two-part test set out in s. 57 of the *Succession Law Reform Act*.

For the purposes of Part V and an application for support, a dependant is defined as a spouse, parent, child, or brother or sister of the deceased, to whom, immediately before death, the deceased was providing, or had a legal obligation to provide support.

Section 1 of the SLRA address the definition of 'spouse' to include two persons who are married to each other, or who have entered into 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. And 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 the parent.

It is important to note that the *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016,* SO 2016, c 23 (Bill 28) (the "*AFAEA*") amended various legislation including 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 the deceased. These amendments allow 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.

The new definitions apply to an individual's Will, drafted after January 1, 2017, unless a contrary intention is clearly expressed. A lawyer should 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 dependants' support claims.

The 1994 Supreme Court of Canada case *Tataryn v. Tataryn*[134] ("Tataryn"), and the 2001 Ontario Court of Appeal in *Cummings v. Cummings*[135] ("Cummings") affirmed that moral considerations are a relevant factor for courts to consider in dependants' support claims.

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.

More recently in *Morassut v. Jaczynski Estate,*[136] the Court followed the principles set out in *Tataryn* and *Cummings*, finding that there was both a legal and a moral obligation on the testator to continue to support her common law spouse after her death. The spouse was awarded sole ownership of a property that he and the testator 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.

[134] *Tataryn v. Tataryn,* [1994] 2 S.C.R. 807
[135] *Cummings v. Cummings* (2004), 69 O.R. (3d) 398 (C.A.)
[136] *Morassut v. Jaczynski Estate*, 2013 ONSC 2856, Aff'd 2013 ONSC 2856

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.

Section 58 of the *Succession Law Reform Act* comprises the second step in analyzing whether or not the deceased has made adequate provision for the proper support of dependants'.

A court must evaluate what has been given under the terms of the Will, or on an intestacy, and then determine what is adequate support.

The definition of what constitutes adequate support is a factual inquiry based upon the circumstances of each individual case. The courts have legislative guidance pursuant to s. 62 of the SLRA and the enumerated factors thereunder from (a) through (s) to consider in determining what support would be adequate.

The courts, 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 assets referred to in s. 72 which have regard to non-traditional 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 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.

A Dependants' Support Claim can be commenced by issuing a Notice of Application pursuant to the *Succession Law Reform Act* and Rules 14.05, 74.15 and 75.06 of the *Rules of Civil Procedure* with supporting affidavit evidence from the dependant claimant.

Section 67 of the SLRA provides for the freezing of the distribution of the assets of the estate until determination of the Dependants' Support Claim.

Section 61 of the SLRA provides that an application for dependants' support must be made within 6 months from the issuance of the Certificate of Appointment of Estate Trustee.

Notwithstanding the six-month limitation period, s. 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.

Note that an application for interim support may also be made pursuant to the provisions of s. 64 of the SLRA.

In *Perkovic v. McClyment,* the court held that an applicant must demonstrate "some degree of entitlement to, and the need for, interim support."[2] More recently in *Kalman v. Pick,*[3] Justice C. Brown noted that the party seeking interim support must establish three things:

1. Impecuniosity or financial difficulties such that the party would otherwise not be able to proceed with the case;

2. A *prima facie* case of sufficient merit to warrant pursuit; and

3. Special circumstances to satisfy the court that the case is within the narrow class of cases where such an extraordinary exercise of its powers is appropriate.

The Court can weigh and assess the evidence and conduct a pre-hearing in that regard. If after such assessment the Court concludes that the record contains credible evidence

from which one could rationally conclude that the applicant could establish a claim for support, then an interim support may be issued.

Other relevant case law, *Reid v. Reid,*[137] is a case where the court found all three of the applicants for support to be dependants and the court stated that actual support provided by a testator need not be direct financial support. By providing the most basic of human needs, for example "shelter", the testator provided substantial financial support to the three applicants all of their lives.

The case of *Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate*[138] is a case that dealt with competing claims by the deceased's children. The Court allocated the entire estate to satisfy the dependant support claims of the children, leaving nothing for the wife.

In *Perilli v. Foley Estate,*[139] Justice Henderson dealt with a claim by Perilli, the common law spouse of the deceased, for constructive trust and dependant support. The court declined to impose a constructive trust, finding that it would be sensible to combine the unjust enrichment in the SLRA claim into one payment to be made by the estate. The court held that the obligation to pay the unjust enrichment claim was a legal obligation of the estate, which should be considered under the SLRA claim. Justice Henderson found Perilli to be a dependant and in need of support. The test that Justice Henderson applied was the two-step test from *Cummings*, and the "Judicious Father and Husband Test".

In the case of *Juffs v. Investors Group Financial Service Inc.,*[140] proceeds held in a locked-in retirement account ("LIRA") owned by the deceased which had designated beneficiaries to it, were said by the court to be proceeds which included those proceeds no longer payable, but already paid out to designated beneficiaries. The Court found that there was an entitlement to make an award from the proceeds from the LIRA and did so.

[137] *Reid v. Reid*, [2005] O.J. 2359 (S.C.J.), Paragraph 21
[138] *Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate,* [2005] O.J. 5774 (S.C.J.)
[139] *Perilli v. Foley Estate* (2006), 23 E.T.R. (3d) 245 (S.C.J.)
[140] *Juffs v. Investors Group Financial Services Inc.* (2005), CarswellOnt. 4384 (S.C.J.)

Finally, *Simpson v. Gualtieri Estate,*[141] concerned a support claim in circumstances where the applicant was not in need. The applicant was the common law spouse of the deceased and the estate was a very large estate. The claim was based on the Cummings argument that the deceased's moral duty to her meant that she should receive a 'fair share of his wealth'. The Court held that Cummings was distinguishable on the basis that Cummings concerned competing claims against an estate where there were insufficient assets to satisfy all of the claims. Accordingly, the Court declined to provide an interim order for support in Simpson, and any permanent support entitlement would have to be determined at trial.

Some additional cases and materials to consider for Dependant's Support claims include: *Lukic v. Zaban*, 2012 ONSC 607; K*alman v. Pick et al*., 2013 ONSC 304; *Matthews v. Matthews*, 2012 ONSC 933; *Blair v. Allair Estate*, 2011 ONSC 498; *Sorkos v. Sorkos Estate*, 2012 ONSC 3196; *Cowderoy v. Sorkos Estate*, 2014 ONCA 618; *Dagg v Cameron,* 2017 ONCA 366; Whaley Estate Litigation Partners on Dependants' Support: http://welpartners.com/resources/WEL-on-dependants-support.pdf; Support Rights and Obligations Under Ontario Family Law, by Robert M. Halpern, Thomson Reuters, Chapter VI, Support on Death, authored by Kimberly Whaley

(ii) Unjust Enrichment Claims

The three elements necessary to establish an unjust enrichment were articulated in *Rothwell v. Rothwell,*[142] and later the Supreme Court of Canada Case in *Pettkus v. Becker*[143] as follows:

1. An enrichment;

2. Corresponding deprivation;

3. The absence of a juristic reason for the enrichment.

[141] *Simpson v. Gaultieri Estate* (2005), CarswellOnt 4898 (S.C.J.)
[142] *Rothwell v. Rothwell*, [1978] 2 S.C.R. 436 (SCC)
[143] *Pettkus v. Becker*, [1980] 2 S.C.R. 834

In the *Pettkus v. Becker*[144] case, the Supreme Court of Canada extended the doctrine of unjust enrichment to compensate a common law spouse for efforts in the acquisition, maintenance, preservation of an asset owned by the deceased, and specifically addressed the appropriate remedy to be granted to the claimant where unjust enrichment is established. The court stated that:

> Where a monetary award is sufficient, there is no need for a 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.

In *Garland v. Consumers Gas Co.,*[145] 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:

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

a) the reasonable expectations of the parties at the time the benefit was conferred; and

b) any public policy considerations.

Pettkus v. Becker[146] remains the authority with respect to the basic requirements of an unjust enrichment claim. To be successful in such a claim, a plaintiff must establish the following three elements: (i) an enrichment of or benefit to the defendant by the plaintiff; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment.

The seminal decision of the Supreme Court in *Kerr v. Baranow; Vanasse v. Seguin,*[147] 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.[148]

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**" 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.[149]

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[146] Supra, note 109
[147] *Kerr v. Baranow, 2011* SCC 10, [2011] 1 S.C.R. 269
[148] Ibid. at para. 34
[149] *Kerr v Baranow*, s*upra* note 63, at paras. 89-100.

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,"[150] 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."[151] Rather, it should remain a broad and flexible approach.

The important point for estates litigators is that the law of unjust enrichment is equally applicable to a surviving spouse against the estate of a deceased spouse as it is to a living spouse.[152] 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 of each. The difficulty for the surviving spouse and his or her lawyer 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 dependant's 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*[153] 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*[154] to the married spouses.

Another important case on unjust enrichment is the Ontario Court of Appeal decision in *Granger v. Granger.*[155] The case involved a dispute between a brother and sister over

[150] *Ibid.* at para. 100.
[151] *Ibid.* at para. 102.
[152] *Hillier Estate v. McLean*, 2011 CarswellNfld 207 at para. 20.
[153] *Barrett v Barrett,* 2014 ONSC 857.
[154] [2011] 1 S.C.R. 269.
[155] *Granger v. Granger*, 2016 ONCA 945, reversing 2015 ONSC 1711, 9 E.T.R. (4th) 281, and 2015 ONSC 6238

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 ("CPOAP").

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 defence or remedy stage.

Estate litigators should note that the law of unjust enrichment is equally applicable to a surviving spouse against the estate of a deceased spouse as it is to a living spouse.[156]

(iii) Constructive Trust Claims

The declaration of a constructive trust is the other remedy that a court can invoke to redress an unjust enrichment. That is, based on the three elements in the analysis set out in *Rothwell v. Rothwell*, and in *Pettkus v. Becker*, if the court finds that the estate has been unjustly enriched, then it has one of two remedies that can be employed. These remedies are either a monetary award (*quantum meruit*), or a declaration that the personal representative 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.

In the case of *Sorochan v. Sorochan,*[157] the Supreme Court of Canada confirmed that there must be a clear link between the contribution and the disputed asset before the court will grant a proprietary remedy of constructive trust.

[156] *Hillier Estate v. McLean*, 2011 NLTD(G) 86
[157] *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38

There is some case law including that of *Bell v. Bailey*[158] in which the Ontario Court of Appeal discussed the fundamental approach to be taken to the award of damages as opposed to a constructive trust. In that case, the Court of Appeal stated that the proprietary 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.

Additionally, the 2006 case of *Fox v. Fox,*[159] is one where a wife brought a claim against her husband for an interest in his inheritance on the basis that she had been involved in the litigation to recover it. The trial judge awarded the wife a constructive trust over the husband's interest in certain monies as opposed to a fixed monetary award.

The case of *Dale v. Salvo,*[160] a wife brought proceedings for a share in property owned by her common law husband and the court used the remedy of a constructive trust as a means of scrutinizing the wife's entitlement and held that the wife's contributions were sufficient to justify imposing a constructive trust.

Again, in the case of *Perilli v. Foley Estate,*[161] 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.

The courts completed an extensive analysis regarding the third element of unjust enrichment - absence of juristic reason for the enrichment and corresponding deprivation in *Moore v. Sweet,* 2017 ONCA 182, rev'd 2018 SCC 52. This case dealt with a constructive trust claim over the proceeds of an insurance policy. An ex-wife and a new common law wife both claimed the proceeds from a life insurance policy belonging to the deceased, Mr. Moore. The ex-wife was originally the designated beneficiary on the policy, and she continued to pay the premiums after she divorced Moore, up until his death, 13 years later. Unknown to her however, Moore officially designated his new common law wife as the irrevocable beneficiary of the policy. He was legally entitled to do so under the

[158] *Bell v. Bailey* (2001), 20 R.F.L. (5th) 272 (CA)
[159] *Fox v. Fox*, [2006] O.J. 616 (O.C.J.)
[160] *Dale v. Salvo*, [2005] O.J. 3111 (S.C.J.)
[161] *Perilli v. Foley Estate,* supra

Insurance Act, RSO 1990, as the legal owner of the policy. The lower court awarded the life insurance proceeds to the ex-wife finding that she had a constructive trust interest and she would be unjustly deprived if the money went to the common law wife.

The majority of the Court of Appeal reversed this decision and confirmed that the operation of the irrevocable beneficiary provisions of the *Insurance Act* constituted a valid juristic reason in this case, thereby defeating the claim of unjust enrichment. The Court concluded that the claim for constructive trust was not made out given there was no unjust enrichment or wrongful act. The Court found no basis for imposing a "good conscience" constructive trust, though declined to decide whether that category is even still available following the Supreme Court of Canada's decision in *Soulos v Korkontzilas*, [1997] 2 SCR 217. The Court of Appeal awarded the proceeds to the common-law wife and refunded the ex-wife the $7000.00 in premiums that she had paid to maintain the policy in the years after the divorce.

On appeal to the Supreme Court of Canada, in a 7-2 decision, the two dissenting judges took the same view as that of the majority of the Court of Appeal. However, the majority at the Supreme Court turned to equity to uphold the ex-wife's expectation interest under her contract with Moore - the contract being that she would receive the proceeds if she continued to pay the premiums. In this particular case, the key to the decision was finding that there was this contract between the ex-wife and the deceased. Writing for the majority, Cote J. concluded:

> . . .With respect to the extent of [the ex-wife's] deprivation, my view is that the quantification of her loss should not be limited to her out-of-pocket expenditures – that is, the $7,000 she paid in premiums between 2000 and 2013. Pursuant to her contractual obligation, she made those payments over the course of 13 years in exchange for the right to receive the policy proceeds from the Insurance Company upon [Moore's] death. In breach of his contractual obligation, however, [Moore] instead transferred that right to [the common law wife] . . .At the end of the day, therefore, what [the ex-wife] lost is not only the amount she paid in premiums. She

> stands deprived of the very thing for which she paid – that is, the right to claim the $250,000.00 in proceeds.
>
> To be clear, therefore, [the ex-wife's] entitlement under the Oral Agreement is what makes it such that she was deprived of the *full* value of the insurance payout. In other cases where the plaintiff has some general belief that the insured ought to have named him or her as the designated beneficiary, but otherwise has no legal or equitable right to be treated as the proper recipient of the insurance money, it will likely be impossible to find either that the right to receive that insurance money was ever held by the plaintiff or that it would have accrued to him or her. In such cases, the properly designated beneficiary is not enriched at the expense of a plaintiff who had no claim to the insurance money in the first place — the result being that the plaintiff will not have suffered a corresponding deprivation to the full extent of the insurance proceeds…[162]

The majority then went on to find the beneficiary designation under the *Insurance Act* did not create a juristic reason to prevent the ex-wife's claim. While Moore had the legal right to designate his common-law wife as his beneficiary the majority held that, having ceded his right by contract, equity prevented him from being considered an owner that had the right to designate a new beneficiary:

> At issue in this case, however, is whether a designation made pursuant to ss. 190(1) and 191(1) of the *Insurance Act* provides any reason in law or justice for [the common-law wife] to retain the disputed benefit notwithstanding [the ex-wife's] prior contractual right to remain named as beneficiary and therefore to receive the policy proceeds. In other words, does the statute preclude recovery for a plaintiff, like [the ex-wife], who stands deprived of the benefit of the insurance policy in circumstances such as these? In my view, it does not. **Nothing in the *Insurance Act* can be read as ousting the common law or equitable rights that persons other than the designated beneficiary may have in policy proceeds.** As this Court explained in *Rawluk v. Rawluk*, … the "legislature is presumed not to depart

[162] Moore v Sweet 2018 SCC 52 at paras 46 and 47.

> from prevailing law 'without expressing its intentions to do so with irresistible clearness'" …. By contrast, while the *Insurance Act* provides the mechanism by which beneficiaries can be designated and therefore become statutorily entitled to receive policy proceeds, no part of the *Insurance Act* operates with the necessary "irresistible clearness" to preclude the existence of contractual or equitable rights in those insurance proceeds once they have been paid to the named beneficiary.[163]

The majority clarified that the juristic reason permitting an unjust enrichment needs to justify not only the enrichment of one party but also the corresponding deprivation of the other party. The dissenting minority provided strong arguments that the *Insurance Act* should have been view as a sufficient juristic reason.

(iv) Resulting Trust Claims

A resulting trust is created when title to a property is in the name of a party that did not provide any value for the property, and that party is then required to return the property to the true owner.

Pecore v. Pecore,[164] is the decision that clarified the concept of resulting trust. 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,"* although the presumption of advancement was in future to be limited to cases of transfers to minor children.

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

[163] *Moore v Sweet* 2018 SCC 52 at para 70.
[164] *Pecore v. Pecore*, 2007 1 SCR 795 – See Also: *Madsen Estate v. Saylor* [2007] 1 S.C.R. 838, 2007 SCC 18

to be provided mostly by third party professionals. Making it even more important for counsel 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. ***Madsen Estate v. Saylor,***[165] another SCC decision rendered at the same time as *Pecore,* has also been followed by the Ontario Superior Court of Justice (the "SCJ") in many decisions since.

Evidence of Adequate Intention

In order for a gift to be valid, it is established that there must be 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. 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.

It appears, however, that courts are uncertain about the role of intention in bringing about the resulting trust. The common belief is that parents do not intend to make gifts to (non-dependant) 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*.[166]

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.[167] So what role does personal affection play, if any, in the determination of a parent's intention?

[165] 2007 SCC 18
[166] *Pecore* at para. 36
[167] *Pecore* at paras.100-103

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.[168]

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 parent's financial affairs. As such, the adult children may be in a better position than the estate to find and present the evidence (unless adult children were not aware of the joint

[168] *Pecore* at paras. 55-70

account.)[169] Consider also the role that financial institutions themselves play. Should they bear some responsibility in updating and clarifying their banking documents? Some 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.[170] What role do documents play? Is the best way to document intention through drafting and executing Deeds of Gift or Declarations of Intention?

A survey of appellate level case law citing *Pecore* and the applicability of the presumption of resulting trust to gratuitous transfers between parents and adult children reveals the evidence upon which the Court will place the most weight. In cases where the parent is still alive and a dispute arises over whether the transfer was a gift or a loan, or the property is being held on resulting trust, it is often a question of credibility of the witnesses that is determinative, especially since the parent is present, can testify, and is able to provide evidence as to intention at the time of the transfer. A chart summarizing appellate decisions (and evidence of intention in those cases) since *Pecore* dealing with gratuitous transfers between parents and adult children is attached at Appendix VI.

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 notary publics involved in the transfer or opening of accounts.

More than ten years on, *Pecore* may well have produced more questions than answers. The key take away however, appears to include that the presumption of resulting trust applies to *inter vivos* gifts, does not apply to testamentary dispositions, and some argue applies to beneficiary designations despite strong argument against this position. Furthermore, 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

[169] See *Doucette v. McInnes* 2009 BCCA 393
[170] 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, *Doucette v. McInnes* 2009 BCCA 393, *Fuller v. Harper* 2010 BCCA 421.

an adult child. Obtaining testimony from relevant financial institutions is also critical early on so as to preserve evidence of intention.

(v) Quantum Meruit Claims

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,*[171] 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 s. 13 of the *Evidence Act*.

In *Re Brown* (1999) 31 ETR (2d) 164, 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;

[171] *Deglman v. Guarantee Trust Company of Canada*, [1954] 3 D.L.R. 785 (S.C.C.)

- The value of such services; and
- The period over which the services were furnished.

Also see the case of *Tarantino v Galvano* 2017 ONSC 3535 where the Court had to determine the validity and monetary value of a *quantum meruit* claim for personal care services rendered by a daughter to her deceased mother, awarding the daughter $273,039.54 on her claim.

(vi) Family Law Act Claims

A surviving spouse who is not satisfied with the provision made under a Will may rely upon the statutory provisions in the *Family Law Act*[172] (FLA) and make a claim against the estate for an equalization payment from the estate. A surviving spouse can therefore elect to either:

a) Receive what was left under the Will, or on an intestacy; or

b) Rely upon s. 5 of the *FLA* to receive an equalization payment thereunder.

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 s. 5(2) of the FLA.

Pursuant to s. 6(1) of the FLA, a surviving spouse is entitled to elect to take under a Will or receive entitlement under s. 5 of the FLA. Subsection 6(2) provides that if the deceased died intestate, the surviving spouse may elect to receive entitlement under the intestacy provisions pursuant to Part II of the SLRA, or entitlement under s. 5 of the FLA.

An election is personal to the surviving spouse and this is pursuant to case law. An election may be made by the personal representative should the spouse become mentally incapacitated pursuant to case law.

[172] *Family Law Act,* RSO 1990, c F3

The election and corresponding application must take place within 6 months of the spouse's death pursuant to s. 6(10) of the FLA.

Pursuant to section 6(12) of the FLA, a spouse's entitlement to an equalization payment under s. 5 has priority over an order made against the estate for dependants' support under Part V of the SLRA, except an order in favor of a child of the deceased's spouse.

An FLA claim is made by way of Notice of Application. Once the election is 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 spouse may make an election under the FLA and may simultaneously commence a Dependants' Support Claim under the SLRA.

(vii) Inter Vivos Undue Influence

Inter vivos undue influence is distinguishable from testamentary undue influence discussed above. Testamentary undue influence arises from common law courts (not a product of equity) and is only available where overbearing coercive pressure has been brought to bear that effective overcomes the free will of the Will-maker.

Inter vivos undue influence is a judicial tool developed in the courts of equity during the 1700s and the 1800s. It is available against a broader spectrum of conduct and renders the gift or wealth transfer voidable (unlike testamentary undue influence which renders a wealth transfer void). The differences may be based on the fact that a gift by Will is fundamentally different than a gift made during one's lifetime. As explained by John Poyser, in his text *Capacity and Undue Influence*:

> Everyone loses ownership of all of their property at death. That turns the making of a will into a common and ordinary event. . .In contrast, very few people voluntarily divest themselves of their wealth while they are alive. . .Thus, a substantial *inter vivos* gift demands an explanation in a way a will does not. . .It is for those reasons that persuasion is allowed in the case of a will, even earnest

> persuasion and pressure, but persuasion is not allowed, unless comparatively mild, in the case of a substantial *inter vivos* gift.[173]

While there is a distinction between testamentary and *inter vivos* undue influence, courts have imported the principles of testamentary undue influence where the person making the gift or wealth transfer is on his or her deathbed.[174] Furthermore, the presumption of undue influence is applicable to gifts but not applicable to testamentary wealth transfers.

Unlike testamentary undue influence, (where the influence must amount to outright and overpowering coercion of the testator)[175] undue influence in the *inter vivos* gift context is usually divided into two classes.[176] As noted by Lord Justice Lindley in *Allcard v. Skinner:*

> First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a done placed in some close and confidential relation to the donor. . .
>
> The second group consists of cases in which the position of the donor to the done has been such that it has been the duty of the done to advise the donor, or even to manage his property for him.[177]

The first class of cases can be characterized as cases of "actual undue influence," and the second class, as "presumed undue influence" or "undue influence by relationship".

(viii) Actual Undue Influence

Actual undue influence occurs where an intention to gift is secured by unacceptable means. No relationship is necessary between the person making the gift and the person receiving it to attack a gift on the grounds of actual undue influence.

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[173] Poyser at pp. 302-303.
[174] Poyser at p. 529; *Keljanovic Estate v. Sanservino* 2000 CarswellOnt 1312 (C.A.).
[175] See *Seguin v Pearson*, 2018 ONCA 355.
[176] *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 171; Poyser at p.473. Note also that there is a distinction between presumption of undue influence and doctrine of undue influence. Presumption is an evidentiary tool. Doctrine is a substantive challenge originating in courts of equity, see Poyser at p.478.
[177] *Allcard v. Skinner* (1887), L.R. 36 CH. D. 145 at 181 (Eng.C.A., Ch.Div.) [*Allcard*].

Actual undue influence in the context of *inter vivos* gifts or transfers has been described as "cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. . ."[178] Actual undue influence would be where someone forces a person to make a gift, or cheats or manipulates or fools them to make such a gift.[179] The conduct amounting to actual undue influence often happens when the influencer and the victim are alone, which means it may be difficult to produce direct evidence. However, actual undue influence can be proven by circumstantial evidence.[180]

Actual undue influence is not reliant on any sort of relationship, instead it is based in equity on the principle that "no one shall be allowed to retain any benefit arising from his own fraud or wrongful act."[181] It is similar (but distinct) from the common law's duress doctrine.

The onus to prove actual *inter vivos* undue influence is on the party who alleges it. The standard of proof is the normal civil standard, requiring proof on a balance of probabilities. No higher standard is ever applicable.[182]

(ix) Presumed Undue Influence/Undue Influence by Relationship

This second class, presumed undue influence, does not depend on proof of reprehensible conduct. It is important to note however that the presumption of undue influence is an evidentiary tool while the doctrine of undue influence is a substantive challenge originating in the courts of equity.

Under this second class, equity will intervene as a matter of public policy to prevent the influence existing from certain relationships or "special" relationships from being

[178] *Allcard* at p. 181.
[179] *Allcard*; *Bradley v. Crittenden*, 1932 CarswellAlta 75 at para.6.
[180] Poyser at p.492.
[181] *Allcard, supra* note 37 at 171.
[182] *C(R) v. McDougall*, 2008 SCC 53

abused.[183] Relationships that qualify as a 'special relationship' are often determined by a 'smell test'.[184] Does the "potential for domination inhere [exist] in the relationship itself"?[185]

Relationships where presumed undue influence has been found include solicitor and client, parent and child, and guardian and ward, "as well as other relationships of dependency which defy easy categorization."[186] However, even these close, traditional relationships (i.e. parent and child) do not always attract the presumption and it is necessary to closely examine the specific relationship for the potential for domination,[187] such as where the parent is vulnerable through age, illness, cognitive decline or heavy reliance on the adult child.[188] *Geffen v. Goodman Estate*[189] remains the leading Supreme Court of Canada decision on presumed undue influence.

Once a presumption of undue influence is established, there is a shift to the person alleging a valid gift to rebut it. However, it is noted that the presumption casts an evidential burden, not a legal one. The legal burden is always on the person alleging undue influence but the party defending the gift can bring evidence to convince the court not to make a factual inference against the gift. The person alleged to have exerted such influence can produce evidence to rebut the presumption of undue influence.

The giftor must be shown to have entered into the transaction as a result of one's own "full, free and informed thought".[190] It is often difficult to defend a gift made in the context of a special relationship. The gift must be from a spontaneous act of a donor able to exercise free and independent will. In order to be successful in attacking a gift based on

[183] *Ogilvie v. Ogilvie Estate* (1998), 49 B.C.L.R. (3d) 277 at para. 14
[184] Poyser, *supra* note 33 at p.499
[185] *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353 at para. 42 [*Geffen*]
[186] *Geffen v. Goodman Estate*,[1991] 2 S.C.R. 353 at para. 42
[187] See *Elder Estate v. Bradshaw* 2015 BCSC 1266 where the Court found that the simple existence of a relationship between a younger caregiver and an older adult was not sufficient to raise a presumption of undue influence: "The generic label caregiver does not necessarily denote a fiduciary relationship of potential for domination. . .The nature of the specific relationship must be examined in each case to determine if the potential for domination is inherent in the relationship" at para. 108.
[188] *Stewart v. McLean* 2010 BCSC 64, *Modonese v. Delac Estate* 2011 BCSC 82 at para. 102
[189] [1991] 2 SCR 353
[190] *Geffen v. Goodman Estate* at para. 45

presumed undue influence the transaction or gift must be a substantial one, not a gift of a trifle or small amount.[191]

The presumption of undue influence can be rebutted by showing[192]:

a) no actual influence was used in the particular transaction or the lack of opportunity to influence the donor;[193]

b) the donor had independent legal advice or the opportunity to obtain independent legal advice;[194]

c) the donor had the ability to resist any such influence;[195]

d) the donor knew and appreciated what she was doing;[196] or

e) undue delay in prosecuting the claim, acquiescence or confirmation by the deceased.[197]

Seguin v Pearson, 2018 ONCA 355 is a case where children from a first marriage commenced litigation against a subsequent spouse of the deceased alleging undue influence. This case confirms the distinction between the analysis for testamentary undue influence and undue influence in the context of an *inter vivos* transaction.

The deceased had made his new spouse the principal beneficiary under his Will and had made an *inter vivos* transfer of his house into joint tenancy with his new spouse. His daughter brought an application seeking to invalidate the Will and *inter vivos* transfer alleging undue influence by the spouse. The trial judge rejected the daughter's argument

[191] Poyser at p.509
[192] From *Zeligs v. Janes* 2015 BCSC 7, citing Justice Punnet in *Stewart v. McLean*, 2010 BCSC 64 at para. 97
[193] *Geffe*n at p.379; *Longmuir v. Holland*, 2000 BCCA 538 at para. 121 [*Longmuir].*
[194] *Geffen* at p. 370; *Longmuir, supra* note 53 at para. 121.
[195] *Calbick v. Warne*, 2009 BCSC 1222 at para. 64.
[196] *Vout v. Hay*, [1995] 2 S.C.R. 876 at para. 29
[197] *Longmuir, supra* note 53 at para. 76

and found on the basis of "all of the evidence" that the daughter had failed to prove the spouse exerted dominance over the deceased.[198]

On appeal the daughter argued that the relationship between her father and his spouse (who also acted as his caregiver near the end of his life) gave rise to a presumption of undue influence which the spouse failed to rebut. In response the Court of Appeal clarified that the rebuttable presumption of undue influence arises only in the context of *inter vivos* transactions that take place during the grantor's lifetime. For Wills, it is testamentary undue influence that amounts to "outright and overpowering coercion of the testator, which must be considered".

The Court of Appeal went on to find though that the trial judge erred in the articulation of the test for testamentary undue influence. The trial judge erroneously conflated the test for undue influence that applies to *inter vivos* transfers with the relevant test in relation to testamentary gifts. However, the Court went on to find that this error "did not affect the reasonableness of his conclusions" and that the "trial judge's finding that there was no undue influence using the *inter vivos* standard would necessarily be the same had the trial judge applied the correct standard applicable to testamentary dispositions."[199]

The Court observed that under either test, the trial judge was required to examine all of the relevant surrounding circumstances, including: medical and lay evidence of the deceased's state of mind and overall health; the nature and length of his relationships with his spouse and his children; and his instructions to his solicitors, which indicated that he had thought deeply and thoroughly about the disposition of his property. The Wills and *inter vivos* transfer were "not the result of rash or emotional action but followed several months of [the deceased's] deliberate reflection, coupled with the meticulous and comprehensive legal advice that he received from two experienced practitioners." The daughter's appeal was dismissed.

Other recent cases and materials addressing *inter vivos* undue influence include*: Verwoord v Goss* 2014 BCSC 2122; *Servello v Servello* 2015 ONCA 434; *Cowper-Smith*

[198] *Seguin v Pearson*, 2016 CarswellOnt 17438 (SCJ) at para. 456
[199] *Seguin v Pearson* 2018 ONCA 355 at para. 14.

v Morgan 2017 SCC 61; *Jansen v Niels Estate*, 2017 ONCA 312; *Vanier v Vanier* 2017 ONCA 561; *Morreale v Romanino*, 2017 ONCA 359; *Thorsteinson v Olson* 2016 SKCA 134; *Zeligs v Janes* 2016 BCCA 280; *Donis v Georgopoulos*, 2016 ONCA 194; *Wittenberg v Wittenberg* 2015 NSCA 79; *Foley v McIntyre* 2015 ONCA 382; *Kavanagh v Lajoie* 2014 ONCA 187; and *Trotter Estate (Re)* 2014 ONCA 841; John E.S. Poyser, *Capacity and Undue Influence,* (Toronto: Carswell, 2014); Kimberly Whaley, *Undue Influence: Estates and Trusts Context*: http://www.welpartners.com/resources/WEL-Undue-Influence-PEI.pdf; Undue Influence Checklist, Appendix IV

(x) Claims under the Estates Act (Creditor Claims or Monetary Claims)

Sections 44 and 45 of the *Estates Act* deal with contestation of claims or demands against the Estate and involve liquidated and unliquidated claims. These provisions allow an estate trustee to expedite the process of any potential claims against the 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 Superior Court 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*[200], the Ontario Court of Appeal discussed the meaning of "claim or demand" under these provisions and held that the term "claim or demand" here refers to third party claims by creditors for payment. The Court further stated that a claim for dependants' support under the SLRA would fall outside of these provisions. Sections 44 and 45 cannot serve to accelerate a claim for support.

[200] *Omiciuolo (Estate Trustee of) v Pasco*, 2008 ONCA 241.

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 requires a Notice of Contestation to be submitted using form 75.13, which contains the following wording:

> 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.

(xi) Solicitor's Negligence[201]

The "high watermark" case on solicitor's negligence is the 1995 decision of the House of Lords of England, in *White v. Jones.*[202] This case affirmed the duty of care owed by solicitors to intended beneficiaries. In doing so, Lord Goff of Chieveley stated:

> [I]f such a duty is not recognized, the only persons who might have a valid claim (i.e. the testator and his estate) have suffered no loss, and the only persons who have suffered a loss (i.e. the disappointed beneficiary) have no claim. It can therefore be said that, if the solicitor owes no duty to the intended beneficiaries, there is a lacuna in law, which needs to be filled. This is a point of cardinal importance in the present case.
>
> The injustice of denying such a remedy is reinforced if one considers the importance of legacies in a society, which recognizes the right of citizens to leave their assets to whom they please. . .
>
> There is a sense in which the solicitor's profession cannot complain if such a liability may be imposed upon their members. If one of the has been negligent in such a way as to defeat his client's testamentary intentions, he must regard himself as very lucky indeed if the effect of the law is that he is not liable to pay damages

[201] Whaley, Kimberly, "Solicitor's Negligence: Estates and Trust Context", The Advocate's Quarterly, February 2016, Volume 45, No.1
[202] [1995] ALL ER 692 (HL)[*White v Jones*]

> in the ordinary way. It can evolve no injustice to render him subject to such a liability, even if the damages are not payable to his client's estate for distribution to the disappointed beneficiary, but rather directly to the disappointed beneficiary…[203]

Canadian Courts have since adopted the reasoning set out by the House of Lords. The principle that a third party beneficiary has standing to bring a claim against the drafting solicitor, despite privity of contract, is now firmly established in Canadian jurisprudence.

Standard of Care

In 1986 the Supreme Court of Canada set out a solicitor's standard of care in the case of *Central Trust Co. v. Rafuse*[204]. The Court noted that a solicitor will be held to the standard of the reasonably competent solicitor, the ordinary competent solicitor or the ordinary prudent solicitor. The standard is one of reasonableness, not perfection. The relevant question is not whether the solicitor made a mistake, rather whether a reasonably competent lawyer, practicing in the same community, at the time in question, would not have made the error?

The factors to consider in determining the reasonableness of the solicitor's conduct are as follows:

- The terms of the lawyer's retainer: for example whether a precise timetable was agreed upon between the lawyer and client;
- Whether there was any delay caused by the client;
- The importance of the Will to the testator;
- The complexity of the job – for example, the more complex the Will the more time is required;
- Any circumstances indicating the risk of death or onset of incapacity in the testator; and

[203] [1995] 1 ALL ER 692 (HL) at 705.
[204] *Central Trust Co. v. Rafuse*, [1986] 2 SCR 147

- Whether there has been a reasonable ordering of the lawyer's priorities.[205]

Undue Influence & Solicitor Negligence

One of the more prevalent areas where negligence becomes an issue is in cases of undue influence. As such, the need to be more aware and diligent about the indicators and potential for undue influence.

The case of *Hussey v. Parsons,*[206] dealt with a claim against a solicitor where undue influence was a factor. Justice Puddestar found no actual evidence of undue influence, but noted that there were "indicia of undue influence" present which "suggested that the situation as a whole was one which called for an extra degree of care and inquiry by the [solicitor] in terms of exactly what were the interests, intentions and understandings of the plaintiff".[207]

Limitation Period

Under the Ontario *Limitations Act*, 2002,[208] a client has two years from the date upon which the claim is discovered to commence an action against the solicitor.

In *Lauesen v. Silverman,*[209] the Ontario Court of Appeal examined the discoverability principle as it applies to claims against solicitors. In that case, the Plaintiff commenced an action against her former lawyer almost 6 years after her personal injury action was settled. She argued that the settlement was unfair. The lawyer brought a motion for summary judgment arguing that the action was statute barred. The motions judge agreed and dismissed the action.

The Plaintiff appealed. She argued that she did not know she had a claim against her lawyer until she consulted a new lawyer and obtained an expert opinion indicating that she had suffered "catastrophic" injuries. The appeal was allowed. The Court found that

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[205] *Rosenberg Estate v Black,* 2001 CarswellOnt 4504 (SCJ) at para 42; *McCullough v Riffert*, 2010 ONSC 3891 at para. 50
[206] *Hussey v Parsons*, 1997 CarswellNfld 349 (T.D.)("*Hussey*")
[207] *Ibid.* para. 633
[208] *Supra*, note 100
[209] *Lauesen v. Silverman*, 2016 ONCA 327

the motion judge misapprehended the significance of the expert opinion. It was the first indication to the appellant and her new lawyer that her injuries from the accident were very significant and warranted more compensation than she had received from the settlement.

Furthermore, given that the appellant had no reason to believe there was anything to investigate with respect to a potential claim against the respondent, she exercised reasonable due diligence in the circumstances of this case.

Discoverability is very fact specific. In the context of estates cases, however, it is likely that no injury will occur and no "discovery" until after the death of the testator.

There is a vast and expanding number of authorities on this topic which illustrate the need for heightened awareness and diligence amongst solicitors. There is a clearly defined duty of care on the estate planning lawyer. Reasonable foreseeability and proximity of relationship may serve to sustain a negligence claim against counsel. The solicitor must exercise diligence in avoiding acts or omission which may be detrimental to the testator/client and the intended beneficiaries.[210]

Best Practices

Implementing a "best practices" set of guidelines and adhering to them is always preferred to facing a negligence claim. I have set out a number of practice considerations below, which are by no means meant to be exhaustive:

> **Time Considerations**: Do not miss time limits or cause inordinate delay in carrying out your client's instructions. Come to an agreement regarding the time frame for completing the will at the outset with the client. However, also be vigilant when *unreasonable* time limits are imposed by the client. Decline to act where timelines are unreasonable and prevent you from consulting fully with the client and other third parties or giving a matter appropriate time and attention.

[210] Whaley, Kimberly, "Solicitor's Negligence: Estates and Trust Context", The Advocate's Quarterly, February 2016, Volume 45, No.1

Communication: Be clear in communications with your clients, other solicitors, or third party beneficiaries. Manage your client's expectations through clear communications. Ask probative, open-ended and comprehensive questions which may help to elicit important information involving the psychology of the client executing the planning document. First and foremost, always take comprehensive and detailed notes.

High-Risk Situations: Be aware of high-risk situations including estate planning for spouses which impact matrimonial and family property rights; or estate freezes by parents, including where only one child may benefit from the freeze and receive the benefit of future equity growth; or estate planning involving the lawyer's family members. Be vigilant during "death-bed" planning or pre-nuptial Wills "on-the-way-to-the-alter" etc.

Avoid Potential for Undue Influence: Set in place "best practices" to avoid the potential for undue influence:

- Interview the client alone;
- Obtain comprehensive information from the client, determine relationships between the client and family members, friends, acquaintances and draw a family tree; determine recent changes in relationships or living circumstances etc.;
- Consider indicators of undue influence including whether there is an individual who tends to come with your client to his or her appointments. If so, what is the nature of that relationship?;
- Is your client well-supported? Or does that support come from one family member? Or, is your client socially isolated? Is your client independent with respect to personal care and finances or does she rely on one particular individual? Is there conflict within the client's family?; and
- Are there any communication issues? Medical issues? Physical impairment of sight, hearing or mobility?

For a detailed review of the case law as well as practice tips on avoiding negligence claims, please see my article: "Solicitor's Negligence: Estates and Trust Context", The

Advocate's Quarterly, February 2016, Volume 45, No.1.[211] For a checklist of further best practices see Appendix V: Checklist "Red Flags" of Decisional Incapacity in a Legal Retainer": http://www.welpartners.com/resources/WEL_ILA_checklist.pdf, and The Advocates Quarterly, *Independent Legal Advice: Risks Associated with "ILA" Where Undue Influence and Capacity are Complicating Factors:* *http://welpartners.com/resources/WEL-Adv-Quarterly-47-4-Risks-Associated-with-ILA.pdf*

(xii) Promissory/Proprietary Estoppel

The two main forms in which the doctrine of equitable estoppel exists have been called promissory estoppel and proprietary estoppel.

Promissory estoppel is an equitable defence. The party relying on the doctrine must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. The representee must establish that in reliance on the representation, he acted on it or some way changed his position. See *Maracle v. Travellers Indemnity Co. of Canada*, 1991 CanLII 58 (SCC), [1991] 2 S.C.R. 50 at para. 13 per Sopinka J.

Proprietary estoppel deals with a promise with respect to land or property and is an increasingly used tool to remedy and to protect a person 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. The modern doctrine of proprietary estoppel can be used as *either* a cause of action or as a defence.

In *Schwark v. Cutting* in 2010, the Ontario Court of Appeal confirmed the well-settled test for proprietary estoppel:[212]

[211] Whaley, Kimberly, "Solicitor's Negligence: Estates and Trust Context", The Advocate's Quarterly, February 2016, Volume 45, No.1.
[212] *Schwark v Cutting*, 2010 ONCA 61 at para 34.

(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.[213]

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. Estate litigants should be aware of this potential avenue of legal recourse and plead it in appropriate cases.

In a recent case, ***Cowper-Smith v. Morgan*, 2017 SCC 61**, the Supreme Court of Canada had occasion to reconsider the equitable doctrine of proprietary estoppel. The Supreme Court's ruling clarifies the test for proprietary estoppel and arguably expands its scope. It is an important decision for all practice areas, and particularly for those who practice in wills and estates.

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 it once it passed to her under

[213] *Schwark* at para 23.

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 assurance are made.

The only 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 Home defeated the brother's claim and if it did not, 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 as a result 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.

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 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.

The majority of the Court directed the sister, in her capacity as estate trustee of her mother's estate to effect 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 – nor whether equity more broadly enforces non-contractual promises on which claimants have detrimentally relied. 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.

Other cases dealing with proprietary estoppel include: *Cowderoy v Sorkos Estate*, 2012 ONSC 1921, rev'd in part 2014 ONCA 618; *Clarke v Johnson* 2012 ONSC 4320, aff'd 2014 ONCA 237; *Scholz v Scholz* 2013 BCCA 309.

22. Passing of Accounts

A passing of account is a formal procedure, governed by statute, for court approval of the accounts of a fiduciary (estate trustee, trustee, attorney under a power of attorney, guardian, etc.) for a relevant period of administration or property management. This portion of the paper is a short summary of the passing of account applications, for a more thorough discussion see the publication WEL on Fiduciary Accounting.[214] Further, for more information on the role of attorneys under a Power of Attorney to account, see the

[214] This can also be found on WEL's website at: http://welpartners.com/resources/WEL-on-fiduciary-accounting.pdf

publications WEL on Powers of Attorney[215] and for the role of guardians and their duty to account, see the publication WEL on Guardianships.[216]

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 jurisdiction of the Estate Trustee to pass accounts arises from Section 23(1) of the *Trustee Act*:

> **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. R.S.O. 1990, c. T.23, s. 23 (1); 2000, c. 26, Sched. A, s. 15 (2).

Additionally, Section 48 of the *Estates Act*, further states 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. R.S.O. 1990, c. E.21, s. 48.

The jurisdiction of the court, as it extends to specific powers of inquiry on an application to pass accounts, arise from the *Estates Act*, section 49. Those include, receiving 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

[215] This can also be found on WEL's website at: http://welpartners.com/resources/WEL-on-powers-of-attorney.pdf
[216] This can also be found on WEL's website at: http://welpartners.com/resources/WEL-on-guardianship.pdf

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) and make all necessary directions in connection with the issue.

Subsections 49 (8) and (9) of the *Estates Act*, requires service of notice of taking accounts upon the Public Trustee's office in certain circumstances, such as where the estate requires charitable donations, or where the deceased dies intestate and the administration is granted to someone who is not the deceased's next of kin.

Judges also have 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 of 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 there shall be no requirement to render an account of the property of the deceased, subjection at the instance or on behalf of a person interested in the property, or of a third-party creditor of the deceased.

As to the jurisdiction of the attorney and guardian to pass accounts, such jurisdiction arises from the *Substitute Decisions Act* S.O 1992. c. 30*,* at Section 42(1)-(5).

The procedure and form for the passing of accounts is set out in the *Rules of Civil Procedure* at Rule 74.16 through to 74.18. Rule 74.18 addresses the process of filing an Application to Pass Accounts. Some significant changes to this particular Rule came into effect as of January 1, 2016. The changes involved service and filing deadlines for such applications.

In addition to the Rules discussed below, if a passing of account application is brought in Toronto, it is important to review the "Consolidated Practice Direction concerning the

Estates List in the Toronto Region", most recent version effective June 15, 2018, in particular Part V (B).[217]

Passing of Estates Accounts

Rule 74.16 of the *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. Rules 74.17 (1) (a) through (j) (2) and (3) sets out the proper form of the accounts.

As to how the passing of accounts may come about, Rule 74.15(1) (h) gives any individual having a financial interest in an estate to compel a passing of accounts.

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, amended as of January 2016. Rule 74.18(4) requires the applicant on an application to pass accounts also serves the Notice of Application and files 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 other fiduciary).

[217] Toronto Practice Direction, online: http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/estates/#B_Passing_of_Accounts_Applications

Notice of Objection

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.

Request for Further Notice Form

If the recipient does not want to make an objection, but wishes to continue to be served with notice of any further steps in the application, they may, as of January 1, 2016, serve and file a new form called a "Request for Further Notice" (Form 74.45.1) at least 35 days before the hearing date specified in the Notice of Application. Only those who serve and file this new form will be entitled to receive notice of any further step in the application, receive any further document in the application; file material relating to costs and in the event of a hearing be heard at the hearing, examine a witness and cross-examine on an affidavit but only related to a request for increased costs.

Uncontested

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

Where there is an objection and a contested hearing for a passing of accounts, Rules 74.18(11.5) through (13) apply. Recent amendments to these sub-rules set out the court's authority to order a trial and provide direction with respect to its conduct at the hearing of the application to pass accounts. New 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 served 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. See Rule 74.18(11.9).

Trial May Be Directed

New sub-rules 74.18(13.1) & (13.2) provide that on a hearing of the application the court may order that the application, or any issue, proceed to trial and the court may provide direction with respect to the conduct of the trial. The court may also order that a mediation session be conducted in accordance with new Rule 75.2 (discussed above), even if not subject to mandatory mediation.

Costs

The costs of an unopposed Judgment are addressed in Rule 74.18(10) and for an opposed hearing they are set out in Rule 74.18(13) and Tariff C (a chart setting out Lawyer's Costs Allowed on a Passing of Accounts without a Hearing).

In respect of costs, often the costs set out at Tariff C for an unopposed passing are insufficient. Regard should also be had to Rules 74.18(11) to 74.18(11.5) and the form of Request for Increased Costs.

The Request for Increased Costs must be served at least 15 days before the hearing date of the application. While the previous rule required all parties to be served with a Request

for Increased Costs, under the amendments, only the applicant, objectors, and parties who have served a Request for Further Notice (and sometimes the PGT/ OCL) need to be served. The Request should include a costs outline.

The Response to the Request is to be served either consenting or objecting to the Request for Increased Costs at least 10 days before the hearing date of the application. The applicant for increased costs must file any supplementary record at least 5 days before the hearing date of the application. The court has the discretion to modify costs awards.

Judgment

The form of judgment received on a contested passing of accounts after a hearing is as set out in Form 74.51 under the *Rules of Civil Procedure*. The form of judgment received without a hearing is Form 74.50 under the *Rules of Civil Procedure*.

The *Estates Act*, Section 10, governs appeals from passing of accounts, which states that any appeal for a judgment amount exceeding $200.00 is to the Divisional Court.

In terms of timing, there is no particular timing mandated by statute, case law, or otherwise, concerning the passing of accounts procedure in Ontario.

Case Law

There has been a great deal of case law concerning passing of accounts, primarily addressing compensation, and the calculation thereof, amongst other issues, a few include: *Strickland v Thames Valley District School Board; Re Kaptyn*, 2009 CarswellOnt 7548 (SCJ); *Zimmerman v McMichael Estate* 2010 ONSC 2947; *DeLorenzo v Beresh* 2010 ONSC 5655; *Vincent Estate Re*, 2011 ONSC 3806, 2011 ONSC 5625 (unreported); *Craven v Osidacz Estate* 2010 CarswellOnt 8975; *Langsten v Landen,* 2010 CarswellOnt 9919, 2011CarswellOnt 1948, 2012 CarswellOnt 16824 (SCJ), 2013 ONSC 4241; *(Re) Aber Estate* 2015 ONSC 5123 (Div Ct);*Tierney (Estate) v Brown)* 2015 ONSC 4137.

23. Multiple Wills, "Basket Clauses" and Probate: *Re Milne* & *Re Panda*

In 2018, there were two cases that addressed multiple wills which caused a ripple of concern for estate solicitors.

Re Milne 2018 ONSC 4174 involved multiple wills (a primary will and a secondary will) that contained what have become known as “basket clauses”. These clauses give the estate trustee power to allocate assets into either the primary will (the will that would be probated and which attracts estate administration tax) or the secondary will (that does not have to be probated). When the estate trustee applied for a Certificate of Appointment of Estate Trustee (probate) of the Primary Will in Milne, Justice Dunphy held that the Primary Will was void because its basket clause excluded assets for which the trustees determined that probate was not required. His Honour concluded that this rendered the Primary Will uncertain. He came to this conclusion because he opined that a will is form of trust and it must therefore satisfy the three certainties of intent, subject matter, and objects. In his view, certainty of objects was lacking. The decision is under appeal

Following the decision several lawyers raised concerns about the decision and LawPro even published a “statement” on its website stating that as the appeal may take several months, “Lawyers that have drafted wills that may be impacted by this decision because they used similar wording should report to their excess insurer(s)”.

However, one month after *Re Milne* was released another decision was reported with almost identical facts to those in *Re Milne*. However in this case, *Re Panda*, 2018 ONSC 6784 Justice Penny declined to follow *Re Milne*. His Honour stated that the decision in Milne raised one procedural and two substantive issues. The procedure being:

- whether on an unopposed application for a certificate of appointment as estate trustee, it is appropriate to inquire into substantive questions of construction of the will or whether the inquiry is limited to “formal” validity of the will for purposes of probate?[218]

The substantive issues raised were:

[218] *Re Panda* at para. 13.

- whether the validity of a Will depends upon the testamentary instrument satisfying the "three certainties" test which govern the test for the valid creation of a trust; and
- whether apart from the questions of the validity of the Will itself, a testator can confer on his/her personal representatives the ability to decide those assets in respect of which they will seek probate and those in respect of which they will not.[219]

With respect to the procedural issue, Justice Penny disagreed with Justice Dunphy's approach and concluded that the role of the Court when exercising its Probate function is limited.[220]

With respect to the first substantive issue, Justice Penny also disagreed strongly with Justice Dunphy's assertion that a will is a kind of trust and for a will to be valid it must satisfy the "three certainties". As for the second substantive issue, Justice Penny concluded that the question whether a testator can give the estate trustee power to determine the assets subject to probate is a question of construction and not a question of the validity of the will itself. A question of construction should not be considered on an application for probate.

However, Justice Penny also made clear that such basket clauses may raise validity issues that can be addressed in proceedings in which the will or portions of it are presented to the court for construction. While those issues should not be considered in probate, they may and are likely to be raised in future proceedings before the court exercising its construction function.

Both *Milne Re* and *Panda Re* are Ontario Superior Court of Justice cases. We will have to see what the Ontario Court of Appeal has to say on this issue.

For more information, please see: *What is a Will and What is the Role of a Court of Probate*:http://welpartners.com/blog/2018/09/what-is-a-will-and-what-is-the-role-of-a-

[219] *Re Panda* at para. 14.
[220] *Re Panda* at paras 15-18.

court-of-probate/ and *What Is a Will and What Is the Role of a Court of Probate Redux: Re Milne and Re Panda*: http://welpartners.com/blog/2018/11/what-is-a-will-and-what-is-the-role-of-a-court-of-probate-redux-re-milne-and-re-panda/

24. Appendices

Appendix I – Notice of Objection

Appendix II - Precedent Orders Giving Directions

Appendix III – Capacity Checklist

Appendix IV – Undue Influence Checklist

Appendix V – Checklist: "Red Flags" for Decisional Incapacity in the Context of a Legal Retainer

Appendix VI – Chart: Pecore 10 Years Later – Summary of Appellate Level Cases Applying Pecore

Appendix VII – Estate Litigation Evidence "Cheat Sheet"

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

Kimberly A. Whaley, Whaley Estate Litigation Partners, January 2019

Appendix I

Notice of Objection

FORM 75.1

Courts of Justice Act

NOTICE OF OBJECTION

ONTARIO

SUPERIOR COURT OF JUSTICE

In the Estate of the deceased person described below:

DETAILS ABOUT THE DECEASED PERSON

Complete in full as applicable

First given name	Second given name	Third given name	Surname

And if the deceased was known by any other name(s), state below the full name(s) used including surname.

First given name	Second given name	Third given name	Surname

IN THE MATTER OF an application for a certificate of appointment of estate trustee

NOTICE OF OBJECTION

I, _____ , object to the issuing of a certificate of
(insert name)

appointment of estate trustee to _____
(insert name of applicant)

without notice to me because: *(Indicate reason, such as lack of testamentary capacity, undue influence or unfitness to act as estate trustee.)*

The nature of my interest in the estate is *(State relationship to the deceased and whether a named beneficiary under the will, or other basis for financial interest.)*:

DATE .....

.....

(Name, address and telephone number of objector or lawyer for objector)

Appendix II

Draft Orders Giving Directions

Order for Directions – Estate List Proceedings – Applications – Motions (Sample Terms)

Issue	Comments		Sample Clause
Accounting of former Attorney; Estate Trustee			**THIS COURT ORDERS** that the Respondent file accounts of the Estate of ● and an Application to pass accounts, in accordance with Rules 74.15 - 74.18 of the *Rules of Civil Procedure*, in the Court office within ● days after this Order is served for ● from the date of the within Order.
Tracing Order			**THIS COURT ORDERS** that a tracing Order shall be and hereby is granted in accordance with the provisions of the *Rules of Civil Procedure*, Rules 44 and 45, and Section 104 of the Courts of Justice Act, as deemed necessary and appropriate by the (applicants/ respondents) to ascertain assets for recovery in respect of (person ●attorney for property ● Estate Trustee) **THIS COURT ORDERS** that ____shall, within 60 days of the date of this Order, commence an application to pass his accounts as attorney for property of ___ from 1994 to the date of this Order on notice to __, the Applicant, and the Public Guardian and Trustee **THIS COURT ORDERS** that the Attorney (person) shall pass accounts in accordance with Sections 42 of the *Substitute Decisions Act*, S.O. 1992, c 30 as amended

Issue	Comments		Sample Clause
			("SDA") and Rules 74.16, 74.17, and 74.18 of the *Rules of Civil Procedure* for the period of time when (person) was acting as attorney, pursuant to Continuing Powers of Attorney for Property dated ( ) and Personal Care (dated), or otherwise acting as a fiduciary, until the period ending (date) ● or until the date of the within Order.
Substitute Decisions Act Accounting matters			**THIS COURT ORDERS** that leave of this Honourable Court, be and is hereby granted to the (applicants) to bring this application pursuant to Section 42(1) of the *Substitute Decisions Act*, S.O. 1992, c 30 as amended .
Addresses for all Respondents not known			**THIS COURT ORDERS** that the Estate Trustee During Litigation shall search through all the records of the Deceased and provide to the Applicants any and all contact information relating to those Respondents not yet served. The Estate Trustee During Litigation shall take all reasonable steps to obtain those addresses for service if same are not available through the Deceased's books and records. The costs of the search to obtain the addresses shall be borne by the Estate.
Affidavit of Documents			**THIS COURT ORDERS** that the Moving Parties/Applicants and the Respondent shall serve and file Affidavits of Documents and attend and submit to Examinations for Discovery in accordance with the *Rules of Civil Procedure*.
Certificate of Pending Litigation			**THIS COURT ORDERS** the local registrar for the County of ● in the Province of Ontario to issue a Certificate of

Issue	Comments		Sample Clause
			Pending Litigation against the real property known municipally as ● and having a legal description of ● registered in the name of ●. **THIS COURT ORDERS** that a Certificate of Pending Litigation be and hereby is granted, subject only to the filing of the required papers giving effect to the registration of the same, and such Certificate of Pending Litigation shall be filed against title on the property referred to ● legally described as ● and defined herein as (identify property) and the costs of effecting the same shall be borne by ● person ●estate ● attorney **THIS COURT ORDERS** that the issuance and registration of the Certificate of Pending Litigation herein is without prejudice to _____ to move for an order discharging the Certificate on the grounds that it is not appropriate in the circumstances, that he/she will provide substituted security, or on such other grounds as he/she may advise and the court may accept, and that such motion shall be on notice to the Applicant. **THIS COURT ORDERS** that a Certificate of Pending Litigation on the property legally describes as ● and municipally known as ● be discharged

Issue	Comments		Sample Clause
Consolidation of Other Proceedings			**THIS COURT ORDERS** that the application brought by ●, File No. ● is hereby consolidated and joined with the within proceedings.
Constructive Trust Claim			● affirm and ● denies that the Deceased, at the time of her death, had a beneficial interest in the assets of her spouse, ●, common law spouse ●, including, but not limited, to his shares in the company, ●, titled owner of the house property known as ● and legally described as ● as in ●, or otherwise known as ● by way of constructive trust, resulting trust, trust, unjust enrichment, quantum meruit, or otherwise, such interest having devolved to the Deceased's Estate upon her death.
Constructive Trust Unjust Enrichment Resulting Trust			**THIS COURT ORDERS** that the parties to the proceedings and the issues to be tried are as follows: (x) affirms and (y) deny that (x) is entitled to relief from the estate of the deceased for unjust enrichment, constructive or resulting trust, trust, and/or quantum meruit, such relief claimed to be equal to the value of the (x) contribution to the real property owned by the deceased, including household property, and to be calculated either in the form of damages, or the transfer of any said remaining properties, and/or from the estate of the deceased to the (x).
Costs			**THIS COURT ORDERS** that the costs of and incidental to the (applicants) in the bringing of this application, shall be paid on a full indemnity, solicitor and client basis by (person ●estate of the deceased ● Estate Trustee ● Attorney).

Issue	Comments		Sample Clause
			THIS COURT ORDERS that the costs of this return of this Application shall be determined by the Judge hearing the Application or trial, or on further Order of this Honourable Court.
De bene esse examination			**THIS COURT ORDERS** that a *de bene esse* Examination of ● be conducted and videotaped for use at the trial of this action, such examination to take place within one month of the date of this Order.
Deemed Undertaking			**THIS COURT ORDERS** that Rule 30.1.01(3) of the *Rules of Civil Procedure* shall not apply to the use of evidence, or information obtained, by the parties in the within Application. **THIS COURT DECLARES** that Rule 30.1.01(3) of the *Rules of Civil Procedure* does not apply to the evidence obtained pursuant to this Order Giving Directions herein.
Estate Trustee during Litigation ("ETDL")			**THIS COURT ORDERS** that ● be and is hereby appointed Estate Trustee During Litigation without security, of all singular property of the Estate of ●, pending the final resolution or settlement of the litigation herein and that a Certificate of Appointment of Estate Trustee During Litigation be issued to ● subject to the filing of the necessary Supporting Application. **THIS COURT ORDERS** that the ETDL shall be authorized to exercise those powers given by law to an administrator,

Issue	Comments		Sample Clause
			including such powers under the *Estate* Act, R.S.O. 1990 c. E.21, *Trustee Act,* R.S.O. 1990 c.23, and the common law
ETDL Fee Agreement and Consent			**THIS COURT ORDERS** that subject to further review by the Court, if necessary, the Estate Trustee During Litigation, shall receive out of the assets of the Estate of ● reasonable remuneration, which shall be calculated on the basis of the consent and fee schedule attached hereto as Schedule "A".
ETDL Powers			**THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby authorized to exercise those powers given by law to an administrator including such powers under the *Estates Act* R.S.O. 1990 c.E. 21 as amended and without limiting the generality of the foregoing, the Estate Trustee During Litigation is hereby specifically authorized to do the following: (a) to obtain an appraisal of any Real Property comprising an asset of the Estate and to sell any such Real Property; (b) subject to any list or memorandum of ●, to sell any articles of personal, domestic or household use or ornament comprising of the assets of the Estate including Consumable Stores and all automobiles and accessories thereto; and (c) that the Estate Trustee During Litigation shall be at liberty to appoint an agent or agents and pay such agent or agents from the Estate, and seek such assistance from time to

Issue	Comments		Sample Clause
			time as they may consider necessary, for the purpose of performing their duties hereunder. (d) to realize the assets and liabilities of the Estate
			THIS COURT ORDERS that all property and assets forming part of the Estate of the deceased shall be and are hereby vested in the Estate Trustee During Litigation from the date of the Order Giving Directions herein.
Examination for Discovery			**THIS COURT ORDERS** that the Moving Parties and the Respondent shall serve and file Affidavits of Documents and attend and submit to Examinations for Discovery in accordance with the Rules of Civil Procedure. **THIS COURT ORDERS** that the Moving Parties may examine _____ on oath or affirmation, before an official examiner or reporting service, for the purpose of having her testimony available to be tendered at the return of this motion or at trial, and that the Applicant shall have the right to attend said examination and shall have a right of cross-examination. **THIS COURT ORDERS** that, within sixty (60) days of the date of this Order, _____ shall be examined under oath pursuant to Rule 39.03 the *Rules of Civil Procedure,* upon service of a Summons To Witness, for the sole purpose of determining the assets, liabilities and income of the Deceased

Issue	Comments		Sample Clause
			THIS COURT ORDERS that a copy of this Order and the Summons to Witness ,referred to in paragraph __ herein, shall be served by regular and registered mail on _____ to (Address) and shall be served on _____ by regular and registered mail to_____(Address) **THIS COURT ORDERS** that the examination of _____ may take place by video telephone conference if desired by the Moving Parties and by the Applicant, at a time and place to be mutually agreed upon or by further court order, if necessary. **THIS COURT ORDERS that** the evidence of _____ shall only be tendered as evidence at trial, upon evidence acceptable to the Applicant, from a medical professional that, at the time, _____ is incapable of testifying in person due to death or mental incapacity, or failing such agreement upon further order of this Court **THIS COURT ORDERS** that all cross-examinations of the Applicant, the Moving Parties, and _____, the lawyer who prepared the Will dated _____, shall be completed on or before _____
Examination of Non-parties			**THIS COURT ORDERS** that the parties are hereby granted leave pursuant to Rule 31.10 to examine for discovery the

Issue	Comments		Sample Clause
			solicitor who prepared the Will of ●, the costs of the examination to be reserved to the Trial Judge. **THIS COURT ORDERS** that the parties are hereby granted leave to apply to the Court on proper notice pursuant to Rule 31.10 to examine for discovery the solicitor or such other individual, who prepared the Will of ● whose identity is unknown as of the date of this Order, and the costs of the examinations shall be reserved to the Trial Judge. **THIS COURT ORDERS** … to examine for discovery the non-party witnesses herein listed as follows:
Family Law Act			**THIS COURT ORDERS** that a time period with respect to the commencement of an application pursuant to Section 5 (2), Section 6, and 6(1) of The *Family Law Act*, RSO 1990, shall be and hereby is extended to ● days following the determination of the validity of the Last Will & Testament of the deceased, ● or following an accounting of the deceased assets pursuant to the *Rules of Civil Procedure*, ● or for a period of ● days allowing sufficient time to assess the calculation necessary to determine if an election under Section 5(2) of the *Family Law Act* will be made. THIS **COURT ORDERS** that the date by which the (applicant/person) is entitled to file an Election in the office of the Estate Registrar for Ontario pursuant to Section 6(10) of *The Family Law Act*, RSO 1990, shall be and is hereby extended to ● (x) days following the determination of (x).

Issue	Comments		Sample Clause
			THIS COURT ORDERS that a time period with respect to the commencement of an application pursuant to Section 5 (2) of *The Family Law Act*, RSO 1990, be and hereby is extended to (x) days. (i) Having regard to the terms of the Last Will and Testament of l deceased, (the "deceased") dated l and the evidence of the Parties and evidence arising from the within proceedings, was the deceased separated from her spouse, l as at the date of her death on l? ; (ii) If the answer to (i) above is Yes, on what date did the deceased and l separate?; (iii) If the answer to (i) above is Yes, and if the answer to (ii) is a date more than 6 years prior to the date of death of the deceased, has the limitation period for the bringing of an equalization claim expired pursuant to Section 7(3) of the *Family Law Act*? (iv) If the limitation period under Section 7(3) of the *Family Law Act* has expired, should the limitation period be extended pursuant to Section 2(8) of the *Family Law Act*? (v) If the limitation period has not expired, or if it is extended pursuant to paragraph (iv):

Issue	Comments		Sample Clause
			(a) What is the date of separation? (b) What is the "Valuation date"? (c) What is the Net Family Property of the deceased? (d) What is the Net Family Property of l? (e) What is the equalization amount of the net family properties? (f) Should there be a variation of the equalization payment pursuant to Section 5(6) of the *Family Law Act*? Does __have a quantum meruit, unjust enrichment, constructive, resulting trust, or trust interest in the property known as _____? Is _ barred from advancing such claims by way of the Limitations Act, 2002, S.O. 2002, not having advanced such claims at (a) above, during the lifetime of the deceased?
Forensic Accounting			**THIS COURT ORDERS** that a forensic accounting shall be conducted of (incapable person ● deceased) finances and property from the period commencing (date) through the period (date) as deemed necessary and appropriate by the Parties ● by the Applicant with costs to be determined by the Judge disposing of this matter, but paid at first instance

Issue	Comments		Sample Clause
			by ● out of the assets of ● the incompetent person, ● the deceased. .
Further Directions			**THIS COURT ORDERS** that the parties are hereby granted leave to move for further directions as may appear advisable or necessary. **THIS COURT ORDERS** that the Applicant shall file any responding material to the within motion for summary judgment on or before _____, 2012. **THIS COURT ORDERS that** the Moving Parties, or any of them, shall file any reply to the responding material of the Applicant referred to in paragraph _____ herein on or before _____, 2012 **THIS COURT ORDERS** that the motion for summary judgment shall be heard on _____2012. **THIS COURT ORDERS** that the costs of this motion shall be reserved to the Application or trial judge **THIS COURT ORDERS** that the costs of the examination referred to in paragraph _____ herein, shall be paid by the Estate of the Deceased **THIS COURT ORDERS** that the remainder of the relief sought in the within proceeding shall be and hereby is adjourned to a date to be determined by the parties

Issue	Comments		Sample Clause
Hearing/Trial			**THIS COURT ORDERS** that the issues be tried without a Jury in Toronto, Ontario at a date to be fixed by the Registrar, and the records shall consist of this Order Giving Directions and any other Order For Directions made by this Court. Following the mediation in this proceeding any party shall be at liberty to set this proceeding down for trial without the consent of the other party.
Interim administrator /Estate Trustee			**THIS COURT ORDERS** that (x) be appointed as the interim ● Administrator ● Estate Trustee of the Estate of the deceased, and that (x) shall forthwith conduct an investigation to ascertain what assets and debts properly form part of the Estate of the deceased with all powers granted by the within Order to compel information from third parties who are authorized to give such information to the ● Administrator ● Estate Trustee, as is the deceased had requested provision of same.
Irrevocable Direction In respect of Real Estate/Property			**THIS COURT ORDERS** that (person) shall provide an irrevocable direction to the purchaser/purchaser's solicitor in respect of the sale of the property known as (address) and legally described as (parcel details), registered in the names of (person), which irrevocable direction directs that the full proceeds of the sale, save and except for monies deducted in respect of commissions, taxes, GST, and legals associated therewith, shall be paid into the trust account of (a solicitor…) and the form of the irrevocable direction shall be executed in the form attached to the Order herein.

Issue	Comments		Sample Clause
Mediation			T**HIS COURT ORDERS** that the parties attend for a Mediation before a Mediator pursuant to Rule 75.1 of the *Rules of Civil Procedure* and makes the following Directions: (a) the issues to be mediated are those set out in the Order Giving Directions herein; (b) the Moving Parties and the Respondent are designated parties with the Moving Parties having carriage of the Mediation and the Respondent responding to it; (c) the Notice of Mediator giving the date, place, and time of the Mediation shall be served on the designated parties by an alternative to personal service pursuant to Rule 16.03 of the *Rules of Civil Procedure*; (d) the fees of the Mediator shall be paid out of the Estate of ●; and (e) any matters arising out of the mediation requiring further direction of the Court shall be referred to me or such other Judge who is available. **THIS COURT ORDERS** that the parties referred to herein, within ● days of the date of the Order herein, or in the alternative, within ● days of the parties obtaining copies of

Issue	Comments		Sample Clause
			all medical, financial, solicitors records and report, shall attend for mediation before ●, pursuant to Rule 75.1 of the *Rules of Civil Procedure* and the following directions apply to such Order: • or in the alternative, within 60 days of the parties obtaining copies of all medical, financial, solicitors records and reports, shall be required to attend a mediation, prior to Examinations for Discovery, and in accordance with Rules 75.1 of the *Rules of Civil Procedure* and the following directions apply to such Order: **THIS COURT ORDERS** that If the mediation fails to result in a settlement, either party is at liberty to bring a motion for directions as to the next steps in this litigation, including the scheduling of a summary judgment motion
Non-Dissipation Clauses and Injunction			None of the assets of the Estate or the Deceased shall be invested, expended or dissipated or otherwise dealt with except with the prior written consent of all of the parties by their solicitors. [name of executor] shall not transfer funds from, draw cheques on, direct payment from or withdraw funds from, bank account no ● without the prior written consent of the Parties by their solicitors. Investment of the assets of the estate of the deceased shall be determined by the Parties, jointly, failing which, said assets shall be invested in Guaranteed Investment Certificates or Term

Issue	Comments		Sample Clause
Non-Dissipation Clauses and Injunction			Deposits, cashable after 30 days on the written instructions of counsel for the Parties. **THIS COURT ORDERS** that (x) shall be restrained from dissipating, selling, transferring, disposing of, or encumbering, any real or personal property that was once the property of the deceased, or that can be traced from property which was originally or previously owned by the deceased and the within Order shall be filed with any relevant entity to enforce the terms of the within Order. **THIS COURT ORDERS** that ● in her capacity as Estate Trustee of the Estate of the deceased, and the Estate shall not encumber, sell, transfer, or dispose of the ●, with the Municipal address ●, until such time as the within issues have been finally resolved or determined and until further order of this Court. **THIS COURT ORDERS** that ● in her capacity as Estate Trustee of the Estate of the deceased, and the Estate shall not distribute any of the property or assets of the Estate of the deceased to the beneficiaries, until such time as the within issues have been finally resolved or determined and until further order of this Court. **THIS COURT ORDERS** that ● Defendant shall provide to Counsel for the Estate Trustee any and all papers and property which belonged to the deceased and which now

Issue	Comments		Sample Clause
			belong to the Estate within twenty (20) days of the date of this Order Giving Directions and in advance of the within ordered mediation.
Production of documents			**THIS COURT ORDERS** that __ shall forthwith deliver to the Applicant, SIN card, OHIP card, passport, birth certificate, other government identification, bank cards, credit cards, keys or pass cards for real estate or safety deposit boxes together with the PIN numbers related thereto, uncashed cheques, cheque books, particulars of any insurance on any real estate owned by the _____ (whether jointly or solely), and particulars of any pension payments, such as CPP, or OAS, _____ may be receiving or be entitled to
Production of Medical Records By ETDL			**THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby entitled to compel production of all medical records and files relating to ● from any person or institution in possession of such medical records, in the same manner and to the same extent as ● would have been able, if he were alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid from the Estate by the Estate Trustee During Litigation, and the final determination as to payment of such costs and expenses shall be reserved to the Trial Judge.
Production of Medical Records			**THIS COURT ORDERS** that the Parties [or "the Applicant or the Respondent"], through their solicitors, are hereby

Issue	Comments		Sample Clause
By Parties			entitled to compel production of all medical records and files relating to ● from any person or institution in possession of such medical records, in the same manner and to the same extent as ● would have been able, if he were alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid from the Estate by the Estate Trustee During Litigation, and the final determination as to payment of such costs and expenses shall be reserved to the Trial Judge. *Must state that counsel may be entitled to compel on behalf of their clients. **THIS COURT ORDERS** that ___ shall be entitled to compel production of all personal health information (within the meaning of that term as it is used in the *Personal Health Information Privacy Protection Act*) or other medical or caregiving information (whether regulated by the *Personal Information Privacy Protection and Electronic Documents Act* or not) held by any community care access centre or third party service provider concerning ___for the period from 2000 to date and on an ongoing basis.
Production of Original Will			**THIS COURT ORDERS** that the Respondent produce and bring before the Registrar, or otherwise as the Court may direct, any paper or writing being or purporting to be a Testamentary Document that is shown to be in her possession or control in respect of [name of deceased]

Issue	Comments		Sample Clause
Production of Solicitor's Records Real Estate			**THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby entitled to compel production of all solicitor records, notes and files relating to ● from any solicitor or law firm in possession of such relevant legal records in the same manner and to the same extent as ● would have been able, if he was alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid from the Estate by the Estate Trustee During Litigation, and the final determination as to payment of such cost and expenses shall be reserved to the Trial Judge. **THIS COURT ORDERS** that the solicitors involved in the transfer of (property) on in or about (date), forthwith provide all files, documentation, and information to the solicitors for the applicants/respondents, respecting matters relating to the deceased.
Production of Power of Attorney			**THIS COURT ORDERS** that ● shall immediately release the original General Power of Attorney executed by ● on ● , to the Applicant
Productions of Financial Records	Limit to relevant time period		**THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby entitled to compel production of all financial records and files relating to the assets held prior to death or under attorneyship either solely or jointly by ● with another from any financial or banking institution or

Issue	Comments		Sample Clause
			agency whether in Canada, or the United States, or elsewhere, in the same manner and to the same extent as ● would have been able, if he was alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid from the Estate by the Estate Trustee During Litigation, and the final determination as to payment of such costs and expenses shall be reserved to the Trial Judge. **THIS COURT ORDERS** that ● shall forthwith deliver to the Applicant all documents, financial records and files in his power or control relating to assets held solely or jointly by the deceased and/or any liabilities of the estate whether contingent or realized **THIS THIS COURT ORDERS** that ____ is entitled to compel production of all financial records and files relating to assets held either solely or jointly by ●, or liabilities of ● from any professional advisor, financial or banking institution or agency whether in Canada, or the United States or elsewhere, in the same manner and to the same extent ● can; (a) for the purpose of the paragraph above, any claim of financial advisor/client privilege, or any other professional privilege, or the duty of confidentiality relating to instructions

Issue	Comments		Sample Clause
			for, making of, or execution of, any documentation relating to ● 's finances or property, inclusive of any privacy legislation or regulations which may prohibit the obtaining of such information, be and are hereby waived as against ●;
Representation Order			**THIS COURT ORDERS** that subject to obtaining consent of ●, ● be and is hereby appointed to represent the following persons' interest in the Estate of the Deceased: [name individuals] THIS COURT ORDERS that if such consent is not obtained within ● days of the date of this Order, any of the parties hereto may bring a motion for further directions as to such representation upon two (2) days notice to all counsel herein.
Scheduling			**THIS COURT ORDERS that** the parties hereto shall adhere to the following scheduling for : ● responding affidavits to be served: ● defence where statement of claim is to be served: ● return of motion date is to be: ● affidavit of documents to be exchanged: ● Mediation prior to Examinations to be conducted on:

Issue	Comments		Sample Clause
			● Examinations for Discovery to be conducted of ● (persons) ● Examinations of Non-Party witnesses to be conducted of: ● the *de bene esse* examination of ● to be conducted on: ● the Pre-Trial of this matter to be conducted on: ● mediation to be conducted ● on (date) ● the issues to be mediated are those set out in the within Order Giving Directions.
Service of Proceeding outside of Ontario			This Notice of Application is served outside of Ontario without leave of the Court pursuant to Rule 17.02 [applicable subsections] of the *Rules of Civil Procedure*.
Service within Ontario Substituted Service			**THIS COURT ORDERS** that service of this Order shall be effected upon all Parties with a known or discovered financial interest in the Estate, other than the Respondents, by personal service or by an alternative to personal service. **THIS COURT ORDERS** that this Order Giving Directions shall be served by regular mail on the following persons: [name individuals]. **THIS COURT ORDERS** that service of this Order upon all parties with a known or discovered financial interest in the Estate, other than the Respondents, is dispensed with.

Issue	Comments		Sample Clause
Dispensing with Service			**THIS COURT ORDERS** substitutional service of the Notice of Application, Notice of Motion, returnable on (date), the Order of Justice ( ) dated be served ( ) upon (person) by way of leaving the said documents in the mail box, or sending the documents by ordinary mail to (address), and that an Order that adequate service has now been effected by the terms of this Order, with all further documents to be mailed to (person) at this address. **THIS COURT ORDERS** that service shall be and hereby is dispensed with in respect of any persons other than the parties named herein, specifically dispensing with the requirements for service of all those with a financial interest in accordance with Rule 74.18(3) of the *Rules of Civil Procedure* **THIS COURT ORDERS** that on Consent of the Parties the requirement for service of this application shall be and hereby is dispensed with, in accordance with the cases *Boyd v Thomson*, 2006 Carswell Ont 7597, 28 E.T.R. (3d) 312; and *Marcoccia (litigation Guardian of) v. Gill*, 2007 WL 1091 530 (Ont. S.C.J.) 2007 CarswellOnt 2087
Validated Service			**THIS COURT ORDERS** that service upon ("person") of the application record, motion record returnable (date) is hereby validated pursuant to Rule 16.08 of the Rules of Civil Procedure, because copies of these documents were left with (person) at (address) on (date).

Issue	Comments		Sample Clause
Solicitor-Client Privilege issues			**THIS COURT ORDERS** that any claim of privilege and duty of confidentiality respecting solicitors, or financial advisor or banking records reposing in the Estate of ● in respect of the deceased ● incapable ● be and is hereby waived. **THIS COURT ORDERS** that no solicitor and client privilege or duty of confidentiality shall attach to matters as between the deceased and his solicitors relating to any of the legal files of the deceased.
Privilege			**THIS COURT ORDERS** that any claim in respect of the deceased, of solicitor/client privilege, financial advisor/client privilege, or any other professional privilege, including medical privilege, or the duty of confidentiality relating to the instructions for, making of, or execution of, any of the deceased's testamentary or personal documentation, financial documentation, or documentation relating to property, real estate, or a corporation of the deceased, inclusive of any privacy regulations and legislation which may prohibit the obtaining of such information, including personal; health information in respect of the deceased, documentation in respect of the deceased governed by the Personal Information Protection and Electronic Documents Act (the "PIPEDA"), and the Personal Health Information Protection Act (the "PHIPA"), shall be and hereby is waived by the Order Giving Directions herein.

Issue	Comments		Sample Clause
Statement of Assets			**THIS COURT ORDERS** that the Respondent shall, within ● days of the date of this Order, deliver to the solicitor for the Moving Parties and file with the Court a Statement of the Assets of the Estate of ●, setting out the nature and value of the Estate as at the date just prior to the date of death of ● and each of the assets to be administered by ● ("the Estate Trustee During Litigation").
Stay of Distribution			**THIS COURT ORDERS** that there shall be and hereby is an Order directing a stay of the distribution of the assets of the Estate of ● the deceased ● or the incapable person ● until ● , and the within Order effecting same shall be served on the following:
Trial of an Issue: Will Challenge			(Propounder) affirms, and (Challengers) deny that (deceased) had testamentary capacity on the date of execution (or giving of instructions for) of the Will; (Propounder) affirms, and (Challengers) deny that (deceased) had knowledge of and approved the contents of the Will; (Challengers) affirm, and (propounder) denies that the making of the Will was procured by undue influence; (Challengers) affirm, and (propounder) denies that the Will was made under suspicious circumstances; and (Propounder) affirms, and (Challenger) deny that the Will was duly executed by ●.

Issue	Comments		Sample Clause
Interim Support – Dependants The "SLRA" Application for Interpretation			The (x) affirms and the (y) deny that the (x) is entitled to support and interim support pursuant to Part V of the *Succession Law Reform Act*, and a determination of the quantum thereof. The Courts opinion and advice as to the interpretation of the following words and phrases used in the Last Will and Testament of the deceased, ● the Codicil dated:
Triable Issues (SDA)			**THIS COURT ORDERS** that the parties to the proceedings and the issues to be tried are as follows: a) issues relating to the misappropriation of assets belonging to (incapable person). Such assets having been misappropriated between (year), and amounting to (amount) b) issues relating to the misappropriation of assets in the further amount of in or about (amount) (the Adisputed assets@); (c) issues relating to the (Respondent ● Attorney) breach of fiduciary duty, including damages for breach of fiduciary duty and negligence for failure to: (i) maintain a proper standard of care and skill; (ii) disclose breaches of trust and fiduciary duty;

Issue	Comments		Sample Clause
			(iii) maintain and keep accounts in accordance with the *Substitute Decisions Act, 1992* (the "SDA"), and in particular as set out in the regulations to the SDA 1992, Section 2 Ontario Regulation 100/96; (iv) maintain and keep accurate accounts in accordance with the SDA and in particular as set out in the regulations to the Ontario Regulation 100/96, sections 5 and 6; (v) disgorge any benefit obtained by his breach of fiduciary duty and breach of duty of loyalty; (vi) to act in the best interests of (incapable person) , the grantor of the Powers of Attorney; (vii) for falsification of accounts; (viii) for incorrect recording of accounting entries; (ix) for breach of section 32 (1) of the SDA and in particular failure to exercise powers granted to an Attorney, diligently, honestly, with integrity and in good faith and on behalf of (incapable person) benefit; and for beach of section 66 (4.1) of the SDA (d) issues relating to the mismanagement of (incapable person) assets; (e) issues relating to recission and restoring (incapable person) to his/her original financial position as at (date),

Issue	Comments		Sample Clause
			including issues of damages for loss suffered in accordance with, but not limited to S.104 of the Ontario *Courts of Justice Act;* (f) issues relating to the misconduct of the fiduciary; (g) issues relating to damages suffered by (incapable person) as a result of breach of fiduciary duty and negligence including loss of capital from investment income, interest, including interest calculated in accordance with the *Courts of Justice Act*, sections 127, 128, 129 and 131; (h) issues relating to the repayment of all monies misappropriated together with calculations thereon for interest, costs, expenses, loss of investment and income opportunity; and (i) issues relating to the misappropriation of assets belonging to (incapable person) by (respondent ● attorney) which must be repaid as a debt owed and which are impressed with a trust in favour of (incapable person).
Triable Issues for Dependants Support Dependants' Relief			With respect to the Dependant Support Claim of the applicant (person): 1. Is the Applicant (Person) a dependant of the deceased and a person to whom the deceased was under legal obligation to provide adequate and proper support immediately before his death or a

Issue	Comments		Sample Clause
Succession Law Reform Act			person whom the deceased was actually providing support immediately before his or her death? 2. If the answer to (1) is 'yes', did the deceased in his/her Last Will & Testament (and Codicil) make adequate and proper provision for the support of (person) 3. If the answer to (2) is 'no', then what provision, if any, should the Court make out of the Estate of the deceased for the proper and adequate support of (person) With respect to the dependant support claim of the Applicant: 1. Are the applicants dependants of the deceased and persons to whom the deceased was under legal obligation to provide adequate and proper support immediately before his death? 2. If the answer to (1) is 'yes', did the deceased in his/her Last Will and Testament make adequate and proper provision for the support of (person); 3. If the answer to (1) is 'yes', what assets shall be clawed back in pursuant to S. 72 of the *Succession Law Reform Act* RSO 1990 (the "SLRA") for the adequate and proper support of ● a dependant.

Issue	Comments		Sample Clause
			4. If the answer to (2) is 'no' them what provisions, if any should the Court make out of the Estate of the deceased for the adequate and proper support of (person)
Dependant's Support Dependant's Relief Succession Law Reform Act			**THIS COURT DECLARES** that the (x) (applicant) claim for support in accordance with Part V of the Succession Law Reform Act shall be preserved, and that any time limitation in particularizing such claim, shall be abandoned by virtue of these proceedings, and in any event, any such claim shall be brought within six (6) months of the date of determination of ●the Will challenge ● define date ● interpretation etc. **THIS COURT ORDERS** that _____ shall serve her responding affidavit and shall commence any claim against the estate of _____, deceased, including any claim for dependant's relief under Part V of the Succession Law Reform Act, within 60 days of the date of this Order
Injunctive Relief			**THIS COURT ORDERS** compensatory damages against ● individually, in the amount of ●
			THIS COURT ORDERS permanent injunctive relief, restraining and enjoining ● directly or indirectly, and whether acting alone or in concert with others, from: a. transferring any asset owned by ● , in whole or in part , including but not limited to any and all real property or other investments or

Issue	Comments		Sample Clause
			monies, to any other persons and/or entity, without the prior approval of the Court; b. concealing and/or disposing of any and all monies or assets derived from such monies that ● received from ● in 2007and 2008, without the prior approval of the Court; and c. transferring, selling or otherwise disposing of any assets owned by ● that were derived from assets previously owned by ● , without the prior approval of the court; **THIS COURT ORDERS** prejudgment and post-judgment interest at the maximum rate allowed by law, being ● per annum.
			THIS COURT ORDERS a constructive trust for the benefit of ● over any and all ill-gotten gains including the property at ● which are currently held by ●
			THIS COURT ORDERS that the property be listed for sale by ● as soon as possible
			THIS COURT ORDERS that if the listing expires prior to the residence selling or if no offers are forthcoming within 30-45 days, ● shall be at liberty to re-list at the price recommended as long as the price is greater or equal to the comparable as determined by the Appraisal Report, without the consent of the applicants. If however, the recommended

Issue	Comments		Sample Clause
			listing price is less than ● the applicants shall obtain the consent of the Respondents or the Order of the Court
			THIS COURT ORDERS that ● shall be at liberty to accept any offer on the ● residence equal to or greater to ● if she wishes to accept an offer for less than that amount then she will obtain the consent of the applicants or the order of the court.
			THIS COURT ORDERS that ● shall be at liberty to secure a loan of up to -●- against the 50% interest that she holds in the residence
			THIS COURT ORDERS that if the residence **sells**, the distributions will be made from the gross proceeds of sale: (a) The mortgage to RBC Will be discharged; (b) Real estate commissions will be paid; (c) Property tax arrears will be paid; (d) Disbursements incurred by the vendors to address any issues that are listed as purchaser's conditions in the agreement of purchase and sale will be paid, and (e) Any applicable legal fees/adjustments with respect to the sale will be paid

Issue	Comments		Sample Clause
			THIS COURT ORDERS a constructive trust for the benefit of ● over any and all ill-gotten gains including the property at ● which are currently held by ●
			THIS COURT ORDERS that pending further order of the Court or agreement of the Parties, the Respondents, their agents, employees or assigns, be and are hereby restrained from directly or indirectly removing, transferring, selling, encumbering, dissipating or disposing of : (a) the assets or property of the Deceased, including any cash, investments, investment vehicles. Policies of insurance on the Deceased's life, personal property, real property, effects, gifts or belongings, RRSP's, shareholdings, monies, or monies held in any financial institution; (b) assets or property derived from the proceeds of any asset of the estate of the Deceased, and the proceeds of any policy of insurance on her life; and (c) the real property described in ● attached hereto
			THIS COURT ORDERS that the Applicants be and hereby granted leave to obtain a Certificate of Pending Litigation against the lands and premises described as ●
			THIS COURT ORDERS that any party to this proceeding be and is hereby authorized to compel production of all

Issue	Comments		Sample Clause
			documents relating to the assets of the Deceased, including any bank statements, investment statements, estate planning, estate administration, and real property transaction files from any party in possession of such documents including financial institutions, and solicitors, in the same manner and to the same extent as if the Deceased would have been able if he/she were alive. The costs of such production shall be paid by the party requesting it at first instance. Copies of such production shall be provided to all other parties within 10 business days of receipt.
			THIS COURT ORDERS that all lawyers and financial institutions are fully released from any duty of confidentiality and/or any solicitor and client privilege owing by them to the Deceased, to the extent of the documents asked to be produced
			THIS COURT ORDERS that any non-party examined pursuant to this order, or producing records, notes and files, shall be fully released and discharged from any duty of confidentiality, solicitor-client privilege, or doctor-patient privilege, as the case may be, owing by the non-party in relation to the subject matter of the examination authorized herein.
			THIS COURT ORDERS that the Respondent shall serve and file any responding affidavit, if any, on or before ●,

Issue	Comments		Sample Clause
			unless the parties agree otherwise in writing, which shall include the following: (a) particulars of all insurance policy/policies on the life of the Deceased; (b) a statement of assets of the estate and those assets falling under the ambit of Section 72 of the Succession Law Reform Act as at the date of death; (c) an accounting of the Respondent's handling of the assets of the estate, including assets falling under the ambit of Section 72 of the Succession Law Reform Act, for the period ● to the date of this Order; and (d) any document or writing which is testamentary in nature and is in the possession of the Respondent or under his/her control in the court office, and to produce for inspection all solicitors' records in his/her possession or control, notes, affidavits of execution and files relating to the testamentary wishes of the Deceased.
Power of Attorney			**THIS COURT ORDERS that** ● shall immediately release the original General Power of Attorney executed by ● on ● , to the Applicant

Issue	Comments		Sample Clause
			THIS COURT ORDERS that ● is hereby removed as continuing attorney for property for ● pursuant to the power of attorney executed on ●
			THIS COURT ORDERS that ● is hereby removed as attorney for property for ● as provided for in any document executed on or before the date of this Order
			THIS COURT ORDERS that it is hereby declared that ● is the sole continuing attorney for property for ●
			THIS COURT ORDERS that ●shall forthwith deliver to the Applicant all documents, financial records and files in his power or control relating to assets held solely or jointly by ● and/or any liabilities of ● whether contingent or realized
			THIS COURT ORDERS that ● shall forthwith deliver to the Applicant ● SIN card, OHIP card, passport, birth certificate, other government identification, bank cards, credit cards, keys or pass cards for real estate or safety deposit boxes together with the PIN numbers related thereto, uncashed cheques, cheque books, particulars of any insurance on any real estate owned by ● (whether jointly or solely), and particulars of any pension payments, such as CPP, or OAS, ● may be receiving or be entitled to
			THIS COURT ORDERS that ● is entitled to compel production of all financial records and files relating to assets held either solely or jointly by ●, or liabilities of ● from any professional advisor, financial or banking institution or

Issue	Comments		Sample Clause
			agency whether in Canada, or the United States or elsewhere, in the same manner and to the same extent ●, can
			THIS COURT ORDERS that any claim of financial advisor/client privilege, or any other professional privilege, or the duty of confidentiality relating to instructions for, making of, or execution of, any documentation relating to ●'s finances or property, inclusive of any privacy legislation or regulations which may prohibit the obtaining of such information, be and are hereby waived as against ●
			THIS COURT ORDERS that ● shall, within 60 days of the date of this Order, commence an application to pass his accounts as attorney for property of ● from ● to the date of this Order on notice to ●, the Applicant, and the Public Guardian and Trustee
			THIS COURT ORDERS that ● shall be entitled to compel production of all personal health information (within the meaning of that term as it is used in the *Personal Health Information Privacy Protection Act*) or other medical or caregiving information (whether regulated by the *Personal Information Privacy Protection and Electronic Documents Act* or not) held by any community care access centre or third party service provider concerning ● for the period from 2000 to date and on an ongoing basis

Issue	Comments		Sample Clause
			THIS COURT ORDERS that ● shall vacate the property known municipally as ● within 60 days of receiving written notice to vacate from ●
Sealing Order			**THIS COURT ORDERS** that the Application Record of _____ in the within proceeding, in 3 volumes, is sealed and is not to form part of the Public Record pending further order of the Court
Preservation			**THIS COURT ORDERS** that in order to preserve the status quo pending the hearing of the within application, on an interim basis until further Order of this Court, the Respondents are enjoined from disposing, transferring or in any respect further encumbering the lands municipally known as _____ and legally described as follows: _____more particularly described in PIN 03024-0192 LT (the "Property"). **THIS COURT ORDERS** that the Local Registrar of the Land Titles Office for the Land Titles Division for York Region is hereby directed to receive and to register an Application for Restriction Based on Court Order in the form attached as Schedule "A" hereto **THIS COURT ORDERS** that the Respondents shall ensure that the Property is and continues uninterrupted to be covered by an appropriate home insurance policy and shall provide to Royal Trust proof of such policy in effect from

Issue	Comments		Sample Clause
			time to time forthwith and from time to time as Royal Trust may request **THIS COURT ORDERS** that if the Local Registrar of the Land Titles Office for the Land Titles Division for York Region declines for any reason to register the document in the form attached as Schedule "A", or in any other form that the parties may agree upon, by the end of day on _____ February 8, _____, the Applicant may seek further directions from the court

These Precedent Clauses for inclusion in a draft Order Giving Directions are not meant to be exhaustive. Other clauses that may also be typically considered, amongst others, that might relate to pleadings, return of Certificate of Appointment, inter vivos transfers, litigation administrator (Estate Trustee)for deceased, the Children's Lawyer (minor, unborn, unascertained), the Public Guardian and Trustee and/or trusts.

Appendix III

Capacity Checklist: Estate Planning Context

Capacity Generally

There is no single definition of capacity, nor is there a general test or criteria to apply for establishing capacity, mental capacity, or competency.

Capacity is decision-specific, time-specific and situation-specific in every instance, in that legal capacity can fluctuate. There is a legal presumption of capacity unless and until the presumption is legally rebutted.[221]

Determining whether a person is or was capable of making a decision is a legal determination or a medical/legal determination depending on the decision being made and/or assessed.[222]

In determining the ability to understand information relevant to making a particular decision, and to appreciate the consequences of making a particular decision, or not, the following capacity characteristics and determining criteria are provided for guidance purposes:

Testamentary Capacity

The question of testamentary capacity is almost wholly a question of fact.

The assessment or applicable criteria for determining testamentary capacity to grant or revoke a Will or testamentary document, requires that the testator has the ability to understand the following:

(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

[221] *Palahnuk v. Palahnuk Estate* 2006 WL 1135614; *Brillinger v. Brillinger -Cain* 2007 Wl 1810585; *Knox v. Burton* (2005), 14 E.T.R. 3d) 27; *Calvert v. Calver*t [1997] O.J. No. 533 (G.D.) at p. 11(Q.L.), aff'd [1998] O.J. No 505 (C.A.) leave ref'd [1998] S.C.C.A. No. 161

[222] Estates, Trusts & Pension Journal , Volume 32, No. 3, May 2013

(c) The claims of persons who would normally expect to benefit under the Will (or testamentary document).[223]

Further elements of the criteria applied for determining testamentary capacity that the testator 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 person(s) 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 of these factors in relation to each other, and in forming an orderly desire to dispose of his or her property. [224]

The legal burden of proving capacity is on those propounding the Will, assisted by a rebuttable presumption described in *Vout v Hay*[225]:

> *"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*."

Notably, the court recently opined on delusions and the effect on testamentary capacity finding their existence alone is not sufficient to determine testamentary capacity, but are a relevant consideration under the rubric of suspicious circumstances.[226]

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[223] *Banks v. Goodfellow* (1870) L.R. 5 QB. 549 (Eng. Q.B.)

[224] The test for testamentary capacity is addressed in the following cases: *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; *Schwartz v. Schwartz,* 10 DLR (3d) 15. 1970 CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. ; *Hall v. Bennett Estate* (2003) 64 O.R. (3d) 191 (C.A.) 277 D.L.R. (4th) 263; *Bourne v. Bourne* Estate (2003) 32 E.T.R. (2d) 164 Ont. S.C.J.); *Key v. Key* [2010] EWHC 408 (ch.) (BailII)

[225] *Vout v Hay, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.) at P 227*

[226] *Laszlo v Lawton*, 2013 BCSC 305,SCBC

Capacity to Make Testamentary Dispositions other than Wills

The *Succession Law Reform Act* [227] defines a "Will" to include the following:

> (a) a testament,
>
> (b) a codicil,
>
> (c) an appointment by will or by writing in the nature of a will in exercise of a power, and
>
> (d) any other testamentary disposition. ("testament")

- A testamentary disposition may arguably include designations as part of an Estate Plan in a Will for example; For example, designations respecting RRSPs, RIFs, Insurances, Pensions, and others.[228] Therefore, capacity is determined on the criteria applied to determining testamentary capacity

- A testamentary disposition may arguably include the transfer of assets to a testamentary trust.[229] The criteria to be applied, is that of testamentary capacity.

- The capacity required to create an inter vivos trust is less clear. The criteria required for making a contract or a gift may be the applicable standard. If the trust is irrevocable, a more onerous criteria may be applied to assess capacity.

Capacity to Grant or Revoke a Continuing Power of Attorney for Property ("CPOAP")

Pursuant to section 8 of the *Substitute Decisions Act,* [230] to be capable of granting a Continuing Power of Attorney for Property ("CPOAP"), a grantor requires the following:

> (a) Knowledge of what kind of property he or she has and its approximate value;
>
> (b) Awareness of obligations owed to his or her dependants;
>
> (c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

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[227] R.S.O. 1990 c.s.26 as amended subsection 1(1)
[228] S.51(10 of the Succession Law Reform Act
[229] S 1(1)(a) of the SLRA
[230] R. S.O. 1992, c 30, as am.

(d) Knowledge that the attorney must account for his or her dealings with the person's property;

(e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;

(f) Appreciation that unless the attorney manages the property prudently its value may decline; and

(g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.

A person is capable of revoking a CPOAP if he or she is capable of giving one.[231]

If a grantor is incapable of managing property, a CPOAP granted by him or her, can still be valid so long as he or she meets the test for capacity for granting that CPOAP at the time the CPOAP was made.[232]

If, after granting a CPOAP, the grantor becomes incapable of giving a CPOAP, the document remains valid as long as the grantor had capacity at the time it was executed.[233]

When an Attorney should act under a CPOAP

If the CPOAP provides that the power granted, comes into effect when the grantor becomes incapable of managing property, but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when:

- the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or

- the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act* [234]

Capacity to Manage Property

The criteria for assessing the capacity to manage property is found at section 6 of the *SDA*. Capacity to manage property is ascertained by:

(a) The ability to understand the information that is relevant in making a decision in the management of one's property; and

[231] *SDA,* subsection 8(2)
[232] *SDA*, subsection 9(1)
[233] *SDA,* subsection 9(2)
[234] R.S.O. 1990, c. M.7

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision. [235]

A person may be incapable of managing property, yet still be capable of making a Will.[236]

Capacity to Grant or Revoke a Power of Attorney for Personal Care ("POAPC")

Pursuant to section 47 of the *Substitute Decisions Act*, to be capable of granting a Power of Attorney for Personal Care ("POAPC"), a grantor requires the following:

(a) The ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

(b) The appreciation that the person may need to have the proposed attorney make decisions for the person.[237]

A person who is capable of granting a POAPC is also capable of revoking a POAPC.[238]

A POAPC is valid if at the time it was executed, the grantor was capable of granting a POAPC, even if that person was incapable of managing personal care at the time of execution.[239]

When an Attorney should act under a POAPC

- In the event that the grantor is not able to understand information that is relevant to making a decision concerning personal care, or is not able to appreciate the reasonably foreseeable consequences of a decision, or lack of decision, the attorney must act having regard to S.45.

Capacity to Make Personal Care Decisions

The criteria required to determine capacity to make personal care decisions is found at section 45 of the *SDA*. The criterion for capacity for personal care is met if a person has the following:

(a) The ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

[235] See also *Re. Koch* 1997 CanLII 12138 (ON S.C.)
[236] *Royal Trust Corp. of Canada v. Saunders*, [2006] O.J. No. 2291
[237] *SDA*, subsection 47(1)
[238] *SDA*, subsection 47(3)
[239] *SDA*, subsection 47(2)

"Personal care" is defined as including health care, nutrition, shelter, clothing, hygiene or safety.

Capacity under the Health Care Consent Act, 1996[240]

Subsection 4(1) of the *Health Care Consent Act, 1996 (HCCA)* defines capacity to consent to treatment, admission to a care facility or a personal assistance service as follows:

(a) The ability to understand the information that is relevant to making a decision about the treatment, admission or personal assistance service; and

(b) The ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

Capacity to Contract

A contract is an agreement that gives rise to enforceable obligations that are recognized by law. Contractual obligations are distinguishable from other legal obligations on the basis that they arise from agreement between contracting parties.[241]

A contract is said to be valid where the following elements are present: offer, acceptance and consideration.[242]

Capacity to enter into a contract is defined by the following:

(a) The ability to understand the nature of the contract; and
(b) The ability to understand the contract's specific effect in the specific circumstances.[243]

The presumptions relating to capacity to contract are set out in the *Substitute Decisions Act, 1992* ("*SDA*").[244] Subsection 2(1) of the *SDA* provides that all persons who are eighteen years of age or older are presumed to be capable of entering into a contract.[245]

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[240] S.O. 1996, C.2 Schedule A
[241] G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003).
[242] *Thomas v. Thomas* (1842) 2 Q.B. 851 at p. 859
[243] *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant,* [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6
[244] *SDA, supra* note 2
[245] *SDA,* subsection 2(1)

Subsection 2(3) then provides that a person is entitled to rely on that presumption of capacity to contract unless there are "reasonable grounds to believe that the other person is incapable of entering into the contract."[246]

Capacity to Gift

In order to be capable of making a gift, a donor requires the following:

(a) The ability to understand the nature of the gift; and
(b) The ability to understand the specific effect of the gift in the circumstances.[247]

The criteria for determining capacity must take into consideration the size of the gift in question. For gifts that are of significant value, relative to the estate of the donor, the test for testamentary capacity arguably may apply.[248]

Capacity to Undertake Real Estate Transactions

Most case law on the issue of real estate and capacity focuses on an individual's capacity to contract,[249] which as set out above, requires the following:

(a) The ability to understand the nature of the contract; and

(b) The ability to understand the contract's specific effect in the specific circumstances.[250]

If the real estate transaction is a gift, and is significant relative to the donor's estate, then the standard for testamentary capacity applies, which requires the following:

(a) The ability to understand the nature and effect of making a Will/undertaking the transaction in question;

(b) The ability to understand the extent of the property in question; and

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[246] *SDA*, subsection 2(3)
[247] *Royal Trust Company v. Diamant, Ibid*. at 6; and *Bunio v. Bunio Estate* [2005] A.J. No. 218 at paras. 4 and 6
[248] *Re Beaney* (1978), [1978] 2 All E.R. 595 (Eng. Ch. Div.), *Mathieu v. Saint-Michel*[1956] S.C.R. 477 at 487
[249] See for example: *Park v. Park,* 2013 ONSC 431 (CanLII); *de Franco v. Khatri*, 2005 CarswellOnt 1744, 303 R.P.R. (4th) 190; *Upper Valley Dodge v. Estate of Cronier*, 2004 ONSC 34431 (CanLII)
[250] *Bank of Nova Scotia v Kelly* (1973), 41 D.L.R. (3d) 273 (P.E.I. S.C.) at 284; *Royal Trust Company v Diamant,* [1953] (3d) D.L.R. 102 (B.C.S.C.) at 6

(c) The ability to understand the claims of persons who would normally expect to benefit under a Will of the testator.

Capacity to Marry

A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates.[251]

A person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected by the marriage.[252]

Arguably the capacity to marry is commensurate with the requisite criteria to be applied in determining capacity required to manage property.[253]

The capacity to separate and divorce is arguably the same as required for the capacity to marry.[254]

Capacity to Instruct Counsel

There exists a rebuttable presumption that an adult client is capable of instructing counsel.

To ascertain incapacity to instruct counsel, involves a delicate and complex determination requiring careful consideration and analysis relevant to the particular circumstances. An excellent article to access on this topic: "*Notes on Capacity to Instruct Counsel*" by Ed Montigny.[255] In that article, Ed Montigny explains that in order to have capacity to instruct counsel, a client must:

(a) Understand what they have asked the lawyer to do for them and why,

(b) Be able to understand and process the information, advice and options the lawyer presents to them; and

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[251] *Hart v Cooper* (1994) 2 E.T.R. (2d) 168, 45 A.C.W.S. (3D) 284 (B.C.S.C.)
[252] *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 268 A.R. 101 (Q.B.)
[253] *Browning v. Reane* (1812), 161 E.R. 1080, 2 Phill.ECC 69; *Spier v. Spier (Re)* [1947] W.N. 46 (P.D.); and *Capacity to Marry and the Estate Plan*, The Cartwright Group Ltd. 2010, by K. Whaley, M. Silberfeld, H. McGee and H. Likwornik
[254] *A.B. v C.D.* (2009) BCCA 200 (CanLII), leave to appeal to S.C.C. denied October 22, 2009, [2009] 9 W.W.R. 82; and *Calvert (Litigation Guardian of) v Calvert*, 1997 CanLII 12096 (O.N.S.C.), aff'd 1998 CarswellOnt 494
[255] Staff lawyer at ARCH Disability Law Centre.

(c) Appreciate the advantages, disadvantages and potential consequences of the various options.[256]

Issues Related to Capacity

Undue Influence

Undue influence is a legal concept where the onus of proof is on the person alleging it.[257]

Case law has defined "undue influence" as any of the following:

- Influence which overbears the will of the person influenced, so that in truth, what he or she does is not his or her own act;
- The ability to dominate one's will, over the grantor/donor/testator;
- The exertion of pressure so as to overbear the volition and the wishes of a testator;[258]
- The unconscientious use by one person of power possessed by him or her over another in order to induce the other to do something; and
- Coercion [259]

The hallmarks of undue influence include exploitation, breach or abuse of trust, manipulation, isolation, alienation, sequestering and dependancy.

The timing, circumstances and magnitude of the result of the undue influence may be sufficient to prove undue influence in certain circumstances and may have the result of voiding a Will.[260]

Actual violence, force or confinement could constitute coercion. Persistent verbal pressure may do so as well, if the testator is in a severely weakened state as well.[261]

Undue influence does not require evidence to demonstrate that a testator was forced or coerced by another under some threat or inducement. One must look at all the

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[256] At page 3

[257] *Longmuir v. Holland* (2000), 81 B.C.L.R. (3d) 99, 192 D.L.R. (4th) 62, 35 E.T.R. (2d) 29, 142 B.C.A.C. 248, 233 W.A.C. 248, 2000 BCCA 538, 2000 CarswellBC 1951 (C.A.) Southin J.A. (dissenting in part); *Keljanovic Estate v. Sanseverino* (2000), 186 D.L.R. (4th) 481, 34 E.T.R. (2d) 32, 2000 CarswellOnt 1312 (C.A.); *Berdette v. Berdette* (1991), 33 R.F.L. (3d) 113, 41 E.T.R. 126, 3 O.R. (3d) 513, 81 D.L.R. (4th) 194, 47 O.A.C. 345, 1991 CarswellOnt 280 (C.A.); *Brandon v. Brandon,* 2007, O.J. No. 2986, S.C. J. ; *Craig v. Lamoureux* 3 W.W.R. 1101 [1920] A.C. 349 ; *Hall v. Hall* (1868) L.R. 1 P & D.

[258] *Dmyterko Estate v. Kulilovsky* (1992) 46 E.T.R.; *Leger v. Poirier* [1944] S.C.R. 152, at page 161-162

[259] *Wingrove v. Wingrove* (1885) 11 P.D. 81

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

[261] *Wingrove v. Wingrove* (1885) 11 P.D. 81

surrounding circumstances and determine whether or not there was a sufficiently independent operating mind to withstand competing influences. [262]

Psychological pressures creating fear may be tantamount to undue influence.[263]

A testamentary disposition will not be set aside on the ground of undue influence unless established on a balance of probabilities that the influence imposed was so great and overpowering that the document … "cannot be said to be that of the deceased."[264]

Undue influence must be corroborated. [265]

Suspicious circumstances will not discharge the burden of proof required.[266]

* See Undue Influence Checklist

Suspicious Circumstances

Suspicious circumstances relating to a Will may be raised by and is broadly defined as:

(a) circumstances surrounding the preparation of the Will;

(b) circumstances tending to call into question the capacity of the testator; or

(c) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud.[267]

The existence of delusions (non-vitiating) may be considered under the rubric of suspicious circumstances and in the assessment of testamentary capacity.[268]

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

Kimberly A. Whaley, WEL PARTNERS

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[262] *Re Kohut Estate* (1993), 90 Man. R. (2d) 245 (Man. Q.B.)
[263] *Tribe v Farrell,* 2006 BCCA 38
[264] *Banton v. Banton* [1998] O.J. No 3528 (G.D.) at para 58
[265] S. 13 of the *Ontario Evidence Act*: 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. R.S.O. 1990, c. E.23, s. 13.; Orfus Estate v. Samuel & Bessie Orfus Family Foundation, 2011 CarswellOnt 10659; 2011 ONSC 3043, 71 E.T.R. (3d) 210, 208 A.C.W.S. (3d) 224
[266] *Vout v Hay*, at p. 227
[267] *Eady v. Waring* (Ont. C.A.) 974; *Scott v. Cousins*, [2001] O.J. No 19; and *Barry v. Butlin,* (1838) 2 Moo. P.C. 480 12 E.R.1089; *Vout v Hay, [1995] 7 E.T.R. (2d) 209 209 (S.C.C.)*
[268] *Laszlo v Lawton, 2013 BCSC 305 (CanLII)*

Appendix IV

Undue Influence Checklist: Estates and Related Matters

Undue Influence: Summary

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions, planning, and testamentary documents where through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent.

Lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to making decisions involving their estate planning and related transactions. Many historical cases address undue influence in the context of testamentary planning, though more modern case law demonstrates that the applicability of the doctrine extends to other planning instruments such as powers of attorney.

The Courts' Historical View of Undue Influence

The historical characterization of undue influence was perhaps best expressed in the seminal decision of, *Hall v Hall* (1968):[269]

> *"To make a good Will a man must be a free agent. But all influences are not unlawful. Persuasion, appeals to the affections or ties of kindred, to a sentiment of gratitude for past services, or pity for future destitution, or the like,— these are all legitimate, and may be fairly pressed on a testator. On the other hand, pressure of whatever character, whether acting on the fears or the hopes, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid Will can be made*."

In describing the influence required for a finding of undue influence to be made, the Court in *Craig v Lamoureux*,[270] stated:

> "*Undue influence in order 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's mind, but which really does not express his mind, but something else which he did not mean*."[271]

These cases and the treatment of the doctrine continue to be cited in more recent cases of undue influence. Common law has continued to apply the historical definition of undue influence, focusing on a mind "overborne" and "lacking in independence". We see in *Hall*

[269] (1968) LR 1 P&D.
[270] *Craig v Lamoureux*, [1919] 3 WWR 1101.
[271] *Craig v Lamoureux*, [1919] 3 WWR 1101 at para 12.

v Hall, influence of a more subtle characterization which when read together with more recent cases, arguably the application and scope of the doctrine is broadened.

Developing/Modern Application of Undue Influence

In the absence of evidence of actual and specific influence exerted to coerce a person to make a gift, the timing and circumstances of the gift may nevertheless be sufficient to prove undue influence.

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.[272]

In making such determinations, courts will look at whether "the potential for domination inheres in the nature of the relationship between the parties to the transfer."[273]

Relationships Where There is an Imbalance of Power

In making a determination as to the presence of undue influence, courts will look at the relationship that exists between the parties to determine whether there is an imbalance of power within the relationship. Courts will take into account evidence of one party dominating another which may create circumstances falling short of actual coercion, yet, constitute a sufficient subtle influence for one party to engage in a transaction not based on his/her own will. Such evidence may satisfy a court that a planning instrument is not valid. [274]

Multiple Documents

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 at play. For example, where a court sees that a grantor alters his/her her planning documents to benefit the child he/she is 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.[275]

Language

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[272] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543.
[273] *Fountain Estate v Dorland,* 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC).
[274] *Dmyterko Estate v Kulikovsky* (1992), CarswellOnt 543: the Court in this case looked at the relationship between a father and his daughter at the time where he transferred his home and a sum of money to her, which relationship was one of heavy reliance by the father on his daughter.
[275] See for example *Kohut Estate v Kohut,* where 7 wills were made by an elderly now deceased lady, which varied her testamentary disposition in accordance with which daughter she was residing with and who brought her to the lawyer's office.

In cases where a client has limited mastery of the language used by the lawyer, courts have sometimes considered such limitation to be an indicator of undue influence.[276] 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.[277]

Other factors indicative of undue influence

Other decisions where courts have found undue influence include scenarios where the funds of a grantor of a power of attorney are used as though they belong to the grantee, or where an individual hired to take care of a susceptible adult in a limited fashion extends his/her involvement to render the person powerless and dependant for personal profit/gain.[278]

Courts have found, in the context of granting powers of attorney, that the presence of undue influence coupled by a lack of independent legal advice can be sufficient to invalidate a power of attorney document even if it were found that the grantor was mentally capable of granting the power. Additionally, as an ancillary consideration, proof that an individual has historically acted contrary to the best interests of a grantor would disentitle the individual from being appointed as that person's guardian of property. [279]

Not All Relationships of Dependency Lead to Findings of Undue Influence

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.

Where undue influence is alleged, a court will look at the circumstances of the relationship as a relevant factor in determining whether a finding of undue influence is warranted: dependency is not always indicative of undue influence. For example, where an individual relied on a family member for help over a period of time, and that family member performed the duties without taking advantage of the relationship of trust, such litigation may well be seen as indicative of that family member's intentions, and to the genuine willingness of the grantor to effectuate an otherwise questionable transaction in favourable manner.[280]

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[276] See for example *Kohut Estate v Kohut*, Nguyen Crawford v Crawford, *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[277] Nguyen Crawford v Nguyen, 2009 CarswellOn 1877; Grewal v Bral, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.); *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[278] *Juzumas v Baron*, 2012 ONSC 7220.
[279] *Covello v Sturino*, 2007 CarswellOnt 3726.
[280] See for example *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 in particular 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.

One of the factors a court may consider in determining whether influence was unduly exerted is whether the grantee seemed to respect the wishes of the grantor, rather than seeking to obtain control over the individual.

It has been held that simply suggesting to a family member that he/she execute a planning document, even where the person making the suggestion gains a benefit as a result, will not necessarily lead to a finding of undue influence, especially where there are circumstances showing that the person did so in the interests of the grantor and with proper limits in place.[281]

Indicators of Undue Influence

The Court in the 2013 decision of *Gironda v Gironda*[282] provided a (non-exhaustive) list of indicators of undue influence:

- ❑ The testator is dependent on the beneficiary in fulfilling his or her emotional or physical needs;
- ❑ The testator is socially isolated;
- ❑ The testator has experienced recent family conflict;
- ❑ The testator has experienced recent bereavement;
- ❑ The testator has made a new Will that is inconsistent with his or her prior Wills; and
- ❑ The testator has made testamentary changes similar to changes made to other documents such as power of attorney documents.[283]

In *Tate v. Gueguegirre*[284] the Divisional Court noted that the following constituted "significant evidence suggesting that [a] Will was a product of undue influence":

- ❑ Increasing isolation of the testator, including a move from his home to a new city;
- ❑ The testator's dependence on a beneficiary;
- ❑ Substantial pre-death transfers of wealth from the testator to the beneficiary;
- ❑ The testator's failure to provide a reason or explanation for leaving his entire estate to the beneficiary and excluding others who would expect to inherit;

[281] *Hoffman v Heinrichs* at para 64-66: for example, the brother of the will maker in this case asked a trust company to draft the will and act as executor, which the Court interpreted to mean that the brother wanted to ensure there would be no suggestion of impropriety.
[282] *Gironda v Gironda*, 2013 CarswellOnt 8612.
[283] *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56.
[284] 2015 ONSC 844 (Div. Ct.)

- ❑ The use of a lawyer chosen by the beneficiary and previously unknown to the testator;
- ❑ 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 to the lawyer to have it executed;
- ❑ There were documented statements that the testator was afraid of the respondent.[285]

Burden of Proof for Undue Influence

While the burden of proving due execution, knowledge and approval and testamentary capacity, rests with the propounder/enforcer, the burden of proof rests with the challenger of the planning document to prove undue influence on a balance of probabilities.[286]

Evidence of undue influence may even rebut the presumption of capacity that would usually apply.[287]

Although the leading Supreme Court of Canada ("SCC") case of *Vout v Hay* held that "*the extent of proof required is proportionate to the gravity of the suspicion*,"[288] the more recent SCC case of *C(R) v McDougall*[289] held that there is a single standard of proof in civil cases— the balance of probabilities—and the level of scrutiny of the evidence does not vary depending on the seriousness of the allegations.

The case of *Kohut Estate v Kohut*[290] elicited the principles that apply to the standard of proof relating to undue influence:

> "*The proof of undue influence does not require evidence to demonstrate that a testator was forced or coerced by another to make a will, under some threat or other inducement. One must look at all of the surrounding circumstances to determine whether or not a testator had a sufficiently independent operating mind to withstand competing influences. Mere influence by itself is insufficient to cause the court to intervene but as had been said, the will must be "the offspring of his own volition and not the record of someone else's."*[291]

[285] *Tate v. Gueguegirre* 2015 ONSC 844 (Div. Ct.) at para.9.
[286] *Goodman Estate v Geffen* (1991), 42 ETR 97; *Hoffman v Heinrichs*, 2012 MQBQ 133, 2012 CarswellMan 242 at para 63.
[287] Nguyen Crawford v Nguyen, 2009 CarswellOnt 1877 *Grewal v Bral*, 2012 MBQB 214, 2012 CarswellMan 416 (Man. C.Q.B.).
[288] *Vout v Hay* at para 24.
[289] 2008 SCC 53 (SCC) cited in *Hoffman v Heinrichs*, 2012 MBQB 133, 2012 CarswellMan 242 at para 34.
[290] (1993), 90 Man R (2d) 245 (Man QB) at para 38.
[291] (1993), 90 Man R (2d) 245 (Man QB) at para 38, citing in part *Hall v Hall, supra.*

It has been held, in the context of gifts, where the potential for domination exists in the relationship that the onus shifts to the recipient of the gift to rebut the presumption with evidence of intention, that the transaction was made as a result of the donor's "*full, free and informed thought*."[292]

See also *Buccilli et al v. Pillitteri et al*,[293] where the Court stated that:

> "*The doctrine of undue influence is well known. Where there is no special relationship such as trustee and beneficiary or solicitor and client, it is open to the weaker party to prove the stronger was able to take unfair advantage, either by actual pressure or by a general relationship of trust between the parties of which the stronger took advantage. . . Once a confidential relationship has been established the burden shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely*."[294]

Indirect Evidence in Undue Influence Claims

In the U.K. case of *Shrader v Shrader*[295] recently reported, the court made a finding of undue influence despite the lack of direct evidence of coercion. Instead, the court formed its decision on the basis of the testator's vulnerability and dependancy of 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 to disinherit her other son of her own volition. Accordingly, the court is arguably moving towards giving evidentiary weight to indirect evidence, particularly where suspicious circumstances are alleged and substantiated.

Interplay Between Capacity, Undue Influence, Suspicious Circumstances, and other Issues Relating to Capacity

Where the capacity of a client is at issue, chances are greater that undue influence, or other issues relating to capacity, may be inter-related. For instance, there is often interplay between capacity, undue influence and suspicious circumstances.[296]

In *Leger v Poirier*,[297] the SCC explained there was no doubt that testamentary incapacity could sometimes be accompanied by an ability to answer questions of ordinary matters with a "*disposing mind and memory*" without the requisite ability to grasp some degree of

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[292] *Fountain Estate v Dorland,* 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC) at para 45.
[293] 2012 ONSC 6624, upheld 2014 ONCA 337.
[294] *Buccilli, supra* note 248 at para. 139.
[295] *Shrader v Shrader, [2013] EWHC 466 (ch)*
[296] See for example the case of *Gironda v Gironda*, 2013 CarswellOnt 8612 at para 56. In this case, the applicants challenged an 92 year old woman's will and powers of attorney, as well as transfers of property made by her, on grounds of incapacity and undue influence.
[297] *Leger v Poirier*,[1944] SCR 152.

appreciation as a whole for the planning document in question. Where mental capacity is in question and there is potential for a client to be influenced, a lawyer must ensure that steps are taken to alleviate the risk of undue influence.

Where the validity of a planning document is contested, it is not unusual to find that incapacity, undue influence and suspicious circumstances are alleged. As such, a review of suspicious circumstances and the interplay between the burden of proof and undue influence is important.

Suspicious Circumstances

Suspicious circumstances typically refer to any circumstances surrounding the execution and the preparation of a planning document, and may loosely involve:

- Circumstances surrounding the preparation of the Will or other planning instrument;
- Circumstances tending to call into question the capacity of the testator/grantor, and;
- Circumstances tending to show that the free will of the testator/grantor was overborne by acts of coercion or fraud.[298]

Examples of suspicious circumstances include:

- Physical/mental disability of the testator;
- 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;
- Drastic changes in the personal affairs of the testator;
- Isolation of the testator from family and friends;
- Drastic change in the testamentary plan; and
- Physical, psychological or financial dependency by the testator on beneficiaries.[299]

Burden of Proof for Suspicious Circumstances

Where suspicious circumstances are raised, the burden of proof typically lies with the individual propounding the Will/document. Specifically, where suspicious circumstances are raised respecting testamentary capacity, a heavy burden falls on the drafting lawyer

[298] *Vout v Hay,* [1995] 2 SCR 876 (SCC).
[299] Mary MacGregor, "2010 Special Lectures- Solicitor's Duty of Care" ("Mary MacGregor") at 11.

to respond to inquiries in order to demonstrate that the mind of the grantor was truly "*free and unfettered.*"[300]

Where suspicious circumstances are present, the civil standard of proof applies. Once evidence demonstrating that the requisite formalities have been complied with and that the testator approved the contents of the Will, the person seeking to propound must then meet the legal burden of establishing testamentary capacity.

The burden on those alleging the presence of suspicious circumstances can be satisfied by adducing evidence which, if accepted, would negative knowledge and approval or testamentary capacity.

The burden of proof of those alleging undue influence or fraud remains with them, the challenger, throughout.[301]

Lawyer's Checklist of Circumstantial Inquiries

When meeting with a client, it is advisable for lawyers to consider whether any indicators of undue influence, incapacity or suspicious circumstances are present.

In order to detect undue influence, lawyers should have a solid understanding of the doctrine, and of the facts that often indicate that undue influence is present.

In developing their own protocol for detecting such indicators, lawyers may wish to consider the following:

Checklist

- ❑ Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?

- ❑ What are the familial circumstances of your client? Is he/she well supported; more supported by one family member; if so, is there a relationship of dependency between the client and this person?

- ❑ Is there conflict within your client's family?

- ❑ If the client does not have familial support, does he/she benefit from some other support network, or is the client isolated?

[300] Mary MacGregor citing *Eady v Waring* (1974), 43 DLR (3d) 667 (ONCA).
[301] Kimberly Whaley, "Estate Litigation and Related Issues", October 18, 2007, Thunder Bay CLE Conference at 33, http://whaleyestatelitigation.com/blog/published-papers-and-books/

- ❑ If the client is isolated, does he/she live with one particular individual?

- ❑ Is the client independent with respect to personal care and finances, or does he/she rely on one particular individual, or a number of individuals, in that respect? Is there any connection between such individual(s) and the legal matter in respect of which your client is seeking your assistance?

- ❑ Based on conversations with your client, his/her family members or friends, what are his/her character traits?

- ❑ Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?

- ❑ Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?

- ❑ If there have been recent changes in planning documents, it is prudent to inquire as to the circumstances under which previous planning documents came to be; whether independent legal advice was sought; whether the client was alone with his/her lawyer while providing instructions; who were the witnesses to the document, and; why those particular witnesses were chosen.

- ❑ Have numerous successive planning documents of a similar nature been made by this client in the past?

- ❑ Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?

- ❑ Has the client had any recent significant medical events?

- ❑ Is the client requesting to have another individual in the room while giving instructions or executing a planning document and if so, why?

- ❑ In the case of a power of attorney or continuing power of attorney for property, what is the attitude of the potential grantee with respect to the grantor and his/her property? Does the grantee appear to be controlling, or to have a genuine interest in implementing the grantor's intentions?

- ❑ Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the grantor's ability to understand and appreciate the planning document at hand and its implications?

- ❑ Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?

Involvement of Professionals

- ❑ Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependancy? Is the client in some way susceptible to external influence?

- ❑ Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?

- ❑ Have any previous lawyers seemed overly or personally involved in the legal matter in question?

Substantive Inquiries

- ❑ Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?

- ❑ What property, if any, is owned by the client? Is such property owned exclusively by the client? Have any promises been made in respect of such property? Are there designations? Are there joint accounts? Debts? Loans? Mortgages?

- ❑ Is the client making a marked change in the planning documents as compared to prior documents?

- ❑ Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?

- ❑ Does the client have a physical impairment of sight, hearing, mobility or other?

- ❑ Is the client physically dependant on another?

- ❑ Is the client vulnerable?

Guidelines for Lawyers to Avoid and Detect Undue Influence

When taking instructions from a client in respect of a planning document, there are some checklist recommended guidelines to assist in minimizing the risk of the interplay of undue influence:

- ❑ Interview the client alone;

- ❑ Obtain comprehensive information from the client, which may include information such as:
  - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents;
  - (ii) Any previous planning documents and their contents, copies of them.

- ❑ Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);

- ❑ Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;

- ❑ Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability;

- ❑ Address recent health changes;

- ❑ Make a list of any indicators of undue influence as per the information compiled and including a consideration of the inquiries suggested herein, including corroborating information from third parties with appropriate client directions and instructions;

- ❑ Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;

- ❑ Determine whether the client have any physical impairment? Hearing, sight, mobility, limitations …?

- ❑ Consider evidence of intention and indirect evidence of intention; and

- ❑ Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.

Practical Tips for Drafting Lawyers

Checklist

- ❑ Ask probative, open-ended and comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client executing the planning document;

- ❑ Determine Intentions;

- ❑ Where capacity appears to be at issue, consider and discuss obtaining a capacity assessment which may be appropriate, as is requesting an opinion from a primary care provider, reviewing medical records where available, or obtaining permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns (obtain requisite instructions and directions);

- ❑ Where required information is not easily obtained by way of an interview with the client/testator, remember that with the authorization of the client/testator, speaking with third parties can be a great resource; professionals including health practitioners, as well as family members who have ongoing rapport with a client/testator, may have access to relevant information. Keep in mind solicitor client consents and directions;

- ❑ Follow your instincts: where a person is involved with your client's visit to your law office, and that person is in any way off-putting or appears to have some degree of control or influence over the client, or where the client shows signs of anxiety, fear, indecision, or some other feeling indicative of his/her feelings towards that other individual, it may be an indicator that undue influence is at play;

- ❑ Where a person appears to be overly involved in the testator's rapport with the law office, it may be worth asking a few questions and making inquiries as to that person's relationship with the potential client who is instructing on a planning document to ensure that person is not an influencer;[302] and

[302] For a helpful review of tips for solicitors to prevent undue influence, see "Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide", BCLI Report no. 61, Appendix, in particular "Checklist" and "Red Flags", http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf
* For other related resources, see WEL "Publications, Website": www.whaleyestatelitigation.com

- ❑ Be mindful of the *Rules of Professional Conduct*[303] which are applicable in the lawyer's jurisdiction.

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

Kimberly A. Whaley, WEL PARTNERS

[303] *Rules of Professional Conduct*, Law Society of Upper Canada, http://www.lsuc.on.ca/with.aspx?id=671

Appendix V

Checklist: "Red Flags" for Decisional Incapacity in the Context of a Legal Retainer

In general and particularly given our current demographics, it is advisable for lawyers to be familiar with and attuned to issues associated with decisional incapacity. When taking on a new client, providing independent legal advice, or when witnessing a change in an existing client, lawyers must be equipped with the tools to know their client and be alive to certain indictors of incapacity so as to facilitate the development of protocol. While indicators are not determinative of a person's capacity or incapacity, there are some "red flags" and suggested 'best practices' which may assist in the navigation of this complex concept of capacity. For information on the factors criteria to determine requisite decisional capacity in select areas see WEL's Capacity Checklist: Re Estate Planning Context and Summary of Capacity Criteria.

RED FLAGS FOR INCAPACITY

- Be alert to cognitive, emotional or behavioural signs such as memory loss, communication problems, lack of mental flexibility, calculation problems or disorientation of time person and/or place

- Hesitation or confusion on the part of the client, difficulty remembering details, cognitive difficulties or any other difficulties in comprehension

- Short-term memory problems: repeats questions frequently, forgets what is discussed earlier in conversation, cannot remember events of past few days (but remember there is a difference between normal age-related forgetfulness and dementia)

- Communication problems: difficulty finding words, vague language, trouble staying on topic or disorganized thought patterns

- Comprehension problems: difficulty repeating simple concepts and repeated questions

- Calculation or financial management problems, i.e. difficulty paying bills

- Significant emotional distress: depression, anxiety, tearful or distressed, or manic and excited, feelings inconsistent with topic etc.
- Intellectual impairment
- Cannot readily identify assets or family members
- Experienced recent family conflict
- Experience recent family bereavement
- Lack of awareness of risks to self and others
- Irrational behaviour or reality distortion or delusions: may feel that others are “out to get” him/her, appears to hear or talk to things not there, paranoia
- Poor grooming or hygiene: unusually unclean or unkempt in appearance or inappropriately dressed
- Lack of responsiveness: inability to implement a decision
- Recent and significant medical events such as a fall, hospitalization, surgery, etc.
- Physical impairment of sight, hearing, mobility or language barriers that may make the client dependant and vulnerable
- Poor living conditions in comparison with the client’s assets
- Changes in the client’s appearance
- Confusion or lack of knowledge about financial situation and signing legal documents, changes in banking patterns
- Being overcharged for services or products by sales people or providers
- Socially isolated
- Does the substance of the client’s instructions seem rational? For example, does the client’s choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
- Keep an open mind – decisions that seem out of character could make perfect sense following a reasonable conversation

- Keep in mind issues related to capacity including, **undue Influence**. See WEL's Undue Influence Checklist

- Notably, the overall prevalence of dementia in a population aged 65 and over is about 8% while in those over 85 the prevalence is greater than 30%. It is only at this great age that the prevalence of dementia becomes significant from a demographic perspective. However, this means that great age alone becomes a red flag[304]

- Family members who report concerns about their loved one's functioning and cognitive abilities are almost always correct, even though their attributions are very often wrong. The exception would be a family member who is acting in a self-serving fashion with ulterior motives[305]

- A dramatic change from a prior pattern of behaviour, attitude and thinking – especially when associated with suspiciousness towards a family member (particularly daughters-in-law). Paranoid delusions, especially those of stealing, are common in the early stages of dementia[306]

- Inconsistent or unusual instructions. Consistency is an important hallmark of mental capacity. If vacillation in decision-making or multiple changes are not part of a past pattern of behaviour, then one should be concerned about a developing dementia[307]

- A deathbed will where there is a strong likelihood that the testator may be delirious[308]

- Complexity or conflict in the milieu of a vulnerable individual[309]

BEST PRACTICES:

[304] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[305] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[306] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[307] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[308] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre
[309] Per Kenneth I. Shulman, M.D., F.R.C.P.C., Professor, University of Toronto, Department of Psychiatry, Sunnybrook Health Sciences Centre

- Be alert to the signs of incapacity and always ask probing questions not leading questions

- Interview the client alone and take comprehensive, detailed notes

- Use open-ended questions to confirm or elicit understanding and appreciation

- Ask comprehensive questions which may help to elicit important information, both circumstantial and involving the psychology of the client

- Have clients re-state information in their own words and revert back to earlier discussions

- Take more time with older clients so they are comfortable with the setting and decision making process to be undertaken

- Follow your instincts. Where capacity appears to be at issue consider and discuss obtaining a decisional capacity assessment which may be appropriate. Also it may be appropriate to request the opportunity to speak to or receive information from a primary care provider, review medical records where available or obtain permission to speak with a health care provider that has frequent contact with the client to discuss any capacity or other related concerns. Be sure to obtain the requisite instructions and directions from the client given issues of privilege

- Be mindful of the Law Society of Upper Canada, *Rules of Professional Conduct*, http://www.lsuc.on.ca/lawyer-conduct-rules/, particularly the Rules related to capacity

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

Kimberly A. Whaley, WEL PARTNERS

Appendix VI

Chart: Pecore 10 Years Later –
Summary of Appellate Level Cases Applying Pecore

Pecore Last 10 Years – Review of Appellate Decisions Citing *Pecore* – Parent /Adult Child Gratuitous Transfers – Estate Context
Kimberly Whaley

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
2007	*Comeau v. Gregoire* 2007 NSCA 73	**Joint Bank Account** Mother held account jointly with one of her children	• Testimony from various witnesses – mother and daughter were "very close" • If bank account was meant for convenience of helping with banking it would have made more sense to set one up with one of her other children who lived closer to her • Daughter testified that bank employee explained right of survivorship to them • All deposits and all withdrawals were made by the deceased • Annual statement sent to mother, mother paid tax on income • Bank employee testified that she was "100 percent sure" the account was joint • At one point mother withdrew $80,000 from account and put it in an	Gift

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
			investment solely in the name of daughter (post transfer conduct)	
2009	*Simcoff v. Simcoff* 2009 MBCA 80	**Real Property** Mother transferred title into name of herself and son as joint tenants	• Mother told son that she wanted property to go to him on her death • When she moved out of property, son received all rents and was responsible for maintenance and upkeep • Post-transfer conduct supported conclusion that mother used transfer as way for property to devolve to son on death	Gift
2009	*Doucette v. McInnes* 2009 BCCA 393	**Joint Bank Account** Five investment accounts – term deposits - in joint names with children except one son. Children not aware of accounts	• "spotty" but uncontested evidence – trial judge failed to properly incorporate uncontested facts • Children had no idea they were joint owners – Appeal Court noted this was important factor • Bank teller testified that although in joint names, only mother's address on account – only she received statements - Mother insisted on complete control • Mother surreptitiously obtained the signatures of her children on the banking documents • Shortly before death mother wanted to transfer GIC from one child to another but non-redeemable – Teller advised	Gift

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
			mother to see lawyer – perhaps make the gift by Will • Bank documents specified rights of survivorship • Mother received income from investments and paid taxes owing • Although – no evidence mother ever made any statements about her intention with respect to accounts and mother did not tell lawyer that the joint accounts would *not* form part of estate	
2009	*Breau v. The Estate of Ernest St.Onge et al* 2009 NBCA 36	**Joint Bank Account** Deceased added friend (who was 32 years his junior) as joint holder on bank account (also 'gifted' personal items and tools)	• Deceased lacked mental capacity to gift personal items & tools (notes from lawyer at the time assessing him for testamentary capacity- disoriented, memory loss, deteriorating cognitive capacity etc.) • Deceased required help with his finances – reviewing bills and writing cheques • Had daughter previously on bank account to assist with paying bills etc. supported conclusion that friend was added to account for convenience • Friend was also attorney under POA however trial judge did not take this into account – Appeal Court found this was not a determinative factor	Resulting Trust

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
2010	*Fuller v. Harper* 2010 BCCA 421	**Real Property** 5 months before death, father transfer one-half joint interest in vacant lot to long-time friend Estranged son argued friend held lot in resulting trust for estate	• Notary public testified that deceased "clearly intended" to register property in joint tenancy • Deceased advised friend that he was adamant he did not want son to receive any share of the estate • Clause in his Will disinheriting son • Deceased wanted to gift land outright but Notary Public persuaded him to put in joint tenancy	Gift
2011	*Beaverstock v. Beaverstock* 2011 BCCA 413	**Money Transfers** Mother gave money to son. Son died. Mother says money was a loan and sued son's wife (and executor) for return of the money. Wife says it was a gift.	• Trial judge "failed to begin his analysis with presumption of resulting trust" and made no finding of fact with respect to actual intention (did not even consider the question) • Appeal Court: Wife provided no evidence to rebut presumption of resulting trust • Mother's evidence was it was her intention to lend the money	Loan
2012	*Van De Keere Estate, Re,* 2012 MBCA 109	**Money Transfers** Father transferred various sums of money (totalling $408,000) to one daughter over 4 years before his death (unknown to his other children)	• Gifting daughter over 90% of his estate was inconsistent with behaviour by the deceased that showed an intention to treat his children equally, by his earlier gifts and by his Will. • Lawyer testified that deceased made it clear that it was his intention to benefit his children equally	Resulting Trust

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
			• Deceased was a "careful man when it came to his money" • No explanation was provided as to why deceased would "strip himself of almost all of his assets" • Evidence from daughter was insufficient to establish a gift was intended	
2013	*Bergen v. Bergen* 2013 BCCA 492	**Real Property** Parents transferred one-third interest in property to son. They fought and parents severed joint tenancy. Parents sued for order to sell property and that son held property on a resulting trust. Son said parents were holding title on resulting trust for HIM.	• Parents paid for the property and improvements • Hired a lawyer to tsf 1/3 interest • Parents wanted to keep "control" and wanted to avoid probate fees – thought they could do both • Found parents more credible – parents did not intend to make immediate gift of beneficial interest in land	Resulting Trust
2014	*Sawdon Estate v. Sawdon* 2014 ONCA 101	**Joint Bank Accounts** Between deceased father and adult sons	• Direct evidence at the time the bank accounts were opened • Wording of the bank documents • Control and use of the funds • The terms of the POA that the father gave to one son • Tax treatment of the bank accounts	Gift (the sons who held the legal title in the bank accounts held the

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
				beneficial right of survivorship for the other children equally)
2014	*Lorintt v. Boda,* 2014 BCCA 354, leave to appeal dismissed 2015 CanLII 10577 (SCC)	**Real Property** Requested lawyer to transfer his house to son. After discussion agreed to transfer to father and son as joint tenants. Father died. Executor claims son held title in resulting trust.	• Key evidence was lawyer's testimony which was supported by affidavits from the son • Lawyer explained options to father, the concept of joint tenancy, spoke and understood English (although Father's first language was Hungarian) • Executor tried to put evidence of father's intent forward in affidavits – both trial and appellate courts found it not useful – as dealt with father's later inconsistent comments on his intention (not his intention at time of transfer) and medical diagnoses at a later date (not at the time of transfer)	Gift
2015	*Mroz v. Mroz* 2015 ONCA 171	**Real Property** Mother transferred title of her house (only significant asset) into name of herself and daughter as joint tenants	• Mother wanted daughter to have title to the Property after her death BUT mother also wanted her other children to receive bequests under the Will from the sale of the Property	Trust

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
			• *All witnesses* testified this was mother's intention	
2015	*Foley (Re),* 2015 ONCA 382	**Joint Bank Account & Savings Bonds** Monetary transfers to daughter & savings bonds bequeathed under Will to daughter but deposited into joint account in names of both children & father shortly before death	• Testimony from financial advisor: Father looking for a way to avoid probate costs and he assured her that his children would know how to divide the assets • Deceased was only person to deposit/withdraw from joint account • Corroboration of the gifts in written instructions provided to the financial advisor • Deceased would keep track & record of any loans – he did not record the transfer of the savings bonds into the account as a loan • Financial advisor testified father wanted daughter to receive bonds as son received farm – met with deceased alone • Daughter was father's attorney under POA • Expert evidence from geriatric psychiatrist re Father's capacity	Gift & Savings bonds were bequeathed to daughter
2016	*Cowper-Smith v. Morgan* 2016 BCCA 200	**Real Property** Mother transferred residence into joint names with daughter	• Brothers knew of the transfer into joint names with sister but was told it was just for easier management of mother's affairs	Trust

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
		Both the Property and Mother's investments were held in trust through document called 'Declaration of Trust'- Mother was beneficiary and daughter was bare trustee – upon death daughter entitled to both assets "absolutely" This rendered mother's estate devoid of assets	• Found that as the presumption of undue influence was not rebutted, it follows that the presumption of resulting trust was also not rebutted as Mother was unduly influenced by daughter when she made the gratuitous transfer and executed declaration of trust	
2016	*Andrade v. Andrade* 2016 ONCA 368	**Real Property** Mother purchased home with a loan and mortgage, but put name of house and mortgages into children's names One child died – wife of child sought to recover his half-interest in house Mother said house belonged to her as beneficial owner	• Trial judge found deceased son was legal & beneficial owner – Overturned by Court of Appeal: son held house in trust for mother • Mother rented out house and collected rent • Children gave their money from jobs to mother while they lived in the house • Mother used money to pay mortgage • Evidence of intention was not lacking - trial judge failed to direct himself to question of mother's intention – instead looked at intention of children • Mother "borrowed" their names for title and mortgage because she could not qualify and they could • Mother died before trial but was able to give evidence as to her intention in	Trust

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
			affidavit and cross-examination before her death	
2016	*Zeligs v. Janes* 2016 BCCA 280	**Real Property & Joint Account** Elderly mother held joint title in real property with one of her two adult children. Mother also made daughter joint-holder of bank account and attorney under a POA. Daughter mortgaged the property and used money for her and her husband's benefit. Sold house and used funds for own benefit etc.	• Handwritten note by mother saying she wanted her daughter to be full owner when she died • Daughter saw mother put a copy of the note in an envelope to mail to other sister so she would know what was "going on" • Daughter also told sister about transfer • Trial judge found presumptions of undue influence and resulting trust were both rebutted BUT also found daughter severed the joint tenancy and extinguished the right of survivorship when she transferred the sale proceeds to herself and her husband • Mother's estate was entitled to one-half of the sale proceeds – which daughter held in trust for estate	Gift (but JT severed and ½ interest held in trust for Estate)
2016	*Laski v. Laski* 2016 ONCA 337	**Joint Bank Account** Father held certain bank accounts jointly with one of his three children (his daughter). Brother claimed she held funds on resulting trust.	• Clause in Will specified any assets held jointly with daughter were hers alone on his death – residue of estate split between other children • Vast bulk of evidence was produced by daughter • Lawyer's testimony was supported by her contemporaneous notes – she	Gift

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
			suggested clause in Will as Father had told her he suspected son would challenge entitlement to joint accounts – Lawyer wanted testator's intention to be clear • Testator told lawyer he did not want to identify the exact joint assets in Will as that would make his life "a living hell" if son knew the extent of assets that would fall outside of estate • Investment Advisor's evidence: joint accounts were opened on testator's instructions and had rights of survivorship • Close to his death, testator signed direction prepared by the investment advisor transferring securities into joint account – Testator told investment advisor he felt he was dying and he wanted to make sure his daughter was taken care of • Advisor understood that the assets were for daughter's benefit only, testator complained that his son was bullying him and asking for money that the testator did not want to give. He wanted to protect his daughter • Son's evidence was "bald and self-serving" • Evidence was "overwhelming" that the Testator intended gifts	

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
2016	*Franklin v. Cooper* 2016 BCCA 447	**Real Property** Deceased mother transferred title of her home to herself and daughter as joint tenants	• Daughter claimed the transfer was a result of an "agreement" and in consideration of expenses she had paid for in the past and she agreed to support her mother and not put her in a nursing home • Daughter claimed lawyer explained joint tenancy and right of survivorship to mother and she agreed that was what she wanted – but lawyer was not called as a witness, his file was destroyed • No written evidence of an agreement • Sister testified mother put title into joint tenancy to prevent mother from being defrauded into transferring her title away to a third party (she saw a tv show about this)– she claimed she had been offered the joint title first • Mother told all three children they would split the house • No direct evidence to establish intention of a gift (court rejected evidence of daughter)	Trust
2016	*Thorsteinson Estate v. Olson* 2016 SKCA 134	**Real Property** Deceased transferred land into the name of herself	• Deceased signed Deed of Gift and at the time of transfer expressed an intent to gift the land to William	Gift

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
		and a man she treated like a son (William). During her life she commenced action requesting tsf be set aside based on resulting trust (among others) Estate continued on the action.	• It was the deceased's idea to transfer land prompted by high probate fees incurred in William's father's estate • The deceased on her own volition contacted and instructed the lawyer to prepare the Deed and transfers • The transfer was consistent with her Will and the close "mother/child" relationship	
2017	*McKendry v. McKendry* 2017 BCCA 48	**Real Property** Deceased mother transferred legal title to her home into joint tenancy with her son.	• At time of transfer it was clear son held property in trust for Mother. Later Mother decided to remove trust conditions so that son would receive property absolutely on death. • Court of Appeal: Mother's intentions were "manifest and unambiguous" • When she tsf property – she did so with intent that son held property in trust. She had a lawyer prepare a trust declaration reflecting that intention – although son did not sign it – it was clear evidence of her intention • Later she consulted new lawyer – through lawyer's note and a two-page document prepared by lawyer – mother "unambiguously renounced" her beneficial interest in the right of survivorship • Her Will also stated that the property was registered in JT with son and he	Gift

Year	Case	Type of Property	Evidence of Intention	Outcome : Gift /Trust
			would receive it subject to registered mortgages • Nothing more would have been gained had the Mother executed a deed of gift under seal – no further act of delivery was required because of existing joint tenancy.	

Appendix VII

Estate Litigation Evidence "Cheat Sheet"

Angelique Moss, Casey & Moss LLP

> We start with the reality that the law of evidence is burdened with a large number of cumbersome rules, with exclusions, and exceptions to the exclusions, and exceptions to the exceptions.
>
> Dickson J., in *Graat v. The Queen*, [1982] 2 SCR 819

The following "cheat sheet" focuses on objections at trial that may be made in estate litigation cases, along with any exceptions to the rule, and commentary including cases which may be helpful to cite in support of the objection. The chart does not purport to be exhaustive of all of the objections that could be made to evidence and does not deal with any additional objections which might be made in a criminal law context.[i]

In order for evidence to be received by the court, the trier of fact (in estates, guardianship and capacity cases, the trier of fact will be the judge[ii]) will:

(1) Determine whether the evidence is **relevant;**
(2) Determine whether **any exclusionary rule of the law of evidence applies**.
(3) If the evidence is relevant and not subject to any exclusionary rule, the judge will determine whether to exercise his or her discretion and exclude the evidence.

Objection/ Exclusionary Rule	Exception	Comments
Irrelevant	Evidence may be admitted on a conditional basis: at the time the evidence is admitted, facts may have been presented out of order such that the relevance of the evidence might not yet be established. Counsel may give an undertaking that relevance will be	To be relevant, evidence must increase or decrease the probability of the truth of the facts in issue: *R. v. Morris*, 1983 CanLII 28 (SCC) , *Cloutier v. The Queen*, 1979 CanLII 25 (SCC) . Relevance is about the tendency of the evidence to support inferences. In *R. v. Pilon*, 2009 ONCA 248 (CanLII) Justice Doherty stated: > Evidence is relevant if, as a matter of common sense and human experience, it makes the existence of a fact in issue more or less likely. … Relevance is assessed by reference to the material

Objection/ Exclusionary Rule	Exception	Comments
Irrelevant (cont'd)	established later in the trial.	issues in a particular case and in the context of the entirety of the evidence and the positions of the parties. Relevance is distinguished from weight: it is for the trier of law to determine whether the evidence is relevant, and for the trier of fact to determine whether any weight should be given to the relevant evidence admitted.
Immaterial		Evidence that does not address any issue arising from the pleadings or the credibility of a witness (perception, memory, narration, or sincerity) is immaterial and it is inadmissible: Sopkina, Lederman, Bryan, *The Law of Evidence in Canada* (2nd ed.), paras. 2.36, 2.50 as cited in *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp*., 2012 ONSC 6549 (CanLII)
Inflammatory or Prejudicial Effect Outweighs Probative Value		A finding that evidence is relevant does not determine its admissibility. Relevant evidence will be excluded if it runs afoul of a specific exclusionary rule, or if a balancing of its **probative value** against its **prejudicial** effect warrants its exclusion: R. v. Watson 1996 CarswellOnt 2884. The judge can exercise his or her discretion and decide to exclude otherwise relevant evidence i.e. graphic photographs
Authenticity not Established		As a general rule (subject to statutory exceptions), nothing can be admitted as evidence before the court unless it is vouched for *viva voce* by a witness. Even real evidence, which exists independently of any statement by any witness, cannot generally be considered by the court unless a witness identifies it and establishes its connection to the events under consideration. See *R. v. Schwartz,* [1988] 2. S.C.R. 443, at para 65.

Objection/ Exclusionary Rule	Exception	Comments
Failure to Provide Corroboration in Cases Where s.13 of the Ontario *Evidence Act* Applies		To succeed in an action by or against a deceased's estate, a living person's evidence must be corroborated by some other material evidence. This requirement for corroboration is codified in: Section 13 of the *Evidence Act*, R.S.O. 1990, Chapter 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. See *Burns Estate v. Mellon* (2000), 2000 CanLII 5739 (ON CA), at para. 5 which states that the rationale for the rule is that the dead cannot respond to the living's version of events. "[T]he material evidence in corroboration must be independent of the opposite or adverse party and must appreciably help the judicial mind to accept one or more of the material facts deposed to. It must materially enhance the probability of the truth of the adverse party's statement." *Orfus Estate v. Samuel & Bessie Orfus Family Foundation*, 2011 ONSC 3043 (CanLII), at para. 16, aff'd 2013 ONCA 225 (CanLII)) See also: *Brisco Estate v. Canadian Premier Life Insurance Company,* 2012 ONCA 854 (CanLII) at para 65 citing *Sands Estate v. Sonnwald*, [1986] O.J. No. 478 (H.C.J.), for the following proposition:

Objection/ Exclusionary Rule	Exception	Comments
		[S]everal pieces of circumstantial evidence, taken together, may potentially corroborate the evidence of an opposite or interested party, notwithstanding that each item or piece of evidence viewed in isolation may not be so capable, provided that cumulatively the pieces or items satisfy the test of corroboration, that is to say, independent evidence which renders it probable that the evidence of an opposite or interested party upon a material issue is true.
Direct Extrinsic Evidence of Testator's Intention *[Applications to Rectify or Construct a Last Will and Testament]*	Where The Last Will and Testament Contains Equivocation	Equivocation arises where the words of the will, either when read in the light of the whole will or, when construed in the light of the surrounding circumstances, apply equally well to two or more persons or things. In such a case, extrinsic evidence of the testator's actual intention may be admitted and will usually resolve the equivocation. See *Rondel v. Robinson Estate*, 2011 ONCA 493 (CanLII) at para 29, citing *Bruce Estate* (Re), [1998] Y.J. No. 70, 24 E.T.R. (2d) 44 (S.C.) Note that in determining the construction of a last will and testament, extrinsic evidence of the testator's circumstances and those surrounding the making of the will may be considered, even if the language of the will appears clear and unambiguous on first reading. Indeed, it may be that the existence of an ambiguity is only apparent in the light of the surrounding circumstances. However, this does not include extrinsic evidence of a testator's intentions: see *Rondel v. Robinson Estate*, above, at para 24, citing *Haidl v. Sacher*, 1979 CanLII 2289 (SK CA). See also: *Furfaro v. Furfaro*, [1986] O.J. No. 280,22 E.T.R. 241 (H.C.J.), leave to appeal to the C.A. refused [1986] O.J. No. 889.

Objection/ Exclusionary Rule	Exception	Comments
Hearsay	Necessary & Reliable (principled approach)	Hearsay is an out-of-court statement tendered for the truth of its contents. It is presumptively inadmissible: *R. v. Bradshaw*, [2017] 2017 SCC 35 (CanLII); Note that if the statement is not being put forward for the truth of its contents, but simply to show that the statement was made, it is not hearsay: *R. v. O'Brien*, [1978] 1 S.C.R. 591 Hearsay may exceptionally be admitted into evidence under the principled exception when it meets the criteria of necessity and threshold reliability. Evidence will be necessary where the declarant is unavailable to testify at trial and where similar evidence of a similar quality from another source cannot be obtained. Evidence will be reliable where it has sufficient indicia of reliability or there are sufficient means to test the evidence to compensate for the inability to cross-examine: see *R. v. Bradshaw*, [2017] 2017 SCC 35 (CanLII); *R.* v. *Khelawon*, 2006 SCC 57 (CanLII), at paras. 62-63, 105; *R. v. Khan* [1990] 2 SCR 531*;* and *R. v. Smith*, 1992 CanLII 79 (SCC). Even if the evidence meets these requirements, the trial judge retains discretion to exclude it for reasons of trial fairness if its prejudicial effect outweighs its probative value: *R. v. Khelawon,* above*,* at paras. 3, 49.
	Interaction between the Principled Approach and the Categorical Exceptions	The SCC, having recognized the primacy of the principled approach, still maintains the importance of the existing categorical exceptions. The exceptions add predictability and certainty into the law of hearsay. Since the principled approach is implicit in most exceptions, they are likely to be strong evidence of necessity and reliability. See *R. v. Starr* 2000 SCC 40 at paras 202-207.

Objection/ Exclusionary Rule	Exception	Comments
Hearsay (cont'd)	Admissions	Admissions are acts or words of a party offered as evidence against that party. David Paciocco and Lee Stuesser, *The Law of Evidence* 3rd ed. (Toronto: Irwin Law Inc. 2002) at p.120 and following, as quoted in *Isaac v. Matuszynska*, 2016 ONSC 3617 (CanLII) The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Instead of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases: *R. v. Evans* [1993] 2 S.C.R. 629 See also: *Performance Factory Inc. v. Atlantic Insurance Co.*, 2013 NLCA 11 (CanLII), at paras. 46-51.
	Business Records	Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. (section 35(2) of the *Evidence Act*, R.S.O. 1990, CH. E.23) Note "business" and "record" are broadly defined per 35(1). Notice needs to be provided at least 7 days prior to trial. There is nothing preventing the opposing party from calling the person who made the record as a

Objection/ Exclusionary Rule	Exception	Comments
Hearsay (cont'd)		witness and challenging the accuracy of the record: *Ares v. Venner* 1970 CanLII 5 (SCC).
	Business Records (cont'd)	While s. 35 of the Ontario *Evidence Act* makes it easier for business records to be admissible, it does not assist in establishing the weight given to this records; that is for the judge to determine: *Inno-Vite Incorporated v. De Wit Trading Co. Inc.,* 2008 ONCA 362 (Ont. C.A.)
	Medical Records	A report obtained by or prepared for a party to an action and signed by a practitioner and any other report of the practitioner that relates to the action are, with leave of the court and after at least ten days' notice has been given to all other parties, admissible in evidence in the action. (section 52(2) of the *Evidence Act,* R. S.O. 1990, CH. E.23) Note definition of "practitioner" pursuant to section 52(1) of the *Evidence Act.* If leave is granted to file a report pursuant to section 52(2) of the *Evidence Act*, the opposite party has an absolute right to require that the practitioner attend for cross-examination. The trial judge may permit or direct the practitioner to be called as a witness, even though a report has already been filed. As well, the practitioner may be called but the Judge may later require that the report should be filed. All of these situations call for the exercise of a judicial discretion by the trial Judge: see *Ferraro v. Lee*, [1974] 2.O.R. (2d) 417 and more recently, *Beck v. Blane* [1999] O.J. No. 529 (C.A.), para. 4 and *Pool v. State Farm Insurance Companies* [2007] O.J. No. 3468 (C.A.)
	Res Gestae or Spontaneous Statement	The stress or pressure of the act or event must be such that the possibility of concoction or deception can be safely discounted. The

Objection/ Exclusionary Rule	Exception	Comments
Hearsay (cont'd)		statement need not be made strictly contemporaneous to the occurrence so long as the stress or pressure created by it is ongoing and the statement is made before there has been time to contrive and misrepresent: *R. v. Nguyen*, 2015 ONCA 278 (CanLII) at para. 146. See also *R. v. Khan*, 1990 CanLII 77 (SCC), [1990] 2 S.C.R. 531, at p. 540, and *R. v. Nicholas,* 2014 ONCA 56 (CanLII) at para. 88.
	Declarations of Physical, Emotional or Mental State	Declarations regarding a person's physical sensation are admissible: *Youlden v. London Guar. Co*. (1912), 4 D.L.R. 721 (Ont.H.C.) affirmed 12 D.L.R. 433 (Ont. C.A.) Declarations of present state of mind are admissible where the declarant's state of mind is relevant and the statement is made in a natural manner and not under circumstances of suspicion: *R. v. Starr* [2000] 2 S.C.R. 144.
	Declarations Against Pecuniary or Proprietary Interest	An out-of-court statement made by a declarant against his or her interest, when the declarant is now unavailable to testify, is admissible: *R. v. Demeter* [1978] 1 S.C.R. 538
	Prior Testimony	Evidence at trial of statements made by a witness in a prior proceeding represents a form of hearsay. Under the modern principled framework for defining exceptions to the hearsay rule, a hearsay statement will be admissible for the truth of its contents if it meets the separate requirements of "necessity" and "reliability". Where the parties and issues are substantially the same, testimony in earlier proceedings is admissible: *R. v. Hawkins,* [1996] 3 S.C.R. 1043. See also Rule 31.11(8) of the Rules of Civil Procedure which permits the use of discovery transcripts from an earlier proceeding involving the same subject matter and parties, which was dismissed or discontinued, to be used in a

Objection/ Exclusionary Rule	Exception	Comments
Hearsay (cont'd)		subsequent trial involving the same matter and parties. However, beware of the restrictions on use of discovery evidence pursuant to the deemed undertaking rule of the *Rules of Civil Procedure* (Rule 30.1.01) which are discussed below. See Rule 31.11(6) of the Rules of Civil Procedure which permits the use of discovery transcripts to be used at trial, with leave of the judge, in certain circumstances where the deponent is unavailable or unable due to death or disability to testify at trial.
	Prior Inconsistent Statement	Evidence that a witness made a prior inconsistent statement out of court may be elicited on cross-examination. The tests of reliability and necessity need to be met. Before you can prove the prior inconsistent statement, the witness must be given an opportunity to address it (the rule in Browne v Dunn), if the prior statement is denied, written or oral recordings may be used to impeach the credibility of the witness on cross-examination. See sections 20 and 21 of the Ontario *Evidence Act* regarding use of prior written or oral statements. Section 48(1) of the *Evidence Act* provides for the use of certified transcripts as evidence.
	Past Recollection Recorded	A document may be admitted as evidence for the truth of its contents if the following criteria are met: (1) the witness has no present recollection of an event or fact of which they had first-hand knowledge (2) the witness or someone else has recorded the event and if it was someone else, the witness confirmed it was accurate at the time; (3) the document was made contemporaneously to the event recorded,

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		when the witness's memory was clear; and (4) the witness attests that the document accurately reflects what they knew and remembered at the time. See: *R v. Richardson* (2003), 174 OAC 390, at para 26; *R* v. *Colangelo*, 2007 ONCJ 489, at para 30. Used often with professional witnesses such as doctors, nurses, lawyers, judges, and police officers who deal with far too many cases to be expected to have a present recollection.
Self-Serving Evidence/ Prior Consistent Statement	Evidence to Rebut Allegations of Recent Fabrication of the Witness	Evidence of a prior consistent statement is generally inadmissible, the exception is where the statement is used to rebut an allegation that the witness's evidence is a recent fabrication. To rebut an allegation of recent fabrication, it is necessary to identify statements made prior to the existence of a motive or of circumstances leading to fabrication. In all cases, the timing of the prior consistent statements will be central to whether they are admissible. See *R. v. Ellard* 2009 SCC 27, at para 33.
	Past Recollection Revived	A document or object which does not have to have been authored by the witness may act to revive a witness's memory (an "aide memoire"). However, it is the witness's testimony, and not the document or object, which forms the admissible evidence. The "aide memoire" is not admitted as evidence and does not need to be admissible evidence: *R. v. Fliss*, [2002] 1 S.C.R. 535. If the document was privileged, privilege is waived by its use to refresh the witness's memory.[iii]
	Narrative	Evidence of a prior consistent statement is

Objection/ Exclusionary Rule	Exception	Comments
		admissible in order to provide a context and to properly understand how the story or incident was initially disclosed but not as proof of its contents: *R. v. Dinardo*, 2008 SCC 24 (CanLII); *R. v. F.(J.E.)*, 1993 CanLII 3384 (ON CA)
Character	Evidence of good character may be led if relevant to the issues at stake [rare in civil cases]	Evidence of good character in a civil action is ordinarily inadmissible since it is irrelevant in the determination of most issues arising in those cases: *Deep v. Wood* (1983), 143 DLR (3d) 246 (Ont.C.A.) *Plester v. Wawanesa Mutual Insurance Co*. 2006 CarswellOnt 3241, stands for the proposition that when accused of a criminal act within a civil case, evidence of good character will be permitted as it would be in a criminal case (para 43).
	Cross-examination on character is permitted	Cross-examination relating to general reputation for untruthfulness or to prior criminal convictions or to findings of professional misconduct involving dishonesty may be used to diminish the credibility of a witness: *Deep v. Wood* (1983), 143 DLR (3d) 246 (Ont.C.A.)
Bad Character	Similar Fact Evidence may be admitted in certain circumstances	The general exclusionary rule that similar fact evidence is presumptively inadmissible has been affirmed repeatedly and recognizes that the potential for prejudice, distraction and time consumption associated with the evidence generally outweighs its probative value. Issues may arise, however, for which its probative value outweighs the potential for misuse. Similar circumstances may defy coincidence or other innocent explanation. The onus is on the prosecution [i.e. the party seeking to introduce the evidence] to show on a balance of probabilities that the probative value of the similar fact evidence outweighs its potential for prejudice: *R. v. Handy*, 2002 SCC 56 (CanLII). See also: *Anderson v.*

Objection/ Exclusionary Rule	Exception	Comments
		Maple Ridge (District), 1992 CanLII 2389 (BCCA) and *Cammack v. Martins Estate*, 2002 CanLII 11072 (ON SC).
Opinion	Lay Opinion	Opinions about every day human experience may be permitted Generally, lay witnesses are not permitted to testify as to their opinion. See for instance *R. v. Abbey*, 2009 ONCA 624 (CanLII), at para. 71, where Doherty J.A. held "[i]t is fundamental to the adversary process that witnesses testify to what they saw, heard, felt or did, and the trier of fact, using that evidentiary raw material, determines the facts." However, the SCC has also stated, in *R. v. Graat* 1982 CanLII 33 (SCC), that the "line between 'fact' and 'opinion' is not clear" and that there is "no reason in principle or in common sense why a lay witness should not be permitted to testify in the form of an opinion if, by doing so, he is able more accurately to express the facts he perceived." Opinions that lay witnesses have been able to testify about (not a closed list): (i) the identification of handwriting, persons and things; (ii) apparent age; (iii) the bodily plight or condition of a person, including death and illness; (iv) the emotional state of a person—*e.g.* whether distressed, angry, aggressive, affectionate or depressed; (v) the condition of things—*e.g.* worn, shabby, used or new; (vi) certain questions of value; and (vii) estimates of speed and distance;

Objection/ Exclusionary Rule	Exception	Comments
		(viii) intoxication. [as set out in *R. v. Graat*] The rule does not permit the witness to draw legal conclusions or opine on the very issue that the trier of fact decides. [*R. v. Graat*].
Opinion (cont'd)	Expert Opinion	The witness must be qualified by education or experience to provide the judge with an opinion that is outside of the judge's knowledge and experience, which will assist the judge to come to a conclusion. Expert evidence is admissible when (two-stage) 1) it meets the threshold requirements of admissibility, which are that a. the evidence must be logically relevant; b. the evidence must be necessary to assist the trier of fact; c. there must be no other exclusionary rule; d. the expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the duty to the court to provide evidence that is i. Impartial, ii. Independent iii. Unbiased AND e. for opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose; AND 2) it passes scrutiny at the gatekeeper stage, and the trial judge determines that the benefits of admitting the evidence

Objection/ Exclusionary Rule	Exception	Comments
Opinion (cont'd)	Expert Opinion (cont'd)	outweigh its potential risks, considering such factors as a. relevance, b. necessity, c. reliability, and d. absence of bias *See White Burgess Langille Inman v. Abbott and Haliburton Co.,* [2015] 2 SCR 182, 2015 SCC 23 (CanLII). Commentary by Lisa Dufraimont (Osgoode Hall). The judge must do his or her best to ensure that throughout, the expert's testimony remains within the proper boundaries of expert evidence. This includes ensuring, so far as possible, that the content of the evidence itself is properly the subject of expert evidence. Where mistakes are made and the testimony strays beyond the proper scope of expert evidence, it is imperative that the trial judge not assign any weight to the inadmissible parts: *R. v. Sekhon*, 2014 SCC 15 (CanLII) The expert opinion needs to comply with notice provisions etc. as set out in Rule 53.03 of the Rules of Civil Procedure.
	Witness has Special Skill, Knowledge, Training or Experience ("Participant Experts")	Pursuant to *Westerhof v. Gee Estate*, 2015 ONCA 206 (CanLII), a witness with special skill, knowledge, training, or experience who has not been engaged by or on behalf of a party to the litigation may give opinion evidence for the truth of its contents without complying with rule Rule 53.03 where: (1) the opinion to be given is based on the witness's observation of or participation in the events at issue; and (2) the witness formed the opinion to be given as part of the ordinary exercise of his or her skill, knowledge, training and experience

Objection/ Exclusionary Rule	Exception	Comments
		while observing or participating in such events.
Lawyer-Client Privilege	Client Waives Privilege	A client may expressly or implicitly waive privilege: *Bell v. Smith*, [1968] S.C.R. 664, *Bentley v. Stone* (1999), 42 O.R. (3d) 149 (Gen. Div.) Lawyer-client privilege survives the death of the client. The client's estate trustees/personal representative can waive privilege and ask for disclosure of any documents that the client, if living, would have been entitled to: *Hicks Estate v. Hicks*, 1987 CarswellOnt 367 In the case of will challenge litigation, where the identity of the estate trustee or personal representative is called into question, a court Order for production of the drafting lawyer's notes and records is typically required before the lawyer will produce the file. Curtailing or waiving lawyer-client privilege in order to ascertain what the deceased client's true intentions were is in the interests of justice and in the client's interests. See for instance, *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC).
	Crime or Fraud	If client sought guidance from lawyer re: commission of crime or fraud, then such communication is not privileged. *R. v. Cox and Railton* (1884), 14 Q.B.D. 153; *Descoteaux v. Mierzwinski,* [1982] 1 S.C.R. 860
	Public Safety	Lawyer-client privilege may be set aside where public safety is involved and death or serious injury is imminent*: Smith v. Jones* [1999] 1 S.C.R. 455
Litigation Privilege	The same exceptions	Communications between a lawyer and a client

Objection/ Exclusionary Rule	Exception	Comments
	apply as with lawyer-client privilege	or between a lawyer and a third party made for the dominant purpose of the client's contemplated or pending litigation are privileged. Any document that meets the conditions for the application of litigation privilege will be protected by an immunity from disclosure unless the case is one to which one of the exceptions to that privilege applies. Litigation privilege can be asserted against third parties, including third party investigators who have a duty of confidentiality. See: *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 (CanLII); *Blank v. Canada (Minister of Justice)* [2006] 2 S.C.R. 319, *General Accident Assurance Company v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).
Privileged Confidential Relationship	Case-By-Case	Privilege may arise if the following criteria are satisfied: (1) the communication must originate in a confidence that it will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties; (3) the relationship must be one which should be sedulously fostered in the public good; and (4) if all of these requirements are met, the court must consider whether the interests served by protecting the communication from disclosure outweigh the interest at getting at the truth and disposing correctly of the litigation. See*: M.(A.) v. Ryan*, [1997] 1 S.C.R. 157, *R. v. Gruenke,* [1991] 3 S.C.R. 236, *Slavutych v. Baker* [1976] 1 S.C.R. 254, *R. v. National Post*, 2010 SCC 16.
Deemed Undertaking Rule Prohibits Admission of Evidence (Rule 30.1.01 of the Rules of Civil Procedure)	Order that the deemed undertaking Rule has no application	Rule 30.1.01(3) prohibits the use of evidence or information obtained in discovery [i.e. Rules 30 [documentary discovery including non-party documentary discovery], 31 [examination for discovery including non-party discovery], 32 [inspection of property], 33 [medical examination], and 35 [discovery by written

Objection/ Exclusionary Rule	Exception	Comments
Deemed Undertaking Rule Prohibits Admission of Evidence (cont'd)		questions] for any purpose collateral or ulterior to the lawsuit in which the discovery took place. See *Kitchenham v. AXA Insurance Canada* (2008), 94 OR (3rd) 276. *Juman v. Doucette*, [2008] S.C.J. No. 8 at paras. 25-26. There are certain exceptions to the deemed undertaking rule as set out in Rule 30.1(4)-(7), including but not limited to evidence that is filed with the court, evidence that is given or referred to during a hearing, and using evidence obtained in one proceeding or information obtained from such evidence to impeach the testimony of a witness in another proceeding. Additionally, 30.1(8) provides that a court may order that the deemed undertaking rule does not apply if the interests of justice outweighs any prejudice that would result to the party disclosing the evidence. In *Juman v. Doucett*, 2008 SCC 8 (CanLII), the Supreme Court of Canada considered when relief should be given against deemed undertakings. Binnie J., writing for the court, observed, at para. 35, that, "where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will be generally granted." See also: *Bluewater Health v. Kaila*, 2012 ONCA 629 (CanLII). In will challenge litigation, the parties will often consent to an Order that the deemed undertaking rule does not apply in an Order Giving Directions. Such an Order would permit the evidence provided by the drafting solicitor in non-party documentary or oral discovery pursuant to Rule 30 or 31 to be used in a subsequent action against him or her.
Without Prejudice Communications /	Costs Submissions	Settlement offers are relevant to costs awards and disclosed in costs submissions

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Settlement Privilege Without Prejudice Communications / Settlement Privilege (cont'd)		
	Concluded settlement agreement is at issue	If one party fails to abide by the terms of the settlement, the parties' communications regarding settlement can be disclosed in order to prove that a settlement was reached and its terms.
	Public Interest	As set out in *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37, at para 19: "To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ. Div.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*)."
Leading Questions on Direct Examination	Routine or introductory questions that are not controversial; for purposes of identifying persons or things; where the witness needs assistance due to disability or the complexity of the matter	Leading questions suggest an answer or assume a state of facts that is in dispute: *R. v. E.M.W.,* [2011] 2 SCR 542, 2011 SCC 31 (CanLII) The degree of concern that may arise from the use of leading questions will depend on the particular circumstances and the rule is applied with some flexibility. Leading questions are routinely asked to elicit a witness' evidence on preliminary and non-contentious matters. Leading questions are also permitted to the extent that they are necessary to direct the witness to a particular matter or field of inquiry. Apart from these specific examples, the trial judge has a general discretion to allow leading questions whenever it is considered necessary in the interests of justice: *R. v. Rose*, 2001 CanLII

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Leading Questions on Direct Examination (cont'd)		24079 (ON CA) citing *Reference Re R. v. Coffin,* 1956 CanLII 94 (SCC),1 at pp. 211-12 S.C.R., p. 22 C.C.C. See also Rule 53.01(4) of the Rules of Civil Procedure which provides that where a witness appears unwilling or unable to give responsive answers, the trial judge may permit the party calling the witness to examine him or her by means of leading questions.
	To Impeach One's Own Witness Who Proves to Be Adverse	A party producing a witness shall not be allowed to impeach his or her credit by general evidence of bad character, but may contradict the witness by other evidence, or, if the witness in the opinion of the judge or other person presiding proves adverse, such party may, by leave of the judge or other person presiding, prove that the witness made at some other time a statement inconsistent with his or her present testimony. See section 23 of the Ontario *Evidence Act*, R.S.O. 1990, c. E. 23. *Ontario (Ministry of Municipal Affairs & Housing) v. Ontario (Municipal Board)*, (2001) 144 O.A.C. 281 (Ont. Div. Ct.) said at para. 25: "S. 23 of the *Evidence Act* specifically permits a party to contradict his own witness "by other evidence" so long as that party does not 'impeach his or her credit by general evidence of bad character.'"
	Pursuant to Rule 53.07	A party may call and cross-examine an adverse party (the adverse party is not cross-examined by their own lawyer in this case).
	Hostile Witness	A hostile witness as one who does not give his or her evidence fairly and with a desire to tell the truth. A party's own witness who has been declared hostile and is unwilling to testify may be

Objection/ Exclusionary Rule	Exception	Comments
		cross-examined and asked leading questions. *R. v. Coffin,* 1956 CanLII 94 (SCC). A declaration that a witness is "hostile" allows for broad cross examination (as opposed to where the witness is simply adverse). See: *R. v. Figliola,* 2011 ONCA 457 (CanLII); *Wawanesa Mutual Insurance Co. v. Hanes*, 1961 CanLII 28 (ON CA), [1961] O.J. No. 562 (C.A.); *R. v. Cassibo* (1982), 1982 CanLII 1953 (ON CA)
Abusive Cross-Examination		The court may prevent the abuse of a witness: Rule 53.01(2) of the Rules of Civil Procedure. See also: *R. v. Snow* (2004), 73 O.R. (3d) 40 (C.A.)
Collateral Fact Rule	Credibility is Central to the Case	If the fact is something the court would allow you to prove independently, it is not a collateral fact (Wigmore). As a matter of credibility if you suggest to a witness that they are not telling the truth or that they are mistaken, and they deny it, you are limited in how you respond by the Collateral Facts Bar. The rule does not impact the scope of cross-examination, but rather limits what contradictory evidence can be called to refute a witness's answer. The rule seeks to preserve trial efficiency and avoid confusion and distraction by preventing the litigation of issues that have only marginal relevance. See generally, David Watt, *Watt's Manual of Criminal Evidence*, (Toronto: Thompson Reuters Canada, 2016. The collateral fact rule is not absolute. As the Supreme Court recognized in *R. v. R.(D.)*, 1996 CanLII 207 (SCC), [1996] 2 S.C.R. 291, evidence that undermines a witness's credibility may escape the exclusionary reach of the collateral fact rule if credibility is central to the case against an accused.

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	Bias	Evidence to establish a witness's bias towards or against a party may be elicited on cross-examination. In *R. v. Watson* 1996 CanLII 4008 (ONCA), the Ontario Court of Appeal held that a witness' credibility may be impeached to show that the witness has a bias for or against a party to the litigation or a personal interest to be served by testifying in a particular manner. Because impeachment by the demonstration of bias or partiality is potentially so helpful to the trier of fact in assessing a witness's credibility, the opposing party is allowed to call evidence to contradict a witness's denial of partiality or bias: *R. v. Martin* (1980), 53 C.C.C. (2d) 425 at pp. 434-36 (Ont. C.A.)
Post-Testimony Impeachment [The Rule in Browne v. Dunn]		The rule in *Browne v. Dunn* requires the cross-examiner to "confront the witness with matters of substance on which the party seeks to impeach the witness's credibility and on which the witness has not had an opportunity of giving an explanation because there has been no suggestion whatever that the witness's story is not accepted": *R v. Quansah*, 2015 ONCA 237 at para 81. Sections 20 and 21 of the Ontario *Evidence Act* also codify this rule.
	Reading in Discovery Evidence of Adverse Party	The adverse party's examination for discovery transcript for discovery can be read into the trial record pursuant to Rule 31.11(2) and in this way, *admissions* can be received by the court. However, discovery transcripts cannot be read into the record per Rule 31.11(2) *for impeachment purposes* without first complying with the Rule in *Browne v. Dunn* and the *Evidence Act* (above): *International Corona Resources Ltd. v. Lac Minerals, (1986)* 1986 CanLII 2839 (ON SC), see also *Austin v. Bubela,* 2011 ONSC 3287 (CanLII)

Objection/ Exclusionary Rule	Exception	Comments
		A court may require a party to read-in additional evidence from the discovery of the adverse party in order to prevent an injustice being done to the examined party. See *Graat v. Adibfar*, 2013 ONSC 1690 (CanLII) quoting with approval from *Andersen v. St. Jude Medical Inc.* 2010 ONSC 1824 (CanLII) and *Saskatchewan Co-Op Wheat Producers Ltd. v. Luciuk,* 1931 CanLII 250 (SK CA)
Improper Re-examination		Re-examination is designed to be rehabilitative and explanatory. An attempt is made to have the witness explain, clarify and/or qualify answers given in cross-examination. No new subjects are permitted to be raised, except with leave of the Court: *R. v. Candir* (2009), 2009 ONCA 915 (CanLII), at para 148. *R. v. Evans* (1993), 1993 CanLII 102 (SCC) at page 339.
Improper Reply (case splitting; new issues)		Improper reply includes case splitting and introducing new issues instead of responding to matters raised by the defendant (see *R. v. Krause*, 1986 CanLII 39 (SCC), [1986] 2 S.C.R. 466, at p. 474); *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd.*, 1966 CanLII 282 (ON CA) Proper reply is evidence that the party could not have anticipated as being relevant when it presented its case in chief: *R. v. Krause*, 1986 CanLII 39 (SCC), at p. 474; and *Halford v. Seed Hawk Inc.*, 2003 FCT 141 (CanLII), 24 C.P.R. (4th) 220, at paras. 15-16; cited with approval by the Div. Ct. in *Lockridge v. Director, Ministry of the Environment*, 2013 ONSC 6935 (CanLII). As noted in *Lockridge (above)* the court can exercise its discretion to admit new evidence that was not previously available, in reply.
Judicial Notice (inclusionary rule)		"Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond

Objection/ Exclusionary Rule	Exception	Comments
Judicial Notice (inclusionary rule) (cont'd)		reasonable dispute." SCC in *R v Find*, 2001 SCC 32 at para 48 The test for Judicial Notice is as follows: 1) "Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: a. so notorious or generally accepted as not to be the subject of debate among reasonable persons; OR b. capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy" SCC in *R v Find (above)* at para 48 If the information falls short of this threshold there is a secondary stage. 2) If the fact is adjudicative there will be no judicial notice taken. However, if the fact is non-adjudicative, the analysis will continue as such: Would the fact be accepted by reasonable people who have informed themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind "the closer the fact approaches the dispositive issue, the more the court ought to insist on compliance with the stricter Morgan criteria" See *R v Spence* 2005 SCC 71 paras 54, 61, 65 Adjudicative facts are case specific based on who, where, when, what, and why. One example would be the mental state of the testator. Non-adjudicative facts tend to be broad social or legislative concepts such as battered wife syndrome, systemic discrimination, and the

Objection/ Exclusionary Rule	Exception	Comments
		feminization of poverty. See *R v Spence* (above) at paras 56 – 61.

[i] The author is indebted to the "Cheat Sheet" prepared by Justice Paul Perrell. His Honour's "An Evidence Cheat Sheet" was originally published in *The Advocates' Quarterly* (2007) Vol. 33. As well, *The Law of Evidence in Canada* by Sopinka, Lederman & Bryant, is an invaluable resource and reference used in the course of preparing this paper.

[ii] See section 108 of the *Courts of Justice Act,* R.S.O. 1990 c. C. 43*,* which precludes the use of juries for several types of proceedings, including cases involving declaratory and equitable relief, rectification or setting aside a written instrument.

[iii] OBA Civil Litigation Section, "Proving Your Case: Evidence for Litigators…", held on May 7, 2015, Allan Sternberg/Alejandro Manevich, Ricketts Harris LLP