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## *Practice Direction Concerning the Estates List of the Superior Court of Justice in Ontario*

*Justice D. Brown*

The new *Practice Direction Concerning the Estates List of the Superior Court of Justice in Ontario* went into effect on April 1, 2009. You can find the Practice Direction on the website for the Superior Court of Justice: [www.ontariocourts.on.ca](http://www.ontariocourts.on.ca) in the "Practice Directions" section.

The Practice Direction seeks to address three needs: (i) updating previous directions about the Estates List to reflect current practices; (ii) improving the scheduling of matters on the Estates List to obtain more timely dates for the hearing of contested matters; and, (iii) describing "best practices" regarding the preparation for, and the hearing of, matters on the Estates List.

The daily list now is divided into two parts: each day starts with the hearing of 10-minute Scheduling Appointments, followed by the hearing of contested matters. Up to five Scheduling Appointments can be booked for each day. That number may be adjusted as experience reveals the actual demand for Scheduling Appointments. After the judge has dealt with any Scheduling Appointments, the Hearing Matters portion of the daily list will proceed.

Separate bookings must be made for Scheduling Appointments and Hearing Matters, and the OSCAR system has been changed to enable such separate bookings. Separate confirmation forms also must be used to confirm Scheduling Appointments and Hearing Matters. Each form contains different information in order to enable judges to prepare properly for each kind of matter.

Although the Practice Direction came into effect on April 1, 2009, due to matters already booked, the real effect of the new scheduling procedures will not be felt until late May or early June, 2009. In the fall, I plan to survey the Bar to obtain your comments on the operation of the new Practice Direction.

There is one final matter. At the end of 2008, I released a "filing endorsement" concerning the evidence applicants for certificates of appointment must file to support requests to dispense with administration bonds. *Re Estates of Robert Henderson and Eugenia Zagaglia*, 2008 CanLII 69136 (ON S.C.), identified the following information, which should be addressed in affidavits filed in support of a request to dispense with a

bond: (i) the identity of all beneficiaries of the estate; (ii) the identity of any beneficiary of the estate who is a minor or incapable person; (iii) the value of the interest of any minor or incapable beneficiary in the estate; (iv) executed consents from all beneficiaries who are *sui juris* to the appointment of the applicant as estate trustee and to an order dispensing with an administration bond should be attached as exhibits to the affidavit. If consents cannot be obtained from all the beneficiaries, the applicant must explain how he or she intends to protect the interests of those beneficiaries by way of posting security or otherwise; (v) the last occupation of the deceased; (vi) evidence as to whether all the debts of the deceased have been paid, including any obligations under support agreements or orders; (vii) evidence as to whether the deceased operated a business at the time of death and, if the deceased did, whether any debts of that business have been or may be claimed against the estate, and a description of each debt and its amount; (viii) if all the debts of the estate have not been paid, evidence of the value of the assets of the estate, the particulars of each debt – amount and name of the creditor – and an explanation of what arrangements have been made with those creditors to pay their debts and what security the applicant proposes to put in place in order to protect those creditors.

The affidavit addressing these matters should contain, as exhibits, any consents or other documents referred to in the affidavit. The operative language of the draft order filed with the affidavit in support should read as follows: “THIS COURT ORDERS that the posting of an administration bond by the Estate Trustee is dispensed with.”

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## *Simonin v. Simonin* [2008] O.J. No. 4502 (Ont. Sup. Ct. J.)

*David Lobl\**

This was an action for unjust enrichment brought by Mary Simonin (“Mary”), personally and as Estate Trustee of the Franco Simonin Estate, against Matilda Simonin (“Matilda”), the defendant. The late Franco Simonin (“Franco”) was Mary’s husband and Matilda’s son.

Mary and Franco had lived rent-free on a farm property owned by Matilda from the time they were married until Franco’s death, approximately seven years. While living on the farm property, Franco made substantial renovations and improvements to the property that was paid for by his company, which had the effect of increasing its sale value by approximately \$230,000. The property had an active income generating farm. The farm income was retained by Franco and Mary.

Shortly after Franco died, Mary decided she could no longer live on the farm property. After Mary moved out, Matilda sold the farm property for a sale price of \$880,000.00. Mary alleged that Matilda had been unjustly enriched on account of the substantial renovations and improvements made to the farm property by Franco, which increased the value obtained by Matilda upon its sale.

The Honourable Justice P.A. Daley of the Ontario Superior Court of Justice dismissed the claim after finding that the three elements for an unjust enrichment had not been satisfied, namely: (i) an enrichment of the defendant, (ii) a corresponding deprivation of the plaintiff and, (iii) the absence of a juristic reason for the enrichment. Justice Daley found as follows on each of these points:

(i) Enrichment of the Defendant

On its face, it appears that the defendant was enriched in light of the renovations and improvements to the farm property and the corresponding increase in its value. However, Justice Daley concluded

that since the renovations and improvements to the farm property had in fact been paid for by Franco's company, and not by Mary or Franco, the action failed as no benefit was conferred on the defendant by Mary or Franco.

(ii) Corresponding Deprivation

In determining whether there was any corresponding deprivation, the Court should consider the "totality of what had passed between the parties" and not merely undertake a mathematical exercise. Justice Daley stated that Mary, Franco and their family had received intangible benefits associated with their occupancy of the farm property and the use of the land over and above a simple monetary comparison. They had enjoyed the use of all aspects of the farm property in their day to day lives. In addition to these non-tangible benefits, Mary and Franco received monetary benefits in excess of \$600,000.00 flowing from their use and occupancy of the farm property, its buildings and farmland. Justice Daley found that the monetary benefits far out-weighed the increased sale value of the farm property, estimated at \$230,000.00, which resulted from the improvements undertaken by Franco. The Court concluded that Mary had not established that she or her late husband had suffered a corresponding deprivation as a result of the benefit Matilda received from the renovations and improvements carried out at the farm property.

(iii) Absence of a Juristic Reason for Enrichment of the Defendant

Pursuant the Supreme Court of Canada's test set out in *Garwin v. Consumers Gas Co.* [2004] 1 S.C.R. 629 (S.C.C.), Mary was required to demonstrate a *prima facie* case by showing that there was no juristic reason from an established category (a contract, a disposition of law, a donative intent, or other valid common law, equitable or statutory obligations) which would deny recovery. The Court held that Mary had failed to establish her *prima facie* case, as Matilda was never billed for any of the work performed and was never advised that Franco and Mary expected to be compensated for their contributions. In addition, the Court concluded that any benefit conferred by Mary and Franco upon Matilda was voluntary and in their own self-interest and that there was therefore a juristic reason for Matilda to retain the benefits received by her.

Justice Daley stated that if a plaintiff conferred a benefit to another for his or her own self-interest, or if a plaintiff benefited in return from his or her conferral of benefits, then this would amount to evidence that the parties had no reasonable expectation that the benefit conferred by a plaintiff would be compensated for by a defendant. Unjust enrichment only applies to requested benefits. Granting a plaintiff compensation for a benefit which the plaintiff had not previously requested would unjustly enrich the plaintiff.

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## *Papageorgiou v. Walstaff Estate* (2008), 42 E.T.R. (3d) 50 (S.J.C.); appeal dismissed (2009), 45 E.T.R. (3d) 1 (Ont. C.A.): Summary Judgment in Estates Cases

*Susan J. Stamm\**

Justice Strathy recently confirmed the court's jurisdiction to grant summary judgment in contested estate cases.

The deceased, Eva Walstaff, died on October 22, 2004. Her mother, father and brother predeceased her. Her cousins, Vicky Lyons and Bonnie Shear, survived her.

In her will, made December 14, 1973 (the "1973 Will") the deceased made specific charitable and other bequests. She left the residue of her estate to her brother, who had predeceased her.

A friend of the deceased, Peter Papageorgiou, objected to the 1973 Will claiming that it had been revoked. He claimed to be the sole beneficiary and trustee of her estate based upon an unsigned will dated June 25, 1990 ("1990 Draft Will").

Mrs. Walstaff suffered a serious accident on April 18, 1990, when she was 79 years old. A Certificate of Incompetence to Manage One's Estate was issued on June 8, 1990. The Public Guardian and Trustee (PGT) became her committee until August 1990, when Ms. Shear, who had been named attorney in a power of attorney document made in 1988, took over her affairs.

Mrs. Walstaff moved to the Barton Place Nursing Home on or about June 11, 1990.

Mr. Papageorgiou attested that in June of 1990, Mrs. Walstaff instructed him to have a will prepared. He visited a lawyer and gave the instructions to him. The lawyer, who is now deceased, wrote a letter "To Whom it May Concern" dated May 23, 1996, advising that he went to Barton Place with the 1990 Draft Will, but was not permitted to see Mrs. Walstaff, as there was an order in the hospital office prohibiting any person from seeing her, or discussing a will with her.

Mr. Papageorgiou asked the lawyer to go back to Barton Place, but he refused to do so.

As such, the 1990 Draft Will was never executed.

In December 1990, Ms. Shear obtained an interim injunction restraining Mr. Papageorgiou, his wife and his daughter, from communicating with Mrs. Walstaff until January 7, 1991. The order was continued after that date, but permitted Mr. Papageorgiou to telephone Mrs. Walstaff. The materials filed on the injunction proceeding indicate that Mr. Papageorgiou was attempting to involve himself in Mrs. Walstaff's financial affairs, against the wishes of her caregiver and nieces. Some evidence on the record indicated that Mrs. Walstaff also objected to his activities.

The PGT filed an affidavit showing that from June 1990 until April 1994 (the date of their last record), Mrs. Walstaff was consistently found to be incapable of managing her affairs.

Mr. Papageorgiou argued that the 1990 Draft Will expressed Mrs. Walstaff's true intentions, but that she was prevented from executing it as a result of the actions of the staff at Barton Place, acting on the instructions of Ms. Shear and/or Ms. Lyons.

Justice Strathy reviewed the law concerning the court's jurisdiction to grant summary judgment in contested estates cases. He found that the jurisdiction existed, but that the court should not grant summary judgment where it is concerned that a full evidentiary record is not before the court.

His Honour noted specifically that the Order Giving Direction made in this matter, had contemplated the bringing of such a motion. This is important because in *Knox v. Trudeau* (2001), 38 E.T.R. (3d) 67, Justice Pardu had found that where an order had already been made directing a trial of an issue, a party could not come back to court and request summary judgment.

Justice Strathy went on to consider the argument in favour of summary judgment, namely that the 1990 Draft Will had not been signed. He noted that, in Ontario, there is no substantial compliance legislation, and that wills must comply with the formal requirements as set out in the *Succession Law Reform Act*, R.S.O. 1990, c.S.23. Justice Strathy found that he had no legal authority to make law to admit an unsigned will to probate. He held that the 1990 Draft Will was a piece of paper with no legal effect.

Justice Strathy went on to find that Mr. Papageorgiou has no financial interest in the estate of Mrs. Walstaff and therefore lacked standing to advance these proceedings.

Mr. Papageorgiou appealed. On February 6, 2009, the Court of Appeal dismissed the appeal in a brief endorsement.

In my view, this case underscores the importance of providing for a summary judgment motion in an order giving directions, and not simply inserting boilerplate language concerning "issues to be tried". *Knox v. Trudeau* has not been explicitly overturned. Summary judgment motions should be used to quickly end estate proceedings that have no chance of success.

*This case comment represents the opinion of the author and does not represent or embody the official position of The Children's Lawyer or the Ministry of the Attorney General.*

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# Re Schaefers

Fareen Jamal\*

Removing an attorney for property is notoriously difficult. Great deference is afforded to the incapable person's choice for attorney provided in a valid power of attorney (POA). On September 12, 2008, Justice Fragomeni issued a landmark decision in *Re Schaefers Estate*<sup>1</sup> wherein the attorney for property of an incapable person was removed. While "strong and compelling evidence of misconduct or neglect" must be established, this case illustrates that the threshold for removal is lower than Ontario counsel may have previously believed.

The attorney for property, a lawyer named Peter Verbeek ("Verbeek"), was removed as attorney even though he did not receive compensation as attorney,<sup>2</sup> he did not misappropriate any of the incapable person's property, and no actual damage to the incapable person's estate was established. This case demonstrates the court's willingness to act preemptively in these types of cases without waiting for actual damage to occur.

## Facts

Verbeek was the named attorney for property of Johanna Maria Schaefers ("Schaefers") in POAs for property dated December 4, 1998 and April 27, 2006. Schaefers was an 87 year old woman formally diagnosed with Alzheimer's disease in September 2006. Verbeek began managing Schaefers property in June 2006, shortly after Schaefers was admitted to hospital in March 2006, due to a fall related to her debilitating illness. The court held that Schaefer did not have the capacity to appoint an attorney for property in April 2006 and that the appointment was not valid.<sup>3</sup> The court was also troubled by the circumstances surrounding the 1998 appointment. However, it could not conclude that the 1998 POA was invalid since none of the affidavits filed had been subjected to cross-examination and it was difficult to determine the issue without clear and unequivocal independent evidence.

To add flavor to the facts, on December 17, 2007, the Tribunal of the Law Society of Upper Canada found that Verbeek engaged in professional misconduct in connection with certain purchase, sale and mortgage transactions. His license was suspended for three months as a result. While these events were not directly related to his role as Schaefer's attorney, they informed the judge's decision.

A motion to remove Verbeek as attorney was commenced by Schaefers, as represented by counsel pursuant to Section 3 of the *Substitute Decisions Act*.<sup>4</sup> Section 3 counsel had previously obtained preliminary orders effectively freezing Schaefers' assets and requiring Verbeek to perform general administrative duties, including filing tax returns and providing a monthly accounting.

## Verbeek's Failings and Defence

Verbeek's failings as outlined by section 3 counsel included: failing to provide a monthly accounting contrary to a court order; failing to voluntarily pass his accounts notwithstanding his agreement to do so; failing to provide information and documentation sought by section 3 counsel (amongst other parties); opening the sealed envelope containing the Will and POA following a delay of approximately one month after discovering it; failing to make the last two quarterly payments for Schaefers' 2007 taxes; and being tardy in providing the accountant information required to prepare and file Schaefers' 2006 Income Tax Return.

Once these issues were raised, why did Verbeek not simply resign as attorney? In November 2006, Verbeek stated: "[Schaefers'] relatives in Holland, who are the beneficiaries under the will, have expressed great concern to me about my relinquishing the power of attorney..." Fragomeni, J. pointed out that as attorney, Verbeek was expected to act in the best interests of Schaefers and not necessarily in accordance with the wishes or influence of Schaefers' relatives.

## Law and Analysis

*Re Schaefer's Estate* articulates a two-step test for the removal of an attorney:

- 1) there must be strong and compelling evidence of misconduct or neglect on the part of the attorney before a court should ignore the clear wishes of the donor. With respect to this issue, the evidence has to establish that the donor was capable of granting a proper POA; and
- 2) the Court must determine whether the best interests of an incapable person are being served by the attorney.

The courts have generally upheld the view that a written POA executed by the grantor at a time when s/he was apparently of sound mind will be jealously guarded and the court will respect the wishes and preference of the person who made the grant.<sup>5</sup> In the case at bar, Justice Fragomeni was unable to conclude that Schaefer was mentally incapable when she granted her POA in 1998. Upon finding the 1998 POA valid, the judge stated, "the next issue to be determined is whether there is strong and compelling evidence of misconduct or neglect on the part of Verbeek to such an extent that the wishes of Schaefer in 1998 ought to be ignored and Verbeek's appointment terminated".<sup>6</sup>

Chief Justice Hickman of the Newfoundland Supreme Court Trial Division in *Re Hammond Estate*<sup>7</sup> stated:

There must be strong and compelling evidence of misconduct or neglect on the part of the donee duly appointed under an enduring power of attorney before a court should ignore the clear wishes of the donor and terminate such power of attorney.

Three Ontario cases arrive at the same conclusion as Chief Justice Hickman in emphasizing that where a valid general power of attorney exists in favour of one party, it is not appropriate to replace that party with a property guardian.<sup>8</sup>

On my reading of the facts in *Re Schaefer's*, Verbeek's conduct seemed tardy and at worst sloppy. But, the evidence fell far short of establishing mismanagement, misappropriation, breach of trust or dishonesty. Verbeek did not improperly dispose of the assets or omit to pay any of Schaefer's bills or expenses. His conduct did not result in any loss to Schaefer. The court stated, "To characterize his conduct as tardiness or sloppiness minimized the seriousness of his non-compliance with court orders and disclosure requests and his inaction in proceeding with a passing of accounts despite his expressed intention to do so."

After considering all of the evidence, Fragomeni, J. concluded that Verbeek ought to be removed as attorney and that there was strong and compelling evidence of neglect on the part of Verbeek such that Schaefer's wishes as set out in her 1998 POA for property should be terminated. The court held that the evidentiary foundation had been established to conclude that Schaefer's best interests were not being met.

## Conclusion

The lesson for attorneys is surmised in the court's closing: "An attorney for property is a fiduciary and the duties and responsibilities of an attorney are significant. If Mr. Verbeek is too busy as a sole practitioner to discharge his duties as an attorney for the property of Schaefer then he should be relieved of those responsibilities".<sup>9</sup>

In short: attorneys beware!

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<sup>1</sup> *Teffer v. Schaefers*, [2008] 93 O.R. 3d, 2008 CarswellOnt 5447 (Ont. S.C.J.), also indexed as *Re Schaefers Estate*.

<sup>2</sup> This case is especially noteworthy given the lower standard of care provided to attorneys who do not receive compensation – see *Substitute Decision Act*, 1992, S.O. 1992, c. 30, s. 32(7) (*SDA*).

<sup>3</sup> Section 9(1) of the *Substitute Decision Act* provides that a person may be incapable of managing his or her own property – a person may be cognitively impaired – and yet be capable of giving a continuing power of attorney.

<sup>4</sup> *SDA*, *supra* note ii, s. 3.

<sup>5</sup> *Glen v. Brennan*, [2006] O.J. No. 79 (Ont. S.C.J.) at para. 9.

<sup>6</sup> *Re Schaefers Estate*, *supra* note i at para. 36.

<sup>7</sup> *Re Hammond Estate* (1998), 25 E.T.R. (2d) 188, [1999] N.J. No. 28 (Nfld. T.D), para. 31.

<sup>8</sup> *Axler v. Axler* (1993), 50 E.T.R. 93 (Ont. Q.B.); *O'Connor v. Mulville* (1997), 42 O.T.C. 360; (1997), 20 E.T.R. (2d) 171 (Ont. Q.B.); and *McGoey v. Wedd* (1999), 28 E.T.R. (2d) 236 (Ont. S.C.J).

<sup>9</sup> *Substitute Decision Act*, s. 32(1) – Attorneys for property are fiduciaries whose powers and duties must be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.

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## *Re Drago Barbulov v. Dr. R. Cirone: Appeal to the Superior Court of Justice – Ontario from the Consent and Capacity Board decision of January 22, 2009 pursuant to s. 80 of the Health Care Consent Act, 1996, S.O. 1996, c. 2*

*Kimberly A. Whaley\**

The Honourable Justice D. M. Brown released his endorsement on April 2, 2009, with subsequent written submissions. It set out the Consent and Capacity Board's ("CCB") decision, reasons for decision, the standard of review, issues on appeal and directions on disposition.

### The Facts

On August 18, 2008, Stadoje Barbulov ("Stadoje") was admitted to St. Joseph's Hospital suffering from brain damage. After admission to the hospital, Stadoje was found incapable of making his own decisions with respect to treatment.

The family informed the treating physicians that Stadoje did not have a power of attorney for personal care ("POAPC"). Dr. Cirone made a Form "G" Application under the *Health Care and Consent Act* (HCCA). Before the commencement of the CCB hearing, it was discovered that in fact a POAPC existed. The Public Guardian and Trustee (the "PGT") arranged for legal representation for Stadoje. The substitute decision-maker ("SDM"), Drago Barbulov ("Drago"), the son of Stadoje, was not represented by counsel at the CCB hearing.

The issues included whether or not Stadoje had capacity to consent to treatment, and whether Drago had complied with the principles for substitute decision-making contained in the HCCA.

## The CCB's Decision and Reasons for Decision

Paragraphs 20 through 24 of Justice Brown's endorsement include the CCB's reasons for the decision as follows:

[20] On January 21, 2009, the CCB issued a decision that Stadoje was not capable of giving or refusing life support treatments. No issue was taken with that decision.

[21] On January 22, 2009, the CCB issued the decision in which it was determined that Drago had not complied with the principles for substitute decision-making set out in the HCCA, and it directed Drago to: comply with the request contained within Mr. Stadoje Barbulov's POAPC [paragraphs 4 (a), (b), (c) and (d)] and to specifically consent to the treatment withdrawal process, beginning with and not limited to withdrawal of and no re-institution of ventilative support.

The CCB gave Drago until 11 a.m. on January 26, 2009, to comply with its directions, failing which he would be deemed not to meet the requirements for substitute decision-making set out in s. 20(2) of the HCCA.

[22] Following the hearing, Drago must have retained counsel, for on January 26, 2009, his current counsel requested written reasons for the decision from the CCB. The CCB released its 16-page decision on January 28, 2009. Drago filed a Notice of Appeal to this Court the following day.

[23] The CCB turned to the issue of the 1995 POAPC. The CCB held that: the POAPC clearly set out the wishes of Stadoje as described in paragraphs [4(b), (c) and (d)], in the event that any one of the potential precipitating events described in paragraph 4(a) should arise (see endorsement for POAPC provisions).

[24] The CCB then considered the criteria in s. 21 of the HCCA regarding Stadoje's "best interests." It found that Dr. Cirone's evidence about Stadoje's condition and prognosis was "clear, cogent and compelling" – the patient would continue to deteriorate; his brain function would not improve; his respiratory condition would diminish because of recurrent pneumonia; there would be continued renal failure; the medical team could not determine adequate cognitive functioning; and, there was no evidence of likely improvement in any of those areas. "The predictive likelihood" was that Mr. Barbulov would not recover from his illnesses. In light of the evidence, the CCB concluded that Drago was not acting in the best interests of his father.

## STANDARD OF REVIEW

Justice Brown set out the standard for reviewing findings of the CCB as one of "reasonableness" and relied on the cases of: *T. (I) v. L. (L.)* (1999), 46 O.R. (3d) 284 (C.A.), at para. 21; *Conway v. Jacques* (2002), 59 O.R. (3d) 737 (C.A.), at para. 34.

## ISSUES AND CONCLUSIONS

### **(1) Did the Board fail to afford Drago a meaningful right to counsel?**

Justice Brown found that in fact the duty of the CCB was discharged in this regard in that the CCB advised the appellant of his right to have counsel at the proceedings. Therefore no effect was given to the first ground of appeal.

**(2) Did the CCB err by permitting Dr. Cirone to amend his proposed plan of treatment during the hearing?**

In the absence of any request at the hearing for an adjournment to consider a new treatment plan, and particularly in light of the discovery of the existence of the 1995 POAPC, Justice Brown held that the CCB provided the parties with a fair opportunity to deal with the new treatment plan and therefore dismissed this second ground of appeal.

**(3) Did the CCB err in treating the 1995 POA for personal care as the expression of a prior capable wish under section 21(1) of the HCCA?**

Justice Brown found that it was unreasonable for the CCB to conclude from the whole of the evidence before it that the 1995 POAPC signed by Stadoje expressed his prior capable wishes applicable to the circumstances. It was found to be unreasonable for the CCB to conclude that for the purposes of s. 21(1) 1 of the HCCA, that the 1995 POAPC expressed the wishes of the patient for these purposes. The judge concluded that the decision did not fall within the range of possible acceptable outcomes which were defensible in respect of the facts of the case.

**Did the CCB err in concluding that Drago failed to give or refuse consent to treatment in accordance with the principles contained in s. 21 of the HCCA?**

The court found that the conclusions of the CCB in this regard were reasonable and were supported by the evidence. Justice Brown reviewed the case law on “condition and well-being” and of “best interests” and found that the SDM had failed to act in accordance with the best interests of his father. The decision of the CCB was upheld.

## DISPOSITION ON APPEAL

Justice Brown directed Drago to give or refuse consent to treatment for his father and in accordance with the treatment plan described in the endorsement. A time limit was imposed within which Drago was to meet the requirements, failing which the PGT would then act as SDM for Stadoje and a like time frame would be imposed. In that event, the PGT would then be the SDM and would consent to any further treatments, or changes to treatment in accordance with the best interests of Stadoje

The Court did not award any costs of the appeal.

## THE ENDORSEMENT

The purpose of this review was to give context to the excerpt below from the endorsement, flagging the insightful and refreshing commentary which captured the seriousness and complexity of the nature of these types of proceedings on which the Court is increasingly asked to adjudicate.

The following excerpt reproduced herein demonstrates the great care that the Court took in addressing what were very difficult, emotional, and delicate family health issues:

*“[1] Death, for some, is an end; death, for others, is a beginning; death, for all, is the unavoidable outcome of birth, the natural completion of life. Medical treatment and technology can remedy some illnesses one encounters along life’s path, but medical treatment cannot alter the inevitability of death. The past half century has seen, however, significant developments in the ability of medical technology to prolong existence, delay death, and create conditions where the final phases of life*

*risk becoming overly medicalized. Consequently, as a person advances closer towards death, issues arise about what medical assistance should be administered. The HCCA represents an effort by the legislature to create a framework for addressing these issues....*

*[87]... “well-being” in s. 21(2) of the HCCA was “a very broad concept” which encompasses many considerations including “quality of life”. With respect, I question whether that is so. The phrase “quality of life” does not occur in s. 21 of the HCCA, whereas, it is found in the provisions dealing with best interests criteria for the purposes of making decisions for incapable persons about the admission of care facilities (s. 42(2)) and personal assistance services (s. 59(2)). That the legislature omitted the concept of “quality of life” from Part II of the HCCA dealing with “treatment” may very well signal that it was alive to the possible dangers associated with the use of that term, especially in the context of end-life-treatment. Dignity attaches to a person from the beginning through the end of his or her physical existence, irrespective of a person’s ability to act on a various capacities he or she possesses as a human being. Dignity surrounds the unresponsive, dying person, just as it does the active one. To that extent, that one equates the notion of “quality of life”, with one’s ability to pursue an “active life”, one risks diminishing the innate dignity of those whose ability to act on their human capacities may be impaired through temporary illness, handicap, or the approach of death. A person at death’s door possesses a dignity as robust and worthy of protection as the active one. The difference between a healthy, self-conscious human being and an incapacitated, or impaired, human being is not one of kind, but only one of degree. To fold the concept of “quality of life” into the statutory concept of “well-being” in section 21(2) of the HCCA risks losing sight of this innate dignity when considering the appropriateness of treatment at the end of life.*

My thanks to D’Arcy Hiltz, a lawyer at *Hiltz Szigeti LLP* in Toronto, for providing me with this endorsement of Brown, J., and for bringing it to our attention.

A great deal of guidance and insight into consideration of matters under the HCCA can be gleaned from this decision.

*\* Kimberly A. Whaley, Certified Specialist, Whaley Estate Litigation.*

# Ashton Estate: A Rejoinder

Glenn Davis\*

I read the case comment in the last issue of *Deadbeat*. The author is to be commended for his bravery as a junior practitioner in offering his views in such a public forum. Doubtless, we all hope the Ashton decision was wrong and will shortly be distinguished or extinguished. Otherwise, thousands of estates have been maladministered, and the Province denied untold sums of tax. Other judges in other cases concerning beneficiary designations have neatly ducked the same revocation issue by describing beneficiary designations as ‘akin to’ and ‘quasi-testamentary’ dispositions. It would have been preferable for the judge in Ashton to have followed suit. However, while the learned Judge has put the cat among the pigeons and fuelled a thousand facts, I think two important points have been overlooked in speculating on the ripples the case itself may cause.

Firstly, surely it is an opportune time for everyone to reconsider the ‘standard’ revocation clause used in Wills. What are “other testamentary dispositions” referred to in the blanket revocation? Why don’t we just revoke prior wills and codicils?

Secondly, put bluntly, readers should appreciate that the Judge was faced with a poor will that failed the willmaker on two important points: (1) it failed to properly revoke the extant RRIF beneficiary designation (that alone would have been sufficient to put the RRIF proceeds into the estate); and (2) it contained an impotent attempt to ‘appoint’ new beneficiaries of the RRIF plan (incorrectly called an RRSP) in unequal shares.

The actual ‘appointment’ wording of the will was sort of a trailer to the gift of residue, which was worded thusly:

## RESIDUE OF ESTATE

TO PAY or transfer the residue of my estate to my children, in the following shares, per stirpes:

A, an amount equal to 2.5%

B, an amount equal to 2.5%

C, an amount equal to 2.5%

D, an amount equal to 17.5% [and four more 17.5% gifts to E, F, G and H]

for their own use absolutely, and I HEREBY SPECIFICALLY APPOINT them beneficiary of any pension plan benefits or Registered Retirement Savings Plan that I may own.

The judge found that the attempted ‘appointment’ provision was mere surplusage. (Note that it does not actually ‘appoint’ them in unequal shares, or in the same proportions as the gifts of residue). Had Mr. Ashton’s will contained an effective plan beneficiary designation, the 2001 will designation (in unequal shares) would have been inconsistent with the prior 1998 RRIF beneficiary designation. The Judge could have then relied upon s.52 (2) under Part III of the SLRA which states the following:

*(2) Despite section 15, a later designation revokes an earlier designation, to the extent of any inconsistency.*

I think I can fairly state that the will itself is a classic example of disturbingly common drafting errors. Among other things, in addition to using *per stirpes* improperly, it is oblivious to *Saunders vs Vautier* and the *Accumulations Act*, and purports to authorize the estate trustee to make contributions to RRSPs of which the deceased was the annuitant, rather than a surviving spouse. Readers should also ponder explicit references to RRSPs in a will being prepared for someone already over the age of 71 at the time. Surely better is to be expected of lawyers preparing such vital documents for seniors.

The learned Judge deserves some sympathy, too. This was a rights submission case, not a fully advocated battle. The express wishes of the willmaker for an unequal estate distribution were perfectly clear. But, the prior beneficiary designation plan (also far from perfect), implied equal shares. The estate trustee, and therefore the judge, were faced with a conflicted group of beneficiaries, a modest estate, and needed some closure. So, we are left gossiping about a troubling decision. Yet, we cannot point to an authoritative Ontario decision that conclusively says that the Judge was simply wrong. We can, however, amend our precedents and look closer to home to avoid other wills resulting in needless court proceedings and professional embarrassment.

*\* Glenn M. Davis, LL.B., MTI, TEP. The author is a grumpy old guy who sells life insurance for a living. He worries about beneficiary designations a lot.*

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## The Dead Green Hand of the Testator

*Susannah B. Roth\**

I recently had a young professional client come in to have a Will drafted. When I asked her whether she had any wishes regarding her funeral or the disposal of her remains, she inquired about “green” burials.

Since I had never heard of this concept, I was intrigued (as well as not able to answer her question at that time). After some discussion, she decided to simply state that it was her wish that her remains be disposed of in the most environmentally friendly way possible (thus leaving room for potential advances in technology and green alternatives becoming available in Ontario). I was interested enough that I decided to look into this possibility. After all, I am a good environmentalist, if not a fanatical one, and most likely, interest in environmentally friendly ways to dispose of one’s remains will only grow, so I can expect more questions on this issue from future clients. And after all, your wishes regarding the way your remains are disposed is one of your last chances to make a statement.

What I have discovered should not be read if you are currently eating something, but is fascinating nonetheless. Did you know that while it takes the equivalent energy of driving a car for 7,700 kilometers to cremate a body, a body actually burns cleaner than many other processes that deposit particles in our air? According to one article,<sup>1</sup> the human body burns cleaner than a Big Mac if you compare unburnt particles per hour (but I make no promises). Many crematoria have installed filters to capture most, if not all, of the particles that are produced and keep them out of the environment. Most experts agree that cremation is more environmentally friendly than burial because: the chemicals necessary to embalm a body seep out into the ground and can make their way into groundwater; carbon emissions are released during the decomposition process; and chemicals are released by the coffin as it disintegrates (not to mention that some are made from rare wood that is shipped here from other countries). For even greener cremation, you can now purchase biodegradable urns for cremated remains that will be buried or scattered.

However, if one really wants to go green, new alternatives are on the horizon. The first alternative, already available in Europe, the U.S., and in Western Canada, is green or natural burial. Essentially, green burial involves burial without embalming or a casket, (and, in some cases without a headstone), in a protected green space. The burial area is maintained and to a certain extent landscaped so that loved ones can visit. It basically looks like a natural forest or other green space, usually with pathways. Location co-ordinates are marked so burial sites can be found. There are also natural headstone options available depending on the facility, such as boulders or rocks designed to blend into the landscape, but still provide a marker for loved ones. Variations on this type of burial area also include low-impact burial grounds, where caskets are used,

but must be biodegradable and made from non-toxic materials, and conservation area burial areas, which are contiguous to conservation lands and are run in conjunction with the government authorities that oversee these lands.

Greener still is the newest way to dispose of one's remains: liquification (seriously, do not eat and read this). The process is called resomation and has been used by veterinarians for years, but is now available for humans, too. Basically, the body is immersed into a tank filled with a solution of potash lye and water, the temperature and pressure within the tank is raised, and a chemical process occurs (no, you are not boiled) whereby the entire body except for bone ash is liquefied, leaving only the bone ash and any implants or prosthetics the person had.

According to the information I have read, the process consumes about 90 kWh of electricity, versus 250 kWh for cremation, on average. It is also 100% mercury-free, which burial and cremation are not. The liquid remains can then be used as fertilizer, as can the ash, although the ash can be sifted and placed in an urn and buried or scattered as in cremation (and as an added feature is 100% remains, which cremated remains are not since they also contain ash from the crematoria furnace). The prosthetics can be cleaned and reused as well, although probably not in developed countries due to health regulations (apparently a donation program to ship them to developing countries is being considered in the U.S.).

A funeral with coffin can still be held, with the addition of a silk lining to the coffin that becomes a sealed silk bag that goes into the tank with the body. The coffin is only rented and is reused. The process was only available in the U.S. as of last year, although it should soon be available in the U.K. as well. Various environmental groups are pushing to legalize it in many countries around the world.

So, when a client asks you about a green burial, you will now be ready to help them make another statement from beyond death, with or without a grave, as well as show that you are as hip and green as the next lawyer.

*\* Susannah B. Roth, O'Donohue & O'Donohue, Barristers & Solicitors.*

<sup>1</sup> "Green deathmatch: burial vs. cremation", by Josh Lopusser, January, 2008, [www.greendaily.com](http://www.greendaily.com).

# The Law as it Affects Older Adults Residing in Institutional Settings

*Lisa Romano\**

The Advocacy Centre for the Elderly (ACE) is pleased to be working with the Law Commission of Ontario as it moves forward with its multi-year project to develop a new framework to analyze and understand the impact of law on older persons. Specifically, ACE has been awarded a research grant to research the best ways of enforcing the rights of older adults in institutional settings, namely hospitals, long-term care homes and retirement homes.

## Introduction to ACE

ACE is a specialty community legal clinic that was established to provide a range of legal services to low income seniors in Ontario. The legal services include individual and group client advice and representation, public legal education, community development, and law reform activities. ACE has been operating since 1984 and it is the first and oldest legal clinic in Canada with a specific mandate and expertise in legal issues of the older population.

ACE receives, on average, over 2,500 client intake inquiries a year. These calls are primarily from the Greater Toronto Area, but approximately 20 per cent are from outside this region, and may come from any part of the province, as well as from outside Ontario.

The individual client services are in areas of law that have a particular impact on older adults. These include, but are not limited to: capacity, substitute decision-making and health care consent; end-of-life care; supportive housing and retirement home tenancies; long-term care homes; patients' rights in hospitals; and elder abuse.

## Access to Justice: Myth or Reality?

On paper, there appears to be a multitude of protections available to older adults in institutions, such as:

- complaints to different professional colleges (e.g., College of Physicians and Surgeons of Ontario, College of Nurses, College of Social Workers);
- proceedings before the Consent and Capacity Board to challenge findings of incapacity and placement in long-term care homes;
- the ACTION telephone service operated by the Ministry of Health and Long-Term Care to investigate complaints in long-term care homes;
- the statutory Resident's Bill of Rights for residents in long-term care homes;
- complaints to the Ombudsman of Ontario if residents or their representatives are dissatisfied with the way in which the Compliance Adviser or the Ministry of Health and Long-Term Care deals with their concerns;
- The Complaints Response and Information Service (CRIS), a telephone service funded by the Government of Ontario, but operated by the Ontario Retirement Communities Association; and
- Residents and Family Councils in retirement and long-term care homes.

Access to justice for older persons, however, is a huge obstacle in the administration of both civil and criminal justice. Older adults are confronted with many barriers, such as:

- ageism;
- the lack of awareness of legal rights;
- financial and physical barriers in attempting to access the legal system;
- the insufficient number of lawyers practicing elder law; and
- lengthy court proceedings.

Consequently, many people contend that Ontario has an inadequate legal structure for older adults residing in institutional settings to have their complaints heard and resolved in a timely and satisfactory manner. These residents are particularly vulnerable as they are dependent on those very institutions that have violated their rights, in addition to the fact that they are “out of sight” and public scrutiny is lacking.

In an effort to influence both law reform in Ontario and the best practices of institutions, ACE wishes to examine existing legal mechanisms in a variety of jurisdictions respecting the enforcement of rights and remedies for older adults in institutions including, but not limited to, the following:

- ombudsman models;
- tribunals/administrative boards;
- government regulatory bodies;
- industry regulation;
- alternative dispute resolutions; and
- lay advocate programs, including Residents’ and Family Councils.

These “access to justice models” will be analyzed with the goal of developing an effective, inexpensive model which promotes the autonomy and dignity of older adults residing in institutions.

ACE will be holding meetings and focus groups with a variety of stakeholders in order to obtain their opinions regarding the various methods that might help older adults enforce their rights in long-term care homes. We encourage lawyers interested in these issues to contact us, either to be interviewed individually or to participate in a focus group.

More information about the LCO’s project on older adults can be found on their website: <http://www.lco-cdo.org/en/olderadults.html>. ACE’s submission to the LCO about a variety of legal issues, not only those impacting on institutional settings, can be found at [http://www.advocacycentreelderly.org/pubs/Law\\_as\\_it\\_Affects\\_Older\\_Adults\\_July\\_2008.pdf](http://www.advocacycentreelderly.org/pubs/Law_as_it_Affects_Older_Adults_July_2008.pdf).

*\* Lisa Romano is a staff lawyer at ACE.*

# Alterations to Wills

Laura Tyrrell\*

A solicitor retained by an estate trustee to administer the estate of a deceased person may be presented with an original Will to which alterations have been made, often in handwriting. The solicitor will need to advise the estate trustee as to the validity of the alterations in order that he can distribute the estate. The determination of the validity of alterations to a Will may be made by a court Application under Rule 14.05(3)(d) of the *Rules of Civil Procedure*.<sup>1</sup> The law regarding alterations to Wills is intended to protect against fraudulent changes made to Wills which cannot be verified after the testator dies.

The estate solicitor should first determine when the alteration was made. If a Will is altered before it is executed, the alteration is valid even if it is not witnessed.<sup>2</sup> It is the common practice of solicitors, however, to have changes made by the testator initialled by the testator and both witnesses before the Will is executed. Initials of the testator are sufficient for this purpose.<sup>3</sup> If the changes are not attested, an Affidavit of Condition of Will (Form 74.10) can be sworn by one of the witnesses in which the unattested changes are set out and the witness confirms that the Will is in the same condition as when it was executed.

If the alteration to the Will is not dated, it is presumed to be made after the date the Will was executed and the onus is on the person relying on the alteration to show that it was made before the Will was executed.<sup>4</sup> If the alteration is made after the Will is executed, section 18 of the *Succession Law Reform Act*<sup>5</sup> (the “Act”) addresses the determination of the validity of the alteration. This section provides as follows:

18(1) **Alterations in will** – Subject to subsection (2), unless an alteration that is made in a will after the will has been made is made in accordance with the provisions of this Part governing making of the will, the alteration has no effect except to invalidate words or the effect of the will that it renders no longer apparent.

(2) **How validly made** – An alteration that is made in a will after the will has been made is validly made when the signature of the testator and subscription of witnesses to the signature of the testator to the alteration, or, in the case of a will that was made under section 5 or 6, the signature of the testator, are or is made,

(a) in the margin or in some other part of the will opposite or near to the alteration; or

(b) at the end of or opposite to a memorandum referring to the alteration and written in some part of the will.

The effect of this section is that an alteration to a Will is only valid if it is made in accordance with the Act; that is, an alteration to a formal Will must be in writing and signed by the testator in the presence of two witnesses, and an alteration to a holograph Will must be made wholly in the handwriting of the testator and signed by him. The only exception to this is where the alteration deletes words (renders them “no longer apparent”) in which case the alteration will be effective even if it is not attested or signed by the testator. In the case of a deleted word, it must be completely unreadable to be effective.<sup>6</sup> Thus, where a testator used liquid paper to white out certain words in a Will, the court held the deletion to be effective and probate was granted leaving the words out.<sup>7</sup>

If an alteration to a Will does not comply with section 18 of the Act, it may be valid if it constitutes a holographic Codicil. In order for an alteration to constitute a holographic Codicil, it must contain a fixed and

final expression of intention as to the disposal of property.<sup>8</sup> For example, in one case,<sup>9</sup> the court considered the validity of the handwritten words to a formal Will which read “delete Julia + Daniel D. King 4/21/91”, which were followed by the signature of the testator. Although the alteration was not witnessed and therefore would have been invalid under section 18 of the Act, the court found that the words constituted a valid holographic Codicil to the Will under section 6 of the Act, which evidenced the testator’s intention to exclude these beneficiaries from the Will.

In *Luty v. Magill*,<sup>10</sup> Madam Justice Greer considered the validity of several alterations that were made to a Self-Counsel Press Will form originally signed by the testatrix before two witnesses. The testatrix obliterated certain words so that they were unreadable, followed by the word “delete” and initialled by the testatrix and dated by her, a date that was after the execution of the Will. The court held that this was a valid holographic Codicil and that the bequests and legacies referred to were revoked for the purposes of probate of the Will. The court also found that the initials of the testatrix were sufficient to constitute a signature.<sup>11</sup>

In the recent case of *CIBC Trust Corporation v. Horn*,<sup>12</sup> the testatrix made a formal Will which was later altered by several handwritings in at least three different types of ink. One original paragraph of the Will provided, “The sum of Four Thousand Dollars (\$4,000) to my friend Sandra Lee Kenney, if she shall survive me.” In the margin, there was an arrow pointing to a handwritten word “yes”, which was crossed out and underneath the handwritten words “giving her my house no money” were added, but neither initialled nor dated. Even though the beneficiary’s evidence was that she had been promised the testatrix’s house, the court did not give effect to the alteration as it was not a valid alteration under section 18 of the Act and it could not constitute a valid holographic Codicil as it was neither signed nor dated.

While we will continue to impress upon our clients the importance of not making handwritten changes to their Wills, we will no doubt continue to see Wills that are doctored with handwritten changes in various forms, at a time when it is too late to ascertain the testator’s true intentions. In such cases, if the alteration is not made in accordance with the strict requirements of section 18, then the person relying upon the alteration will need to show that it constitutes a valid holographic Codicil. This seems a reasonable balance between giving effect to a testator’s intentions and preventing fraudulent alterations to Wills.

\* *Laura Tyrrell, Barrister & Solicitor*, (416) 422-2172.

<sup>1</sup> R.R.O. 1990, Reg. 194.

<sup>2</sup> *Law v. Law* (1989) 33 E.T.R. 183 (O.S.C.J.).

<sup>3</sup> *Re Pattulla Estate* [1955] 17 W.W.R. 666 (B.C.S.C.).

<sup>4</sup> *Law v. Law*, *supra*, note 2.

<sup>5</sup> R.S.O. 1990, c. S. 26.

<sup>6</sup> *CIBC Trust Corporation v. Horn* [2008] O.J. No. 3091; 2008 CanLII 3983 (O.S.C.J.) and *Luty v. Magill* (2004) 12 E.T.R. (3d) 225 (O.S.C.J.).

<sup>7</sup> *Re Douglas Estate* (1986) 25 E.T.R. 154 (Newfoundland S.C.).

<sup>8</sup> *Bennett v. Toronto General Trusts Corp.* [1958] S.C.R. 392 (S.C.C.). However, in the *King* case, note 9, below, the court said that the Codicil need not be dispositive of assets – it could be a change of executors, or a direction to the executor to do something. This principle was followed in the *Luty* case, *supra*, note 6.

<sup>9</sup> *King v. King-Fleming (Litigation Guardian of)* (1995) 10 E.T.R. (2d) 258 (O.C.J. General Division).

<sup>10</sup> *Supra*, note 6.

<sup>11</sup> *Luty* case, *supra*, note 6, referring to the case of *Re Coate Estate* (1987), 26 E.T.R. 161 (Ont. Surr. Ct.).

<sup>12</sup> *CIBC Trust Corporation v. Horn*, *supra*, note 6.

# Book Review: *The Book of Dead Philosophers* by Simon Critchley, Vintage (2008)

*Reviewed by Jane E. Martin\**

Nothing says “light reading” to me like a book about philosophy and death, and when I saw Simon Critchley’s title, I was intrigued. My interest may have been sparked by the still lingering hangover from my undergraduate days studying philosophy. But, I could not wait to find out how Kierkegaard and Nietzsche had met their ends, and if the suffering their writings inflicted upon me was in any way reflected in the means of their demise. What I ended up with was a thought provoking exploration of how philosophers’ deaths, linked with the tenets of their theories, can teach me about living. So, I forgive Kierkegaard for ruining my GPA and offer you this review.

Simon Critchley, an English born philosopher currently teaching at the New School for Social Research in New York City, is a prolific author, writing for both academic and mainstream audiences. His style is light, crisp and mirthful.

In *The Book of Dead Philosophers*, Critchley has presented a defence of the ideal of a philosophical death. He believes that philosophy can teach a readiness for death without which any conception of contentment, let alone happiness, is illusory. To this end, Critchley had composed a *memento mori* of roughly 190 philosophers’ final acts, often linked to their central ideas, travelling through time from the pre-Socratics to the present day, and through the classical cannon, to the middle and far east, and to the new world. The collection does not pretend to be exhaustive; gaps are acknowledged and Critchley admits he has focused on the thinkers who interest him. He provides a reasonably inclusive overview of major philosophical epochs: a surprising number of women, a sampling of Saints, classical Chinese philosophers, and medieval Jewish and Islamic philosophers.

The result is thought-provoking, funny, somber and insightful. Throughout the book, Critchley highlights the lessons, often overlooked, that great thinkers can offer us in grappling with the terror of mortality – our own and others – which Critchley posits defines modern, western life.

Whereof the humour? The author is largely to blame. Critchley appears to derive a perverse pleasure in the absurd and misses no opportunity to revel in a bad pun, clever aside or rhyming couplet. He quotes with apparent glee the execrable verse of Diogenes Laertius (an example of Laertius’ rhyming style, on the death of Thales, who flourished in Sixth Century B.C: “As Thales watched the games one festal day; The fierce sun smote him and he passed away). He describes Schopenhauer as the “Eyeore of Continental philosophers”. Schopenhauer, who believed that human desire and human action is futile, illogical and directionless, died an unremarkable death at the age of 72, was found dead sitting in his chair, having suffered a heart attack and lung infection.

Pythagoras, who may not have actually existed, apparently had a strong revulsion to the humble bean: revulsion so strong he submitted to death by at the hands of his enemies rather than cross a bean field.

Food and drink have undone many a mighty thinker: Lucretius (love potion); La Mettrie (dodgy paté); Diderot (choked on an apricot); Ayer (close call with salmon); Sartre (a life of overindulgence in drugs and alcohol). The empiricist Bacon died from the chill caught when stuffing a chicken with snow in the streets of London to assess the effects of refrigeration. I do not suppose it is fair to blame the chicken for that.

Through the ages, a sad many thinkers have died for their writings and teachings: the forced suicide of Socrates; Hypatia was killed with pieces of broken pots, then her skin stripped with oyster shells; St. Paul was killed at the hands of Nero; Bruno was gagged and burned alive at the stake during the Inquisition; Concordet was murdered by Jacobins during the French Revolution; and Edith Stein was murdered by the Nazis in Auschwitz.

The intellectually well-endowed are not immune from absurdity when it comes to modes of death: Nietzsche made what Critchley describes as a long, soft-brained and dribbling descent into oblivion after kissing a horse in Turin. Rousseau died of cerebral bleeding, possibly caused by a forceful collision with a Great Dane, a poignant reminder to us all that those dogs are unconscionably large.

And, of course, many simply die of the illnesses of their day – edema, cancer, car accidents, emphysema, drowning, heart attacks and AIDS, or if they were lucky, peacefully in their sleep with disciples and loved ones at their sides.

Throughout the text, Critchley returns to thought-provoking questions: what is the role of suicide in the philosophical life? Can an atheist die a peaceful death? He highlights how many thinkers have grappled with these questions and how their own ends may be seen to reflect their answers to these questions.

To philosophize is, in Montaigne's words, to learn the habit of having death continually present in one's mouth – allowing us to confront the terror of annihilation that enslave us and leads us into either escape or evasion; in speaking of death, laughing at our frailty and mortality, one can accept the creaturely limitation that is the very condition for human freedom. And Critchley's compendium is a wonderful jumping off point for the contemplation for this journey.

Critchley's own demise, the final entry in his book: "Exit, pursued by bear."

*This review represents the opinion of the author and does not represent or embody the official position of the Children's Lawyer or the Ministry of the Attorney General.*

*\*Jane E. Martin, Counsel, Office of the Children's Lawyer, hoping to expire like Heidegger who, after a refreshing night's sleep, fell asleep again and died.*

# Spelling and Grammar Query

## Fulsome

*Susan J. Stamm\**

One of the most common irritants for lawyers appears to be the apparent misuse of the adjective, “fulsome”. However, when I looked into it, both American and English dictionaries recognize two very different definitions for the word.

1. Generous in amount, extent or spirit; full and well developed.
2. Related to the word “foul”: excessive, extravagant, overdone, immoderate, inordinate, over appreciative, insincere, ingratiating, fawning, sycophantic, adulatory, cloying, nauseating, sickening, saccharine, unctuous.

*Oxford Compact* ([www.AskOxford.com](http://www.AskOxford.com)) offers the following explanation: “Although the earliest sense of **fulsome** was ‘abundant’, this is now regarded by many as incorrect; the correct meaning today is said to be ‘excessively flattering’. This gives rise to ambiguity: the possibility that while for one speaker **fulsome praise** will be a genuine compliment, for others it will be interpreted as an insult”.

Merriam Webster online has this to say about the two meanings:

“The senses shown above are the chief living senses of *fulsome*. Sense 2, which was a generalized term of disparagement in the late 17th century, is the least common of these. *Fulsome* became a point of dispute when sense 1, thought to be obsolete in the 19th century, began to be revived in the 20th. The dispute was exacerbated by the fact that the large dictionaries of the first half of the century missed the beginnings of the revival. Sense 1 has not only been revived but has spread in its application and continues to do so. The chief danger for the user of *fulsome* is ambiguity.”

It appears as if the first definition, once obsolete, is enjoying renewed popularity. I find many examples of use of that definition in the business section of a popular Canadian national newspaper (and in litigation documents and letters).

Accordingly, when I advise the judge that my materials contain a “fulsome summary of the facts of the case”, do I mean that my materials are full and well developed, or insincere and fawning?

Brian’s List, which is a very useful (and funny) online grammatical tool, offered through the Washington State University website, has this to say about the word:

(see <http://www.wsu.edu:8080/~brians/errors/errors.html>)

“In modern usage, “fulsome” has two inconsistent meanings. To some people it means “offensive, overdone,” so “fulsome praise” to them would be disgustingly exaggerated praise.

To other people it means “abundant,” and for them “fulsome praise” is glowingly warm praise.

The first group tends to look down on the second group, and the second group tends to be baffled by the first. Best to just avoid the word altogether.”

In case you were wondering, the adverb is “fulsomely” and the noun is “fulsomeness”.

If you would like us to address common errors, please send an email to me at [susan.stamm@ontario.ca](mailto:susan.stamm@ontario.ca).

\* *Susan J. Stamm, Counsel, Office of the Children’s Lawyer.*

## CBA/Queen's Conference "Elder Law: Theory and Practice", Kingston, Ontario, June 12-13, 2009

*Mary-Alice Thompson\**

The Canadian Bar Association National Elder Law Section has just published the programme for its 4<sup>th</sup> National Continuing Education conference, and a number of aspects of the programme make it of interest to the readers of *Deadbeat*.

Firstly, the conference has a stellar array of speakers from Ontario and across Canada – Michel Silberfeld, Carol Rogerson, Phil Epstein, David Freedman, Patricia Hughes, Laura Watts, Doug Melville, as well as keynote speakers Sharon Carstairs and Flora MacDonald. Shortly after publication of the programme, we have confirmed that Madam Justice Marion Allan of the B.C. Supreme Court will give the opening plenary address. If any of these names are unfamiliar to you, visit the conference website at [http://www.cba.org/CBA/CLE/main/Elder\\_Law\\_09.aspx](http://www.cba.org/CBA/CLE/main/Elder_Law_09.aspx).

Secondly, the conference is multidisciplinary – as well as subjects frequently covered at CLE for estate practitioners in Ontario, this one will deal with cross-jurisdictional matters, such as the recent work done on reforming powers of attorney in the western provinces. It also crosses traditional subject borders. By its very nature, the emerging area of Elder Law touches on family law, real estate law, administrative law and criminal law, as well as the core concerns of wills and estate planning. All of these are treated to a fresh look by leading speakers. If funds are tight, and only one conference is in your budget, choosing a multi-faceted one like this one makes good sense. At \$550 for a two-day conference, including meals and very reasonable hotel rates at the conference centre, this is an economical conference, too.

This is the first National Elder Law Section conference to be co-sponsored. The CBA and Queen's University Faculty of Law are joint hosts for this event, as well as the Frontenac Law Association. The real energy here comes from the collision of high level theory with on-the-ground experience. As befits a conference subtitled "Theory and Practice", this one has thoughtful, intellectually challenging material -- such as the first report of the Ontario Law Commission on the Law Affecting Older Adults -- but also some very practical nuts and bolts discussions on matters like shared property, domestic contracts and criminal law issues. The penultimate session will be a cross-country panel to share tales from the trenches in all the jurisdictions of the country.

Finally, and not least, the conference takes place on the cusp of summer – June 12<sup>th</sup> and 13<sup>th</sup> -- in the beautiful city of Kingston, where the St. Lawrence meets Lake Ontario. To encourage registrants to refresh their minds, the conference includes many opportunities to network including tours, golf, cruises, and the very popular "at home" dinners.

The conference has a limited number of places and had a lively response even before the brochure was published. So, anyone interested should not wait to sign up – there may be no last minute places!

\* *Mary-Alice Thompson, TEP, practices in Kingston and can be reached at (613) 545-0311 or [maryalice@mathompson.ca](mailto:maryalice@mathompson.ca).*

## Brown Bag Lunch Summary

*Bianca La Neve, Diane Vieira and Suzana Popovic-Montag\**

We continued our Brown Bag Lunch series on **February 17, 2009**.

We began our discussion by considering the options available to an estate trustee when a beneficiary refuses to provide a release. Referring to the case of *Rooney Estate v. Stewart Estate*, an estate trustee cannot refuse to distribute estate assets simply because a beneficiary refuses to sign a release. While many participants hoped that a release would be signed by all beneficiaries, they agreed that true protection could only be achieved by having an estate trustee pass his or her accounts.

We then discussed Tax Free Saving Accounts (“TFSAs”), how different financial institutions are dealing with beneficiary designations, whether funds held in these accounts pass outside of the estate, and the source of law that governs these accounts. We discussed how the federal government likely lacks the jurisdiction to give effect to beneficiary designations and that provincial legislation needs to be amended to allow for TFSAs designations similar to RRSP beneficiary designations. One participant noted that the Ontario Bar Association was advocating for the *Succession Law Reform Act* to be amended to include TFSAs.

During a discussion of the right to elect for equalization under the *Family Law Act*, we considered whether the proceeds of RRSPs and RIFs were included on the side of the surviving spouse or that of the deceased spouse. This then led to a discussion on the recent 2009 Ontario Court of Appeal family law divorce case of *Serra v. Serra*, which found that a post separation decrease in the value of assets may be taken into account in awarding an unequal division. We discussed whether this case would affect equalization claims by surviving spouses when the value of the estate decreases significantly after an election is made.

We also had a general discussion concerning the impact of prenuptial agreements on dependant support claims. One participant felt that while the prenuptial agreement may carry some weight, a party cannot contract out of their support rights and there is no way to prevent a dependant’s support claim from being brought forth.

Another participant asked how she should advise an estate trustee who received a request from a beneficiary that their expenses to attend the funeral be paid from the proceeds of the estate. Participants suggested that those expenses be paid out of the share of the beneficiary making the request or that the estate trustee write to all beneficiaries to obtain their consent to make a payment from the estate. It was suggested that, in certain circumstances, *i.e.*, when there are beneficiaries who reside abroad and have limited funds, such payment instructions be included in the deceased’s Will to avoid such a problem.

We ended our February meeting with a lively discussion about what an estate trustee should do when the deceased has made a request to be buried with a piece of jewellery or other item of value. Some participants believed that the estate trustee was free to follow the wishes of the deceased, while others thought that no items of value should be buried regardless of the instructions of the deceased.

Our next Brown Bag Lunch was held on **March 17, 2009**.

We began with a discussion regarding powers of attorney for personal care and trigger events for bringing them into effect. A particular situation involved competing opinions by two doctors as to whether the grantor was incapable, so as to trigger the involvement of the attorney for personal care in health care decisions. We discussed the applicable provisions of the *Health Care Consent Act, 1996*.

We then discussed competing powers of attorney for property. A participant raised an interesting scenario in which there was a general power of attorney and a specific power of attorney in respect of a bank account. It was noted that a grantor may have more than one power of attorney and specific terms can be included to allow for multiple powers of attorney to apply to different situations.

Another participant raised an issue regarding an attorney for property's duty to account (after death) for transactions undertaken by the grantor while still alive, capable and actively making financial decisions. In the particular fact scenario presented, the grantor was mentally competent but physically frail, and the attorney would attend at the bank on various occasions on the grantor's behalf. After the grantor's passing, the beneficiary of his estate wanted the attorney for property to account for all transactions since the date the power of attorney was signed, including those undertaken by the grantor. We discussed recent case law on the issue and practical ways to address any demands for accounting.

We then discussed the Saskatchewan decision in *Carlisle Estate (Re)* and the viability of including insurance trusts in Wills. We debated the application of this decision to Ontario. We also discussed different ways of drafting Wills in light of the *Carlisle Estate* decision.

We ended our lunch with a discussion of recent caselaw dealing with beneficiary designations, including the Manitoba decision in *Re Moss* and the Ontario decision in *McConomy-Wood v. McConomy*.

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## Do You Encounter Capacity Law Issues in Your Practice? If So, We Want to Hear from You!!

You can share your experiences by completing the survey available through the following link at your earliest convenience - [http://www.surveymonkey.com/s.aspx?sm=zmAeV6bam\\_2fZJnVrsdlGbVw\\_3d\\_3d](http://www.surveymonkey.com/s.aspx?sm=zmAeV6bam_2fZJnVrsdlGbVw_3d_3d)

The survey can be completed in five to 10 minutes. It was prepared by the Capacity Law Working Group, a committee recently struck by the Trusts and Estates Section Executive of the OBA to identify issues relating to capacity encountered by practitioners in the Province. The deadline is June 15, 2009.

**All lawyers, who complete the survey on or before May 31, 2009 and provide contact information to enable the Working Group members to follow-up with any questions, will be entered in a draw for a \$100 Indigo gift certificate.**

## Certificates of Appointments in the Toronto Region

An initiative is underway to examine how to speed up the processing of applications for certificates of appointment of estate trustees in the Toronto Region. I have asked your Section Executive for assistance in providing me with information which identifies the types of delays the Bar commonly encounters when filing such applications, as well as putting forward possible solutions to these problems. To that end, I would be most grateful if Section members could inform their Executive about the kinds of delays they encounter with certificate applications, and provide suggestions on how we can remedy such problems. That kind of information will assist in resolving this problem.

Comments should be directed to Kim Whaley at [kim@whaleystatelitigation.com](mailto:kim@whaleystatelitigation.com).

*Mr. Justice David M. Brown  
Superior Court of Justice*

## New Practice Direction Feedback

Our new practice direction in Toronto took effect in April 2009. Justice Brown invites feedback. Please direct your feedback to Kim Whaley at [kim@whaleystatelitigation.com](mailto:kim@whaleystatelitigation.com).

2009 Award for Excellence in Trusts and Estates

The Trusts and Estates Section  
cordially invites you to its annual Award Dinner

**Honoured  
Award Recipient**



**Timothy G. Youdan**  
*Davies Ward Phillips & Vineberg LLP*

The evening's events will also include the presentation of the Hoffstein Book Prize and the Widdifield Award.

**Date:** Thursday, May 28, 2009

**Time:** 5:30 p.m. Reception - 6:30 p.m. Dinner

**Place:** Gardiner Museum, Jamie Kennedy at the Gardiner Restaurant  
111 Queen's Park, Toronto

To purchase tickets or for more information,  
visit the OBA website at <http://www.oba.org/trustsaward>  
or call 1-800-668-8900 ext. 307



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## Awards

The winner of the Hoffstein Book Prize is  
**Kimberly A. Whaley,**  
Whaley Estate Litigation

The winner of the Widdifield Award is  
**Professor C. David Freedman,**  
Queen's University, Faculty of Law

***Deadbeat*** is published by the Trusts and Estates Section of the Ontario Bar Association. Members are encouraged to submit articles or suggest story ideas.

*The articles that appear in this publication represent the opinions of the authors. They do not represent or embody any official position of, or statement by the OBA except where this may be specifically indicated; nor do they attempt to set forth definitive practice standards or to provide legal advice. Precedents and other material contained herein are intended to be used thoughtfully, as nothing in the work relieves readers of their responsibility to consider it in the light of their own professional skill and judgment.*

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