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Trusts and Estates Section
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Message from the Chair

*Craig Vander Zee**

I am privileged to be the chair for the 2010-2011 term of the Trusts and Estates Section Executive of the Ontario Bar Association. This year's Executive is comprised of another group of enthusiastic and

committed individuals, who look forward to a very productive and memorable year.

Let me introduce our OBA Executive slate for this year along with our subcommittee members:

- Chair:** Craig Vander Zee
- Past Chair:** Suzana Popovic-Montag
- Vice Chair:** Ed Esposito
- Secretary:** Melanie Yach

Subcommittees:

Brown Bag Lunches: Suzana Popovic-Montag, Sean Lawler

Regional Issues: Mitch Leitman, Ed Upenieks

OPGT Guardianship Advisory Committee: Melanie Yach

Technology Liaison: Mitch Leitman

CBA National Wills, Estates and Trusts Liaison: Craig Vander Zee

Capacity Law Working Group: Jan Goddard, Kim Whaley, Danielle Joel, Jordan Atin, Melanie Yach, Sean Lawler and Irit Gertzbein

CBA National Elder Law Liaison: Craig Vander Zee

Estates List: Danielle Joel, Sender Tator, Shael Eisen, John O'Sullivan, Lucinda Main

Statutory Review: Ann Elise Alexander, Laura West, Vince De Angelis, Sean Lawler, Irit Getzbein

Public Affairs Liaison: Vince De Angelis

Deadbeat: Dina Stigas, John Sullivan, Susan Stamm, Ed Esposito, Irit Gertzbein, Lucinda Main

Institute: Susan Stamm and Melanie Yach

Your Section Executive invites all of your comments, concerns and suggestions as we endeavour to continually improve the initiatives of the Section for its members.

Please email me directly at cvanderzee@hullandhull.com and I together with your Executive members will put forward your comments for discussion.

We look forward to an exciting and successful year.

Craig Vander Zee, Hull & Hull LLP

End of Term Annual Awards Dinner Report

*Suzana Popovic-Montag**

This year, our Section's end of term dinner was held at Archeo in Toronto's Distillery District. A fantastic time was had by all at our new location and we congratulate our End of Term Dinner Committee, who made the evening a very memorable event.

This year's recipient of the OBA Award for Excellence in Trusts and Estates was Hilary Laidlaw of McCarthy Tétrault LLP.

Ms. Laidlaw was recognized for her exceptional contributions and achievements, and for having demonstrated leadership, expertise and passion in the area of wills, trusts and estates.

Presentations and speeches recounting memorable moments in Ms. Laidlaw's past were made by Bernadette Dietrich and the Honourable Madam Justice Greer.



Madam Justice Susan E. Greer, Hilary E. Laidlaw, Bernadette Dietrich and Suzana Popovic-Montag



Jordan Atin, Elena Hoffstein and Sender Tator

Ms. Laidlaw's many accomplishments were celebrated by her fellow OBA Section members, friends, family, colleagues and members of the judiciary. Ms. Laidlaw joins a list of exemplary past recipients of the award, including Timothy Youdan (2009), Barry Corbin (2008), Brian A. Schnurr (2007), M. Elena Hoffstein (2006), Rodney Hull, QC (2005) and William P.G. Allen (2004). Congratulations to a most deserving recipient!

The Hoffstein Book Prize was presented to Sender Tator of Schnurr Kirsh Schnurr Oelbaum Tator LLP, and the

Widdifield Award was presented to Lionel Smith. In addition, there was a special tribute to celebrate the retirement of the Honourable Mr. Justice Cullity, who retired on July 31, 2010. Ian Hull and Timothy Youdan spoke to His Honour's illustrious career and remarkable contributions to the world of estates and trusts.



Bernadette Dietrich, Hilary Laidlaw and Julie Garner-Smith

We thank our generous Platinum Sponsors, The Canadian Bar Insurance Association (CBIA) and CBA Financial Services, and our Gold Sponsors, Borden Ladner Gervais, Lawrences Lawyers, Whaley Estate Litigation, Schnurr Kirsh Schnurr Oelbaum Tator LLP and Hull & Hull LLP along with our hard-working and dedicated OBA representatives.

We look forward to the next end of term dinner and to celebrating next year's awards' recipients.

**Suzana Popovic-Montag, Hull & Hull LLP*

Mandatory CLE is Here – Are You Ready?

*Susannah Roth**

By now, if you are a practising lawyer or paralegal, you should have heard that mandatory continuing legal education – now called continuing professional development (CPD) – is coming for all Ontario lawyers and paralegals as of January 1, 2011. What you might not know is what exactly the new rules require of you. If this is the case, read on.

CPD is defined by the Law Society of Upper Canada (LSUC) as the maintenance and enhancement of a lawyer or paralegal's professional knowledge, skills, attitudes and ethics throughout the individual's career. As of January 1, 2011, every lawyer (and paralegal) licensed to practise in Ontario must complete 12 hours of CPD each year, three hours of which must be on topics of ethics, professionalism and/or practice management.

The three hours of ethics, professionalism and/or practice management may take the form of stand-alone programs or modules (LSUC has stated that it will be providing free programs on these topics so that all lawyers can be sure of obtaining the necessary ethics, professionalism and/or practice management CPD hours) or they may be part of regular, accredited CPD programs, or other CPD activities (discussed below). The OBA will strive to have as many programs as possible accredited by LSUC to include CPD ethics, professionalism and/or practice management components, in addition to continuing to provide quality programs that will count towards a lawyer's general CPD hours.

New lawyers must complete 12 hours of accredited CPD per year, for the first two years of practice. All programs for new lawyers must be accredited by LSUC to qualify for their CPD hours. New lawyers can begin to accumulate CPD hours as soon as they are called to the bar, even though their CPD requirement does not commence until January 1st of the year after they are called.

Eligible CPD activities are: attending live or “real-time” programs (webcast or telephone conference programs are acceptable as long as participants can ask questions and the speakers/chair can answer them); listening to a program replay with another lawyer/paralegal and discussing the program with them; university/college course participation including distance learning, teaching (qualifies to a maximum of 6 hours/year); acting as an articling principle or mentoring or being mentored or supervising a paralegal field placement (qualifies to a maximum of six hours/year); writing or editing books or articles (qualifies to a maximum of six hours/year); study group participation, and the educational components of any bar/law association meetings. All of these activities must be on topics related to the individual’s practice, which can include the law in other jurisdictions or non-law topics, as long as these topics are related to the individual’s practice.

Teaching (which includes speaking at CPD programs) is accredited on a 1-3 basis – three hours of CPD are credited for every hour of teaching to reflect the teacher’s preparation time. The preparation time itself is considered self-study and does not qualify for CPD hours.

It is important to note that to qualify for CPD ethics, professionalism and/or practice management hours, teaching, writing or study group activities must be accredited in advance. Also, writing and editing activities must be law-related, performed solely by the person claiming the CPD hours, and not undertaken for the purpose of self-use (i.e., the materials produced must be for publication) or for the individual’s professional or personal marketing or business development to qualify for general CPD hours. Teaching or writing activities which are part of the individual’s regular employment or which the individual does full time will not qualify for general CPD hours.

Self-study activities such as reading program materials or listening to a program replay alone **do not** qualify for CPD hours (although self-study hours must be reported on the individual’s yearly LSUC report).

Lawyers in the 50% or 25% fee-paying category are exempt from the new CPD requirements. In addition, individuals may obtain partial or full exemptions from CPD requirements in circumstances coming within the Human Rights Code or other circumstances as LSUC deems appropriate.

Reporting of CPD is to be done via the LSUC online member portal. Online reporting can be done at any time, or ongoing as each CPD hour/program is completed, but must be done by December 31st each year. As a member benefit, OBA members can track their CPD hours online using the CBA professional development website. This is made easy with the tracking tool.

Failure to complete CPD hours or reporting will result in an administrative suspension which will continue until the necessary CPD hours are completed and reported. Random CPD audits will be done

each year on a certain number of lawyers and paralegals by LSUC, in the form of a written request for proof of CPD activities.

For more information, go to <http://rc.lsuc.on.ca/jsp/cpd>

**Susannah B. Roth, O'Sullivan Estate Lawyers*

Case Comment: *Smith v. Rotstein*, Supplementary Reasons for Decision – Costs, Released 30 July 2010 ONSC4487: Costs to be Paid by Unsuccessful Party

*John O'Sullivan**

The costs decision of Brown J. in *Smith v. Rotstein* is important because it applies two principles governing costs awards in civil litigation, with dramatic effect.

The principles are: (1) that full indemnification costs are only to be awarded in circumstances where there has been "reprehensible" conduct; and (2) that the reasonable expectation of the unsuccessful party as to the amount they would be exposed to, should be taken into account when determining a costs award.

Applying these two principles Brown J. ordered the unsuccessful party to pay 100% of the full indemnification fee amount sought by the successful party in hard fought litigation – \$707,173.00, plus disbursements of \$30,407.29.

Rotstein is of particular importance to the Estates bar because it applies these costs principles in an Estates litigation context, and also because it illustrates the degree of "lack of merit" in a challenge to testamentary validity that justifies elevated cost consequences.

Ruth Smith died in 2007 at the age of 92. She amended her 1975 will to reduce the share of residue given to her daughter Nancy Gay Rotstein, and she made wills in 1976, 1978, 1984 and 1986 in which she eliminated any gift of residue to her. Ruth Smith's last will, made in 1987, and its four codicils continued that decision. Ms Rotstein took the position that all the wills and codicils after her estrangement from her mother in 1976 were invalid on the basis of capacity, lack of knowledge and undue influence.

Brown J. found no genuine issue for trial on any of these grounds, and dismissed the challenge on a summary judgment motion brought with respect to the 1987 will and two of the four codicils.

The full indemnity scale

Brown J. described Ms Rotstein's case as being in the category of, "meritless will challenges driven by blind emotion but devoid of any material relevant evidence."

In arriving at this conclusion, Brown J. cited the following facts about Ms Rotstein's conduct:

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1. She declared her intent, if successful in challenging the 1987 will, to attempt to strike down every one of the prior five wills until she reached one that treated her equally.
 2. She challenged the will on every possible ground, except due execution.
 3. She refused to give evidence personally and instead put her husband forward as her evidentiary spokesman.
 4. She blocked efforts to gain her personal knowledge via her husband's examination.
 5. Neither she nor her husband had personal information surrounding the preparation and execution of the documents because they had severed contact with the family after 1976.
 6. She did not adduce any evidence about the deceased's capacity, and persisted in alleging incapacity when she had no evidence of it, and even though her husband made admissions against this position.
 7. She persisted in asserting that her mother did not know of or approve of her will without evidence, even when faced with evidence to the contrary.
 8. She put in issue over 30 years of family history but there was "no air of reality" about her allegations of undue influence or other misconduct by her brother, the executor.
 9. Her approach was "scorched earth litigation".
 10. She persisted in her position of testamentary invalidity through to the hearing of the summary judgment motion, despite the fact that she had no evidence. Her conduct constituted harassment by the pursuit of fruitless litigation.

Brown J. cited the public policy objective of ensuring that the courts only give effect to valid wills but concluded that it must be open to the courts to sanction meritless will challenges through elevated costs. He ruled:

"To engage in baseless, hugely expensive, scorched earth litigation over the validity of a will is litigation conduct that falls into the category of "reprehensible" and merits the award of elevated costs."

The appropriate sanction in this case was not substantial indemnity but the full indemnification scale.

Appropriate quantum

In determining quantum, Brown J. began from the proposition that the overriding principle in costs award is reasonableness. One factor to be taken into account in determining quantum is the reasonable expectation of the unsuccessful party as to the amount of the award.

In his reasons on the merits Brown J. ordered that any party making costs submissions was required to file a Bill of Costs. His Honour described this as, "One of the most effective ways to measure the reasonableness of the expectations of an unsuccessful party ..."

The objector did not file a Bill of Costs. As a result, Brown J. placed "little weight" on her detailed critique of her opponents' Bill of Costs. He inferred the fees she incurred were in a similar amount and thus dismissed complaints that the successful party had overreached on time.

Brown J. also addressed the new principle of "proportionality" in awarding costs. His Honour took the view that this principle should be applied where a successful party has over-resourced a case having regard to what is at stake, but not to reduce the costs payable where the unsuccessful party has forced long and expensive proceedings.

Conclusion

Frequently in Estates litigation the costs fight is over whether the Estate or the individual litigants should pay. *Rotstein* was unusual in this respect: the unsuccessful objector appropriately acknowledged she was liable for costs. The only question was the scale and the amount.

Rotstein is authority for the broad principle that, taken together, lack of merit, compelling the creation of a massive record and a "scorched earth" litigation approach, constitute "reprehensible" conduct that can justify full indemnity costs.

It is also authority for the principle that the level of an unsuccessful party's own expenditures is relevant to the issues of how much the unsuccessful party could reasonably expect the successful side to claim, as well as the quantum the court might award.

**John O'Sullivan, Weir Foulds LLP*

Case Comment: *In the Matter of the Estate of Blanca Esther Robinson, Deceased*, 2010 ONSC 3484, Can LII: Limits to Rectification

*Jane E. Martin**

In this recent endorsement, Justice Belobaba of the Superior Court of Justice considers the scope of the Court's powers to rectify a will, concluding that rectification is not available to correct a testator's mistake about the legal effect of words in a will where the evidence proves that the testator reviewed and approved the language in the will.

The deceased, Blanca Robinson owned property in Spain, England and Canada. She executed a will in 2002 in Spain to deal with her European property. The 2002 Spanish will made it clear that she had executed a separate will to deal with her non-European property. In 2005 Blanca executed a will in Canada, prepared by her solicitor Sheldon Silverman. The 2005 will contained a revocation clause revoking all prior wills. In 2006, upon learning of a terminal brain tumour, Blanca had Mr. Silverman prepare a change to her Canadian will, adding a monetary bequest for a long time friend (the 2006

Canadian will). Mr. Silverman did not know of the existence of the 2002 Spanish will until after Blanca died.

The revocation clause of the 2006 Canadian will read:

I hereby revoke all wills and other testamentary dispositions of every nature or kind whatsoever by me heretofore made.

Two applications were before Justice Belobaba: an application brought by Mr. Silverman in his capacity as estate trustee for advice and direction regarding the interpretation of the 2006 Canadian will, in particular the revocation clause contained within it. The second application, supported by Mr. Silverman, was commenced by a beneficiary of the 2002 Spanish will, for an order setting aside the grant of probate and rectifying the 2006 Canadian will by deleting the revocation clause.

A beneficiary of the 2006 Canadian will resisted the application for rectification, arguing that revocation was not available on grounds including: the 2006 Canadian will had been probated; the language of the revocation clause was clear and unequivocal, had been reviewed by the testator and executed by her with her knowledge and approval; and that the extrinsic affidavit evidence tendered by the applicants was inadmissible.

Justice Belobaba set out the test for rectification. Anglo-Canadian courts will rectify a will and correct unintended errors in three situations: where there is an accidental slip or omission because of a typographical or clerical error; where the testator's instructions have been misunderstood; or where the testator's instructions have not been carried out.

The goal of rectification is to prevent the defeat of testamentary intentions due to errors or omissions by the drafter of a will – unfortunately for the applicants in this case, rectification is not aimed at preventing the defeat of testamentary intentions due to mistaken belief by the testator of the legal effects of a will which the testator reviewed and approved.

Justice Belobaba reviewed the extrinsic evidence of Mr. Silverman and the Applicant beneficiary, accepting that the testator expected and intended the 2002 Spanish will to stand despite the revocation clause in the 2006 Canadian will. His honour found that Blanca intended the wills to co-exist, that Mr. Silverman went through the will with Blanca “clause by clause.” He found no suggestion and no evidence of any drafting errors, that Blanca read and approved the language in the 2006 will and the words in the revocation clause. Blanca was, however, mistaken about their legal effect. She did not realize that the revocation provision would revoke her Spanish will.

As a consequence of these findings of fact, Justice Belobaba found that the case was not one which fit within the test for rectification, rejecting the argument that what is meant by saying a testator must know and approve of the contents of her will is that a testator must understand their legal effect. After a review of the authorities, Justice Belobaba concluded that the Court lacked jurisdiction to rectify a mistake of the testator about the legal effect of the words used in her will. To extend the Court's jurisdiction to rectify a will in such circumstances would be a significant change to the law, one which Justice Belobaba stated was best left to the appellate courts or legislature.

Justice Belobaba made quick disposition of the Respondent's other arguments, rejecting the submission that the fact that the 2002 Canadian will had already been probated precluded an interpretation application. He found no merit to arguments that the applicants had delayed in commencing their applications.

On the matter of costs, Justice Belobaba found that in his capacity as estate trustee, Mr. Silverman was right to apply for advice and direction and that the applicant beneficiary of the 2002 Spanish will and the respondent who resisted the rectification application had good reason to litigate the issue of rectification. The two applications clarified an essential question and benefited the estate as a whole. Mr. Silverman, in his capacity as estate trustee, the Spanish and the respondent were awarded costs out of the estate on a solicitor client basis. Justice Belobaba held that Mr. Silverman, in his capacity as solicitor, was unsuccessful on his rectification application, and that his costs should not be absorbed by the estate but by his professional liability insurer. Despite the comment at paragraph 38, I wonder whether the split result on costs for Mr. Silverman but not the Spanish beneficiary is in fact a comment on the question of negligence. "I pause to note that a suggestion has been made that Mr. Silverman had an obligation to explain the world-wide reach of the revocation clause to his client (even if he had no knowledge of any off-shore wills) and he failed to do so. The allegation of professional negligence is obviously a matter for another proceeding and I make no comment."

*Jane E. Martin, Eisen Graham Barristers & Solicitors, jmartin@eisengrahamestatelaw.com

Case Comment: *Hix v. Ewachniuk*, 2010 Carswell BC 1563: Evidence of Coercion

Angélique Moss

A successful will challenge on the grounds of undue influence requires proof by the challenger on the balance of probabilities that the will was written as a result of coercion or pressure. Persuasion is not enough, and the onus has been described as "a heavy one and not readily proved". As undue influence is usually exercised only in secret, gathering together the evidence to prove it is often difficult, if not impossible. However, a recent decision of the British Columbia Court of Appeal, *Hix v. Ewachniuk*, suggests that a finding of undue influence is possible even where the evidence of coercion is circumstantial, and the coercion itself seems subtle.

In this case, the elderly testator, Sophia Ewachniuk, signed a will approximately two years prior to her death. The will was written by her son, Theodore (Ted), who was a former lawyer (although as suggested by the tortuous language of Sophia's will, his legal practice did not include drafting wills). The will divided Sophia's two million dollar estate equally between Ted and his two sisters. However, the sisters could only receive their entitlement if they transferred their shares in a family business to Ted. Otherwise, Ted would inherit the estate, and the sisters would each inherit \$5,000.00. As the sisters' shares in the family business were worth far more than their entitlement in the estate, it was clear that they would never want to exercise the "option". They were effectively written out of Sophia's will.

The sisters were successful in challenging the will on the grounds of undue influence at trial.⁵ Justice Hinkson of the British Columbia Supreme Court found that only Ted knew about the preparations and

the terms of the will prior to Sophia's death. Therefore, the only available evidence by which the court would be able to assess the presence or absence of coercion was his own evidence.

Although his Honour was careful to note that Ted did not bear the burden of disproving coercion, he held that Ted had created a situation which required the court to test his evidence against "the preponderance of probabilities that rationally emerge out of all of the evidence in the case" (citing *Faryna v. Corny* (1951), [1952] D.L.R. 354 at 359 (B.C.C.A.)). Or, as the Court more bluntly put it, the court needed to use common sense.⁶

Sophia's medical records and the testimony of her physician portrayed her as sad and lonely in her later years, for reasons not unknown to many elderly women: her daughters lived across country; and her friends and husband had pre-deceased her. She required help with her day-to-day tasks, and relied upon Ted to hire and pay for her caregivers, and to buy her groceries and medications. Sophia was also dependant on Ted to take her to church and also needed him and his wife to take her to a seniors' program. Beyond this dependency, by the time she signed her will, Sophia had started experiencing some confusion, and she was very vulnerable and virtually dependant on Ted for her existence. By way of contrast, Ted was found to be a domineering and aggressive person, who desired absolute ownership of the shares of the family company (which were held in part by his sisters) and had wanted the shares "long before the execution of his mother's will."⁷

In determining whether or not Ted had exercised undue influence, the Court asked a series of questions, including, "why would a mother who was said to be a fair and generous woman by all who gave evidence and who felt that she herself had not been treated fairly in the distribution of assets to which she had a claim, suddenly, and in her declining years, prefer to favour her son in her will over her daughters?"⁸. The answers to these questions, when taken together, permitted the Court to conclude that "even though [Sophia] was aware of the terms of the will... she only signed the will as a result of coercion on the part of her son Ted, and his ability to unduly overbear [her] will."⁹ While there may have been other explanations for Sophia changing her will, common sense led the court to conclude that Ted had unduly influenced his mother. Certainly, the Court determined that Ted's evidence "did nothing to dispel this conclusion" that he had unduly influenced his mother.¹⁰ He was an extremely poor witness and "said whatever he felt would assist his case regardless of whether it was true or not."¹⁰

Ted appealed. One of his grounds for appeal was that there was no evidence to support the trial judge's finding that he "worked on" his mother to have her change her will. The Court of Appeal rejected this ground of appeal. The Court of Appeal found that it was open to the trial judge to find that Sophia "executed the will her son drew in secrecy that benefitted him to the effective exclusion of her daughters because he had exerted undue influence, not by threats or promises but by working on her over a period of time. She was in that way coerced into doing what she would not otherwise have done." The Court of Appeal saw no reason why the judge's finding that Ted cared for Sophia would be inconsistent with a finding that he had also unduly influenced her: Indeed, the Court of Appeal noted that "his caring for her, and her dependence on him, may well have been what enabled him to influence her as the judge found he did."¹³ The final ground for appeal was Ted's contention that the trial judge failed to consider whether there was another reasonable conclusion as to why Sophia had written the will in question. Ted argued that Sophia could have simply decided to favour him over his sisters. This ground of appeal was also rejected. The Court of Appeal held that it was open to the trial judge to have concluded that the most probable explanation for Sophia changing her will was that Ted unduly influenced her to change it.

On the facts of this case, undue influence seems less like brazen bullying, and more like a cunning advertising campaign, one that persuades by “working on” its audience over time. So when does persuasion become coercion? It seems the vulnerability and dependency of the testator will be key factors in a court’s determination of when that hazy line has been crossed.

Angélique Moss is an associate at de Vries Litigation and can be reached at amoss@devrieslitigation.com. The firm’s blogs on estates, trusts, and guardianship issues can be followed at www.allaboutestates.com

1 Note however that new legislation is scheduled to come into effect in B.C. early 2011 which will shift the burden of proof to the person benefitting under the will if that person was in a position to potentially dominate the testator. In those cases, the burden will be on the person benefitting under the will to show that undue influence was not exercised. See the proposed *Wills, Estates and Succession Act* at http://www.leg.bc.ca/39th1st/3rd_read/gov04-3.htm#section52

2 *Hall v. Hall* (1868), L.R. 1 P. & D. 481; *Wingrove v. Wingrove* (1885), 11 P.D., 81

3 A.H. Oosterhoff, *On Wills and Succession* (6th ed.) (Toronto: Thomson Carswell) 2007, p.225.

4 *Hix v. Ewanchniuk* 2010 CarswellBC 1563; 2010 BCCA 317

5 *Hix v. Ewanchniuk* 2008 CarswellBC 1300; 2008 BCSC 811 They had also challenged the will on the grounds of lack of testamentary capacity and lack of knowledge and approval, but were unsuccessful on these grounds.

6 *Ibid* at 106.

7 *Ibid.*, at 105

8 *Ibid.*, at 106

9 *Ibid.*, at 114

10 *Ibid.*, at 115

11 *Ibid.*, at 92

12 B.C.C.A., at 13

13 *Supra*, note 4, at 13

Case Comment: *Reid Estate v. Reid*, [2010] O.J. No. 1815 and [2010] O.J. No. 3076: Costs - The New Battleground in Estate Litigation

*Edwin Upenieks**

The deceased Laura Reid died in Toronto in 2005, shortly after the death of her husband. Under her will, she appointed her two sons Lynn and Bruce Reid as her estate trustees and left her estate to them equally.

Lynn Reid was successful in trial and obtained a declaration that his deceased’s mother’s home remained part of her estate. The home had been transferred to Lynn’s brother Bruce Reid as a joint tenant, prior to her death. Bruce claimed that the home was transferred to him as payment for his years of service to his parents, and made a *quantum meruit* claim for his services.

The two brothers commenced three applications, an action, and a cross-application, that were joined together in 2006. The joined proceeding was to be tried together before Justice Wright in February, 2008. As there was insufficient time scheduled to complete the trial, it was adjourned. During the

period of the adjournment, Lynn suffered a stroke and his rehabilitation took some time. Thereafter, Justice Wright declared a mistrial.

Justice Wright wrote a letter to the brothers urging them to settle by having an additional \$80,000 paid to Lynn from the estate before equal division. Justice Wright commented that by the time of the mistrial, both parties had already expended about \$125,000 each on their legal costs and that this litigation was “a waste of the parents’ estate and a complete lack of common sense” and urged the brothers to settle on the basis of his suggestion rather than “continuing to deplete the assets of the estate with further legal costs.”

Lynn made a written offer to settle in accordance with Rule 49.10 of the *Rules of Civil Procedure*, exactly in accordance with Justice Wright’s suggested terms. Bruce declined and demanded a complete recapitulation by his brother.

The matter proceeded to trial before Justice Code for eight days in 2010, with Lynn being successful on the main issue, namely whether the transfer of a home by the deceased prior to her death would be upheld on the basis of a resulting trust. Of note, Bruce was not represented by counsel at the trial before Justice Code, but was represented in the earlier trial before Justice Wright.

In his cost decision released July 2, 2010, Justice Code followed the analysis of the Ontario Court of Appeal in *McDougald Estate v. Gooderham* (2005), 255 D.L.R. (4th) 435, noting that this approach balanced the traditional public policy reasons for paying costs out of the estate (where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator) against the rationale for the costs rules that apply ordinarily in civil litigation (the need to restrict unwarranted litigation and protect estates from being depleted).

In this case, Justice Code determined that ordinary cost rules should apply as the litigation was caused by disputing the effect of the transfer (which would lead to a presumption of resulting trust) and was not caused by the deceased’s decision to transfer title to her home prior to her death. His Honour noted that Bruce took a substantial risk in undertaking the burden of rebutting the presumption of resulting trust on the basis of suspicious circumstances. His Honour noted that if the costs of this risky litigation were to be paid from the estate, that result would be unfair and unjust to Lynn, who was successful in the litigation.

Justice Code awarded Lynn costs on a partial indemnity scale up to the date of his offer, and substantial indemnity thereafter.

Lynn claimed total fees of \$130,670, but Justice Code awarded \$110,000, plus GST, noting that Lynn was not successful on two subsidiary issues, and certain time spent appeared excessive. Lynn received all disbursements claimed. Justice Code noted that Lynn’s costs were similar to those of Bruce.

This case is part of a growing trend in Estate litigation where the courts are penalizing the loser with legal expenses, and providing very detailed analysis of the costs awarded, much other like other civil litigation. It is a trend that I expect will continue.

**Edwin G. Upenieks, Partner, Lawrence, Lawrence, Stevenson LLP*

Case Comment: *McCullough v. Riffert* [2010] O.J. No. 2921 (S.J.C.): Solicitor's Negligence Action by Disappointed Beneficiary

Linda Omazic*

Robert McCullough died ten days after visiting his lawyer to give instructions for a will. The will, which was not signed, would have left his entire estate to his niece Sarah. The estate passed to Robert's three adult children. Sarah, the disappointed beneficiary, brought a claim against the lawyer who was retained to prepare the will.

At issue was whether the lawyer was negligent in not attending to the preparation and execution of the will before Robert died. Justice Mulligan accepts the principle that a solicitor who is unreasonably slow in preparing a will, such that the testator died before it was executed, may be liable to a prospective beneficiary who was not her or his client.

To determine whether the solicitor acted reasonably in the preparation of Robert's draft will, the factors outlined in *Rosenberg Estate v. Black*, [2001] O.J. No. 5051 (S.C.J.) are considered including:

- (1) the terms of the lawyer's retainer (for example whether a precise time table is agreed upon);
- (2) whether there was any delay caused by the client;
- (3) the importance of the will to the testator;
- (4) the complexity of the job (the more complex the job the more time required);
- (5) the circumstances indicating the risk of death or onset of incapacity in the testator; and
- (6) whether there has been a reasonable ordering of the lawyer's priorities.

Brian Schnurr's text, *Estate Litigation*, 2nd ed. Looseleaf (Thompson Reuters Canada, 2008) section 21.3(b), is noted as providing guidance to solicitors:

"[I]f that testator is elderly and it is known to the lawyer (or ought to have been apparent to the lawyer), that the testator is in poor health there is a higher obligation upon the solicitor to take all reasonable steps to give priority to completing the will quickly.

Faced with a testator in these circumstances, the solicitor should give serious consideration to the immediate preparation of an abbreviated "temporary" will (whether typed or handwritten) setting out the essence of the testator's intentions. Another approach would be to dictate a form of holograph will for the testator to create immediately. In this way the testator's intentions would be immediately in force while the solicitor attends to the drafting and subsequent revision of the "formal" will or other components from the testator."

Justice Mulligan points out that Robert took no independent steps to obtain a new will to reflect his stated intentions. His niece, the prospective beneficiary, contacted the lawyer to arrange for the preparation of Robert's will.

The Court finds that a reasonable standard of care was met by the lawyer retained to prepare the will given that:

- The lawyer met with Robert within a week of the niece calling to arrange an appointment. Three days later a draft will was prepared and sent out to Robert for review. The lawyer noted on the file that the will should be signed by February 29th, which would have been about two and a half weeks after the initial interview.
- The lawyer did not have knowledge that Robert was terminally ill. The lawyer asked Robert if he had visited a doctor. Robert advised that he had not seen a doctor and there was no diagnosis as to his weight loss. Nor was there a diagnosis that he was subject to a terminal illness. This was not a visit to the client's hospital or palliative care bedside.
- There were no signs that Robert was terminally ill. Robert attended at the lawyer's office and walked with the assistance of a cane and some help from his niece. He was dressed in a track suit and jacket. When Robert died ten days after the meeting with the lawyer, the niece expressed shock; she was taken aback and not expecting it.
- Robert did not express any urgency other than a desire to complete the will before a proposed trip to Texas.
- After the meeting with the lawyer Robert did not call back to advise as to the possible alternate estate trustee or to inquire if the will was ready. The niece did not call back in the days following the office visit to determine if the will was ready.

Justice Mulligan comments at paragraph 61:

"There may be circumstances where a solicitor does have a professional obligation to give priority to the preparation of a will as soon as possible. Visits to a hospital, nursing home or a palliative care centre will give rise to greater urgency. The more so when the lawyer has the benefit of medical advice that the client has a terminal illness. Even when a client visits the lawyer's office, the level of urgency can be raised, especially in cases where the client is elderly or has been diagnosed with a serious illness which could be life threatening."

This decision may provide guidance to counsel in prioritizing the preparation of wills. It can be found on the CanLII website at: <http://www.canlii.org/en/on/onsc/doc/2010/2010onsc3891/2010onsc3891.html>.

The cost endorsement, which awards the lawyer \$45,000.00, is available at:

<http://www.canlii.org/en/on/onsc/doc/2010/2010onsc4769/2010onsc4769.html>.

Any views expressed in this case comment are those of the author and do not represent the views or position of the Ministry of the Attorney General or the Office of the Children's Lawyer.

**Linda Omazic, Counsel, Office of the Children's Lawyer linda.omazic@ontario.ca*

Case Comment: *Estate of Divina Damm*, 2010 ONSC 5119; [2010] O.J. No. 3894: Form of Guardianship Accounts

*Katherine Duvall Antonacopoulos**

This recent decision addresses the form of accounts that must be used by a guardian of property appointed for a modest estate.

The guardian in this case was appointed under the *Substitute Decisions Act* (SDA), and section 42(6) of that Act requires that accounts filed by a guardian of property “shall be filed in the court office and the procedure in the passing of the accounts is the same...as in the passing of executors’ and administrators’ accounts.” The Rules of Civil Procedure, at rule 74.17, specify the form of accounts that must be filed on an application to pass accounts.

Justice Brown described the accounts filed in the *Estate of Divina Damm* as recording information at the “30,000 foot” level, lacking the detail and itemization required by the Rules. Justice Brown was concerned about whether adequate notice of the application can be said to have been given to the respondent, where the accounts do not disclose the fiduciary’s management of the guardianship funds in the detail required by the Rules. As well, the link between the numbers listed in the draft judgment and the information in the accounts was not apparent, because the accounts were not in the proper form. Justice Brown concluded by noting that, while there may be a case to be made for amending the requirements for the form of accounts so that fiduciaries of smaller estates can use a more simple form of accounts than that required under rule 74.17, that is a matter for the Legislature and the Rules Committee.

Justice Brown declined to consider the unopposed application to pass accounts, because the accounts filed by the guardian of property were not in proper form, and directed the applicant to re-serve and re-file accounts prepared in proper form.

Although this decision involved a guardian appointed pursuant to the SDA, Rule 74.16 provides that the Rules dealing with the form of accounts (74.17) and applications to pass accounts (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.

This decision should encourage fiduciaries to not only file accounts that comply with the form of accounts required pursuant to rule 74.17, but also to keep draft accounts from the start of the fiduciary’s appointment that comply with the form of accounts required on a passing so that the

fiduciary is able to account properly to the beneficiaries when called upon to do so. (Or, at least, to keep sufficiently detailed and accurate draft accounts so that it will be possible to put the accounts into the form required for a formal passing.)

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.

**Katherine Duvall Antonacopoulos, Counsel, Office of the Children's Lawyer*

Case Comment: *Barberi v. Triassi*, 2010 ONSC 3734: Breach of Duties as Attorney for Personal Care and Property and Breach of Duties of Estate Trustees

*Angela Casey**

The recent decision in *Barberi v. Triassi* illustrates the Court's division of an estate among three siblings: a sister who breached her duties as attorney for personal care and property for her mother and her two brothers, who breached their duties as estate trustees for their mother's estate.

The mother's will provided that her assets would be divided equally among her three children, John, Joseph and Nina, subject to a few specific gifts. The mother named her two sons as estate trustees and all three children as joint attorneys for property and personal care.

The mother suffered a stroke around 2002 and was hospitalized. Thereafter, she suffered from mobility problems and was unable to speak. The three children, as joint attorneys for personal care, met with a social worker and all three agreed to move their mother to a nursing home.

Nina apparently had a change of heart. The next day, she unilaterally decided to cancel the nursing home arrangements and take her mother into her own care. Her mother ultimately resided with Nina from 2002 until shortly before the mother's death in February 2004. At the trial, Nina explained her actions on the basis that her mother never wanted to be in a nursing home and that she believed she could provide better care for her mother than could be provided in a nursing home facility.

Nina and her brothers could not agree on how to manage their mother's financial affairs, with the result that the brothers ultimately requested a capacity assessment of their mother. The mother was found to be incapable of managing her finances but capable of granting a new power of attorney for personal care. As a result, the mother executed a new power of attorney for personal care naming only Nina as her attorney for personal care. The three children continued to be joint attorneys for property pursuant to the existing power of attorney for property.

Notwithstanding that her mother was found to be incapable of managing her affairs and without consultation with her co-attorneys for property, Nina opened a new joint account with her mother.

Nina then deposited sums totalling \$22,855.69 of her mother's money into the account and withdrew it to compensate herself for caring for her mother.

There was evidence that (a) the mother never wanted to be in a nursing home; (b) Nina made modifications to her home to improve her mother's mobility; (c) the mother enjoyed visits at Nina's house from supportive friends and family (including from John and Joseph); and (d) that the mother expressed to friends that she was happy in Nina's home. As such, it appeared that there were facts capable of supporting a finding that Nina met her statutory duties to:

- consider her mother's wishes [as required by 66 (4) (b)],
- consider her mother's prior values [as required by subsection 66(4)(a)], and
- seek to foster personal contact between supportive friends and family [as required by subsection 66 (6)].

Nevertheless, the trial judge had "no hesitation" in concluding that Nina's conduct constituted a breach of her duties as an attorney for personal care under section 66(1) of the *Substitute Decisions Act*.

Interestingly, Justice Mulligan's reasons focus not on Nina's decision itself (to forego the nursing home in favour of personally caring for her mother) but rather on how the decision was reached. The judge found that because Nina "acted unilaterally, without consulting with her brothers notwithstanding their meeting with the social worker and agreement to place their mother at the nursing home", her actions constituted a breach of her duties as an attorney for personal care for her mother.

Nina unsuccessfully argued that she should be compensated in the same amount as her mother would have otherwise spent on nursing home care. The trial judge considered and rejected the submission that the estate would be unjustly enriched by the services provided by Nina. Consequently the judge disallowed Nina's entire claim for (pre-taken) compensation.

The trial judge also found fault with the brothers' actions as estate trustees. When their mother died, they obtained a Certificate of Appointment, sold the family home (the estate's major asset), distributed the proceeds between themselves and refused to provide their sister with an accounting. Their actions prompted Nina to commence court proceedings to recover her share of the estate. The brothers counterclaimed, citing Nina's actions as an attorney for their mother. They also alleged that Nina took cash out of the family home (an allegation which they were unable to prove at trial). In the end, while neither side's actions found favour with the Court, Nina was successful in obtaining judgment for her 1/3 share of the estate, adjusted for her disallowed compensation and other amounts owed to her mother.

**Angela Casey, Fraser Milner Casgrain LLP*

Case Comment: *Bessie Orfus Estate*, 2010 ONSC 5204: Jurisdiction to Hear Motion for Summary Judgment

*Philippa Geddie**

In a decision dated September 23, 2010, Justice Harriet Sachs confirmed that a judge has jurisdiction to hear a motion for summary judgment in an estate matter even if no order for directions has been made.

The deceased, Bessie Orfus, died on October 3, 2009. A contested estate proceeding arose. On July 12, 2010, Justice D. Wilson granted leave to certain parties to bring a summary judgment motion although no order had been made giving directions.

Sharon Gerstein, a daughter of the deceased, sought leave to appeal Justice Wilson's order to the Divisional Court on the basis that the judge lacked the jurisdiction to make it.

Ms. Gerstein's submissions were three-pronged. First, she argued that a Superior Court judge does not have inherent jurisdiction to order that an estates matter proceed by way of summary judgment. Second, a judge cannot grant summary judgment under rule 20 unless pleadings have been exchanged, and, in an estates matter, pleadings are normally provided for in the order giving directions. Third, the sole source of a judge's jurisdiction to grant summary judgment in an estates matter is rule 75.06(3), which states that in an application or motion for directions, a court may direct procedures for bringing the matter before the court in a summary fashion.

Accordingly, Ms. Gerstein submitted that a court has no jurisdiction to order that a matter proceed by way of a summary judgment motion, unless there is an order giving directions which provides for such a motion.

Justice Sachs rejected these submissions. She relied, in part, on the Court of Appeal decision in *Re Chappus Estate* (2009), 46 E.T.R. (3d) 186, which was an appeal from a judgment granted at a summary judgment motion. In this case, there was an order giving directions, but it did not provide for summary judgment. Nevertheless, the Court of Appeal found, the motions judge had the jurisdiction to order summary disposition. It would have been preferable if the respondents had brought a motion to amend the original order giving directions, to provide for this possibility. However, the respondents' failure to amend the order constituted only a procedural defect.

Justice Sachs acknowledged that *Re Chappus* differed from the case before her in several respects. In *Re Chappus*, there was an order for directions, though it did not provide for summary judgment. In addition, unlike the appellants in *Re Chappus*, Ms. Gerstein objected to the summary procedure as soon as she was advised of the motion.

However, Justice Sachs observed, a judge either has the jurisdiction to make an order or she does not. Jurisdiction is not a procedural nicety. In *Re Chappus*, there was no order giving directions which provided for summary judgment. Therefore, Ms. Gerstein could not be correct in stating that a judge's authority to grant summary judgment stems exclusively from this source.

Justice Sachs also questioned Ms. Gerstein's assertion that Superior Court judges cannot order the hearing of a summary judgment motion under their inherent jurisdiction to control their own process. Superior Court judges have a wide, though not unlimited, power to manage the matters before them. The rules contemplate that judges will grant summary judgment in some estates matters. Consequently, any defect in the proceedings related to procedure, not to jurisdiction.

In the result, Justice Sachs dismissed the motion for leave to appeal and ordered that the parties attend at Estates Summary Judgment Scheduling Court.

Justice Sachs's judgment provides some needed clarification with respect to a judge's jurisdiction to grant summary judgment in contentious estate matters.

In *Knox v. Trudeau*, [2001] O.J. No. 352 (S.C.J.), Justice Pardu ruled that a Superior Court judge lacked jurisdiction to grant summary judgment when an order had been made directing trial.

In *Papageorgiou v. Walstaff Estate*, [2008] O.J. No. 2620 (S.C.J.), Justice Strathy found that he had jurisdiction to grant summary judgment because the order giving directions explicitly permitted the respondent to bring such a motion. Therefore, *Knox v. Trudeau* was distinguishable.

Papageorgiou v. Walstaff implied that summary judgment was only available if the order giving directions provided for this possibility. Perhaps as a result, it has become common practice to include an explicit term in an order giving directions that provides for summary judgment, as Justice Brown notes in *Smith Estate v. Rotstein*, [2010] O.J. No. 1527 (S.C.J.) at para. 34.

Re Orfus Estate rebuts the theory that an order giving directions must precede a summary judgment motion. According to this decision, a judge's jurisdiction to grant summary judgment in an estates matter does not stem from observance of a procedural detail. Rather, Justice Sachs implies, it may be an aspect of Superior Court judges' inherent jurisdiction. This aspect of the judgment serves to emphasize the importance of summary judgment motions as a mechanism by which courts can regulate and control their own processes.

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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Case Comment: *Estate of Arthur O. Sawdon v. Watch Tower Bible & Tract Society of Canada*, 2010 ONSC 4066: Can the Validity of a Will be Raised in the Context of a Will Challenge?

Megan F. Connolly*

In his recent endorsement in *Estate of Arthur O. Sawdon v. Watch Bible & Tract Society of Canada*, Ricchetti J. addressed the issue of whether the validity of a will could be raised in the context of a contested passing of accounts.

By way of background, Arthur Sawdon died in March 2007. He was predeceased by his wife and survived by his five adult children.

He left a will which was made in October 2006. In it, he appointed his son Wayne as his executor, provided a bequest to each of his children, and left the residue of the estate to the Watch Tower Bible & Tract Society of Canada (Watch Tower). The bequest to his son Stephen was in the form of a forgiveness of a mortgage loan of approximately \$125,000. Apparently, the will represented a significant departure from prior wills in that it named Watch Tower as the residual beneficiary.

The total value of the estate is not mentioned in the endorsement. However, it appears that it was significant – reference is made to the deceased owning 75% of the shares in a holding company in the Cayman Islands (his children owned the other 25%). The deceased also held bank accounts and investments jointly with some of his children.

Subsequent to the deceased's death, Wayne (the estate trustee) raised questions about the validity of the October 2006 will. It appears that medical records were reviewed by the estate solicitors, and Watch Tower provided evidence in support of its position that the deceased had testamentary capacity at the time the will was made. A meeting took place about a year after the deceased's death in which it was agreed that the October 2006 will would be probated. A certificate of appointment was subsequently granted in June 2008.

The administration of the estate was not without complexity. Neither the deceased nor his children had declared the foreign income they were earning from the holding company and voluntary disclosure to the Canada Revenue Agency became necessary. The Public Guardian and Trustee decided to commence an application for dependant support on behalf of one of the deceased's children. Watch Tower challenged the ownership of the joint accounts and investments.

While the administration was still ongoing, Wayne brought an application to pass accounts.

Stephen filed a notice of objection taking the position that the October 2006 will was invalid. He alleged that his father lacked testamentary capacity when the will was made and that Watch Tower had exercised undue influence. No objection to the estate accounts themselves was made – the only issue raised was with the validity of the October 2006 will (Watch Tower and the Public Guardian and Trustee each filed a notice of objection, although raising different issues).

Ricchetti J. considered whether the validity of the October 2006 will could be raised as part of the passing of accounts. He concluded it could not.

From a procedural standpoint, he determined that had Stephen wished to challenge the will, the appropriate course of action would have been to seek the revocation of the certificate of appointment pursuant to rule 74.04 of the *Rules of Civil Procedure*. However, rather than leaving it open to Stephen to pursue the will challenge in another venue, Ricchetti J. went on to find that had Stephen moved to have the certificate of appointment revoked, he would have dismissed the request. The reasons for this included the following:

- a. The only evidence raised on the issue of capacity and undue influence was based on Stephen's suspicion and speculation;
- b. Stephen accepted the validity of the will during the meeting that took place in May 2008, which resulted in the application for and grant of probate and when receiving financial benefit under the will, never raised issue with validity;
- c. Stephen admitted in court that his motivation for challenging the will was because Watch Tower was challenging the jointly held bank accounts and investments; and
- d. Given the amount of work that had been done by the estate trustee (such as in realizing assets and making voluntary disclosure to the Canada Revenue Agency) the beneficiaries would be prejudiced if the administration of the estate was suspended.

In refusing to consider the issue of the validity of the will on the passing of accounts, Ricchetti J. proceeded to dismiss the will challenge. Thus, the effect of the decision was not simply that Stephen could not raise the issue of validity on a passing of accounts, but he could not raise the issue at all (presumably, by commencing a new proceeding). While this was, in part, because Ricchetti J. determined that no evidence had been produced to suggest the will was not valid, it was also because he found that given the progress in the administration of the estate, the other beneficiaries would be prejudiced if the validity of the will became an issue.

An interesting aspect of the decision is that, in his reasons, Ricchetti J. raised the issue of whether the *Limitations Act* could act as a bar to a will challenge. While none of the parties involved had argued the *Limitations Act*, he nevertheless stated that he had "serious concerns" that the *Limitations Act* might apply given that the certificate of appointment had been issued more than two years prior to the attempted challenge of the October 2006 will.

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Death of a Support Payor, Recipient or Child: Notifying the Family Responsibility Office

Elizabeth Seo*

The Director of the Family Responsibility Office (FRO) should be contacted in cases where a support payor, support recipient, or child receiving support, who is registered with FRO's enforcement program, has died.

Death of a Support Payor

The Director requires written verification of the death. Section 8(3) of the *Family Responsibility Support Arrears and Enforcement Act* (FRSAEA) provides that the Director shall not enforce a support order or support deduction order against the estate of a payor after the Director is notified, in accordance with the regulations, of the payor's death.¹

Section 2(1)(2) of *Ontario Regulation 167/97* states that notice of the payor's death shall be given in writing and shall be accompanied by a copy of the death certificate, a funeral notice, a copy of the certificate of appointment of estate trustee, a letter from the solicitor for the payor's estate or any other supporting documentation providing satisfactory proof of the payor's death.² The notice and supporting documentation must be sufficient to identify the deceased person as the payor.

It should be noted that *Ontario Regulation 167/97* has been amended but has yet to be proclaimed. The proclamation date is expected to be July 1, 2010. The proposed amendments include references in clauses 8(2)(d) and 8(3) of FRSAEA and subsection 2(2) of the regulation to the deceased person as the child entitled to support under a support order.

Since FRO will close its file and stop all enforcement of the order or agreement on the death of a support payor, the support recipient may be able to enforce the order against the estate of the support payor or bring other claims against the estate including possibly a claim pursuant to the *Succession Law Reform Act*.³

Death of a Support Recipient Receiving Spousal Support

Ongoing spousal support payments will terminate on the death of the support recipient as these payments are a personal right of the support recipient for the provision of the necessities of life. FRO will terminate ongoing spousal support accruals upon receipt of proof of death of the recipient, however, FRO will not close its file if arrears are still owed to the estate of the recipient.

Spousal support arrears have been found to be a valid judgment debt and are enforceable by the estate of the support recipient. In the 1999 decision *Hennings v. Hennings*⁴, Justice Shaughnessy of the Ontario Superior Court of Justice held that while ongoing spousal support payments terminated on the death of the recipient, the arrears and interest of almost \$44,000 that accumulated under the original order for support constituted a judgment debt in favour of the recipient's estate. Justice Shaughnessy rejected the position of the payor who unsuccessfully argued that the right of his former wife to arrears did not survive her death, and found that the payor was unable to demonstrate a material change in circumstances that would eliminate or reduce the arrears.

In *Hampton v. Hampton Estate*,⁵ the British Columbia Court of Appeal outlined factors that should be considered in an application to cancel spousal support arrears owing to the estate of a deceased person. Justice Lambert stated as follows:

“All the factors which should in the usual course, be considered in dealing with rescinding an order, with the exception of the future needs of the recipient, should be taken into account, although some of those factors should be given a different weight because of the debt. But other factors will arise or will have to be given greater weight. Has the payor stopped paying in anticipation of the death of the recipient? Has the payor caused the death of the recipient? Has the payor been contemptuous of the court order? One very important factor is this: has the failure to make the payments caused the recipient to borrow money or sell capital assets in order to provide herself or himself with day-by-day support? If so, then the estate of the deceased recipient will have been depleted by the failure of the payor to make the maintenance payments. That factor will be particularly strong where it is shown that the arrears accumulated in spite of the recipient making every reasonable effort to enforce the maintenance order.”

Courts have refrained from rescinding arrears where the support payor has failed to act promptly and conscientiously. These situations include where the payor has frustrated the order, took no steps to notify the recipient or enforcement authority as soon as possible after the loss of the ability to pay, or failed to immediately obtain court authority for non-payments.⁶ In the 1998 case *Tavares v. Tavares*, Justice Wright of the Ontario Court of Justice (General Division) held that it would be against public policy to allow a support payor to escape paying spousal and child support simply because of inadequate enforcement procedures: “The message to support payors is: you cannot avoid your support obligations by ignoring them.”⁷

Death of a Support Recipient Receiving Child Support

In order to determine whether ongoing child support payments terminate upon the death of the custodial parent (the support recipient), a review of the terms of the support order or agreement is necessary. Many orders or agreements will contain specific provisions that child support terminates on the death of the support recipient or when the child no longer permanently resides with the support recipient. If that is the case, ongoing accruals will terminate as of the date of death of the recipient.

If the order or agreement is silent as to whether child support terminates upon the death of the support recipient, courts have found that ongoing child support continues notwithstanding the death of the custodial parent.⁸ As such, FRO will continue to enforce ongoing accruals and arrears of child support pursuant to the original operative order/agreement until and unless a further court order/agreement is made.

Any person(s) who becomes the child’s custodial parent after the death of the support recipient should obtain a new order for custody and support. If the support payor obtains *de facto* custody of the child following the recipient’s death, the payor may be credited for that period of time pending final resolution of any custody proceeding, provided that this credit is clearly set out in a court order.⁹

A personal representative for the support recipient’s estate may notify FRO of any consent in writing of the personal representative to the termination of support owed to the recipient in the same manner available to the recipient while alive.

If child support arrears exist at the time of the support recipient's death, payment of these arrears may be enforced against the payor.

Death of a Child Receiving Child Support

Ongoing child support will terminate upon the death of the child since the purpose of support is to provide the child with the necessities of life.

Child support arrears accrued prior to the date of death are enforceable. Justice Vogelsang stated in *Jackson v. Jackson and the Minister of Community and Social Services* that: "I do not think the fact that enforcement of arrears for child support is sought after the child is no longer entitled is, in itself, fatal."¹⁰

In the 1985 case of *Ontario (Minister of Community & Social Services) v. Cassidy*, Justice Gammell was asked to determine whether the court had jurisdiction following the death of a child to enforce the payment of arrears that accrued before the death of the child and whether the support payor was required to pay arrears that arose while he was in receipt of public assistance. Justice Gammell found as follows:

"The arrears are those payments that the debtor did not make for the support of the child. The child, while alive, unless the contrary was proved, continued to need support. The mother and the Minister took up the slack and provided the funds for those expenditures and the Minister and the mother according to their various interests should be entitled to reimbursement. They are not being unjustly enriched. The debtor would be unjustly enriched if he was allowed to avoid meeting his obligations having the ability to meet them. The right to those arrears is not extinguished by the death of the person for whose benefit the order for support was originally made."¹¹

In dealing with past arrears, Justice Gammell concluded that the court must consider the debtor's ability to pay at the time of the enforcement or application and must in some circumstances consider the ability to pay at the time of the failure to pay. A debtor, however, may be found to have an ability to pay at a later date and "shouldn't be excused forever merely because in the past he had no ability to pay."¹² Justice Gammell held that a debtor may be required to pay arrears that arise even while the debtor was in receipt of public assistance.¹³

Varying Support Post-Death

Courts have reviewed the ability of an applicant to vary either spousal or child support provisions after the death of the payor.

In *Williams Estate v. Reid*, Justice Vogelsang noted that divorce variation cases require the applicant to commence a claim for relief before the death of the payor.¹⁴ Once a claim for variation has been advanced before death it can be prosecuted even if the applicant dies, as was in the case of *Lesser v. Lesser*.¹⁵ In *Schwartz Estate v. Schwartz*, Associate Chief Justice Smith found that a former wife was limited to relief under the *Succession Law Reform Act* as she had not applied to vary the support order before the payor's death in order to make it binding on the estate.¹⁶

It would appear that there is no authority to bring an application to vary child support once a support payor has died. Part V of the *Succession Law Reform Act*¹⁷ should be the appropriate vehicle for the recovery of child support post-death.

**Elizabeth Seo, Counsel - Family Responsibility Office (on secondment from the Office of the Children's Lawyer)*

Contact Information for the Family Responsibility Office

FRO may be contacted citing the case and file number for the support payor, recipient, or child as follows:

Family Responsibility Office
Ministry of Community and Social Services
P.O. Box 220
Downsview, Ontario
M3M 3A3
FRO Contact Number: 1-800-267-4330
Toronto Area Contact Number: (416) 326-1817
Fax: (416) 240-2402.

1 *Family Responsibility and Support Arrears Enforcement Act*, 1996 S.O. 1996, c. 31, section 8(3)

2 *Ontario Regulation 167/97*, as am. O. Reg 359/97; 385/05; 258/06; 527/06; 87/07, section 2(1)(2)

3 *Succession Law Reform Act*, R.S.O. 1990, c. S. 26, as am.

4 *Hennings v. Hennings*, [1991] O.J. No. 1740; 27 E.T.R. (2d) 251

5 *Hampton v. Hampton* (1985), 46 R.F.L. (2d) 113 at 120

6 *Litke v. Ryan* (1995), 139 N.S.R. (2d) 325, at 328

7 *Tavares v. Tavares*, [1998] O.J. No. 2536, at paragraph 26

8 *Chalmers v. Chalmers* (October 31, 1990), A.C.W.S. (3d) 946 (Alberta Q.B.); *Lesser v. Lesser* (1985), 44 R.F.L. (2d) 255 (Ont.

H.C.), affirmed 51 O.R. (2d) 100; *Mathieu v. Coote* (March 19, 1986), unreported (Ontario Provincial Court - Family Division)

9 *Christoph v. Christoph*, [1985] S.J. No. 57, at paragraph 8

10 *Jackson v. Jackson*, [1984] O.J. No. 669, at paragraph 29

11 *Cassidy v. COMSOC and Cassidy*, [1985] 47 R.F.L. (2d) 106 at paragraph 7

12 *Ibid.*, at paragraph 10

13 *Ibid.*, at paragraph 11

14 *Williams Estate v. Reid*, [1998] O.J. No. 2633; see also *Brubacher v. Brubacher* (1997), 30 R.F.L.

(4th)276 (Ont. Gen. Div.)

15 *Lesser v. Lesser* (1985), 44 R.F.L. (2d) 255 (Ont. H.C.)

16 *Schwartz Estate v. Schwartz*, [1988] O.J. No. 378, Toronto Doc. No. 97-FA-5655 (Ont. Gen. Div.)

17 *Succession Law Reform Act*, R.S.O. 1990, c. S. 26, as am., Part V

Spelling and Grammar Query

Sean Lawlor*

Canadian Spelling

The topic for this month's query is 'Canadian' spelling. Does a writer use 'color' or 'colour', 'centre' or 'center', and 'analyse' or 'analyze'.

The leading authority is *The Canadian Oxford Dictionary*. It sets out some rules, which direct us to follow British practices. These rules include:

- (a) Use 'ce', not 'se'. For example: 'practice', not 'practise';
- (b) Use 'ize' and 'yze' not 'ise' or 'yse'. For example: 'organize', not 'organise'; and 'analyze', not 'analyse';
- (c) Use 'our' not 'or'. For example: 'labour', not 'labor';
- (d) Use 're' not 'er'. For example: 'centre', not 'center'.
- (e) (usually) Double the consonants when adding suffixes to words even when the final syllable before the suffix is not stressed. So write 'travelled' and 'medallist', not 'traveled' or 'medalist'. But see 'profiting', which is spelled the same using British English as in American English (this from Wikipedia, although the *COD* approves of the examples).

These are useful, but Canadian spelling cannot be reduced to a set of rules. Conventionally, Canadians spell 'tire', not 'tyre', and 'curb' not 'kerb'. We tend to run 'amok', not 'amuck'. These conventions are not governed by 'hard and fast' rules. For the writer, the only solution is to keep the *COD* close at hand.

It is important to not be dogmatic:

- (a) If the building in New York is called the 'Lincoln Center', then that is how the Canadian writer should spell its name;
- (b) J.K. Chambers, an Editorial Adviser to the *COD* says: "*Wherever British and North American practices differ from one another in vocabulary, pronunciation, or spelling, Canadians usually tolerate both*"; and
- (c) Professor Chambers also writes, "[D]ifferent [Canadian] regions sometimes maintain different norms, as for instance, Ontarians prefer the spellings of colour and neighbour but Albertans prefer color and neighbour."

If you would like us to address common errors, please send an email to susan.stamm@ontario.ca or sean.lawler@shibleyrighton.com.

Brown Bag Lunch Summary

*Sharon Davis and Natalia Angelini**

Below is a summary of some of the noteworthy topics discussed at our Brown Bag Lunch series from April to September, 2010.

Our April brown bag lunch was held on April 20, 2010.

Ignagni Estate – We began our session with a discussion about the decision of Justice Brown in *Ignagni Estate* 2009 CanLII 54768 (ON S.C.). In this decision Justice Brown considered when orders for assistance can be granted without notice. He determined that there have to be circumstances of extraordinary urgency for an ex parte order to be given. One participant mentioned that you can no longer do ex-parte passings of accounts for the OCL as they now have to be brought on notice.

Releases from CRS for partial distributions – Next the group considered when payouts could be made to beneficiaries, whether releases for partial distribution from the CRA were required prior to making such payouts and, if so, how such approvals get granted.

Involuntary assessments – The next question concerned a situation where a participant's client had an adult brother who was not eating. A justice of the peace signed a form authorizing the police to bring him in for an assessment. When he was brought into the hospital, because he did not consent, the assessment was not carried out. The group then discussed whether the consent of the individual was required under the *Mental Health Act*. It was thought that while treatment required consent, assessment did not. If there are reasonable and probable grounds to bring a person to a hospital, the hospital can keep the person for 72 hours for observation and can determine the nature of the illness. Without reasonable and probable grounds, a person can refuse under the *Substitute Decisions Act* unless some cause is given for the assessment. Under the *Mental Health Act*, the doctor must conduct the examination and determine if the threshold is met for detention for 72 hours. Under section 79 of the *Substitute Decisions Act*, an order can be obtained for an assessment.

Drafting wills without giving planning advice – Next we discussed an advertisement for set fee wills with a disclaimer that no estate planning advice or tax advice was given. The group queried whether this waiver was effective and whether it would be possible to draft a "simple will" with no advice. Mention was made of the potential danger in wills being drawn without estate planning advice being given. Some of the difficult drafting issues were discussed such as gift-overs, joint ownership and anti-lapse provisions where you have to be careful with drafting. The same difficulties exist with online wills where people pick and choose clauses and paste them into their own will. The need for public education on the dangers of cutting corners in having one's will drafted was discussed. It was thought that more public education is required with respect to estate planning.

The next Brown Bag Lunch was held on May 18, 2010.

Powers of appointment – We opened with considering powers of appointment with respect to a US will. If there are US and Canadian assets, there was consideration as to whether there should be a Canadian will to deal with the Canadian assets.

US vacation properties – Then the group discussed the buying and selling of US vacation properties and the issues surrounding taxes, especially with respect to holding the property in a partnership where a

single purpose corporation was one partner and the spouses, who were the two principals of the company, were also partners. With respect to US properties, it was thought that any agreements should not be drafted without getting the appropriate US expert advice.

Income splitting trusts – Next we discussed multiple income splitting trusts and CRA’s discretion to merge trusts. It was considered that it is helpful in keeping the trusts separate to have different Trustees.

Foreign estate trustees – The next topic was about out of province estate trustees involved in litigation. Litigation was over who owned certain assets in Canada and the Canadian will had an executor that was resident in the US. The bond was waived. There were two beneficiaries under the will and both agreed to waive the bond. Once the Certificate of Appointment of Estate Trustee is issued, the estate trustee has the requisite authority needed to participate in any litigation in spite of being resident outside the jurisdiction.

Foreign divorce and reciprocity – We then discussed spouses on intestacy. There was an instance where there was a legitimate marriage with a spouse in a different jurisdiction and the question was reciprocity. The re-marriage happened after a divorce that occurred in another jurisdiction. The divorce was valid in that jurisdiction but would have been invalid in Ontario.

Political gift refused – The next situation discussed was a gift given to the Liberal Party of Canada. The gift was refused because the *Elections Act* says that a discretionary gift contravenes the contribution provisions unless it is a specific gift. It has to be a testamentary disposition of a non-discretionary nature.

Re-settling a trust – The next question was the application of the *Perpetuities Act* and how it would apply in the re-settling of a trust with respect to the vesting period being time of death of the last person in being plus 21 years.

Multiple original Powers of Attorney – Next we considered the situation of powers of attorney where there are multiple originals. You have to be careful with respect to the language because one revokes another unless the language in the document says that there are multiples. If the power of attorney is executed in duplicate or triplicate, you need to make sure that they co-exist under the *Substitute Decisions Act*. Another comment with respect to powers of attorney was that a personal power of attorney isn’t necessarily a power of attorney for personal care and you cannot read personal to mean personal care.

Re Moss – Next, the group discussed the case *Re Moss* (2010) M.B.C.A. 39 (CanLII). This case was regarding the validity of execution of change of beneficiary forms to life insurance policies. The issue was whether the forms were validly executed by the insured and whether the proceeds of the life insurance policies ought to have been paid to the son’s bankrupt estate instead of to the named beneficiary under the policies. The son had authority under the power of attorney given to him by the insured, his deceased mother. Five months prior to the son making an assignment into bankruptcy, the forms were executed by or on behalf of the mother to change the beneficiary to the granddaughter. The Court of Appeal found that a general power of attorney is insufficient to vest the requisite authority to change a beneficiary designation under insurance policies; the power to do so has to be very specific.

Our next brown bag lunch was held on June 15, 2010.

Compensation when action as attorney and executor – We opened with a question as to compensation for a lawyer who acted as the attorney for property as well as the executor for the estate of the deceased. The beneficiary was a charity that claimed that the attorney was not entitled to full compensation as the executor when he was also the attorney. Participants suggested that there is generally no automatic reduction but the five factors relevant to compensation that are enumerated in the case law should be considered in determining if a reduction is warranted. Some banks reduce the net fee when they act as both attorney for property and as estate trustee.

Wills banks – Next we discussed “wills banks” kept by solicitors and whether there is any system in place to consult clients at regular intervals to determine if new wills should be drafted due to changes in circumstances. It was suggested that letters be sent more frequently to older clients. Some put a letter in the package that the will should be reviewed regularly. Sending a copy of the will to the client every three years is generally good practice. This could keep the address of the client up to date and could help the family locate the will if they find the letters.

Solicitor as executor – The group then considered when solicitors draft wills appointing themselves executor. The group thought a solicitor probably should not seek this but that it was possible. A solicitor who acts as executor will likely be held to a high standard and trust accounts must be pristine. Other things to watch for regarding acting as executor is the compensation clauses and gift clauses which could be lost if the executor witnesses the will and then the common law provisions for compensation could apply. Also, if a solicitor acts as an executor, they should probably specify a person in their own will to take on this responsibility because the solicitor’s executor will have to take this role on if the solicitor was the only acting executor on another estate at the time of his or her death. Also discussed was compensation if the solicitor does all the work of executor and solicitor. Again, there are vigorous standards and a higher duty of care.

Next the group discussed clauses in wills directing the drafting solicitor to be retained as estate solicitor. There was a B.C. Court of Appeal case that commented on self appointment and that it should be brought to the attention of the Law Society where there is a clause appointing the drafting solicitor as the solicitor for the estate. While a testator can state a preference, the appointment of an estate solicitor is up to the trustee.

Power of attorney for personal care – A participant then mentioned a situation where an attorney for personal care had a grantor who did not recognize he should not live alone. The attorney contacted CCAC and they went to visit and agreed with the attorney’s assessment but would not consent to let the attorney make arrangements unless the grantor’s capacity was assessed.

Fareed v. Wood – In another power of attorney situation, a solicitor agreed to go on as joint attorney with two elderly clients. One died shortly after and the other is in now in the hospital and has no family in Canada and no one to step in except the PGT. The attorney was working with CCAC and the client was competent to give instructions to CCAC. The group mentioned a similar case *Fareed v. Wood*, 2005 CanLII 22134 (ON S.C) where the attorney was responsible because he did not take sufficient control of the property in a situation where the grantor was being taken advantage of. The attorney was responsible for overseeing the property even though the grantor was giving instructions.

Non-resident trustees – Then a participant brought up a situation where there were two siblings as estate trustees who were non-residents. The other sibling was in Canada but was not a beneficiary. Suggestions included having the two non-residents renounce and have the brother in Canada be

Trustee; afterward he could go to Court to have an additional trustee appointed so the trust would not be a non-Canadian trust.

Probate for property outside Ontario – The next question was regarding whether you can get an original grant of probate outside Ontario where probate was not required in Ontario but was required for property in another province. It was recommended to consult with someone in the other province. One possibility in such a situation is to do a secondary will containing only the property in the other province and a separate will for Ontario assets. For real property in other jurisdictions you will likely have to pay fees of the jurisdiction where the property is located.

Our next Brown Bag Lunch was September 21, 2010.

Liability of named beneficiaries of RRSPs where estate insolvent – We discussed a situation where the deceased died leaving RRSPs of which his children were designated beneficiaries. There was a large judgment against him and nothing more in the estate. In issue was the right of the CRA to collect against the named beneficiaries of the RRSPs if the estate did not file taxes and pay. It was thought that the tax return would quantify the liability and the filing of the return by the beneficiaries would not make them estate trustees. The *Income Tax Act* was discussed and what provisions it made for tracing the money back to the beneficiaries and in what instances the CRA could claim the proceeds from the RRSPs for the payment of taxes.

Beneficiary as witness – Next a participant had a situation where there was a will kit will and one of the witnesses received an amount of money in a bequest. The group thought it was likely the bequest failed but the will did not fail. The witness could rebut the presumption of undue influence and get the gift. The beneficiaries could also consent to the gift.

Negotiating a large cheque without probate – The next situation was an estate where no probate was required but there was a large cheque coming into the estate. The bank would allow it to be deposited but not to be withdrawn. Different banks apparently have different limits with respect to amounts that can be withdrawn. Possibilities were discussed as to how to deal with this. If it was certain that there was no will challenge, and the lawyer put it through his account, the group thought it wise to get indemnities from the client.

Multiple wills – We then discussed a situation where there were multiple wills in an estate with substantial wealth. The primary will revoked all earlier wills and the secondary will did not revoke anything but dealt with shares. The first will was amended by a Codicil. The group considered the possibility that the Codicil republished the first will so as to revoke the secondary will. In such a situation new wills might be wise.

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