

**ONTARIO BAR ASSOCIATION
ESTATE LITIGATION: A PRIMER**

DECEMBER 9, 2009

**THE BASICS:
SOME COMMON CLAIMS IN ESTATE LITIGATION**

LAWRENCES

LAWRENCE · LAWRENCE · STEVENSON · LLP

**EDWIN G. UPENIEKS
and
GOSHA S. SEKHON**

*Lawrence, Lawrence, Stevenson LLP
43 Queen St. West
Brampton, ON L6Y 1L9
Ph: (905) 451-3040
Fax: (905) 451-5058
www.lawrences.com*

*Edwin G. Upenieks: eupekieks@lawrences.com; (905) 452-6873
Gosha S. Sekhon: gsekhon@lawrences.com; (905) 452-6879*

ESTATE LITIGATION: A PRIMER

THE BASICS: SOME COMMON CLAIMS IN ESTATE LITIGATION

EDWIN G. UPENIEKS and GOSHA S. SEKHON

INTRODUCTION

Testamentary freedom is neither unlimited nor absolute. There are many legal and moral obligations which restrict the parameters of an individual's estate planning. Nowhere is this more apparent than when a claim arises against an estate. Whether successful in part or in full, following a full trial of the issues or a negotiated settlement, a claim has the effect of partly or completely impairing, tampering with, or amending the estate plan that was put in place by the deceased.

Even more unfortunate, this circumstance can arise even where the deceased obtained thorough legal advice and guidance in the preparation of their estate plan. The level of success of a claim is greatly tempered, however, by the depth and caliber of the legal guidance that was received during the preparation of the estate plan.

This paper attempts to provide a general overview of the more common claims that can arise in estate litigation. It is our effort to make practitioners aware of the potential conflicts that can arise and the process and implications arising from such conflicts. Each type of potential claim involves much more detailed analysis than we are able to provide in the limited format available here. The goal is to ensure you as practitioners are

“forewarned” so as to be “forearmed”, whether you are a solicitor who needs to be aware of what you can do to avoid potential claims against your client’s estate, or you are a litigator seeking to determine the best possible foundation for a challenge against an estate on behalf of your aggrieved client.

WILL CHALLENGES – GROUNDS FOR CHALLENGING A WILL

1. *Due Execution*
2. *Testamentary Capacity*
3. *Knowledge and Approval of the Contents of the Will*
4. *Undue Influence*
5. *Forgery or Fraud*

1. Due Execution

Sections 3 and 4 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 set out the formal requirements for the execution of a Will. These include:

- a. The Will is in writing;
- b. The Will is signed by the testatrix at the end after it has been completed;
- c. The testatrix signed the Will in the presence of two or more witnesses; and
- d. The witnesses signed in the presence of the testatrix and each other.

An individual who is a beneficiary or the spouse of a beneficiary should not be a witness to the Will, nor should the estate trustee or the spouse of the estate trustee.

If a beneficiary or the spouse of a beneficiary is a witness, this may be fatal to the

validity of the gift that is left to that individual or the spouse of that individual, as the case may be.

2. **Testamentary Capacity**

An individual should be of sound mind, memory and understanding when she makes a Will. This includes an understanding of the terms she wishes to include in the Will and an understanding of the circumstances around the making of the Will. The testatrix should have an understanding of:

- a. the nature and extent of her property;
- b. the individual(s) to whom she may have an obligation, such as dependents, or those who would “normally” be expected to benefit from her estate;
- c. that making a Will revokes any prior testamentary dispositions she had in place; and
- d. the consequences of making the particular dispositions she has included in her Will.

A challenge on the basis of a lack of testamentary capacity will require substantial and persuasive medical evidence, corroborated by expert witness evidence and strengthened by other evidence from those familiar with the testatrix and her circumstances at the time that the Will was completed.

If enough evidence is put before the court to demonstrate that the circumstances surrounding the completion of the Will were sufficiently “suspicious”, the court

may require a higher standard of proof from the Executor, who has the burden of proving that the testatrix had capacity. This is known as the “Doctrine of Suspicious Circumstances”.

Practice Tip: When obtaining information from your client avoid questions that require just a “yes” or “no” response. Instead ask questions which require answers demonstrating cognitive awareness and ability and prepare a contemporaneous memorandum to file documenting your observations on the client’s capacity.

Practice Tip: Inquire about any medical conditions that your client may have. If necessary, insist on obtaining an expert opinion of capacity. This may be a difficult request to make of your client, however, you can advise the client that it is ultimately in her own best interests and those of the estate if there is documented support that the individual had capacity. This is especially important if there is a high likelihood of a challenge to the Will.

3. **Knowledge and Approval of the Contents of the Will**

Another possible basis for challenging a Will is that the testatrix did not have full knowledge and approval of the contents of the testamentary document. For example, if the testatrix was legally blind or was not fluent in English, does the attestation clause contain any reference to that fact and state that the contents were read to the individual or translated for the individual before the document was executed?

Practice Tip: The solicitor acting in the preparation of the Will must carefully document the instructions received and the process by which the instructions and the contents of the Will are confirmed prior to execution. Contemporaneous and meticulous notes should always be made and preserved.

4. **Undue Influence**

If it can be proven that the testatrix did not make the Will of her own free-will and volition, it may be possible to have it set aside. Any evidence propounded in support of a challenge on this basis would have to demonstrate that the testatrix's free-will was overcome by coercion or fraud. Evidence of persuasion or influence per se is not enough.

There are very few reported cases where a Will has been set aside based on undue influence. It is very difficult to prove undue influence.

Practice Tip: Be mindful of "trusted advisors" who insist on accompanying the client to all meetings and staying during the course of your interview with the client or during the execution of the Will. It is imperative that client instructions be confirmed privately, either at the instruction or the execution stage, and preferably both.

Practice Tip: Inquire about any prior Wills a new client may have. Ensure you acquire and review any such prior documents. If there are significant changes to

the intended distribution of the estate, this may be a red flag with regard to undue influence of other individuals on the testatrix.

5. **Forgery or Fraud**

Is the signature on the document indeed that of the testatrix? Allegations of fraud are considered to be the most extreme allegations with respect to the challenge of a Will. Not surprisingly, it is also a very difficult allegation to substantiate.

Practice Tip: The Lawyer should arrange for execution of the Will, including the affidavit of execution, and keep the Will in their Will vault.

Practice Tip: Take the extra step with the Know Your Client Rules. Even where you only need to identify the client, verify her identity pursuant to the KYC Rule for verification whenever possible.

DEPENDANTS' SUPPORT CLAIMS – SUCCESSION LAW REFORM ACT

Part V of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (“SLRA”) sets out the framework for claims by dependants against the estate of a deceased individual.

Section 58 of the SLRA states, in part:

58(1) Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.

(2) An application for an order for support of a dependant may be made by the dependant or the dependant's parent.

Section 57 of the SLRA defines “dependant” to include:

- a) *the spouse of the deceased;*
- b) *a parent of the deceased;*
- c) *a child of the deceased; or*
- d) *a brother or sister of the deceased*

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

For the purposes of this section of the SLRA, “spouse” includes a person with whom the deceased cohabited for at least three years or with whom the deceased had a relationship “of some permanence” if the couple had a child, i.e. a common-law spouse.

Once an application is made by a dependant for support from the deceased’s estate and notice of the application has been served on the executor, the executor is restricted by section 67 of the SLRA from making any distribution of the estate, with the exception of reasonable advances for support to dependants who are beneficiaries.

The Ontario Court of Appeal decision in *Cummings v. Cummings* (2004), 5 E.T.R. (3d) 97 (Ont. C.A.), has caused no small amount of concern among the Estates Bar in that the decision supports the proposition that when determining whether the deceased’s estate should be allocated to providing relief to the dependant, the moral as well as the legal obligations of the deceased towards the dependant can be considered. In that decision, Justice Blair writes at paragraphs 26-27 that:

In determining the allocation of the testator's estate for dependants' relief purposes, the application judge took into account not only the needs of Paul and Elizabeth but also the moral obligations of Mr. Cummings towards his dependants, including his second wife, Rita Cummings. He did so even though the Respondent was admittedly not in need of support at the time and was not claiming relief under the Act. In my view, he was entitled to do so.

When judging whether a deceased has made adequate provision for the proper support of his or her dependants and, if not, what order should be made under the Act, a court must examine the claims of all dependants, whether based on need or on legal or moral and ethical obligations. This is so by reason of the dictates of the common law and the provisions of sections 57 through 62 of the Act.

If the court determines that there was a moral obligation to provide for a dependant, does the estate of the testatrix still get allocated towards the relief of that dependant if there was no legal obligation on the deceased's part to so provide, and there were in fact excellent reasons that the deceased had for so acting? It would stand to reason that in fact if the deceased had good reasons for excluding a dependant to whom she was not legally obligated then this would counter any potential argument on moral grounds for claiming support.

A party considering making a claim for dependant's relief should be mindful of any applicable limitations period. The *Limitations Act, 2002*, S.O. 2002, c.24, Schedule B, provides at section 4 that "a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered". Section 5 sets out when a claim is said to have been discovered:

Section 5: A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

- (iii) that the act or omission was that of the person against whom the claim is made, and
- (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Any potential claimants should be advised of the potential bar to a proceeding if the limitation period has been exceeded.

FAMILY LAW ACT ISSUES

FLA Elections

Subsection 6(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 (“FLA”) states:

When a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under section 5.

Under section 5 of the FLA a spouse whose net family property (“NFP”) is the lesser of the two NFPs is entitled to one-half of the difference between them. The FLA sets out the manner in which NFP is calculated. Recent amendments to subsections 6(6) and 6(7) affect the treatment of jointly held property with the right of survivorship in making the NFP calculation.¹

Additionally, an election must be made in the prescribed form and within six months of the death of the first spouse (subsection 6(10)). Until court’s decisions in *Iasenza v. Iasenza*, [2007] W.D.F.L. 3501 (Ont. S.C.), there were conflicting decisions as to whether an election under subsection 6(1) was irrevocable or whether it could be overturned by the court.

¹ The following article was presented by Daniel S. Melamed at the recent Estates Summit and provides a helpful summary of the amendments to the FLA: Melamed, Daniel S. and Lindsay G. Mills, “2009 Family Law update for Estates Lawyers”, 2009 Estates and Trusts Summit, Day One, November 12-13, 2009.

In *Iasenza*, Justice Hackland found that there is no general right to revoke an election as such an allowance would create uncertainty for third parties who have relied on the election. However, he also found that the court has a residual jurisdiction to authorize the revocation of an election. The circumstances which would allow the court to exercise that residual jurisdiction would be extremely restrictive. Justice Hackland's decision sets out certain factors to which the court should give consideration when making the determination to exercise its residual jurisdiction. These are set out at paragraph 25 of the decision as follows:

In exercising this discretion, the Court should have particular regard to the following:

- (a) *Was the election filed as a result of a material mistake of fact or law made in good faith?*
- (b) *Was there any responsibility or culpability on the part of effected parties in relation to the election?*
- (c) *Was the notice of intent to seek revocation of the election given in a timely way and, in particular, how long after the 6 month filing period was such notice given?*
- (d) *Has the estate been distributed or would interested parties otherwise be adversely effected by a revocation of the election?*
- (e) *Does the election result in an injustice to the surviving spouse in all of the circumstances?*

Insurance Designations

It is not uncommon to come across separation agreements involving the provision that one spouse will maintain a life insurance policy in a particular amount and for a particular period of time and that his or her former spouse will be named as the designated beneficiary on such insurance policy. The issues arising with frequency in this particular area of the law are the interpretations of the insurance clause, including the

intentions of the contracting parties after the death of one of the spouses and the implications for such clauses when part of an agreement that is meant to be “temporary” but that is never revisited by the parties. Obviously, the intentions of the parties become that much more difficult to ascertain when one of them is no longer available to provide their own understanding of the arrangement.

The most recent decision in this area is that of the Ontario Court of Appeal in *Richardson Estate v. Mew*, [2009] O.J. No. 1947 (Ont. C.A.). On the death of the testator, his surviving spouse, who was also his second wife, discovered that the beneficiary on one of the testator’s life insurance policies was still his first wife. His second wife had paid some of the premiums on the policy in the later years of the testator’s life, never realizing that he had not changed the designation from his first wife.

The Court of Appeal upheld the beneficiary designation, finding that it neither resulted in unjust enrichment nor did the constructive trust doctrine apply to the policy by virtue of the second wife’s contribution to the premiums. The deceased and his first wife had a contractual agreement that he would maintain a policy with her as the beneficiary. If the contract was meant to be temporary, the parties were perfectly capable of revisiting it but did not do so. Therefore the terms of the contract continued to apply.

In addition the Court noted that even though the second wife was the Attorney for Property, she would not, as argued by her, have the authority to change the beneficiary designation “had she known” as this would have involved a change to a testamentary

disposition. Attorneys for Property cannot make or change a grantor's Will and this extends to testamentary dispositions such as beneficiary designations.

Constructive Trusts

While common-law spouses do not have the same automatic property rights as legally married spouses, there are alternative avenues available to them for making claims against the property of their now deceased partner. One such avenue is that of a claim of constructive trust.

In *Peter v. Beblow*, [1993], 1 S.C.R. 980, the Supreme Court succinctly stated at paragraph 8 of the decision that:

The constructive trust remedy may be applied where a spouse, including common-law spouse, has contributed to the preservation, maintenance or improvement of property but not directly to its acquisition.

The Court noted, however, that it would be necessary to determine if a monetary award would be a sufficient remedy for the aggrieved party, or if a constructive trust should be imposed on a particular property. A direct link between the aggrieved party's contribution and the property in question would have to be established. Otherwise, compensation by way of a monetary award should suffice.

A finding of a constructive trust would obviously result in a potentially significant disruption of the overall estate plan of the deceased.

JOINT ASSET DISPUTES

In an effort to avoid estate administration taxes or to allow a child to assist an elderly parent with his or her finances, we are seeing an increase in assets being held on joint account by a testatrix and another individual with right of survivorship. Disputes arise when the intentions of the deceased have not been properly documented as to whether the joint asset was meant to pass as a gift from the deceased to the joint account holder or whether the other individual holds the property on a resulting trust for the deceased's estate.

While section 14 of the *Family Law Act* has established that when property is held in joint account by spouses there is a presumption of advancement unless there is evidence to the contrary, the issue of joint assets held by a parent and child has led to a proliferation of case law in recent years. The common law in Ontario is that absent clear evidence demonstrating the intention of the deceased with regard to the joint asset, there is a "presumption of resulting trust" when the asset is held with an independent adult child. Without evidence of an intention on the part of the deceased to leave the joint asset as a gift to that child, the joint asset is presumed to be held in trust for the estate of the deceased parent.²

RULE 13.1 – WHERE A PROCEEDING CAN BE COMMENCED

Rule 13.1.01(1) of the Rules of Civil Procedure sets out that:

² *Madsen Estate v. Saylor*, [2007] 1 S.C.R. 838, 2007 SCC 18; *Pecore v. Pecore* (2005), 19 E.T.R. (3d) 162, (Ont. C.A.); *McLear v. McLear Estate* (2000), 33 E.T.R. (2d) 272 (Ont. S.C.)

If a statute or rule requires a proceeding to be commenced, brought, tried or heard in a particular county, the proceeding shall be commenced at a court office in that county and the county shall be named in the originating process.

If Rule 13.1.01(1) does not apply, i.e. that a statute or rule does not require a proceeding to be commenced in a particular county, then per Rule 13.1.01(2) “the proceeding may be commenced at any court office in any county named in the originating process.”

Section 7(1) of the *Estates Act* requires that an “application for probate shall be filed in the office for the county in which the deceased had their fixed place of abode at the time of death”. If the deceased did not have a fixed place of abode, then section 7(2) of the *Estates Act* allows for the application for probate to be filed “in the county in which the deceased had property at the time of death”.

That an application for probate has been brought in a particular county in accordance with the requirements set out in the *Estates Act* does not necessitate that any subsequent proceeding in relation to the estate must be commenced in the same county in which probate was obtained. A recent decision released by Justice Brown reinforces the simplicity of Rule 13.1.

In *Pearsall Estate*, 2009 CanLII 25140 (Ont. S.C.), Justice Brown directed the Estates Office staff in Toronto to accept the filing of a proceeding in an estate that had been probated in another county. Justice Brown noted that there is “only one type of proceeding mentioned in the Practice Direction for which a statute or rule ‘requires’ it to

be commenced in a particular county”, i.e. section 7(1) or 7(2) of the *Estates Act*. He goes on to state at paragraph 7 of the decision that:

Rule 13.1.01(2) applies to all other applications which may be heard on the Toronto Region Estates List – that is to say, all such other applications can be commenced in Toronto regardless of where the deceased person died, the place of residence of the respondents, or the location of the respondents’ counsel.

Justice Brown notes that Rule 13.1.02 “operates as a safeguard against one party commencing an application in an inappropriate location” by allowing the Respondent(s) to bring a motion to have a proceeding moved. The party so moving would then have to demonstrate that it is “desirable in the interests of justice” for the proceeding to be moved.

CONCLUSION

It is abundantly apparent that a myriad of grounds can give rise to an estate challenge. As practitioners you need to be aware both of the steps that can be taken at the estate planning stage to minimize the occurrence or at least the success of such challenges. As litigators you need to be aware of the options that are available in bringing about a just resolution for your client if they believe they have a solid foundation for challenging someone’s estate plan on the individual’s death.

This paper has been an attempt to give a very broad overview of such potential issues but cannot purport to stand in place of in-depth analysis on a case-by-case basis and further research into each potential challenge.