Law Society of Ontario | Barreau de l'Ontario

THE SIX-MINUTE Estates Lawyer 2018

CHAIRS

Ian Hull, C.S.
Hull & Hull LLP

Marcia Green
Nelligan O'Brien Payne LLP

May 3, 2018

cpd Continuing Professional Development

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Law Society of Ontario | Barreau de l'Ontario

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Chairs: Ian Hull, C.S.
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May 3, 2018
9:00 a.m. to 12:00 p.m.
Total CPD Hours = 2 h 30 m Substantive + 30 m Professionalism

U of T – Chestnut Residence and Conference Centre
Giovanni Room, 2nd Floor
89 Chestnut Street
Toronto, ON

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CLE18-0050201

Agenda

9:00 a.m. – 9:05 a.m. **Welcome and Opening Remarks**

Ian Hull, C.S., *Hull & Hull LLP*

Marcia Green, *Nelligan O'Brien Payne LLP*

9:05 a.m. – 9:12 a.m.	**Predatory Marriages** Kimberly Whaley, C.S., TEP, *WEL Partners*
9:12 a.m. – 9:19 a.m.	**Tips for Gifts to Charities in Wills and Dealing with Charities in an Estate Administration** Mary-Alice Thompson, C.S., TEP, *Cunningham Swan LLP*
9:19 a.m. – 9:26 a.m.	**Common Issues on Applications for Certificates of Appointment and Recent Developments** Satie Seeraj, Registrar and Supervisor of Court Operations, *Ontario Superior Court of Justice,* Bankruptcy/Commercial, Estates and Assessments
9:26 a.m. – 9:33 a.m.	**Cross Border Tax Update** Paul Taylor, *Borden Ladner Gervais LLP*
9:33 a.m. – 9:40 a.m.	**Question and Answer Session**
9:40 a.m. – 9:47 a.m.	**Increasing the Odds of a Successful Mediation** Clare Burns, *WeirFoulds LLP*
9:47 a.m. – 9:54 a.m.	**Hotchpot Clauses** Debra Stephens, Firm Counsel to WEL Partners, *WEL Partners*
9:54 a.m. – 10:01 a.m.	**Life Insurance and RRSP Beneficiary Designations for Minor Children** Susan Stamm, Counsel, Property Rights, Office of the Children's Lawyer, *Ministry of the Attorney General*

10:01 a.m. – 10:08 a.m.	**Evolution of Orders Appointing Estate Trustee During Litigation (ETDL) – What Should be Covered?** Suzana Popovic-Montag, TEP, *Hull & Hull LLP*
10:10 a.m. – 10:17 a.m.	**Interim Orders for Dependant Support** Carol Craig, *Nelligan O'Brien Payne LLP* (via audio conference)
10:17 a.m. – 10:25 a.m.	**Question and Answer Session**
10:25 a.m. – 10:45 a.m.	**Coffee and Networking Break**
10:45 a.m. – 10:52 a.m.	**Estates – Privilege and the Duty of Confidentiality** (7 minutes Ⓟ) Justin de Vries, *de VRIES LITIGATION LLP*
10:52 a.m. – 10:59 a.m.	**Costs and the Impact of Proportionality Considerations** Jordan Atin, C.S., TEP, *Atin Professional Corporation*
10:59 a.m. – 11:06 a.m.	**Conflicts Involving the Role of Estate Trustee and Estate Solicitor** Brendan Donovan, *Wagner Sidlofsky LLP*
11:06 a.m. – 11:14 a.m.	**Accommodating Clients with Disabilities** (8 minutes Ⓟ) Alexander Procope, *Perez Bryan Procope LLP*
11:14 a.m. – 11:20 a.m.	**Question and Answer Session**

11:20 a.m. – 11:27 a.m.	**Disputes over Remains** Jason Ward, *Wards Lawyers* [PC]
11:27 a.m. – 11:34 a.m.	**Canadian Tax Law Update** Michael Morgan, *Ross & McBride LLP*
11:34 a.m. – 11:41 a.m.	**Deathbed Retainers** (7 minutes P) Alexandra Mayeski, *Mayeski Mathers LLP*
11:41 a.m. – 11:48 a.m.	**Pros and Cons of Using a Qualifying Spousal Trust, Alter Ego Trusts and Joint Spousal Trusts** Kathleen Robichaud, *Law Office of Kathleen Robichaud* (via audio conference)
11:48 a.m. – 11:56 a.m.	**Estates and Trusts Hotspots** (8 minutes P) Daniel Pinnington, President & Chief Executive Officer, *Lawyers' Professional Indemnity Company (LAWPRO®)*
11:56 a.m. – 12:00 p.m.	**Question and Answer Session**
12:00 p.m.	**Program Ends**

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Ontario Superior Court of Justice

Submitted by:
Satie Seeraj, Registrar and Supervisor of Court Operations,
Ontario Superior Court of Justice, Bankruptcy/Commercial,
Estates and Assessments

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TAB 1

THE SIX-MINUTE Estates Lawyer 2018

Predatory Marriages

Prepared and presented by:
Kimberly Whaley, C.S., TEP, *WEL Partners*

Prepared by:
Albert Oosterhoff, *WEL Partners*

May 3, 2018

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PREDATORY MARRIAGES

LSUC SIX-MINUTE ESTATES LAWYER

MAY 3, 2018

Kimberly A. Whaley and Albert H. Oosterhoff

www.welpartners.com

INTRODUCTION:[1]

Current and evolving statistics confirm that our population is aging and doing so, rapidly. With age and longevity can come an increase in the occurrence of medical issues affecting cognitive executive functioning. Certain diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, related cognitive disorders and other conditions involving reduced functioning and capability also become more prevalent with age.[2] There are a wide variety of disorders that affect decisional capacity and in turn, increase an individual's susceptibility to becoming vulnerable and dependent. Factors affecting decisional capacity can include, normal aging, disorders such as depression, which are often untreated or undiagnosed, schizophrenia, bipolar disorder, psychotic disorders, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction.[3] These sorts of issues unfortunately invite the opportunity for abuse, elder abuse, and exploitation.

Civil marriages are solemnized with increasing frequency under circumstances in which one party to the marriage is decisionally incapable of understanding, appreciating, and formulating a choice to marry.[4] Indeed, unscrupulous opportunists too often get away with preying upon those older adults with diminished reasoning ability purely for financial profit. An appropriate moniker for this type of relationship is that of the "predatory marriage".[5] This is not a term that is in common use, though it is gaining popularity through media references of late. Given that marriage brings with it a wide range of property and financial entitlements, it does effectively capture the classic situation when one person marries another of limited capacity solely in the pursuit of these financial advantages that come with the union of marriage.[6]

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[1] Authored by Kimberly A. Whaley, Principal of WEL Partners. Paper and analysis updated herein April 2018.
[2] Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70. http://www.canadalawbook.ca.
[3] *Ibid* at 1.
[4] *Ibid*.
[5] *Ibid*.
[6] *Ibid*. at 70.

The overriding problem with such marriages today, is that they are not easily challenged. The current standard or factors to be applied for ascertaining the requisite "capacity to marry" as developed at common law are anything but rigorous. Consequently, requisite capacity is often found by a court, even in the most obvious cases of exploitation. Predatory and exploitive marriages are more likely than not, to withstand challenge because the common law has not kept pace with the reality of the current property rights legislative regime. While some refer to a "test" when speaking of the consideration of factors to be applied to determine requisite decisional capacity to marry, it is important to note that this is a colloquial or lay term only. There is no "test" per se, but rather there are often factors or a standard referenced in case precedent to be applied to determine decisional capacity to marry.

This paper is but a snapshot of the many critical issues, both legal and public policy related, arising from predatory relationships. Those interested in learning more about this topic may wish to refer to ***Capacity to Marry and the Estate Plan*, Canada Law Book,** co-authored by Kimberly Whaley et al., http://www.canadalawbook.ca/Capacity-to-Marry-and-the-Estate-Plan.html[7], "**Predatory Marriages**" (2013) by Albert H. Oosterhoff and "**Predatory Marriages - Equitable Remedies**" (2015) by Kimberly Whaley and Albert H. Oosterhoff.[8]

This paper is by no means exhaustive in its approach or content. The subject matter is broad, and a mere overview of some of the many developing patterns across Canada and beyond are considered, while focusing primarily on the specific challenges arising out of predatory relationships and the decisional capacity to marry.

CAPACITY TO MARRY AND PREDATORY MARRIAGES

1. What is Capacity?

[7] *Supra* note 2.
[8] Albert H. Oosterhoff, "Predatory Marriages" (2013), 33 ETPJ 24, Kimberly Whaley and Albert H. Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014), 34 ETPJ 269.

In law, one is presumed capable unless and until such presumption is legally rebutted. Legal capacity is decision, time, and situation/context specific.[9] The law prescribes decisional capacity requirements in different contexts. An overview of some of the related contexts in which decisional capacity is required include the following:

1. Giving instructions for and execution of a Will or trust. In other words, "testamentary capacity";[10]
2. Making other testamentary beneficiary dispositions legislatively defined;[11]
3. Contracting;[12]
4. Managing property;[13]
5. Managing personal care;[14]
6. Granting or revoking an enduring/continuing power of attorney for property;[15]
7. Granting or revoking a power of attorney for personal care;[16]
8. Consenting to treatment decisions in accordance with the *Health Care Consent Act;*[17]
9. Gifting or selling property;[18]

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[9] *Supra* note 2 at 46

[10] Testamentary capacity is set out in *Banks v. Goodfellow* (1870), L.R. 5 Q.B.D. 549 (Eng.Q.B.); *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; and *Schwartz v. Schwartz*, 10 D.L.R. (3d) 15, 1970, CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. affirmed (1971), 20 D.L.R. (3d) 313, [1972] S.C.R. 150, 1971 CarswellOnt 163 (S.C.C.)

[11] See for example in Ontario under the *Succession Law Reform Act*, RSO 1990, c S 26, "will" includes,
(a) a testament,
(b) a codicil,
(c) an appointment by will or by writing in the nature of a will in exercise of a power, and
(d) any other testamentary disposition. ("testament")

[12] *Hart v O'Connor* [1985] AC1000.

[13] *Substitute Decisions Act,* 1992, S.O. 1992, c.30, as amended, s. 6.

[14] *Ibid.* s.45.

[15] *Ibid*. s. 8.

[16] *Ibid*. s.47.

[17] *Health Care Consent Act*, 1996, SO 1996, c 2, Schedule A, section 41.

[18] *Archer v. St. John,* 2008 A.B.Q.B. 9; *Pecore v. Pecore* [2007] 1 S.C.R. 795; *Re Beaney (Deceased)* [1978] 1 WLR 770 at 774; *Re Morris (Deceased), Special trustees for Great Ormond Street Hospital for Children v Pauline Rushin* [2000] All ER(D) 598.

10. Instructing a lawyer; and

11. Marrying.

The capacity required to grant a power of attorney for property differs from the capacity required to grant a personal care power of attorney, which differs still from the capacity required to actually manage or direct the management of one's property or personal care.[19] And, importantly, as the law currently stands, the decisional capacity to marry may exist despite incapacity in other legal decisions or matters.[20]

The relevant time period to assess capacity is the time at which the decision in issue is made.[21] Legal capacity can fluctuate over time.[22] Capacity is situation-specific in that the choices that a person makes in granting a power of attorney or making a Last Will & Testament are considered by a court in its determination of capacity.[23] For example, if a mother appoints her eldest child as an attorney, under a power of attorney, this choice may be viewed with less suspicion and concern for potential diminished capacity than if she appoints her recently-hired gardener.[24]

Assessing capacity is an imperfect science which further complicates its determination.[25] In addition to professional and expert evidence, lay evidence can also be determinative, if not more so in some situations.[26] The standard and reliability of the capacity assessment conducted varies and this too, can become an obstacle that may need to be overcome in determining capacity with some degree of compelling accuracy.[27]

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[19] *Supra* note 2 at 45
[20] *Ibid.* at 45
[21] *Ibid.* at 46.
[22] *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (3d) 216 (Ont. S.C.J.) The Ontario Court of Appeal held that a cognitively impaired person can fluctuate between being capable and incapable of granting a power of attorney.
[23] *Supra* note 2 at 48.
[24] *Ibid.*
[25] *Ibid*.
[26] *Ibid*.
[27] *Ibid*.

On this point, a 2011 English High Court of Justice, Queen's Bench Division Judgment[28] *Thorpe v. Fellowes Solicitors LLP*, concerning the capacity of a 77 year old Mrs. Hill to enter into a transaction to sell her home and pay the proceeds to her daughter resulted in the eventual claim brought by her son against Mrs. Hill's solicitor for negligence in failing to check mental capacity, appreciate Mrs. Hill's vulnerability, susceptibility to influence, and, *inter alia*, properly investigate the sale transaction.

The Honourable Mrs. Justice Sharp found that there was no evidence of lack of capacity, nor, that the solicitor knew or ought to have known that Mrs. Hill had dementia. Her Honour stated in this regard:

> *A solicitor is generally only required to make enquiries as to a person's capacity to contract if there are circumstances such as to raise doubt as to his in the mind of a reasonably competent practitioner, see Jackson & Powell at 11-221 and by analogy Hall v Estate of Bruce Bennett [2003] WTLR 827. This position is reflected in the guidance given to solicitors in The Guide to the Professional Conduct of Solicitors (8th edition, 1999), which was in force at the relevant time, where it is said that there is a presumption of capacity, and that only if this is called into question should a solicitor seek a doctor's report (with client's consent) "However, you should also make your own assessment and not rely solely upon the doctor's assessment" (at 24.04).*
>
> *In opening, the Claimant's case was put on the basis that Fellowes* [the solicitors] *ought to have been "more careful" with regard to the sale of the Property because Mrs. Hill was suffering from dementia and did not really know what she was doing. The relevant test where professional negligence is alleged however is not whether someone should have been more careful. The standard of care is not that of a particularly meticulous and conscientious practitioner. The test is what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession: see Midland Bank Trust Co Ltd v Hett Stubbs and Kemp [1979] ch 384 at 403 per Oliver J at 403.*
>
> *I should add (since at least part of the Claimant's case seemed to have suggested, at least implicitly, that this was the case) that there is plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary*. [29]

[28] *Thorpe v Fellowes Solicitors LLP*, [2011]EWHC 61 (QB), (21 January 2011)[*Thorpe]*
[29] *Thorpe* at paras 75-77.

It should also be noted that despite clear academic acknowledgement within the legal and medical profession that the types of " decisional capacities" identified at law do not fall along a threshold-based hierarchy, in practice (including in cases discussed below[30]) there nonetheless appears to be a tendency to apply such a model.[31] While it is tempting to assume that requisite decisional capacity merely consist of a spectrum, with various decisions requiring higher or lower thresholds in terms of identifying the applicable criteria to ground a finding of incapacity, the reality is that the process at law is much more intricate.[32]

2. Capacity to Marry: Historical Context

Marriage vows often include promises to be exclusive, to stay together until death, and to provide mutual support.[33] Yet, at the time of marriage, parties regularly, as a matter of course, fail to consider other relevant facets of the marital union; namely, the obligation to provide financial support, the enforced sharing of equity acquired during the marriage, and the impact it has on the disposition of one's estate.[34]

Currently, in Canada, to enter into a marriage that cannot be subsequently voided or declared a nullity, there must be a minimal understanding of the nature of the contract of marriage.[35] No party is required to understand all of the consequences of marriage. The reason for this is that cases dealing with claims to void or declare a marriage a nullity on the basis of incapacity often cite long-standing classic English cases, such as *Durham v. Durham*,[36] which collectively espouse the following principle: "the contract of marriage is a very simple one, one which does not require a high degree of intelligence to comprehend."[37] Current legal treatment is still unsettled and given the demographics of

[30] See *Babiuk v. Babiuk*, 2014 SKQB 320 (CanLII), *Ross-Scott v. Potvin* 2014 BCSC 435 and *Devore-Thompson v. Poulian* 2017 BCSC 1289.
[31] Kimberly A. Whaley, Kenneth I. Shulman & Kerri L. Crawford, "The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective" (2016) Advocates' Q Vol 45 No 4 at 395.
[32] *Supra* note 31 at 419
[33] *Supra* note 2 at 50.
[34] *Ibid.* at 50.
[35] *Ibid.* at 50.
[36] *Durham v. Durham* (1885), 10 P.D. 80 [*Durham*].
[37] *Durham* at 82.

our population and those older adults affected by these predatory unions, the law is in immediate need of clarity whether that be legislatively or at common law.

The Historical Development of Capacity to Marry

Several common themes appear to emerge from a comprehensive review of historical cases on the question of decisional and requisite capacity to marry. These themes are summarized here:

1. That the factors for determining the requisite decisional capacity to marry are equivalent to those of the requisite capacity to contract;

2. That marriage has a distinct nature of rights and responsibilities which must be able to be appreciated;

3. That the contract of marriage is a simple one, not requiring a high degree of intelligence to negotiate; and

4. That the factors for determining the requisite capacity to marry are the same as the factors for ascertaining requisite capacity to manage property; or even still that it requires both the requisite capacity to manage the person and property.

Marriage as a Civil Contract

From a review of the old English cases, there emerges a notion that the requisite capacity to marry is equivalent to the capacity to enter into a civil contract. Thus, for instance, in the case of *Lacey v. Lacey (Public Trustee of),*[38] the marriage contract is described in the following manner:

> Thus at law, the essence of a marriage contract is an engagement between a man and a woman to live together and to love one another as husband and wife to the exclusion of all others. It is a simple contract which does not require high intelligence to comprehend. It does not involve consideration of a large variety of circumstances required in other acts involving others, such as in the making of a Will. In addition, the character of consent for this particular marriage did not involve consideration of other circumstances normally

[38] *Lacey v. Lacey (Public Trustee of)* [1983] B.C.J. No. 1016 [*Lacey*].

> required by other persons contemplating marriage - such as establishing a source of income, maintaining a home, or contemplation of children. Were the parties then capable of understanding the nature of the contract they were entering into?[39]

As is evident from *Lacey v. Lacey*, historically, the contract of marriage was considered to be "simple" one, perhaps relevant at the time and more in line with social norms of that day. This case and the result, is consistent with the case of *Durham v. Durham*, where Sir James, Hannen stated:

> *I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend*.[40]

In the case of *In the Estate of Park, Deceased*,[41] Justice Singleton was faced with making a determination as to whether the deceased had the requisite capacity to marry. His articulation of how to determine the validity of marriage was as follows:

> *In considering whether or not a marriage is invalid on the ground that one of the parties was of unsound mind at the time it was celebrated the test to be applied is whether he or she was capable of understanding the nature of the contract into which he or she was entering, free from the influence of morbid delusions on the subject. To ascertain the nature of the contract of marriage a person must be mentally capable of appreciating that it involves the duties and responsibilities normally attaching to marriage.*

This decision enumerated a number of other factors to consider but does not provide a definitive criteria to apply. Moreover, starting from the proposition that the contract of marriage is a simple one, Birkett L.J., contributed further as follows:

> *The contract of marriage in its essence is one of simplicity. There can be degrees of capacity apart from soundness of mind. It is understandable that an illiterate man, perfectly*

[39] *Lacey* at para.3.
[40] *Durham* v. *Durham*, (1885), 10 P.D. 80 at p.82.
[41] *Estate of Park, Park v. Park* [1954] p. 112, C.A.; aff'g, *Park* v. *Park*, [1953] All E.R. Reports [Vol. 2] at 1411 [*Estate of Park*].

> *sound of mind, but not of high quality, might be able to understand the contract of marriage in its simplicity, but who, coming into a sudden accession of wealth, might be quite incapable of making anything in the nature of a complicated will, but degrees of unsoundness of mind cannot have much relevance to the question whether it is shown that a person was not mentally capable of understanding the contract into which he or she had entered*.[42]

Karminski J., took the position that there is "a lesser degree of capacity ... required to consent to a marriage, than in the making of a Will."[43] In his view, the determination of a valid marriage is as follows:

> i. *the parties must understand the nature of the marriage contract;*
> ii. *the parties must understand the rights and responsibilities which marriage entails;*
> iii. *each party must be able to take care of his or her person and property;*
> iv. *it is not enough that the party appreciates that he is taking part in a marriage ceremony or that he should be able merely to follow the words of the ceremony; and*
> v. *if he lacks that which is involved under heads (i), (ii) and (iii) the marriage is invalid...The question for consideration is whether he sanely comprehended the nature of the marriage contract*.[44]

While the Court clearly struggled with developing an appropriate process for determining requisite decisional capacity to marry, it concluded that the capacity to marry is essentially equivalent to the capacity to enter into any binding contract.

The case of *Browning v. Reane*[45] concerned a marriage between a woman, Mary Reane, who, at the time of her marriage was 70 years old; her husband 40. The case was heard after the wife had passed away. The court concluded that the marriage was legally invalid by virtue of the fact that the deceased had been incapable of entering into the marriage.

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[42] *Estate of Park* at 1411.
[43] *Estate of Park* at 1425.
[44] *Estate of Park* at 1417.
[45] *Browning* v. *Reane* (1812), 161 E. R. 1080, [1803-13] All E.R. Rep. 265 [*Browning*].

In reaching this conclusion, the court addressed the concept of consent and observed the following:

> *A fourth incapacity is, want of reason; without a competent share of which, as no others, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and, consequently, that his marriage was valid. A strange determination!*
>
> *Since consent is absolutely requisite to matrimony; and neither idiots, nor lunatics, are capable of consenting to anything; and, therefore, the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not be in a lucid interval, was absolutely void." [Mr. Justice Blackstone]*
>
> *Here, then, the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy, or from both combined, nor does it seem necessary, in this case, to enter into any disquisition of what is idiocy, and what is lunacy. Complete idiocy, total fatuity from the birth, rarely occurs; a much more common cause is mental weakness and imbecility, increased as a person grows up and advances in age from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either or both causes,* ***that the party is incapable of understanding the nature of the contract itself, and incapable from mental imbecility to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract,*** *any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract, though it may not be difficult, in most cases, to decide upon the result of the circumstances, and this appears to be a case of that description, the circumstances being such as to leave no doubt upon my mind*.[46]

This decision [as bolded] would later be reviewed and adopted by Ontario courts.

The Distinct Nature of Marriage

[46] *Browning* at 1081.

There is yet another line of still historical cases which suggest that marriage, as an institution, is distinct, and that decisional capacity to marry requires an appreciation of the duties and responsibilities that attach to the particular union. As such, in the case of *Durham, supra,* the question raised and answered by the court was, "whether or not the individual had capacity to understand the nature of the contract, *and* the duties and responsibilities which it creates?" [emphasis added].

The principle that it is necessary to understand and appreciate the responsibilities which marriage creates, above and beyond an understanding of the nature of marriage as a contract, was then echoed in the case of *Spier v. Spier*,[47] where Willmer J. stated:

> *…it was not sufficient merely to be able to understand the words of the ceremony or even to know that the party was going through a ceremony. There must be capacity to understand the nature of the contract and the duties and responsibilities which it created, and from Browning v. Reane…**there must also be a capacity to take care of his or her own person and property**…But as pointed out in Durham, supra, marriage was a very simple contract which did not require a high degree of intelligence to contract; certainly it did not call for so high a degree of mental capacity as the making of a will*.[48]

Notably, again, the Court seemed to expand its consideration even further and stated that "there must also be a capacity to take care of both his/her own person and property."

The Simplicity of the Marriage Contract

As evinced by the decisions discussed, the courts historically viewed marriage not only as a mere contract, but a simple one at that. Paraphrasing the Court in *In the Estate of Park, supra,* "marriage is in its essence a simple contract which any person of either sex of normal intelligence should readily be able to comprehend."[49] The Court in *Hunter v.*

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[47] *Spier v. Benyen (*sub nom. *Spier Estate, Re*) [1947] W.N. 46 (Eng. P.D.A.); *Spier* v. *Spier* [1947] The Weekly Notes, at para. 46 per Willmer J.
[48] *Ibid*. at 46.
[49] *Estate of Park, Park v. Park,* [1954] p. 112, C.A. affirming; *Park* v. *Park*, [1953] All E.R. Reports [Vol. 2] at 1411 at 1411.

Edney[50] held the very same view, stating: "no high intellectual standard is required in consenting to a marriage."[51] Notably focusing on consent to the marriage as opposed to decisional capacity to enter into the contract of marriage.

Capacity to Marry Considered the Same as Capacity to Manage Property

An alternative view of the requisite decisional capacity to marry can be seen to be evolving in the jurisprudence as was referenced above in the cases of *Browning v. Reane,* and *Spier, supra*. The Court in *Browning v. Reane* stated that for a person to be capable of marriage, they must be capable of managing their person and their property. Similarly, in *Spier, supra*, the Court stated that one must be capable of managing their property, in order to be capable of marrying.

Concluding Summary

From a historical perspective, it is apparent that there is no single or complete definition of marriage, or, of the requisite decisional capacity to marry, or even what the consent to marry involves. Rather, on one end of the judicial spectrum, there is the view that marriage is but a mere contract, and a simple one at that. Yet, on the other end of the spectrum, several courts have espoused the view that the requirement to marry is not so simple; rather, one must be capable of managing one's person or one's property, or both, in order to enter into a valid marriage.

3. Statutory Requirements

Some, but not all, provinces and territories in Canada have marriage legislation that contemplates the necessity of capacity in order to marry. For example, certain statutes prevent a marriage commissioner from issuing a license to, or solemnizing the marriage of someone known, or with reasonable grounds believe an individual lacks mental

[50] *Hunter* v. *Edney*, (1881) 10.P.D. 93.
[51] *Hunter* v. *Edney*, (1881) 10.P.D. 93 at 95-96.

capacity to marry,[52] is incapable of giving a valid consent,[53] or who has been certified as mentally disordered.[54]

At a glance, in Manitoba, certain rigorous precautions exist. For instance, persons certified as mentally disordered cannot marry unless a psychiatrist certifies in writing that the individual is able to understand the nature of marriage and its duties and responsibilities.[55] In fact, a person who issues a marriage license or solemnizes the marriage of someone who is known to be certified as mentally disordered, will be guilty of an offence and liable on summary conviction to a fine.[56]

Section 7 of Ontario's *Marriage Act* prohibits persons from issuing a license to or solemnizing the marriage of any person who, based on what he/she knows, or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs *or for any other reason*.[57]

In British Columbia, it is a criminal offence to issue a license for a marriage, or to solemnize a marriage, when the authority in question knows or has reason to believe that either of the parties to the marriage is mentally disordered or impaired by drugs or alcohol.[58] The B.C. legislation Act further provides that a caveat can be lodged with an issuer of marriage licenses against the issuing a license to persons named in the caveat.[59] Once lodged, the caveat prevents the issuing of a marriage license until the issuer has inquired about the caveat and is satisfied the marriage ought not to be obstructed, or the

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[52] Section 7 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3, provides: "No person shall issue a license to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason."
[53] *Marriage Act*, R.S.N.W.T. (Nu.) 1988, c. M-4 (Nunavut).
[54] *The Marriage Act*, CCSM c. M50.
[55] *The Marriage Act*, CCSM c. M50, section 20.
[56] *The Marriage Act*, C.C.S.M. c. M50, sub-section 20(3).
[57] Section 7 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3, provides: "No person shall issue a license to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason."
[58] *Marriage Act*, RSBC 1996 chapter 282, section 35.
[59] *Ibid*, s. 23.

caveat is withdrawn by the person who lodged it.[60] However, there are no reported cases citing section 35 of the B.C. legislation Act, which suggests that offences under this legislation, if they occur, are not prosecuted. The writer has been told, however, by B.C. counsel that this provision is successfully used for protective purposes where predatory marriages are suspected. Discussion with lawyers in British Columbia suggests further, however, that the caveat system, although useful in theory, is not fully implemented; we understand that there is no centralized, searchable roster of caveats lodged in the province.

Where provincial or territorial legislation is silent on this issue of capacity and marriage (Nova Scotia, Prince Edward Island, New Brunswick and Yukon) common law dictates that a marriage may be found to be void *ab initio* if one or both of the spouses did not have the requisite mental capacity to marry.

As such, whether by statute or at common law, every province requires that persons have legal capacity in order to consent to, and therefore enter into a valid marriage.

In spite of the various legislation on commissioning a marriage it appears there is no diligence in heeding the provisions as marriages continue to be convened where there is no apparent attention paid to capacity and consent.

4. Marriage and Property Law: Consequences of a Predatory Marriage

To truly appreciate why predatory marriages can be so problematic, it is necessary to understand what financial and property entitlements are gained through marriage.

Put in context, it is also important to note that in many Canadian provinces, marriage automatically revokes a Will or other testamentary document. An exception applies where there is a declaration in the Will that it is made specifically in contemplation of marriage.[61]

[60] *Ibid*, subsection 23(2).
[61] Marriage revokes a will in all provinces except, British Columbia, Alberta and Quebec. See the *Wills Act*, RSNB 1973, c W-9 (New Brunswick), *Probates Act*, RSPEI 1988, c P-21 (PEI), *Wills Act*, RSNL

This revocation of a Will upon marriage can raise serious consequential issues when a vulnerable adult marries but yet lacks the requisite capacity to make a new Will thereafter or even dies before a new Will can be executed.

For example, the vulnerable adult unaware or unable to make a new Will, will die intestate and the predator will likely inherit under provincial intestacy legislation. In Ontario, under the intestacy provisions of Part II of the *Succession Law Reform Act*,[62] when a person dies intestate in respect of property and is survived by a married spouse and not survived by issue, the spouse is entitled to the property absolutely. Where a spouse dies intestate in respect of property having a net value of more than $200,000.00 and is survived by a spouse and one child, the spouse is entitled to the $200,000.00 absolutely (the "preferential share") and the remaining assets are split ½ to the spouse and ½ to the child. If the deceased had more than one child, the spouse will get the preferential share of $200,000.00, along with one third of the remaining estate funds.

Some provinces have now recognized this inequity as an issue and have enacted legislation to prevent revocation of Wills upon marriage. Marriage does not revoke a Will in Quebec. Alberta's *Wills and Succession Act* came into force on February 1, 2012, and under that act marriage now no longer revokes a Will.[63] British Columbia followed suit and on March 31, 2014, the new *Wills, Estates and Succession Act* ("WESA") came into force.[64] Under WESA, marriage now no longer revokes a Will. Ontario has not followed suit in spite of the advocacy that goes hand in hand with this article.

In addition to the testamentary consequences of marriage, in all Canadian provinces, marriage comes with certain statutorily-mandated property rights as between spouses. In Ontario, the surviving spouse is entitled to elect and apply to either take pursuant to the intestate succession provisions as set out in the *Succession Law Reform Act (the*

1990, c W-10 (Newfoundland), Succession Law Reform Act, RSO c S 26 (Ontario), *The Wills Act*, CCSM c W 150 (Manitoba), *The Wills Act*, 1996, c W-14.1 (Saskatchewan), *Wills Act* RSNWT (Nu), 1988 c W-5 (Nunavut, Northwest Territories), and *Wills Act*, RSY 2002 c 230 (Yukon).

[62] *Succession Law Reform Act*, RSO 1990, c. S. 26, ss.44-49.

[63] *Wills and Succession Act,* SA 2010, c W-12.2.

[64] *Wills, Estates and Succession Act*, SBC 2009 c 13.

"SLRA"), or to elect to receive an equalization payment pursuant to the Ontario *Family Law Act* ("*FLA")*.[65]

There are legitimate and important policy reasons underlying this statutorily-imposed wealth-sharing regime which has developed over time. Using the marital property provisions of Ontario's *FLA* as an example, section 5(7) of the FLA sets out its underlying policy rationale as follows:

> The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6).

Arguably however, this policy rationale does not really apply to a predatory marriage scenario, with the usual hallmarks including, situation, in which one party is significantly older than the other, holds the bulk, if not all of the property, wealth and finances in the relationship; where there are no children of the union; and where the other party offers little by way of financial contribution. Such a relationship is not, as the property legislation presumes, an equal contribution partnership, whether financial or otherwise.

As is apparent, in some provinces, the marital legislation is extremely powerful in that it dramatically alters the legal and financial obligations of spouses and has very significant consequences on testate and intestate succession, to such an extent that spouses are given primacy over the heirs of a deceased person's estate. For example, Ontario's *SLRA* permits, under Section 58, a spouse to claim proper and adequate support as a dependant of a deceased, whether married, or living common law. Interestingly, in decision of *Blair v. Cooke (Allair Estate)*[66] Belleghem J. determined that two different women, simultaneously spouses of the deceased, were not precluded from both obtaining a support award from the Estate.

[65] *Family Law Act,* RSO 1990, c F.3
[66] *Blair v. Cooke* (Allair Estate) 2011 ONSC 498 (Can LII).

The inherent difficulty with a predatory marriage is in reconciling the injustice caused to the vulnerable and/or incapable person (and the legitimate heirs, if any), since such unions are not easily challenged because of common law developments. These common law factors employed to determine the requisite capacity to marry, have historically been set at a fairly low threshold. Common law precedent has simply not kept pace at all with the development of legislation that has been designed to promote and protect property rights.

5. Predatory Marriages/Capacity to Marry: Cross-Canada Look at More Modern Case Law

Predatory marriages are on the rise world-wide, irrespective of country, ethnicity or culture. There is a pattern that has emerged that makes these types of unions easier to spot. Such unions are usually characterized by one spouse who is significantly advanced in age and, because of a number of potentially complicating factors, which range from the loneliness consequent upon losing a long-term spouse, illness, mental incapacity, or dependency, the person is vulnerable, and thus more susceptible to exploitation. These unions are frequently clandestine – with sudden or gradual isolation, alienation and sequestering from friends, family and loved ones being a tell-tale red flag that the relationship is not as it appears. The following cases address these issues of decisional capacity and the "capacity to marry" and involve similar fact situations: *Cadieux v. Collin-Evanoff*,[67] *Hart v. Cooper*,[68] *Banton v. Banton*,[69] *Barrett Estate v. Dexter*,[70] *Feng v. Sung Estate*,[71] *Hamilton Estate v Jacinto,*[72] *A.B. v. C.D.,*[73] *Petch v. Kuivila,*[74] *Ross-Scott v. Potvin,*[75] *Juzumas v. Baron*,[76] *Elder Estate v. Bradshaw*,[77] and most recently, *Asad v.*

[67] *Cadieux v Collin-Evanoff*, 1988 CanLII 524 (QCCA)
[68] *Hart v. Cooper,* 1994 CanLII 262 (BCSC).
[69] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at 244.
[70] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII).
[71] *Feng v Sung Estate,* 2003 CanLII 2420 (ONSC)
[72] *Hamilton v. Jacinto*, 2011 BCSC 52 (CanLII).
[73] *A.B.v. C.D.* 2009 BCCA 200.
[74] *Petch v. Kuivila* 2012 ONSC 6131.
[75] *Ross-Scott v. Potvin* 2014 BCSC 435.
[76] *Juzumas v. Baron* 2012 ONSC 7220.
[77] *Elder Estate v. Bradshaw* 2015 BCSC 1266.

Canada (Citizenship and Immigration)[78] *Devore-Thompson v. Poulain*,[79] *Hunt v. Worrod*,[80] and *Chuvalo v. Chuvalo*[81].

1988 - Cadieux v Collin-Evanoff (Quebec)[82]

In *Cadieux v Collin-Evanoff*, a caregiver secretly married a 75 year old man dying of colon cancer. She had known him for several years, he had dinner at her house regularly and when he became ill she looked after him on a remunerated basis. Shortly before the marriage, the older adult executed a new Will leaving everything to his new caregiver wife (marriage does not revoke a Will in Quebec). His previous Will had left his estate to his brothers and sisters. He also executed a marriage contract containing a gift of a building in which the caregiver was a tenant and sold the family home for a price well below market value to someone the caregiver knew.

The older adult's family was not told of his marriage and the only witnesses to the marriage were the two people who had witnessed his new Will, one of whom who was the purchaser of the family home. While the Quebec Superior Court was not asked to address whether the older adult had the requisite capacity to marry, they did however set aside the new Will as well as the marriage contract gift on the grounds of lack of capacity and undue influence. This decision was upheld on appeal.

1994 - Hart v. Cooper (BC)[83]

The case of *Hart v. Cooper* involved a 76 year old man who married a woman 18 years his junior. The couple married in a civil marriage ceremony. As is generally the case, the marriage automatically revoked a Will the older adult had made six years prior, which named his three children as the beneficiaries of his Estate. His children challenged the

[78] *Asad v Canada (Citizenship and Immigration)* 2017 CanLII 37077 (CA IRB).
[79] *Devore-Thompson v. Poulain*, 2017 BCSC 1289.
[80] *Hunt v. Worrod,* 2017 ONSC 7397.
[81] *Chuvalo v. Chuvalo*, 2018 ONSC 311.
[82] 1988 CanLII 524 (QC CA)
[83] 1994 CanLII 262 (BCSC).

validity of his marriage on the ground that their father lacked the mental capacity to contract a marriage. Allegations were also made of alienation by the new wife of their father.

Referring to the cases of *Durham v. Durham*, *Hunter v. Edney*, and *Cannon v. Smalley*, the British Columbia Supreme Court reiterated the classic historical determination of the requisite decisional capacity to marry. Factors which included and rely on the concept of marriage as a "*simple contract*":

> *A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates. The recognition that a ceremony of marriage is being performed or the mere comprehension of the words employed and the promises exchanged is not enough if, because of the state of mind, there is no real appreciation of the engagement entered into; Durham v. Durham; Hunter v. Edney (otherwise Hunter); Cannon v. Smalley (otherwise Cannon) (1885), L.R. 10 P.D. 80 at 82 and 95. But the contract is a very simple one - - not at all difficult to understand*.[84]

The Court then proceeded to describe the appropriate burden of proof as follows:

> *Where, as here, a marriage has, in form, been properly celebrated, the burden of proving a lack of mental capacity is borne by the party who challenges the validity. What is required is proof of a preponderance of evidence. The evidence must be of a sufficiently clear and definite character as to constitute more than a "mere" preponderance as is required in ordinary civil cases: Reynolds v. Reynolds (1966), 58 W.W.R. 87 at 90-91 (B.C.S.C.) quoting from Kerr v. Kerr* (1952), 5 W.W.R. (N.S.) 385 (Man. C.A.).[85]

The Court in this case did not accept the medical evidence of the husband's incapacity and concluded that the burden of proof borne by the three children had not been discharged. The Court commented that there was no evidence proffered to suggest that the young wife ever profited financially from the current marriage or her previous marriages. Additionally, the Court found that the wife's motivation in marrying was not otherwise relevant to the determination of the husband's mental state at the time of the

[84] *Hart v. Cooper,* 1994 CanLII 262 (BCSC) at 9.
[85] *Ibid.*

marriage ceremony. Accordingly, the marriage was upheld as valid, and the Will previously executed remained revoked.

It is difficult to determine from the written reasons in this case whether and to what extent the court considered the allegations of alienation and potentially predatory circumstances that the family asserted. No significant analysis was made by the Court of the allegations of alienation or whether the husband fully understood the financial consequences of marriage or the impact of marriage on his property rights. Consequently, the case makes no advancements in defining the "*duties and responsibilities"* that attach to a marriage contract, nor what must ultimately be understood by those entering into the contract of marriage. In a consistent application of the historical case law, *Hart v. Cooper* therefore, again, affirms the age-old principle that the contract of marriage is but a simple one.

1998 - Banton v. Banton (Ontario)[86]

When Mr. Banton was 84 years old, he made a Will leaving his property equally among his five children. Shortly thereafter, Mr. Banton moved into a retirement home. Within a year of moving into a retirement home, he met Muna Yassin, a 31-year old waitress who worked in the retirement home's restaurant. At this time, Mr. Banton was terminally ill with prostate cancer and was castrated. He was also, by all accounts, depressed. Additionally, he was in a weakened physical state as he required a walker and was incontinent.

Yet, in 1994, at 88 years of age, Mr. Banton married Ms. Yassin at her apartment. Two days after the marriage, he and Ms. Yassin met with a solicitor who was instructed to prepare a Power of Attorney in favour of Ms. Yassin, and a Will, leaving all of Mr. Banton's property to Ms. Yassin. Identical planning documents were later prepared after an assessment of Mr. Banton's capacity to manage his property and to grant a Power of Attorney. However, in 1995, shortly after the new identical documents were prepared, a

[86] *Banton v Banton,* 1998, 164 DLR (4th) 176 at 244 [*Banton*].

further capacity assessment was performed, which found Mr. Banton incapable of managing property, but capable with respect to personal care. Mr. Banton died in 1996.

Mr. Banton's children raised a number of issues before the Court, including the following: whether Mr. Banton had capacity to make Wills in 1994 and 1995; whether the Wills were procured by undue influence; and whether Mr. Banton had capacity to enter into marriage with Ms. Yassin.

Justice Cullity found that Mr. Banton did not have testamentary capacity to make the Wills in 1994 and 1995 and that the Wills were obtained through undue influence. In spite of these findings and the fact that the marriage to Ms. Yassin revoked all existing Wills, Cullity J. held that Mr. Banton did have the capacity to marry.

Justice Cullity reviewed the law on the validity of marriages, emphasizing the disparity in the standards or factors to determine requisite testamentary capacity, capacity to manage property, capacity to give a power of attorney for property, capacity to give a power of attorney for personal care and capacity to marry according to the provisions of Ontario's *Substitute Decisions Act, 1992,* SO 1992, c 30.[87]

Although Justice Cullity observed that Mr. Banton's marriage to Ms. Yassin was part of her "carefully planned and tenaciously implemented scheme to obtain control, and, ultimately, the ownership of [Mr. Banton's] property", he did not find duress or coercion under the circumstances. In his view, Mr. Banton had been a "willing victim" who had "consented to the marriage."[88] Having found that Mr. Banton consented to the marriage, the Court found it unnecessary to deal with the questions whether duress makes a marriage void or voidable, and, if the consequence is that the marriage is voidable, whether it can be set aside by anyone other than the parties.[89] In reaching this conclusion,

[87] *Banton.* at para.33.
[88] *Ibid.* at para.136.
[89] *Ibid.* In Canadian law, a marriage may be either void or voidable. It is void if either party lacks capacity to marry, in which case anyone with an interest, such as a child of a previous marriage, or the personal representative has standing to attack the marriage on that ground. In contrast, undue influence and duress render a marriage voidable only. In this case, only the parties have standing to contest the validity

Cullity J. importantly, drew a significant distinction between the concepts of "consent" and of "capacity," finding that a lack of consent neither presupposes nor entails an absence of mental capacity.[90]

The Court commenced its analysis of requisite decisional capacity to marry with the "well-established" presumption that an individual will not have capacity to marry unless capable of understanding the nature of the relationship and the obligations and responsibilities it involves.[91] In the Court's view, however, the factors to be met are not particularly rigorous. Consequently, in light of the fact that Mr. Banton had been married twice before his marriage to Ms. Yassin and despite his weakened mental condition, the Court found that Mr. Banton had sufficient memory and understanding to continue to appreciate the nature and the responsibilities of the relationship to satisfy what the court described as "the first requirement of the test of mental capacity to marry."

Justice Cullity then turned his attention to whether or not, in Ontario law, there was an "additional requirement" for requisite mental capacity to marry:

> *An additional requirement is, however, recognized in the English authorities that have been cited with approval in our courts. The decision to which its source is attributed is that of Sir John Nicholl in Browning v. Reane (1812), 161 E.R. 1080 (Eng. Ecc.) where it was stated:*
>
> > *If the capacity be such ... that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of his or her person and property by the matrimonial contract, any more than by any other contract. at pp. 70-1*
>
> *The principle that a lack of ability to manage oneself and one's property will negative capacity to marry was accepted and, possibly extended, by Willmer J. in Spier v. Bengen, [1947] W.N. 46 (Eng.*

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of the marriage and only while both parties are living. Other interested persons lack standing, although not all courts seem to be aware of the distinction. See Oosterhoff, Predatory Marriages, *supra*, footnote 2, §3.2.

[90] *Ibid.* at paras. 140-41.

[91] *Banton* at para.142.

P.D.A.) where it was stated:

> *There must be a capacity to understand the nature of the contract and the duties and responsibilities which it created, and ... there must also be a capacity to take care of his or her own person and property. at p. 46*

In support of the additional requirement, Justice Cullity also cited *Halsbury* (4th edition, Volume 22, at para. 911) for "*capacity to marry at common law*":

> *Whether a person of unsound mind was capable of contracting a valid marriage depended, according to ecclesiastical law to which the court had to have regard, upon his capacity at the time of the marriage to understand the nature of the contract and the duties and responsibilities created, his freedom or otherwise from the influence of insane delusions on the subject, and his ability to take care of his own person and property*.

Justice Cullity however found that the passages quoted were not entirely consistent. In his view, Sir John Nicholl's statement in *Browning v. Reane* appeared to suggest both incapacity to manage oneself, as well as one's property was required for the requisite capacity to marry; whereas Willmer J.'s statement in *Re Spier* could be interpreted as treating incapacity to manage property, by itself, as sufficient to give rise to a finding of incapacity to marry. Notably, Halsbury's statement was not precise on this particular question either.

In the face of this inconsistency in the jurisprudence, Justice Cullity looked to the old cases and statutes and found that implicit in the authorities, dating at least from the early 19th century, emphasis was placed on the presence (or absence) of an ability to manage oneself *and* one's affairs, including one's property. It is only with the enactment of the *Substitute Decisions Act* that the line between capacity of the person and capacity respecting property has been drawn more sharply. In light of the foregoing, His Honour made explicit his preference for the original statement of the principle of capacity to marry in *Browning v. Reane*. In his view, while marriage does have an effect on property rights and obligations, "to treat the ability to manage property as essential to the relationship

would [...] be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate."

Despite articulating what would, at the very least, be a dual standard to be applied for determining decisional capacity to marry (one which requires a capacity to manage one's self *and* one's property) and despite a persuasive medical assessment which found Mr. Banton incapable of managing his property, Justice Cullity held somewhat surprisingly, that Mr. Banton did have the capacity to marry Ms. Yassin and declined to find the marriage invalid or void. Justice Cullity made this determination in spite of the fact that he found that at the time of Mr. Banton's marriage to Ms. Yassin, Mr. Banton's "*judgment was severely impaired and his contact with reality tenuous*." Moreover, Justice Cullity made his decision expressly "on the basis of *Browning v. Reane*." Notably, earlier in his reasons, Cullity J., stated that *Browning v. Reane* is the source to which the "*additional requirement"* is attributed, which requirement goes beyond a capacity to understand "*the nature of the relationship and the obligations and responsibilities it involves*" and, as in both *Browning v. Reane* and *Re Spier*, extends to capacity to take care of one's own person *and property*. That said, unfortunately there was no known expert evidence put forward to the court either in the form of retrospective or commensurate evidence on the concurrent of Mr. Banton's capacity to marry. Justice Cullity may not have had available to him the evidence to consider any other result particularly given the restricting and limiting common law standard for determining capacity to marry. Perhaps with the appropriate evidence including if available, medical evidence there could have been a different outcome.

2000 - Barrett Estate v. Dexter (Alberta)[92]

In sharp contrast to the holding in *Banton*, in *Barrett v. Dexter* ("*Barrett*") the Alberta Court of Queen's Bench declared the marriage performed between Arlene Dexter-Barrett and

[92] 2000 ABQB 530.

Dwight Wesley Barrett to be a nullity based upon a finding that Mr. Barrett lacked the legal capacity to enter into any form of marriage contract.

The case involved a 93 year old widower, Mr. Dwight Barrett, who made the acquaintance of a woman almost 40 years his junior, Arlene Dexter-Barrett. They met in a seniors club where Mr. Barrett was a regular attendee. In less than a year or so, Ms. Barrett began renting a room in Mr. Barrett's house. As part of the rental agreement entered into, Ms. Dexter was to pay $100.00/month and do some cooking and cleaning of the common areas of the home.

Not long after she moved in, however, Mr. Barrett's three sons became suspicious of the increasing influence that Ms. Dexter was exerting over their father. In September of that year, only months after she had moved in, Mr. Barrett apparently signed a hand-written memorandum which gave Ms. Dexter the privilege of living in his home until one year after his death. The one year term was later crossed out and initialed, giving Ms. Dexter the privilege of living in the home for the duration of her lifetime and at the expense of the Estate.

Mr. Barrett's withdrawals from the bank began to increase in both frequency and amount. Ms. Dexter then made an appointment with a marriage commissioner, and her daughter and son-in-law were to attend as witnesses. The marriage was not performed as the son-in-law apparently had a change of heart about acting as a witness. Ms. Dexter then made another appointment with a different marriage commissioner. On this occasion, the limousine driver and additional taxi cab driver acted as witnesses. Mr. Barrett advised his grand-daughter of the marriage when she came to visit him the day after the wedding. Mr. Barrett proceeded to draft a new Will, appointing his new wife as executor, and giving to her the house and furniture as well as the residue of his estate.

A capacity assessment was conducted shortly thereafter and Mr. Barrett's son brought an application to declare the marriage a nullity on the basis of lack of mental capacity to marry, or alternatively, that Mr. Barrett was unduly influenced by Ms. Dexter such that he was not acting of his own initiative.

In reviewing the evidence, the Court noted that at the time of the marriage, Mr. Barrett told the marriage commissioner that he believed the marriage was necessary in order for him to avoid placement in a nursing home (evidence of undue influence). There was evidence of alienation by Ms. Dexter, including removal by her of family pictures from Mr. Barrett's home and interference by her with planned family gatherings. Ms. Dexter was also accused of speaking for Mr. Barrett and advising him against answering his son's questions and of writing documents on Mr. Barrett's behalf.

Not only were all of the assessing doctors unanimous in their finding that Mr. Barrett lacked the capacity to marry, they also found that Mr. Barrett had significant deficiencies which prevented him from effectively considering the consequences of his marriage on his family and estate. On the issue of capacity to marry, one of the doctors, Dr. Malloy, opined that a person must understand the nature of the marriage contract, the state of previous marriages, and one's children and how they may be affected. Dr. Malloy testified that it is possible for an assessor or the court to set a high or low threshold for this measurement, but that in his opinion, "no matter where you set the threshold, Dwight [Mr. Barrett] failed".[93] In considering the evidence before it, the court cited a decision of the Alberta Court of Appeal of *Chertkow v. Feinstein (Chertkow)*[94] which employed the factors set out in *Durham v. Durham*:

> *What must be established is set out in Durham v. Durham (1885 10 P.D. 80) at p. 82 where it is stated that the capacity to enter into a valid contract of marriage is "A capacity to understand the nature of the contract, and the duties and responsibilities which it creates*".[95]

According to the Court, the onus rests on the Plaintiff who attacks the marriage to prove on a preponderance of evidence that a spouse lacked the capacity to enter into the marriage contract. Applying the law to the facts, the Court noted that while the opinions of medical experts were not determinative in and of themselves, and had to be weighed in light of all of the evidence, in this case the medical evidence adduced by the Plaintiff

[93] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII) at 71-2
[94] *Chertkow v. Feinstein (Chertkow)*,[1929] 2 W.W.R. 257, 24 Alta. L.R. 188, [1929] 3 D.L.R. 339 (Alta. C.A.)
[95] *Durham* v. *Durham*, (1885), 10 P.D. 80 at 82.

established on an overwhelming preponderance of probability that Mr. Barrett lacked the mental capacity to enter into a marriage contract or any form of marriage on the date he married Ms. Dexter.

Although the Court did consider the evidence of the lay witnesses, relative to the medical evidence, the evidence given by the lay witnesses was weak. In fact, Ms. Dexter was the best lay witness. However, because she had a personal interest in the outcome of the case her evidence could not be accepted.

The Court ultimately held that the plaintiff had proved, on a balance of probabilities, that Mr. Baxter lacked the requisite capacity to marry. Consequently, the marriage was declared null and void and the court found it unnecessary to decide the issue of undue influence. More recent decisions as will be addressed below seemingly are more focused on the evidence and in particular medical evidence in the assessment of requisite decisional capacity. Unfortunately in circumstances where there is often, isolation, alienation, sequestering, there is no medical evidence as the individual is purposely shielded from medical treatment as part of the careful plan to exploit in a fool proof result.

2003 - Feng v. Sung Estate (Ontario)[96]

In 2003, five years post *Banton,* Justice Greer advanced the considering factors and application of the law in determining the requisite decisional capacity to marry in *Re Sung Estate*. Mr. Sung, then recently widowed, was depressed and lonely and had been diagnosed with cancer. Less than two months after the death of his first wife, Mr. Sung and Ms. Feng were quickly married without the knowledge of their children or friends. Ms. Feng had been Mr. Sung's caregiver and housekeeper when Mr. Sung was dying of lung cancer. Mr. Sung died approximately six weeks after the marriage. Ms. Feng brought an application for support from Mr. Sung's estate and for a preferential share of his intestate estate. Mr. Sung's children sought a declaration that the marriage was void *ab initio* on

[96] 2003 CanLII 2420 (ONSC)[*Feng*].

the ground that Mr. Sung lacked the capacity to appreciate and understand the consequences of marriage; or, in the alternative, on the basis of duress, coercion and undue influence of a sufficient degree to negative consent.

In rendering her decision, Justice Greer found that the formalities of the marriage accorded with the provisions of Ontario's *Marriage Act*. In addition, the Court found that the marriage was not voidable, as neither party took steps to have it so declared prior to Mr. Sung's death.[97] That said, Justice Greer was satisfied on the evidence in this case that the marriage of Mr. Sung and Ms. Feng was void *ab initio*.

In the Court's view, the evidence showed that Ms. Feng used both duress and undue influence to force Mr. Sung, who was in a vulnerable position, to marry her. Although Mr. Sung was only 70 years of age, he was both infirm and vulnerable and, the Court noted, Ms. Feng would have been very aware of his frail mental and physical health as a result of her nursing background. The Court also found that Ms. Feng was aware of Mr. Sung's vulnerability because Mr. Sung had agreed to help support Ms. Feng's son financially. It was suspicious that Mr. Sung, who had always been very close to his family, never told his children and his family about his marriage to Ms. Feng. Moreover, that Mr. Sung was under duress was evident from the fact that his health was frail and he feared that Ms. Feng would leave him if he did not marry her.

Justice Greer moreover stated, that had she not found that Mr. Sung was unduly influenced and coerced into his marriage, she would have been satisfied on the evidence that Mr. Sung lacked the requisite mental capacity to enter into the marriage. In reaching this conclusion, Justice Greer referred to *Banton* and the fact that Justice Cullity had referred to the principle set out in *Spier v. Bengen,* where "the court noted that the person must also have the capacity to take care of his/her own person and property." Applying those principles, Greer J., found that the evidence was clear that, at the time of the marriage, Mr. Sung really could not take care of his person. Although Mr. Sung was

[97] *Feng* at para. 51. See further footnote 93, *supra*, on this point.

capable of writing cheques, he was forced to rely on a respirator operated by Ms. Feng. As well, Ms. Feng was, around the time of the marriage, or shortly thereafter, changing Mr. Sung's diapers.

The Court also adopted the factors for determining capacity to marry articulated by one of the medical experts, Dr. Malloy, in the case of *Barrett Estate, supra*: "…a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."[98] Because Mr. Sung married Ms. Feng because he had erroneously believed that he and Ms. Feng had executed a prenuptial agreement (she secretly cancelled it before it was executed), Justice Greer found that Mr. Sung did not understand the nature of the marriage contract and moreover that it required execution by both parties to make it legally effective.

Accordingly, the marriage certificate was ordered to be set aside. A declaration was to issue that the marriage was not valid and that Ms. Feng was not Mr. Sung's legal wife on the date of his death. In the result, the Will that Mr. Sung made in 1999 remained valid and was ordered to be probated.

The decision of Justice Greer was appealed to the Court of Appeal primarily on the issue of whether the trial judge erred in holding that the deceased did not have the requisite capacity to enter into the marriage with Ms. Feng.[99] The Court of Appeal endorsed Justice Greer's decision, although it interestingly, remarked that the case was a close one.

2009 - AB v CD (BC)[100]

In *A.B. v. C.D.*, the British Columbia Court of Appeal considered the question of the requisite decisional capacity required to form the intention to live separate and apart. Like the Court below it, the Court of Appeal agreed with the academic comments made by

[98] *Feng* at para.62.
[99] *Feng v. Sung Estate* [2004] O.J. No. 4496 (ONCA.).
[100] 2009 BCCA 200 (CanLII).

Professor Robertson in his text, *Mental Disability and the Law in Canada,* 2nd ed., (Toronto: Carswell 1994).[101] More specifically, the Court of Appeal agreed with Professor Robertson's characterization of the different standards of capacity and his articulation of the standard of capacity necessary to form the intention to leave a marriage. Professor Robertson's standard focuses on the spouse's overall capacity to manage his/her own affairs and is found at paragraph 21 of the Court of Appeal's decision:

> *Where it is the mentally ill spouse who is alleged to have formed the intention to live separate and apart, the court must be satisfied that that spouse possessed the necessary mental capacity to form that intention. This is probably similar to capacity to marry, and involves an ability to appreciate the nature and consequences of abandoning the marital relationship*.

The Court noted that this characterization differs from the standard adopted in both the English decisions of *Perry v. Perry*[102], and *Brannan v. Brannan*[103], which concluded that when a spouse suffers from delusions that govern a decision to leave the marriage, the delusional spouse does not have the requisite intent to leave the marriage. The Court in *A.B. v. C.D*, preferred Professor Robertson's characterization of requisite capacity because it respects the personal autonomy of the individual in making decisions about his/her life.[104]

2011 - Hamilton Estate v Jacinto (BC)[105]

This British Columbia Supreme Court case is yet another decision involving some of the hallmarks of these predatory relationship situations; however, in this case, there was no marriage. The Court's analysis of the facts and issues is interesting from the perspective of the predatory aspects of the relationship, short of marriage. Predatory relationships can also profit from exploitation.

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[101] Robertson, Gerald B. *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994) at pp.253-54.
[102] *Perry v. Perry*, [1963] 3 All E.R. 766 (Eng. P.D.A).
[103] *Brannan v. Brannan* (1972), [1973] 1 All E.R. 38 (Eng. Fam. Div).
[104] *A.B. v. C.D.*, 2009 BCCA 200 (CanLII) at para.30.
[105] *Hamilton Estate v. Jacinto*, 2011 BCSC 52 (CanLII).

In this case, Mr. Hamilton was married for 59 years before his wife died in March 2001, at which time he was 81 years old. Within a few months of losing his wife, Mr. Hamilton embarked on a relationship with Ms. Jacinto who was approximately 30 years his junior. The evidence before the Court was that at some point Ms. Jacinto and Mr. Hamilton contemplated marriage, though the marriage never took place.

In 2003, transactions took place that formed the subject matter of the action. Mr. Hamilton was the sole trustee and primary beneficiary of a trust that he set up. In that capacity, he arranged a line of credit, secured by property held in the name of the trust, and paid into the trust's bank account, money to fund the purchase of a house, the title to which was registered in Mr. Hamilton and Ms. Jacinto's names as joint tenants with rights of survivorship. Moreover, to facilitate the purchase, Mr. Hamilton opened two bank accounts with Ms. Jacinto, and held jointly. At Mr. Hamilton's death in 2004, legal ownership of the monies in the joint account passed to Ms. Jacinto by survivorship, and not to his estate.

Not surprisingly, Mr. Hamilton's children brought an action alleging, *inter alia*, that as the trustee of the trust, he lacked authority to purchase the property using trust assets. They alleged undue influence against Ms. Jacinto and a claim of resulting trust over the joint assets. They also made allegations of incapacity.

The Court considered whether or not Mr. Hamilton had authority to convert trust assets into non-trust assets. In this regard, the court had to determine Mr. Hamilton's authority as trustee under Washington State Law, the position of Ms. Jacinto, and the interpretation of the trust powers itself. The Court considered the argument of the children that Mr. Hamilton was a man in rapid physical and mental decline and their allegations that he was increasingly confused and forgetful in the last years of his life. There was a great deal of evidence of intent. The Court provided an in-depth analysis of the gratuitous

transfer of property including the application of the doctrine of resulting trust to gratuitous transfers in *Pecore v. Pecore.*[106]

Mr. Hamilton's children alleged that he was confused about his business affairs and had increasing difficulty in understanding them.

There was, however, a great deal of other evidence of independent witnesses. This evidence tended to refute the allegations that Ms. Jacinto was a "*gold digger*". Mr. Hamilton's solicitor was a witness. A number of independent witnesses testified that Mr. Hamilton had shared love and affection for Ms. Jacinto and spoke of their loving and intimate relationship. Relatives of Ms. Jacinto gave evidence. The Deceased's solicitor prepared a form of pre-nuptial agreement which had never been entered into, but also tended to refute the allegations of the children that the parties had not contemplated marriage. The Court also considered the conjugal nature of the relationship.

With respect to undue influence, the Court found that Ms. Jacinto was not exploiting Mr. Hamilton or taking advantage of him in any way. Moreover, there was no evidence to draw an inference from the nature of their relationship that Ms. Jacinto exercised undue influence over Mr. Hamilton with respect to the property transactions.

The Court was satisfied that the intent of the gift to Ms. Jacinto had been proved and accepted her evidence with respect to the jointly held property. Although the Court noted there were issues of credibility, the issues had no bearing on the evidence given by Ms. Jacinto about the decision that the property be held in joint tenancy, nor as to the nature of their relationship. The Court also took into consideration the fact that the children knew about the real property that had been bought during the Deceased's lifetime and the possibility of the marriage. In its thorough analysis, the Court concluded that Mr. Hamilton intended to give a gift to Ms. Jacinto of an interest in joint tenancy in the real property and the joint accounts. The Court determined that the Deceased had given the gift freely; that it was an independent act, and one which he fully understood. Moreover, the Court

[106] *Pecore v. Pecore* 2007 SCC 17 (CanLII).

determined that the presumption of resulting trust had been rebutted. The Court was satisfied that the gift was an act of love and an expression of affection. It dismissed and awarded costs to Ms. Jacinto.

2012- Juzumas v. Baron (Ontario)[107]

In *Juzumas v. Baron,* the plaintiff, a vulnerable adult, initially sought a declaration that his marriage to the defendant was a nullity and void *ab initio*, but he did not pursue this claim at trial; instead, he was granted a divorce/dissolution of the marriage. The resulting decision is therefore not a capacity to marry case *per se*, but the facts have all the hallmarks of a predatory marriage. Mr. Juzumas, an older adult, came into contact with an individual who, under the guise of "*caretaking*", took steps to fulfill more of the latter part of that noun. The result: an older person was left in a more vulnerable position than that in which he was found.

Mr. Juzumas, the plaintiff in this case, was 89 years old at the time the reported events took place, and of Lithuanian descent with limited English skills. His neighbor described him as having been a mostly independent widower prior to meeting the defendant, a woman of 65 years.[108] Once a "*lovely and cheerful*" gentleman, the plaintiff was later described as being downcast and "downtrodden".[109] The defendant's infiltration in the plaintiff's life was said to have brought about this transformation. The financial exploitation, breach of trust, and precipitation of fear caused by the defendant, are the hallmarks of a predator.

The defendant "*befriended*" the respondent in 2006. She visited him at his home, suggested that she provide assistance with housekeeping, and eventually increased her visits to 2-3 times a week. She did this despite the plaintiff's initial reluctance.[110] The defendant was aware that the plaintiff lived in fear that he would be forced to move away

[107] *Juzumas v. Baron*, 2012 ONSC 7220[*Juzumas*].
[108] *Juzumas* at para 1.
[109] *Ibid.* at paras 39 and 56.
[110] *Ibid.* at para 25.

from his home into a facility. She offered to provide him with services to ensure that he would not need to move to a nursing home. He provided her with a monthly salary in exchange.[111]

The defendant ultimately convinced the plaintiff to marry her under the guise that she would thereby be eligible for a widow's pension following his death, and for no other reason related to his money or property.[112] She promised to live in the home after they were married and to take better care of him. Most important, she undertook not to send him to a nursing home, which he was so afraid of.[113] The plaintiff agreed.

The defendant testified that the plaintiff had suggested that they marry because of their mutual feelings of affection, romance, and sexual interest, but Justice Lang found otherwise.[114] The defendant, who had been married approximately 6-8 times (she could not remember the exact number), had previous "caretaking" experience: prior and concurrent to meeting the plaintiff, the defendant had been caring for an older man who lived in her building. She had expected to inherit something from this man in addition to the pay she received for her services and was left feeling sour as she had not received anything. Justice Lang considered that this evidence indicated that the defendant was sophisticated in her knowledge of testamentary dispositions, and that she knew that an expectation of being named as a beneficiary to someone's Will on the basis that she provided that person with care is unenforceable.[115]

The day before their wedding, the soon-to-be newlyweds visited a lawyer who executed a Will in contemplation of their marriage. In spite of the obvious age gap and impending marriage, the lawyer did not discuss the value of the plaintiff's house ($600,000) or the

[111] *Ibid.* at para 28.
[112] *Ibid.* at paras 26-28.
[113] *Ibid.* at para 28.
[114] *Ibid.* at para 27.
[115] *Juzumas* at para 24.

possibility of a marriage contract. And the lawyer did not meet with the plaintiff without the defendant being present.[116]

After the wedding ceremony, which took place at the defendant's apartment, she dropped him off at a subway stop so that he would take public transit home alone.[117] The defendant continued to care for the plaintiff several hours a week and to receive a monthly sum of money from him.

Despite the defendant's promise that she would provide better care to the plaintiff if they married, the plaintiff's tenant and a neighbor, who were both found to be credible, attested that the relationship degenerated progressively. The tenant described the defendant, who had introduced herself as the plaintiff's niece, as "'abusive', 'controlling' and 'domineering'".[118]

With the help of a plan devised over the course of the defendant's consultation with the lawyer who had drafted the plaintiff's Will made in contemplation of marriage, the defendant's son drafted an agreement which transferred the plaintiff's home to himself, not this mother, to financially protect her. The "agreement" acknowledged that the plaintiff did not want to be admitted to a nursing home. Justice Lang found that even if it had been shown to him, the plaintiff's English skills would not have sufficed to enable him to understand the terms of the agreement, and that the agreement did not make it clear that it entailed a transfer of the plaintiff's home.[119]

The plaintiff, the defendant and her son attended the lawyer's office in order to sign an agreement respecting the transfer of the plaintiff's property. Justice Lang found that the lawyer was aware of the plaintiff's limited English skills; that his evidence indicated that the agreement had not been explained adequately to the client; that the plaintiff did not understand the consequences of the transfer of property; and moreover, that he was, in

[116] *Ibid.* at para 30.
[117] *Ibid.* at para 31.
[118] *Ibid.* at para 54.
[119] *Juzumas* at paras 68-69.

the court's words, "*virtually eviscerating the Will he had executed only one month earlier…"*. Further, the lawyer did not meet with the plaintiff alone; and only met with the parties for a brief time.[120] Additionally, Justice Lang found that the agreement signed by the plaintiff was fundamentally different from the agreement he had been shown by the defendant and her son at the plaintiff's home.[121]

Perhaps most important, Justice Lang found that the lawyer did not appreciate the power imbalance between the parties. The lawyer appeared to be under the impression that the defendant, and not the plaintiff, was the vulnerable party.[122]

The lawyer's notes indicated that the plaintiff was "cooperative" during the meeting. Justice Lang interpreted the lawyer's use of this word as indicating that the plaintiff was "acceding to someone else's direction," and not a willful and active participant to the transaction.[123] In addition, Justice Lang found that the plaintiff had been influenced by emotional exhaustion or over-medication at the time the meeting took place. The judge found, based on evidence that this may have been because the defendant may have been drugging his food as suspected by the plaintiff.[124]

Sometime after the meeting, the plaintiff's neighbor explained the lawyer's reporting letter to him, and its effect on of his property. With his neighbor's assistance, the plaintiff attempted to reverse the transfer by visiting the lawyer at his office on three separate occasions. Interestingly, when he would visit, a few minutes after his arrival, his "wife" would appear. The lawyer explained to the plaintiff that the transfer could not be reversed because it was "in the computer."[125]

In considering the transfer of property, Justice Lang applied and cited McCamus' Law of Contracts, which outlines a "*cluster of remedies*" that may be used "where a stronger

[120] *Ibid.* at paras 79-84.
[121] *Ibid.* at para 84.
[122] *Ibid.* at para 88.
[123] *Ibid.* at para 91.
[124] *Ibid.* at paras 63 and 92.
[125] *Juzumas* at para 97.

party takes advantage of a weaker party in the course of inducing the weaker party's consent to an agreement."[126] Justice Lang outlined the applicable legal doctrines of undue influence and unconscionability, stating: "*if any of these doctrines applies, the weaker party has the option of rescinding the agreement*."[127]

Justice Lang found that a presumption of undue influence existed between the parties in this case as the relationship in question involved an older person and his caretaker. The relationship was clearly not one of equals. In such a case, the court noted that the defendant must rebut that evidence by showing that the transaction in question was an exercise of independent free-will, which can be demonstrated by evidence of independent legal advice or some other opportunity given to the vulnerable party which allows him or her to provide "*a fully-informed and considered consent to the proposed transaction*."[128]

As for the doctrine of unconscionability, Justice Lang stated that the doctrine "gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power."[129] The onus is on the defendant to establish the fairness of the transaction. These presumptions were not rebutted by the defendant in this case.

In addressing the defendant's claim of *quantum meruit* for services rendered, Justice Lang found that the period during which services were rendered could be distinguished as two categories: pre-marriage and post-marriage.

During the pre-marriage period, the defendant undertook to care for the plaintiff without an expectation or promise of remuneration, and persuaded the plaintiff to compensate her with a monthly income. Justice Lang found that no additional remuneration could be claimed for that period.

During the post-marriage period, Justice Lang found that the defendant had an expectation that she would be remunerated by the plaintiff, and that the plaintiff had

[126] *Ibid.* at para 8 citing John McCamus, *The Law of Contracts* (2d) (Toronto: Irwin Law, 2012) at 378.
[127] *Ibid.* at para 8.
[128] *Ibid.* at para 11.
[129] *Ibid.* at para 13.

agreed to do so.[130] For this period, Justice Lang calculated the value of the services rendered by the defendant by multiplying the number of hours she worked each week by an approximation of the minimum wage at that time. She adjusted her calculation to account for occasional decreases in hours worked, as well as the period of two months during which she found the defendant had been solely concerned with her own objectives, such that she could not have been caring for the plaintiff.[131] Justice Lang then subtracted the amount of money that had been paid to the defendant already by way of a monthly salary, and found that only a minimal sum remained.

Justice Lang then reviewed the equitable principle of restitution, which permits a court to "refuse full restitution or to relieve [a party] from full liability where to refrain from doing so would, in all the circumstances, be inequitable."[132] In considering this principle, Justice Lang found that the defendant had "unclean hands" and that "the magnitude of her reprehensible behavior is such that it taints the entire relationship."[133] As a result, Justice Lang found that the defendant was not entitled to any amount pursuant to her *quantum meruit* claim.

Substantial costs were awarded to the older adult plaintiff.[134]

This case provides what is, in cases of financial abuse, a rarity: an uplifting ending. In this case, it is not a family member or acquaintance that brought the case before a court after the vulnerable adult's assets had already been depleted, but rather, the older adult who, with the help of his neighbor, was able to seek justice and reverse some of the defendant's wrongdoing. It is not every case of elder abuse that involves an older adult who is able to, or capable of, being present during court proceedings to testify. In addition to its review of the legal concepts that are available to remedy the wrongs associated with predatory

[130] *Juzumas* at para 129.
[131] *Ibid.* at para 128.
[132] *Ibid.* at para 141 citing *International Corona Resources Ltd. v. Lac Minerals Ltd.*(1987), 44 DLR (4th) 592 (CA) at 66.
[133] *Ibid.* at para 142.
[134] *Juzumas v Baron*, 2012 ONSC 7332 (CanLII).

marriages, this case demonstrates the usefulness of presenting the testimony of an older adult when it is possible and appropriate.

2012- Petch v. Kuivila (Ontario)[135]

This decision highlights the effects of marriage on estate planning and specifically, the revocation of a Will by marriage. It also serves as a reminder of the correlation and consequences of predatory marriages and revocations of previous Wills not made in contemplation of marriage.

In 2003, the Deceased designated the Applicant as the revocable sole beneficiary of his life insurance policy. In 2004, the Deceased made a Will in which he named the Respondent and her brother as beneficiaries of that same insurance policy; that Will was not made in contemplation of marriage. In 2008, the Deceased married the Respondent. After the date of death, the Applicant sought the insurance proceeds on the grounds that the deceased's marriage to the respondent revoked the designation in his Will.

Justice Macdonald made the following findings: the Will revoked the 2003 designation pursuant to the *Insurance Act,* the 2008 marriage revoked the 2004 Will pursuant to s. 15 of Ontario's *Succession Law Reform Act*, and the revocation by marriage did nothing to undo the previous revocation by Will. Therefore the insurance proceeds were payable to the Deceased's estate.

2013 - The "Internet Black Widow" Case (Nova Scotia)[136]

While unreported, this case known as the "Black Widow" or "Internet Black Widow", involves Melissa Ann Shepard who has had a long history with the law and with unsuspecting widowers. In 1991 she was convicted of manslaughter and served 2.5 years

[135] 2012 ONSC 6131.
[136] The Canadian Press, "Internet Black Widow Melissa Ann Shepard signs a Peace Bond" CBC News (November 23, 2016) online: http://www.cbc.ca/news/canada/nova-scotia/internet-black-widow-signs-peace-bond-1.3863909

after killing her husband on a deserted road near Halifax. Her husband was heavily drugged when she ran him over twice with a car.[137]

After being released from jail, she met a man at a Christian retreat in Florida. They were married in Nova Scotia in 2000. A year later her husband's family noticed that his health was faltering, he had mysterious fainting spells, slurred speech, and was in and out of hospitals. Also, his money was starting to disappear. The second husband died in 2002 of a cardiac arrest. No one was charged with any criminal offence, although his family remains suspicious about his death.

In 2005, Shepard was sentenced to five years in prison for several charges stemming from a relationship she had with another man in Florida she met online, including grand theft from a person over 65, forgery and using a forged document.

In 2012 Shepard married another man, who had been her neighbour in a quiet retirement community. She had knocked on his door and told him she was lonely and she had heard he was lonely too. A civil union ceremony was performed in the husband's living room, but the marriage was never certified by the province and was ruled invalid by Nova Scotia's Vital Statistics division as false information was provided on the marriage certificate. During a trip to Newfoundland after the wedding ceremony Shepard dissolved a cocktail of sedatives into her husband's coffee. Later, upon return to Nova Scotia, the husband tumbled out of bed and was hospitalized. Tests found tranquilizers in his blood.

Shepard was sentenced to three and a half (3.5) years in jail after pleading guilty to charges for administering a noxious substance and failing to provide the necessaries of life for her then husband. She had originally been charged with attempted murder.[138]

[137] CBC News "Internet Black Widow sentenced to 3 ½ years in jail" CBC News (June 11, 2013) online: http://www.cbc.ca/news/canada/nova-scotia/internet-black-widow-sentenced-to-3-years-in-jail-1.1324946
[138] CBC News "Internet Black Widow sentenced to 3 ½ years in jail" CBC News (June 11, 2013) online: http://www.cbc.ca/news/canada/nova-scotia/internet-black-widow-sentenced-to-3-years-in-jail-1.1324946

This is an extreme case of a predatory marriage, where the predator's intentions may have been more than just defrauding her victims or gaining financially from a marriage, but also of resorting to murder or attempted murder.

Shepard has since been released from prison and the Court noted that there is a high risk that she will reoffend. In 2016 she was rearrested for failing to abide by her parole conditions including accessing the internet, which she was prohibited from doing. Later those charges were dropped.[139]

2014 - Babiuk v. Babiuk (Saskatchewan)[140]

The Saskatchewan Court of Queen's Bench reviewed the requisite decisional capacity to separate, among other issues, in this court decision.. An older adult (after being admitted to the hospital for injuries to her body) was certified incompetent to manage her estate pursuant to *The Mentally Disordered Person's Act*, RSS 1978, c M-14 (since repealed by SS 2014, c 24). The Public Guardian and Trustee became her statutory guardian for property. After being discharged from the hospital the older adult resided in a care home and refused any contact from her husband. During a review hearing for her Certificate of Incompetence the wife stated that she had been physically assaulted and intimidated by her husband during her life and that she was afraid of him. She wanted to remain in her care home, separate and apart from her husband. She said she was happy and safe, although she could not name the care home or its address, could not file a tax return on her own and, while she had some knowledge of her financial situation, it was limited.

The PG&T brought a petition seeking a division of family property pursuant to *The Family Property Act* and maintenance pursuant to *The Family Maintenance Act*. The husband brought a motion seeking an Order prohibiting the PGT from pursuing a property claim on behalf of his wife. The husband argued that his wife would not want the family property to be divided. The wife however testified in an affidavit that while she forgets most things,

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[139] Michael Tutton, "Nova Scotia prosecutors drop charges against 'Internet Black Widow' Melissa Shepard" The Globe and Mail (December 22, 2016) online: https://beta.theglobeandmail.com/news/national/nova-scotia-prosecutors-drop-charges-against-internet-black-widow-melissa-shepard/article33416979/?ref=http://www.theglobeandmail.com&

[140] *Babiuk v Babiuk* 2014 SKQB 320.

she does not forget her life with her husband. She also stated that she would like to have half of her family property and have it managed by the PGT.

The Court noted that the wife may not be capable of managing her financial affairs, but that does not mean she was not capable of making personal decisions. The Court cited ***Calvert (Litigation Guardian of) v. Calvert (1997)*****,** 32 O.R. (3d) 281 (Div. Ct), at 294, aff'd (1998), 37 O.R. (3d) 221 (CA), leave to appeal refused [1998] SCCA No. 161:

> Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he/she does not want to live.

The Court in *Babiuk* concluded that:

> In deciding issues of capacity, insofar as the law is able to, the appropriate approach is to respect the personal autonomy of the individual in making decisions about his or her life. . . There is evidence that [the wife] wants to live in the care home and not with [her husband], and that she wants her half of the family property. . .[141]

The Court dismissed the husband's motion.

As noted above, while this case refers to a "hierarchy of capacities" it is important to appreciate that capacity to marry does not fall lower on a fabricated hierarchy of decisional capacities. The fact that the capacity to marry has been viewed alternately by the courts as both incredibly simple and particularly complex, and the fact that significant property rights in modern society attach to the marriage union, aptly illustrates that it is incorrect to conceptualize decisional capacity in hierarchical terms.[142]

2014 - Ross-Scott v. Potvin (BC)[143]

The British Columbia case of *Ross-Scott v. Potvin,* illustrates the difficulties of attacking the validity of a marriage after the death of the vulnerable adult. The only surviving relatives of the deceased, Mr. Groves, sought an order annulling Mr. Groves's marriage

[141] *Babiuk v. Babiuk* 2014 SKQB 320 at para.48.
[142] Kimberly A. Whaley, Kenneth I. Shulman & Kerri L. Crawford, "The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective" (2016) Advocates' Q Vol 45 No 4 395 at 418.
[143] 2014 BCSC 435 [*Ross-Scott*].

on grounds of undue influence or, in the alternative, lack of capacity. They also argued that various *inter vivos* transfers and testamentary instruments were invalid on the same grounds. Justice Armstrong applied the common law factors for determining requisite capacity to marry and ultimately dismissed all of the claims, despite compelling medical evidence of diminished capacity and vulnerability.

Mr. Groves was a 77 year-old retired civil engineer when he married the Respondent, Ms. Potvin, who was then 56 years old. They were neighbors. Mr. Groves was reclusive and did not socialize; he met Ms. Potvin in 2006 when he delivered a piece of her mail that he had received by mistake. They married in November of 2009. Mr. Groves died a year later, in November of 2010.

The applicants were his niece and nephew, who were his only living relatives. They lived abroad and had not seen the deceased for 25 years.

In 2007, shortly after he had met Ms. Potvin, Mr. Groves instructed a solicitor to prepare a Will. It named one of the applicants, Nigel Scott-Ross, as the executor and trustee of his estate. The proposed Will split the estate equally between Nigel and his sister and the co-applicant. Mr. Groves contacted that solicitor 4 months later and said that he wanted to leave the Will for about six months.

In June of 2008, Mr. Groves contacted a new solicitor, instructed the new solicitor to prepare a new Will and executed the Will in the same month. The Will included a provision that granted his car, space heater, and rugs to Ms. Potvin, and divided the rest of his estate between the applicants and two charities.

Four months later, in October of 2008, Mr. Groves retained his third solicitor, Mr. Holland, and executed another Will which named Ms. Potvin as his executor and trustee, and divided the estate between the applicants, Ms. Potvin, and one charity. In July of 2009, Mr. Groves executed yet another Will that divided his estate in two equal shares; one share for Ms. Potvin and one for the applicants.

By September of 2009, Mr. Groves's health problems, which his doctor had first noted in 2007, had grown more serious.

In November of 2009, Mr. Groves and Ms. Potvin were married. They made no announcements or give public notice, and they took no pictures. Mr. Groves then put his car in Ms. Potvin's name, converted his bank accounts to joint accounts with her, and gave her $6,000 to assist her with her mortgage.

When Mr. Holland learned of the marriage a few months later, he called Mr. Groves and informed him of the impact of the marriage on Mr. Groves's Will. Mr. Groves executed a new Will that gave the applicants $10,000 each and left the rest of his estate to Ms. Potvin. Mr. Groves died in November of 2010.

Justice Armstrong's analysis of the capacity to marry relies primarily on *A.B. v C.D, supra*, and in particular, the importance of autonomy discussed in it.[144] The medical evidence established that Mr. Groves suffered from cognitive impairments, anxiety, depression, and moments of delusional thinking.[145] Mr. Groves's family doctor asserted that Mr. Groves was incapable of "managing himself" in November of 2009.[146] Nevertheless, Justice Armstrong found that these conditions, diagnoses, and limitations did not evidence an inability on Mr. Groves's part to make an informed decision to marry Ms. Potvin.[147] His Honour provided the following observation:

> A person may be incapable of writing a cheque or making a deposit to a bank account and thus be described as being incapable of managing their financial affairs. Similarly, temporal delusions, depression, or anxiety may impact a person's ability to make other life decisions. But these factors do not necessarily impact a person's ability to consciously consider the importance of a marriage contract. Nor do they necessarily impact formation of an intention to marry, a decision to marry, or the ability to proceed through a marriage ceremony.[148]

[144] *Ross-Scott* at paras 46, 184.
[145] *Ibid*. at para 186.
[146] *Ibid*. at paras 94 and 95.
[147] *Ibid*. at para 186.
[148] *Ross-Scott* at para 20.

Mr. Holland, as well as Mr. Groves's accountant, financial advisor and marriage commissioner all gave evidence affirming that Mr. Groves was aware of the nature of the marriage. Of particular assistance was Mr. Holland's evidence; Mr. Holland was concerned about the appearance of elder abuse and he questioned Mr. Groves in detail about his relationship with Ms. Potvin a few weeks prior to the marriage. Mr. Groves was consistent in his assertions that he wanted to marry.

With respect to undue influence, the applicants relied on *Feng v. Sung Estate*. The evidence established that Mr. Groves was afraid of being admitted into care and believed that he could avoid that by marrying Ms. Potvin, who promised to assist him with asserting his autonomy and maintaining his comfort and care at home.[149] His family doctor asserted that Mr. Groves was susceptible to persuasion in 2009.[150]

Regardless, Justice Armstrong found that there was no direct evidence that Ms. Potvin's influence over Mr. Groves supplanted his decision-making power on the issue of his decision to marry.[151] His Honour found that Ms. Potvin may have encouraged Mr. Groves in this regard, but there was no evidence that she exerted influence or force to compel him to do so.[152] His Honour explains his holding as follows:

> I have concluded that the burden of proof regarding a challenge to a marriage based on a claim of undue influence is the same as the burden of proving a lack of capacity. The plaintiffs must provide the defendant's actual influence deprived Mr. Groves of the free will to marry or refuse to marry Ms. Potvin. The plaintiffs have failed to meet the burden of proving that Mr. Groves was not able to assert his own will.[153]

Justice Armstrong also dismissed the claims that Mr. Grover's testamentary dispositions and *inter vivos* transfers were invalid by reason of undue influence.[154] His Honour applied *Hyrniak v. Maudlin*, 2014 SCC 7 and concluded that a summary trial, with a record of

[149] *Ibid*. at para 190.
[150] *Ibid*. at para 95.
[151] *Ibid*. at para 190.
[152] *Ibid*., at para 190.
[153] *Ibid*., at para 240.
[154] *Ross-Scott*, at para 227, 280, and 281.

affidavit evidence and cross-examination transcripts, was a suitable forum for the disposition of the claim.[155] The action was dismissed with costs to Ms. Potvin.[156]

2015 - Elder Estate v. Bradshaw (BC)[157]

This case reminds us that despite a rise in the injustices faced by these challenging predatory incidents, not all such older adult / younger caregiver (or romantic partner) situations are as sinister as they may first appear and each situation must be adjudicated on its own particular facts and evidence.

The older adult in this case was a Mr. Elder. He was 80 years old when he died suddenly on July 20, 2011. He was single, had never married, and never had children. He had a sister with whom he had been close. In 2006 Mr. Elder hired a housekeeper, Ms. O'Brien, (who was twenty-five years younger than he) to assist him around his house and eventually her role changed to that of caregiver. She would assist him with a variety of chores, drive him to appointments and to the bank, fill out cheques for him to sign when he needed to pay bills, etc.

In 2008 Mr. Elder had been diagnosed as having memory loss, functional impairment, and "dementia - likely a mixed vascular Alzheimer type."[158] He was placed on medication and in 2009 he "seemed to improve immensely" and he remained stable until 2011 when his confusion increased for a short time after his sister's death in March of 2011.

On April 2, 2011 he executed a new Will (the "2011 Will") in which he left everything to his caregiver, unlike his previous will in which he left everything to his sister and then his three nephews should she predecease him. He also appointed the caregiver as his attorney under a power of attorney for property.

Also in 2011, the caregiver suggested that they buy a home together. They searched for and found a house that they wanted to purchase, where Mr. Elder would live in a bedroom

[155] *Ibid*. at para 300.
[156] *Ibid*. at para 302.
[157] 2015 BCSC 1266 [*Elder Estate*]
[158] *Elder Estate* at para.38.

on the first floor and the caregiver would live in the basement. The caregiver testified that Mr. Elder was "chuffed" about it and really excited. Mr. Elder agreed to pay for 2/3 of the house and the caregiver 1/3. Mr. Elder deposited $120,000.00 into a joint account with the caregiver for this purpose. However, Mr. Elder died before the house could be bought. After his death, the caregiver used the money to purchase the house herself.

The nephews challenged the validity of the 2011 Will alleging: lack of testamentary capacity, undue influence, and coercion by the caregiver. They also sought the return of the $120,000.000. One nephew testified that his uncle told him that he and the caregiver might be getting married and moving in together, but he did not really want to marry, because he was not the marrying type. This nephew also testified that the uncle was confused when he called to say his mother (Mr. Elder's sister) had died and that Mr. Elder only wanted to talk about the movie he was watching and that he was rambling and incoherent. The nephew didn't think he grasped what he was telling him.[159]

Admittedly, there were some facts surrounding the execution of the 2011 Will and power of attorney that were a cause of concern:

- The caregiver referred Mr. Elder to the law firm. Mr. Elder had not met the lawyer before and it was a different lawyer than the one who drafted his previous will.
- The caregiver called and set up the appointment.
- A note made by one of Mr. Elder's outreach workers stated that Mr. Elder was confused about a phone message from a lawyer's office and was not sure why they were calling. Mr. Elder asked the worker to listen to the message, and she called the lawyer's office to confirm that he had to come in and sign his new will and POA.
- The caregiver brought Mr. Elder to the law office and first met with the solicitor and Mr. Elder together.

[159] *Elder Estate* at para. 81.

However, the solicitor also took necessary precautions:

- The solicitor met with the older adult alone and confirmed his instructions that he wanted the caregiver to receive his entire estate and not his nephews.

- He confirmed the reason why Mr. Elder did not want his nephews to inherit: he had not seen his nephews in 15-20 years.

- The solicitor "looked for signs of undue influence" and "saw none".[160]

- An assistant had taken down information on the relationship between Mr. Elder and the caregiver when the caregiver called to set up the appointment. The solicitor went over this information and confirmed it with Mr. Elder when they were alone.[161]

- The solicitor's opinion was that Mr. Elder was of sound mind and capacity. The solicitor had asked Mr. Elder a series of questions[162] to test his lucidity and awareness and "if he had been even a bit suspicious of his capacity he would have contacted Mr. Elder's doctor as was his practice in such cases".[163]

- The solicitor however did not ask about the value of the estate. Justice Meiklem noted that:

> The omission to inquire about the value of the estate is not insignificant, because learning it was in the range of $500,000.00 at the time may have triggered some additional discussion, **but the omission itself is not a suspicious circumstance sufficient to rebut the presumption of validity**.[164] [emphasis added]

The Court found there was no evidence that the caregiver played any role in conveying the wishes to the solicitor or in influencing Mr. Elder to have a new will prepared and that

[160] *Elder Estate* at para.16.
[161] *Elder Estate* at paras. 15-17.
[162] Unfortunately the decision does not describe the questions.
[163] *Elder Estate* at para. 18.
[164] *Elder Estate* at para. 19.

there were "[n]o suspicious circumstances surrounding the preparation of the 2011 Will that are sufficiently well-grounded to rebut the presumption of validity." [165]

Justice Meiklem also reached the same conclusion in respect of whether there were suspicious circumstances tending to show that Mr. Elder's free will was overborne by acts of coercion or fraud:

> While **there may be a "miasma of suspicion" arising out of the lack of kinship** between Ms. O'Brien and Mr. Elder and the circumstance of his early dementia combined with an ostensible relationship of dependency with her as a caregiver, **there is no evidence of any coercive act or course of conduct on the part of Ms. O'Brien** in respect of the preparation of the 2011 Will.[166][emphasis added]

However, the Court concluded that "the evidence relating to the diagnosis of early dementia and medical services interactions concerning memory loss and functional decline" and Mr. Elder's "moderate dementia" raised a "specific and focussed suspicion that [was] sufficient to rebut the presumption of validity" of the will.[167] Therefore, the burden then shifted to Ms. O'Brien to prove Mr. Elder had testamentary capacity.

While no formal capacity assessment was completed, his doctor had a great deal of geriatrics experience and he performed three psychogeriatric assessments on Mr. Elder that supported the caregiver's case. Furthermore, large portions of the responding expert report tendered by the nephews were ruled inadmissible. Based on this medical evidence and testimony, Justice Meiklem held that "the preponderance of evidence" showed that "as of April 27, 2011, when he executed the 2011 Will, Mr. Elder met the test for testamentary capacity set out in the *Banks* [*v. Goodfellow*] case".[168]

Undue Influence / Coercion

The nephews argued that by the time the 2011 Will was made Ms. O'Brien had moved from housekeeper to primary caregiver and, upon the death of Mr. Elder's sister, became

[165] *Elder Estate* at para. 23.
[166] *Elder Estate* at para. 24
[167] *Elder Estate* at para. 25 and 28.
[168] *Elder Estate* at para. 87.

his main source of emotional and physical support. They submitted that the caregiver made a plan, driven by her need to secure new accommodation for herself, to obtain the funds from their uncle. Furthermore, just losing his sister made Mr. Elder even more dependent upon the caregiver. Justice Meiklem saw things differently:

> The defendants' theory of Ms. O'Brien forming and carrying out a step-by-step plan is quite simply unsupported by the evidence. . . **It is a theory which is based solely on the defendants' original suspicions arising from the overview of the circumstance of a younger housekeeper/caregiver benefitting from the will of an aged man**.[emphasis added][169]

Numerous witnesses, including a financial advisor, real estate agent, home care workers, and doctors provided testimony in this case that supported the caregiver's position.

A financial advisor interviewed Mr. Elder in June of 2011, since she had concerns about Mr. Elder and the caregiver planning to take joint title to the house. Her specific concerns were with his age and possible elder abuse. She testified that he appeared physically frail but was "with it" mentally and was excited about the house purchase. He was the "majority" talker and was "spunky". He was very clear that it was not a romantic relationship but he also stated that he did not know what he would do without the caregiver. The financial advisor saw no red flags. Mr. Elder also told the financial advisor that he did not want his nephews to have any part of the house.[170] It is unclear from the decision whether the financial advisor met with Mr. Elder alone or if the caregiver was present as well.

The real estate agent who showed the home they eventually decided to purchase also testified that Mr. Elder was active and a leading participant in viewing of the new property and in the decision to make an offer to purchase.[171]

Justice Meiklem was impressed with the caregiver and her testimony:

[169] *Elder Estate* at para. 95.
[170] *Elder Estate* at para. 43.
[171] *Elder Estate* at para. 44.

> Ms. O'Brien impressed me, not only as being a credible witness as to her testimony, but as a person of generous character, who genuinely liked and respected Mr. Elder. **Her evidence that she loved him like a grandfather rang true. She was deferential to him rather than dominant, which was supported by the evidence of numerous witnesses.** When her own health prevented her from attending as necessary, she compiled a detailed list of instructions for her friend Mr. Rainbow to take her place. . . .**Ms. O'Brien's relationship with Mr. Elder and the potential for undue influence was scrutinized frequently by the institutional service providers, Ms. Krantz [a case manager with the geriatric mental health team], Ms. Heron[an outreach worker], Ms. Hutton[a home care manager], Dr. Fawcett [his doctor], and to a lesser extent, but in a focussed way, by Mr. Thompson [the drafting lawyer], Mr. Laurie [real estate agent], and Ms. Gibb [financial advisor]. All these witnesses were specifically looking for evidence of undue influence and saw none**.[172]
>
> Certainly Ms. O'Brien had legitimate influence over Mr. Elder, which is evidenced by her proposing the joint house purchase, but there is no evidence that she coerced him into doing something he did not want to do or that was not his own choice. In respect of the will, he actually rejected her advice that he did not need to change his will.[emphasis added][173]

Justice Meiklem found that the nephews did not establish undue influence or coercion on the part of Ms. O'Brien in respect of the 2011 Will.

Inter vivos Gift of $120,000.00

The nephews argued that the caregiver was in a fiduciary relationship with Mr. Elder because she was his caregiver and attorney, and that this was sufficient to raise a presumption of undue influence. Justice Meiklem disagreed:

> The generic label "caregiver" does not necessarily denote a fiduciary relationship or a potential for domination. . . **The nature of the specific relationship must be examined in each case to determine if the potential for domination is inherent in the relationship**.[174]
>
> . . . It is undoubtedly true that Mr. Elder was becoming more dependent upon Ms. O'Brien as time passed and it is reasonable to infer that she became a more significant part of his life after the death of his sister Georgina . . .**but taking into**

[172] *Elder Estate* at para. 98.
[173] *Elder Estate* at para. 99.
[174] *Elder Estate* at para. 108.

> **account their individual natures, and the development of the relationship, I do not find that the potential for domination of his will inhered in that relationship.** . . .[175]

Justice Meiklem concluded that had he found the relationship was sufficient to raise a presumption of undue influence, he would have found the presumption to have been rebutted on the preponderance of evidence and that the caregiver did not exercise any undue influence over Mr. Elder.

2017 – Asad v Canada (Federal)[176]

While this case is not a classic predatory marriage case, it is another example of a vulnerable individual forced into a marriage so that the spouse could gain an advantage. The advantage in this case was the obtaining of permanent resident status in Canada.

A 32 year old man, who was born in Pakistan but came to Canada when he was 14, had "obvious mental developmental deficits" and was in receipt of Ontario Disability Support Program benefits. He could take care of his personal needs such as dressing and washing himself but he could not purchase his own clothes or food. His parents handled all of his money and when he would use the telephone he had a pre-programmed phone with one button to push.

He married a woman in Pakistan in an arranged marriage in 2008. The wife applied for a permanent resident visa in 2011. The visa officer was not satisfied that the marriage was genuine and not entered into primarily for the purpose of immigration. The officer also had concerns about the husband's capacity to marry. The husband appealed to the Immigration Appeal Division.

On appeal, the Panel Member Andrachuk adopted Member Dolin's words in two previous immigration cases (*Khela v Canada (Citizenship and Immigration)*, 2008 CanLII 74722

[175] *Elder Estate* at para. 111.
[176] 2017 CanLII 37077 (CA IRB)[*Asad*].

(CA IRB) and *Karthigesu v Canada (Citizenship and Immigration),* 2010 CanLII 96515 (CA IRB) dealing with the requisite capacity to marry:

> In Canada a lack of mental capacity will render the marriage void *ab initio*. The requirement that one understand the nature of marriage is a manifestation of the basic requirement in contract law that a person should have the appropriate degree of mental functioning in order to be held accountable. However, the case law with respect to capacity to marry suggests that the standard is quite low. The courts have suggested that it does not require a high degree of intelligence to comprehend the significance of marriage. Mr. Justice Lowry of the Supreme Court of British Columbia [in *Hart v. Cooper, supra*] has summarized the standard as follows:
>
> > A person is mentally capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and the duties and responsibilities it creates. The recognition that a ceremony of marriage is performed or the mere comprehension of the words employed in the promises exchanges is not enough if, because of the state of mind, there is no real appreciation of the engagement entered into: Durham v Durham; Hunter v Edney (otherwise Hunter); Cannon v Smalley (otherwise (Cannon)(1885), LR 10 PD 80 at 82 and 95. **But the contract is a very simple one – not at all difficult to understand** (emphasis added).[177]

Member Andrachuk in Asad noted that "while the case law may suggest that the standard to be met in considering capacity to consent to marriage is low, **it is not insignificant** as the appellant has to understand the nature of the marriage contract and responsibilities it creates."[178][emphasis added].

Member Andrachuk found that the appellant had no sense of what responsibility in marriage entailed. He testified that he does not know what the word "responsibility" means. Member Andrachuk described him as a "pleasant, well-cared for young man who is totally dependent on his family . . . He cannot ever imagine that he could cope without his immediate family. He appeared to have no concept that marriage should be the primary relationship in his life." Further Member Andrachuk found that the appellant did not understand family planning or the prospect of having children: "I find that the appellant

[177] *Asad* at para.20.
[178] *Asad* at para.21.

does not understand the basics of what marriage entails. He stated that he slept with his wife but he may have meant it literally . . . Family planning is an essential aspect of marriage, and yet the appellant does not understand what is happening."[179]

Member Andrachuk found two basic faults with the evidence of the psychologist expert hired by the appellant's family: 1) she derived most of her information from the father; and 2) her conclusions dealt mainly with how the appellant would be able to adapt or behave in a marriage rather than the appellant's capacity at the time of his marriage and whether he entered into the marriage with his full and informed consent.

Member Andrachuk concluded that the appellant did not have the mental capacity to give valid consent to his marriage based on the following findings: he believed that his marriage was primarily for his wife to take care of him; he gave very limited responses to what marriage means other than that as he is alone he is to marry; his reasons for marrying was that all of his siblings were married; he did not understand the concept of responsibility; when asked what would he do if he had children, he just managed to say that he would play with them and nothing else. Further he did not consider what the implications were in marrying a foreign national.

As under Canada's laws the marriage was not valid, the applicant "wife" was not a member of the appellant's family and could not be sponsored to Canada. In the alternative Member Andrachuk found that the marriage was entered into primarily for the purpose of acquiring status and was not genuine.

2017 - Devore-Thompson v. Poulain (BC)[180]

In another recent decision, the British Columbia Supreme Court set aside a marriage based on the lack of requisite decisional capacity to marry and declared the marriage void *ab initio*. This claim was brought by a family member after the death of the incapacitated party. The Court also set aside two Wills based on the testator's lack of testamentary

[179] *Asad* at para. 38.
[180] *Devore-Thompson v. Poulain*, 2017 BCSC 1289 [*Devore*].

capacity. This lengthy decision had been the first case since the 2014 case of *Ross-Scott v. Potvin*[181] to provide further ammunition on remedying the now out of date common law treatment of decisional capacity to marry. A few cases have followed suit and are reviewed below.

Ms. Walker was an older adult, who had been previously married and divorced, and had no children. She thought of her sister's children as her own. She was a strong independent woman until she was diagnosed with Alzheimer's disease in 2005. According to those close to her, Ms. Walker's condition progressively deteriorated in the years following her diagnosis, to the point where she forgot how to use utensils and a phone, could no longer cook, forgot who people were, and could not clean or care for herself. Ms. Walker, however, refused to acknowledge her declining health and insisted on remaining independent. Her niece, the Plaintiff in this case, loved her aunt dearly and increasingly assisted her aunt to live independently as long as possible.

In early 2007 Ms. Walker saw Dr. Maria Chung who prepared a consultation report. The report recommended that Ms. Walker's driver's license be revoked before she injured herself or others. Dr. Chung continued to care for Ms. Walker after the initial consultation and provided evidence at the trial.

Following Dr. Chung's advice, Ms. Walker made a new Will as of February 16, 2007 and appointed her niece as her attorney under a power of attorney for property. As of May 17, 2007, Ms. Walker also signed a representation agreement appointing her sister and her niece as her representatives under the *Representation Agreement Act*, R.S.B.C. 1996, c. 405, giving them each independent authority to make health and personal care decisions on her behalf.

Her affairs were in order and everything was settled. Or so the niece thought. It was discovered later (discussed below) that Ms. Walker had executed a new Will in 2009 and granted new powers of attorney.

[181] 2014 BCSC 435.

On September 14, 2010, A Certificate of Incapability was issued pursuant to s. 1(a) of the *Patients Property Act,* R.S.B.C. 1996 c. 349, declaring Ms. Walker incapable of managing her legal and financial affairs. The Public Guardian and Trustee (PGT) was appointed committee of the estate. Ms. Walker died on December 26, 2013.

The "Predatory" Relationship

Unknown to Ms. Walker's caring niece, while Ms. Walker's health was deteriorating significantly she was being "preyed on"[182] by a younger man for financial gain.

Ms. Walker met this man, Mr. Floyd Poulain in 2006 at the local mall when he asked her for five dollars and her address and phone number. Ms. Walker and Mr. Poulain went on to have dinner together and this began Mr. Poulain's "campaign".[183]

Unbeknownst to her family and friends, Mr. Poulain took Ms. Walker to a lawyer in 2009 for Ms. Walker to execute a new Will. The lawyer testified at the trial but had to rely on his "sparse notes" as he could not recall the meeting. His notes indicated that Mr. Poulain remained with Ms. Walker while she was meeting with the lawyer. The evidence demonstrated that the 2009 Will was prepared from handwritten notations to the 2007 Will. The notations were in Mr. Poulain's handwriting. The notes struck out the appointment of Ms. Walker's friend as executor, and inserted "Floyd S. Poulain". Mr. Poulain also struck out the gift of Ms. Walker's car to her nephew with the instruction "omit" (as Mr. Poulain had already taken over Ms. Walker's car). There was also a note "to make power of attorney Floyd S. Poulain."

Madame Justice Griffin, in her decision, noted "*I find there to be a high probability that Ms. Walker sat in front of [the lawyer] and pretended to know what was going on by nodding and smiling a lot and saying very little. Others noted her smiling a lot and Ms.*

[182] *Devore* at para.4.
[183] *Devore* at paras. 255 & 329.

Walker was quite determined not to let on that she was having cognitive difficulties."[184] Justice Griffin found difficulty placing any weight on the evidence provided by the lawyer; noting that nothing in his evidence suggested that based on his standard practices he was able to detect Ms. Walker's testamentary capacity.

Shortly thereafter, the niece became aware that Ms. Walker had placed her condominium up for sale, even though she had previously asserted that she enjoyed living in her condo. The family intervened, and the listing was cancelled. Ms. Walker's actions were likely prompted by Mr. Poulain. Around this time Ms. Walker also became highly suspicious of family members, including her niece who had been assisting her the most. Mr. Poulain was reportedly fueling her suspicions.

Ms. Walker and Mr. Poulain were married in June of 2010. Ms. Walker did not inform any of her family members that she intended to marry Mr. Poulain. In fact, she had said that she did not intend to remarry. The marriage caught her close family members and her treating physician completely off guard. Mr. Poulain testified that it was her idea.

Mr. Poulain was unable to recall any material details of the wedding under cross-examination; including who the witnesses were (they were supplied by the marriage commissioner). There was one photograph produced at trial where Ms. Walker and Mr. Poulain were together and her facial expression was vacant. The marriage commissioner's evidence was unhelpful on the issue of whether Ms. Walker had capacity to marry as he could not remember the marriage ceremony and does hundreds of ceremonies. He had "no practice of testing for capacity" (the Court noted that "it is not suggested he should have") and simply asks the parties to say "I do not" and "I do" to the standard questions.[185]

[184] *Devore* at para. 294.
[185] *Devore* at para. 303.

Justice Griffin noted it was likely that Ms. Walker was prompted on what to say at the ceremony and went along with it and the fact that the marriage ceremony took place is of little help in determining capacity.

When Dr. Chung learned about the marriage from the niece, she made an urgent referral to the PGT stating her opinion that Ms. Walker was incapable of entering into a marriage relationship. Dr. Chung continued to be of the opinion, at the trial of this matter, that Ms. Walker was not capable of consenting to marriage and not capable to sign the 2009 Will.

After the marriage, Mr. Poulain and Ms. Walker consulted another lawyer at the same office where her 2009 Will was executed. This second lawyer's file was produced at trial but the lawyer was not called as a witness. The file suggests that the lawyer was told Ms. Walker had had a stroke but was not advised of her Alzheimer's diagnosis. The file also indicated that the consultation was about obtaining greater access to Ms. Walker's bank account. The lawyer wrote a letter to her bank seeking information about Ms. Walker's account balance and why she was not permitted to access her account. Ms. Walker's niece (her attorney under the power of attorney for property) had put a $500 withdrawal limit on her account as all of Ms. Walker's bills were automatically deducted from her bank account. There was no need for Ms. Walker to obtain large sums of cash. Justice Griffin observed that this evidence pointed to "concerted efforts by Mr. Poulain to try to get access to Ms. Walker's funds at Scotiabank post-Marriage: repeated contact with [the lawyer]; approaching the Scotiabank; and approaching another bank".[186]

When the niece learned of the involvement of the second lawyer she informed the lawyer of her power of attorney and her suspicions of Mr. Poulain. Nevertheless, the lawyer "pressed on for a while" including preparing a new power of attorney appointing Mr. Poulain as Ms. Walker's attorney. The authenticity of this document was at issue since the niece claimed that she was with Ms. Walker until 4:00 p.m. on the date it was purportedly signed and Ms. Walker never mentioned an appointment with a lawyer. It

[186] *Devore* at para. 252.

wasn't until the PGT office communicated with the lawyer that he wrote a letter to Mr. Poulain concluding that he ought not to represent Mr. Poulain.

The day after the new power of attorney was purportedly signed, Ms. Walker had a fall in her condominium and was taken to the hospital. A note was found after Ms. Walker was in hospital in which Mr. Poulain had written "will you please go over to the bank and withdraw $40,000. . . it is really really important".[187]

Mr. Poulain claimed that he had no knowledge of Ms. Walker's health condition and that he never observed anything out of the ordinary in her behaviour. He testified that even in September of 2010 when Ms. Walker was admitted to the hospital, she was fine, there was no change in her memory or other cognitive function from the time that he knew her.

The Court nevertheless found that the evidence showed a consistent campaign by Mr. Poulain to try to get access to Ms. Walker's funds post-marriage:

> I find it likely on the evidence that Mr. Poulain had long been fanning the fire of Ms. Walker's anxiety and paranoia by suggesting that the plaintiff was unfairly restricting her access to her own money, and that the intensity of these efforts increased after the Marriage.[188]

Justice Griffin provided a thorough review of the evidence before her and ultimately concluded that Ms. Walker did not have the requisite decisional capacity to marry and as such the marriage to Mr. Poulain was *void ab initio*. Her Honour also found that, based on the evidence, Ms. Walker did not have capacity to execute a Will in 2009 or even in 2007, leaving the question of Ms. Walker's estate open for further inquiry.

Justice Griffin began her analysis by noting that the starting point is "the notion that a marriage is a contract. Similar to entering into any other type of contract, the contracting parties must possess the requisite legal capacity to enter the contract."[189] Referring to *Hart v. Cooper*, [1994] B.C.J. No. 159 (B.C.S.C.) at paragraph 30, Justice Griffin

[187] *Devore* at para. 253.
[188] *Devore* at para. 262.
[189] *Devore* at para. 43.

confirmed that "a person is mentally capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and the duties and responsibilities it creates."

Relying on *Wolfman-Stotland*, which in turn referred to *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Ont. Gen. Div.), aff'd (1998), 37 O.R. (3d) 221 (Ont. C.A.), leave to appeal refused [1998] S.C.C.A. No. 161 (S.C.C.), Justice Griffin observed:

> the common law has developed a low threshold of capacity necessary for the formation of a marriage contract. The capacity to marry is a lower threshold than the capacity to manage one's own affairs, make a will, or instruct counsel. . .the capacity to marry requires the "lowest level of understanding" in the hierarchy of legal capacities. . . The authorities suggest that the capacity to marry must involve some understanding of with whom a person wants to live and some understanding that it will have an effect on one's future in that it will be an exclusive mutually supportive relationship until death or divorce.[190]

Relying on the evidence presented at trial, Justice Griffin concluded:

> [343] As of the date of the marriage ceremony, Ms. Walker was at a stage of her illness where she was highly vulnerable to others. She had no insight or understanding that she was impaired, did not recognize her reliance on Ms. Devore-Thompson [the niece] and Ms. Devore-Thompson's assistance, and was not capable of weighing the implications of marriage to Mr. Poulain even at the emotional level.
>
> [344] The fact that Ms. Walker told some people that she had married Floyd Poulain does not overcome all of the evidence as to her disordered thinking. This does not mean she had any understanding of what it means to be married.
>
> [345] It is also clear that Ms. Walker's mental capacity had diminished to such an extent that by 2010 she could not have formed an intention to live with Mr. Poulain, or to form a lifetime bond. She did not understand, at that stage, what it meant to live together with another person, nor could she understand the concept of a lifetime bond.
>
> [346] Ms. Walker did not have a grip on the reality of her own existence and so could not grip the reality of a future lifetime with another person through marriage.
>
> [347] I find on the whole of the evidence, given her state of dementia, Ms. Walker could not know even the most basic meaning of marriage or understand any of its

[190] *Devore* at para. 46-48.

> implications at the time of the Marriage including: who she was marrying in the sense of what kind of person he was; what their emotional attachment was; where they would be living and whether he would be living with her; and fundamentally, how marriage would affect her life on a day to day basis and in future.
>
> [348] I conclude that Ms. Walker did not have the capacity to enter the Marriage.
>
> [349] Since I have concluded that Ms. Walker did not have the capacity to enter the Marriage, the Marriage is void *ab initio*. Because the Marriage is void *ab initio*, s. 15 of the *Wills Act* does not apply and, therefore, the Marriage does not revoke the prior wills.

With respect to the 2009 Will, the Court concluded that the circumstances surrounding the document were suspicious and held, based on the evidence presented, that Ms. Walker did not have testamentary capacity at the time the 2009 Will was purportedly signed.

The niece sought an order propounding the 2007 Will should she succeed on other issues. The original copy of the 2007 Will was unavailable. Forgoing the technical Probate Rules, Madam Justice Griffin found that here too the practical and first issue to be decided was whether the deceased had capacity to make a Will. Relying on preceding evidence, her Honor concluded that on a balance of probabilities Ms. Walker lacked capacity to execute the 2007 Will. The Court declined to determine the future of Ms. Walker's estate as it had not been asked to do so.

The question of capacity with respect to marriage will, no doubt, often be more complicated than it was in this case as the niece's evidence was strong, with several credible witnesses. Nevertheless, this is a strong precedent for future claims to set aside predatory marriages for lack of capacity.

This case is also a reminder of the important role that lawyers play in protecting vulnerable older adults with diminished capacity, and in this instance, the evidence indicated that the lawyers failed to follow best practices. The testimony regarding the preparation of the 2009 Will and 2010 power of attorney suggested that no inquiries were made of the deceased's capacity. Instead, notations made by a party, with a vested interest in the changes to the Will, were accepted as instructions.

2017 - Hunt v. Worrod (Ontario)[191]

Hunt v Worrod just released, with the cost decision expected to be out shortly, examines the requisite decisional capacity to enter into a marriage contract.

In this decision, Kevin Hunt, father of two adult sons, was severely injured in an ATV accident and sustained a catastrophic brain injury. Before his accident, Mr. Hunt was involved with Ms. Worrod in an on-again and off-again relationship. Three days after Mr. Hunt returned home from the hospital he disappeared. He did not have his medications with him. When his sons tracked him down at a hotel (by obtaining particulars from his credit card) they learned that Ms. Worrod had made arrangements to marry Mr. Hunt and that the wedding had already taken place. The police were called, and they released Mr. Hunt into the care of his sons. The sons brought an application, and one of the issues that the Court was required to consider was whether Mr. Hunt had the capacity to marry Ms. Worrod and if not, whether the marriage was *void ab initio*?

Justice Koke started the court's analysis by citing *Ross-Scott v. Potvin* 2014 BCSC 435:

> A person is capable off entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and duties and responsibilities it creates. The assessment of a person's capacity to understand the nature of the marriage commitment is informed, in part, by an ability to manage themselves and their affairs. Delusional thinking or reduced cognitive abilities alone may not destroy an individual's capacity to form an intention to marry as long as the person is capable of managing their own affairs.[192]

Justice Koke recognized the need to balance Mr. Hunt's autonomy and the possibility that he did not fully appreciate how marriage affected his legal status or contractual obligations.[193] Justice Koke went on to conclude that a finding by a Court that an individual has capacity to marry, as set out in *Ross-Scott v. Potvin*, requires that that person "entering into a marriage contract understand the duties and responsibilities which a

[191] *Hunt v. Worrod* 2017 ONSC 7397.
[192] *Ross-Scott v. Potvin*, 2014 BCSC 435 at para.177.
[193] *Hunt v. Worrod* 2017 ONSC 7397 at paras. 10-11.

marriage creates *and* have the ability to manage themselves and their affairs" [emphasis in the original].[194]

Justice Koke thoroughly examined the significant amount of evidence dealing with the issue of capacity presented at trial. This evidence came both in the form of expert medical testimony and medical reports as well as the oral testimony of lay witnesses. A number of medical professionals had found that prior to the marriage and shortly after, Mr. Hunt demonstrated the following severe cognitive and physical impairments, among others:

- Significant impairments to his executive functioning, such as his ability to make decisions, organize and execute tasks;
- A neurologically based lack of awareness of his deficits and impairments, making it difficult for him to experience fully what is happening around him as well as to infer consequences of events which might jeopardize his personal safety;
- He demonstrated little emotional reactivity as well as apathy, demonstrated by a lack of initiation and motivation;
- He should not be left alone and continued to need supervision for safety reasons as well as to remind him to take his medications;
- His driver's license was revoked;
- He had difficulty initiating conversation and needed cuing to provide additional information; and,
- He had limited range of motion in his left shoulder, difficulties with balance, some residual left neglect, and his ability to walk was impaired when he performed more than one task at a time.

[194] *Hunt v. Worrod* 2017 ONSC 7397 at para. 83.

Justice Koke found that the evidence of the lay witnesses called by the sons supported the opinion of the medical experts as to Mr. Hunt's cognitive and physical impairments.

Before his release from the hospital, Mr. Hunt was assessed by Bill Sanowar, a capacity assessor on two separate occasions. On August 5 2011, Mr. Sanowar found Mr. Hunt to be incapable of managing his property. On October 19, 2011, five days before the marriage, Mr. Sanowar found Mr. Hunt to be incapable of making personal care decisions with respect to the areas of health care, nutrition, shelter, and safety.

After reviewing this extensive medical evidence, and evidence from the sons, Mr. Hunt, Ms. Worrod, and others, Justice Koke concluded that Mr. Hunt did not have the requisite capacity to marry and declared the marriage to be *void ab initio*.

Unlike the majority of predatory marriage cases which make it to trial, this case is markedly different since Mr. Hunt is not an older person and he is still living. This meant that, while clearly vulnerable, a consideration of his personal autonomy and his safety and wellbeing in the future was necessary.

Due to the nature and extent of Mr. Hunt's injuries from his accident, extensive medical evidence for the period surrounding the marriage was available to the Court. Of particular importance were the contemporaneous capacity assessments with respect to property and personal care that had been conducted and were available to the Court. This is unusual, as predatory marriage cases often involve an older adult who may not require regular medical attention. As a result, there is often limited medical evidence from the period surrounding the marriage available.

Alienation is another common element of predatory marriages, where the unscrupulous opportunist chooses to wedge him or herself in between the older adult and their friends and family. While Ms. Worrod did attempt to alienate Mr. Hunt from his sons and influence his actions, since the sons are his guardians, they were able to do what they could to protect him and continue to make decisions in his best interest.

2018 – Chuvalo v. Chuvalo (Ontario)[195] Capacity to Reconcile

In the recent decision, *Chuvalo v. Chuvalo*[196] Justice Kiteley examined the issue of the requisite decisional "capacity to reconcile". This analysis will review the reported reasons for decision and provide commentary on the "capacity to reconcile" within the context of current Canadian decisional capacity jurisprudence. Notably, this decision continues to highlight the complexity of the underlying principles of decisional capacities.

The Decision: *Chuvalo v. Chuvalo* 2018 ONSC 311

George Chuvalo, now retired, was a legendary boxer who fought over 93 fights throughout his 22-year career. He was a five-time Canadian Heavy-Weight Champion, a two-time world heavy weight challenger, and his accolades include two matches against the Great Muhammad Ali. His famed status as a boxer was achieved despite his losses to Ali. In their last fight George went the distance, all 14-rounds, rallying at the end and withstanding knockout. Now, at 80 years old, George Chuvalo is still making news headlines, but unfortunately respecting his would be private affairs in a nasty public familial dispute over custody and control. His tough beginnings, determined career and personal heartache appear not to be out of public scrutiny just yet.

Recent media articles[197] have reported on George Chuvalo's significant cognitive decline and his children's fight to have their father's expressed wishes recognized by a court. Specifically, over the last two years, Chuvalo's children have been in a fierce legal battle with Joanne Chuvalo, their father's spouse. His children, in their capacity as his attorneys under powers of attorney, brought divorce proceedings against Joanne on behalf of

[195] *Chuvalo v. Chuvalo* 2018 ONSC 311.
[196] *Chuvalo v. Chuvalo* 2018 ONSC 311 (CanLII)
[197] Mary Ormsby, "The Fight Over Boxing Legend George Chuvalo", The Toronto Star, November 3, 2017, online: https://www.thestar.com/news/canada/2017/11/03/the-fight-over-boxing-legend-george-chuvalo.html ; Mary Ormsby, "George Chuvalo Lacks Capacity to Decide on His Marriage, Judge Rules", The Toronto Star, January 13, 2018, online: https://www.thestar.com/news/gta/2018/01/13/george-chuvalo-lacks-capacity-to-decide-on-his-marriage-judge-rules.html

Chuvalo. Joanne however, seemingly seeks to reconcile and not divorce Chuvalo in spite of separation.

In their Application, the children, on behalf of their father, reportedly raised allegations of kidnapping, brainwashing, and extortion, reckless spending and alleged that Joanne preyed on George Chuvalo's vulnerable mental state to "extort cash money".[198]

The Hearing of the Application

In January, 2018, a three-day hearing of an application was heard in part, focusing at that time on the sole issue of whether Chuvalo had the requisite capacity to decide to reconcile with Joanne.[199] The application as a whole also centers on the greater issue of divorce but that issue was put over to a trial. At the outset of the hearing, the parties agreed that the evidence demonstrated that George Chuvalo lacked the requisite decisional capacity to instruct his counsel. As such, the Public Guardian and Trustee was appointed as his representative pursuant to rule 4(3) of the *Family Law Rules* (akin to a Litigation Guardian in estate proceedings).[200]

In her decision dated January 12, 2018, Justice Kiteley decided that Chuvalo "does not have capacity to decide whether to reconcile" with Joanne and further noted that she need not decide whether he has the capacity to divorce.[201]

Justice Kiteley relied on the expert opinion of Dr. Richard Shulman, a geriatric psychiatrist, and also referenced the opinion of Dr. Heather Gilley, a geriatrician. Dr. Shulman set out the legal criteria applicable to assessing whether an individual possesses the requisite decisional capacity to make a particular decision as follows:

[198] *Ibid*., "The Fight Over Boxing Legend George Chuvalo".
[199] *Chuvalo v. Chuvalo*, 2018 ONSC 311, para. 16 ["*Chuvalo*"]
[200] *Chuvalo*, paras. 4-5.
[201] *Chuvalo*, paras. 16-17.

1. The ability to understand information relevant to making the decision (for example relevant facts); and
2. The ability to appreciate the consequences of making or not making the decision (relevant to the context of the situation-specific nature of decisional capacities).

Dr. Shulman had assessed George and testified that earlier in the spring of 2017, he was able to understand and appreciate what he was doing, why he was doing it, and whether he wanted to do it as far as the divorce proceedings were concerned. He explained that George had an adequate understanding of the fact that he was then separated and was pursuing a divorce, and he had consistently indicated that divorce, rather than reconciliation, was his preferred option.[202]

Some months later, in November of 2017, Dr. Shulman again assessed George and noted that his cognitive ability had declined sharply and that he was at that time no longer able to "appreciate the consequences of his choices in regard to the matrimonial proceedings" which involve a "realistic appraisal of outcome and justification of choice."[203] Justice Kiteley accepted the evidence and expert opinion of Dr. Shulman.[204]

In addition to the expert evidence, "[a]fter laying the evidentiary groundwork" Justice Kiteley "ruled that, based on Ms. O'Hara's[205] special skill and based on Ms. Chuvalo's knowledge and experience, each of them could form an opinion as to whether Mr. Chuvalo had the *ability to decide where he wants to live*. Each witness said he had that ability and that he expressed his desire to live with Ms. Chuvalo" [emphasis in original].[206]

[202] *Chuvalo*, para. 34.
[203] "George Chuvalo Lacks Capacity to Decide on His Marriage, Judge Rules"; *Chuvalo*, paras. 33, 35, supra note 1.
[204] *Chuvalo*, paras.44-48.
[205] Ms. Chuvalo's sister.
[206] *Chuvalo*, para. 29.

Justice Kiteley began her analysis with a review of the decision in *Calvert v. Calvert*,[207] which dealt primarily with the issue of whether the applicant wife had the capacity to form the requisite intention to separate from her husband. In that case, the Court relied on the expert evidence of Dr. Molloy in finding that the applicant had the requisite capacity to separate from her husband. Dr. Molloy opined that to be competent to make a decision, a person must: understand the context of the decision; know his or her specific choices; and appreciate the consequences of the choices.[208]

In addition, her Honour considered and cited, *Banton v. Banton*[209] and *Feng v. Sung Estate*,[210] relying on the following principles: "an individual will not have the capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves";[211] and "a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."[212]

Justice Kiteley also relied on that espoused in the recent decision of *Hunt v. Worrod*:[213]

> The consensus of opinion from the medical experts and witnesses, evidence which I note was un-contradicted by other medical experts, is that Mr. Hunt lacked the ability to understand the responsibilities or consequences arising from a marriage, and that he lacked the ability to manage his own property and personal affairs as a result of the injuries he sustained on June 18, 2011.

The Court concluded that the requirement for an individual to understand and appreciate the consequences of making or not making a decision to reconcile were consistent with

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[207] *Calvert (Litigation Guardian of) v. Calvert*, 1997 CanLII 12096 (ON SC), aff'd 1998 CarswellOnt 494; 37 OR (3d) 221 (CA), leave to appeal to SCC refused May 7, 1998.
[208] *Chuvalo*, para.52.
[209] 1998 CarswellOnt 3423, 1998 CanLII 14926, 164 DLR (4th) 176 (Ont Gen Div).
[210] (2003) 1 ETR (3d) 296, 37 RFL (5th) 441 (Ont SCJ), affd 11 ETR (3d) 169, 2004 CarswellOnt 4512 (ONCA).
[211] *Chuvalo*, para. 55.
[212] *Chuvalo*, para. 56.
[213] *Hunt v. Worrod*, 2017 ONSC 7397, para 91, para 58 of Chuvalo

the medical parameters outlined in Dr. Shulman's report as well as the jurisprudence (referenced).[214]

Justice Kiteley found that George Chuvalo expressed a wish to live with his wife, but explained that "there is no evidence that he understood whether there would be consequences to a decision to 'live with' his wife. Indeed, there are consequences such as changing the financial status quo between them . . . There are other consequences such as the emotional impact if the attempted reconciliation fails."[215]

Counsel for Joanna submitted that there was no evidence that George ever intended to separate. The Court acknowledged that by finding that George Chuvalo lacked the capacity to decide whether to reconcile, it appeared to be implicit that there was a separation. Her Honour did not decide whether Chuvalo did separate from Joanna, and held that if it was at issue, it would be addressed in the future trial.

In early March, the parties were ordered to attend a case conference to discuss the next steps in the proceeding. At the close of the hearing, Justice Kiteley encouraged the parties to focus on George Chuvalo's 'best interests' and to "bury the hatchet and co-operate to develop a plan that will work in the best interests of George in his remaining years while he continues to experience inevitable decline."[216] Her Honour found that Joanne was not successful and was not entitled to her costs.

In a separate proceeding, the court addressed Joanne's attempt to seek guardianship of her husband and in which she disputes the validity of the power of attorney granted to George's two children.[217]

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[214] *Chuvalo*, para. 59.
[215] *Chuvalo*, paras. 60-61.
[216] Chuvalo, para. 69.
[217] *Supra* note 1, "George Chuvalo Lack Capacity to Decide on his Marriage, Judge Rules"

This decision is now under an appeal. In the appeal Joanne asserts that Justice Kiteley erred in not applying *Calvert*, by applying an incorrect test and creating a more onerous test than the established tests or factors to be applied in determining the requisite decisional capacity to separate or to divorce, among other issues.[218]

Commentary & Analysis

George Chuvalo's circumstances are not unfamiliar, particularly in our rapidly aging population. With age and longevity often comes an increase in the occurrence of medical issues affecting cognitive ability, and impairment of the executive functioning part of the brain. Diseases such as Dementia, Alzheimer's, Stroke, Parkinson's and other conditions involving reduced executive functioning are examples of the sorts of illnesses that can give rise to decisional capacity concerns. The Chuvalo proceedings illustrate how issues concerning for example, the capacity to marry or divorce are increasingly prevalent in our aging demographic.

Decisions concerning the capacity to marry and divorce are evolving in the law. Historically, courts have viewed the contract of marriage as a 'simple' contract, not requiring a high degree of intelligence to comprehend. This same threshold for determining the requisite decisional capacity to marry has been equated to the requisite decisional capacity to divorce.[219] Issues related to the capacity to marry and divorce are of increasing importance in our society, particularly since marriage and divorce carry with them significant financial and property rights and consequences. In some provinces marriage revokes a testamentary document as does divorce revoke bequests to a prior spouse.

[218] See "Appeal Sought in Chuvalo Divorce Case", The Lawyers Daily online: https://www.thelawyersdaily.ca/family/articles/5896/appeal-sought-in-chuvalo-divorce-case
[219] *Calvert*, *supra*, at paras. 57-58; *AB v. CD*, 2009 BCCA 200, leave to appeal to SCC refused in 2009 CarswellBC 2851; *Wolfman-Stotland v. Stotland*, 2011 BCCA 175.

A more recent stream of cases[220] appear to be moving the law along in the direction of developing more detailed factors that should be considered when determining the requisite decisional capacity to marry that both reflect and accord with the real-life financial implications of marriage or divorce.

Importantly, each of these cases has its own unique facts, defining characteristics and evidence to be weighed and considered. These recent decisions would seem to have had the benefit of extensive probative medical evidence in their success, which is not often the case. The hallmarks of a predatory relationship often include alienation, sequestering, isolation and a deliberate and purposeful lack of medical evidence of cognitive impairment.

The consideration of determining the requisite capacity to reconcile is not an often deliberated issue before the court. A few cases have addressed the requisite decisional capacity to *separate*[221] but none, until *Chuvalo*, have expressly addressed reconciliation purely from a cognitive assessment perspective.

Justice Kiteley in *Chuvalo* considered[222] the oft-cited quotation from Justice Bennoto in *Calvert* dealing with the various "levels" of capacity":

> There are **three levels of capacity** that are relevant to this action: capacity to separate, capacity to divorce and capacity to instruct counsel in connection with the divorce.
>
> **Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. Divorce, while still simple, requires a bit more understanding. It requires the desire to remain separate and to be no longer married to one's spouse. It is the undoing of the contract of marriage.**

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[220] *Banton v. Banton*, *supra*; *Barret Estate v. Dexter* (2000), 34 ETR (2d) 1, 268 AR 101 (Alta QB); *Feng v. Sung Estate*, *supra*; *Devore-Thompson v. Poulain*, 2017 BCSC 1289; *Hunt v. Worrod*, 2017 ONSC 7397.
[221] *Calvert*, *supra* and *Babiuk v. Babiuk* 2014 SKQB 320.
[222] At para. 50.

> The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: *Park*,[223]…… at p. 1427. If marriage is simple, divorce must be equally simple. The American courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage: *Re Kutchins* [citation omitted].
>
> **There is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live and decisions regarding financial matters. Financial matters require a higher level of understanding.** The capacity to instruct counsel involves the ability to understand financial and legal issues. This puts it significantly higher on the competency hierarchy. It has been said that the highest level of capacity is that required to make a will: *Park, supra*, at p. 1426. . . . [Emphasis added]

While *Calvert* may be the current state of the law, the question of whether it is correct is arguably at issue. It may be that the Courts have not quite got it right for various reasons, which can be problematic in future application.

First, referenced are the various "levels" for the capacity to separate, divorce, and marry within a hierarchical analysis. While it may be easier or instinctive to apply hierarchies to such analysis, a hierarchy delineating differing levels of decisional capacity does not exist. Rather different types of decisional capacity simply call for different standards to be applied.[224]The court in Chuvalo simply did not get caught up in an analysis of hierarchical paradigms.

Second, at first glance, it appears that in *Calvert*, Justice Bennoto finds capacity to separate is simply determining with whom one wants to, or does not want to, live. Finding that separation only requires the decisional capacity to decide with whom one wants to live is not in keeping with the *Molodovich*[225] factors – since reconciliation or separation does not necessarily involve living together – it is but one factor in a sea of other factors all of which have far reaching consequences. Separation, specifically determining the

[223] *Re Park*, [1953] 2 All E.R. 1411
[224] See Kimberly A. Whaley, Kenneth I. Shulman, and Kerri L. Crawford, "The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective", Adv. Q., Volume 45, No.4, July 2016.
[225] *Molodowich v. Penttinen*, 1980 CanLII 1537 (ON SC).

date of separation, has legal and financial consequences in the family law and statutory context, since it is used to determine the equalization of property, separation agreements that may be entered into and other domestic contractual arrangements or divorce decrees.

Justice Bennoto went on to find in *Calvert* that that there is a distinction between deciding with whom one wants to live and decisions with financial consequences; and concluding that financial matters require a "higher level of understanding". The decision to separate inherently involves financial considerations and consequences as does marriage and divorce. The question of a higher or lower level or threshold is really dispelled by the decision itself that is being undertaken. Each decision has different factors to be applied in ascertaining requisite decisional capacity.

This must equally be true of the decision to reconcile. Neither separation, nor reconciliation, is simply about with whom one wants to or does not want to live. If it was then perhaps the factors to be applied in its determination would be the same. For George, perhaps the question was more about where he wanted to live then with whom he wanted to live. There was notably, no discussion about personal care decisional capacity. Justice Kiteley clearly notes the distinction in her decision and she concludes that Ms. Chuvalo and Ms. O'Hara could "form an opinion as to whether Mr. Chuvalo had the *ability to decide where he wants to live*" but it was only the experts who could express an opinion on Mr. Chuvalo's executive functioning and his cognitive ability to decide to reconcile.

Determining the requisite capacity to reconcile may be situation specific depending on the intentions and terms of the contemplated reconciliation. For example, it may involve living together, or living separate and apart for the purposes of the *Divorce Act*. In this case, Ms. Chuvalo removed Mr. Chuvalo from the long-term care facility in which he was residing and took him to her house. Few people willingly want to live in a long-term care facility. Living with Ms. Chuvalo was likely a happy alternative for him, but that is not the

only consideration in determining the question of requisite decisional capacity (or desire) to reconcile with his wife.

Two key paragraphs to examine in this decision are paragraphs 61 & 62:

> ….However, expressing a desire to live with his wife is just that. There is no evidence that he understood whether there would be consequences to a decision to "live with" his wife. Indeed, there are consequences such as changing the financial status quo between them; such as changing the date of separation for purposes of s. 8(2) of the *Divorce Act*. There are other consequences such as the emotional impact if the attempted reconciliation fails.
> This court cannot rely on Mr. Chuvalo's assertions that he wants to live with his wife as a basis on which to find that he is capable of making the decision to reconcile.

Justice Kiteley decided that Mr. Chuvalo did not have the requisite decisional capacity to reconcile. For if he reconciles, he needs to be able to foresee and understand the consequences of a reconciliation which involve not only emotional but financial consequences as well.

Justice Kiteley looked at several cases and appropriately (in my view) applied the standard which is arguably developing in more recent case law. Perhaps the standard or factors to consider when determining the requisite decisional capacity to reconcile should be the same as applied in determining the capacity to marry (or marry again), which ought to include both factors of property and personal care management, as found in obiter by both the Honorable Justice Cullity in *Banton,* and again by the Honorable Justice Greer in *Sung*.

In our opinion, Justice Kiteley, made the correct decision on the evidence before her. Dr. Shulman was the only expert called to give evidence (and be cross-examined on this evidence), and he was in the fortunate position of having seen and having assessed Mr. Chuvalo both while he was decisionally capable of certain tasks and at a later point of significant decline in cognitive and executive functioning when he was no longer capable of certain other tasks. This made Dr. Shulman a very compelling and appropriate medical

expert witness and he addressed the correct legal questions (i.e., the ability to understand information relevant to making the decision; and the ability to appreciate the consequences of making the decision or not). So, in my respectful opinion, Justice Kiteley properly declined to apply the hierarchical and "levels" of decisional capacity approaches. Moreover, in my opinion, based on the evidence that Mr. Chuvalo could not understand the consequences of reconciliation (including both financial and emotional considerations) and was not capable of instructing his counsel, the court correctly determined that Mr. Chuvalo lacked the requisite decisional capacity to reconcile on the evidence before it.

To complicate matters a little in the reading of this decision, there were two concepts of reconciliation at play relative to the presumed separation: 1) in the statutory context, under the *Divorce Act*, section 10[226] which deals with inter alia, dates of separation and the divorce proceedings proper (which will be dealt with at a future hearing/trial – where evidence will be marshalled surrounding their separation in accordance with that statute); and, 2) what Justice Kiteley was asked to do in this hearing, which was to determine

[226] Sec 10 (1) In a divorce proceeding, it is the duty of the court, before considering the evidence, to satisfy itself that there is no possibility of the reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.
Adjournment
(2) Where at any stage in a divorce proceeding it appears to the court from the nature of the case, the evidence or the attitude of either or both spouses that there is a possibility of the reconciliation of the spouses, the court shall
(a) adjourn the proceeding to afford the spouses an opportunity to achieve a reconciliation; and
(b) with the consent of the spouses or in the discretion of the court, nominate
(i) a person with experience or training in marriage counselling or guidance, or
(ii) in special circumstances, some other suitable person, to assist the spouses to achieve a reconciliation.
Resumption
(3) Where fourteen days have elapsed from the date of any adjournment under subsection (2), the court shall resume the proceeding on the application of either or both spouses.
Nominee not competent or compellable
(4) No person nominated by a court under this section to assist spouses to achieve a reconciliation is competent or compellable in any legal proceedings to disclose any admission or communication made to that person in his or her capacity as a nominee of the court for that purpose.
Evidence not admissible
(5) Evidence of anything said or of any admission or communication made in the course of assisting spouses to achieve a reconciliation is not admissible in any legal proceedings

whether George Chuvalo had the requisite decisional capacity to reconcile at the time the application on this issue was heard.

It will be interesting to learn the outcome of the appeal. Ms. Chuvalo's position seems to involve the proposition that an understanding of the legal effect of reconciliation ought not to be part of the assessment of the requisite decisional capacity to reconcile and that Justice Kiteley failed to apply *Calvert*. However, I do not see how it can be concluded that Her Honour failed to apply *Calvert* – indeed the reasons for decision reference a selection of relevant and notable cases which were considered, evaluated and examined in tandem with the medical and expert evidence and the fact specific nature of the issues for determination before her.

In my respectful view, the suggestion that Justice Kiteley created a more onerous test (an argument Her Honor addresses head on and provides reasons for) simply does not carry any weight.[227] The consequences are all part of the *'test'* or factors to be applied in the determination of capacity for any decision made, even for simple contractual capacity. In the end, she preferred the probative evidence of the expert that Mr. Chuvalo did not have the requisite capacity to instruct counsel and did not have the requisite capacity to reconcile.

The only part of the decision that may perhaps raise some question for further examination or consideration are the comments made on the reverse onus. There is a legal presumption of capacity, so therefore the onus is usually on the person who challenges capacity to prove a lack of capacity on a balance of probabilities. Here, Justice Kiteley directed Mr. Chuvalo to prove that he had capacity. Nevertheless, Her Honour

[227] Her Honour says in para. 46: "I do not accept the submission that he [Dr. Shulman] created his own 'new and elevated test for capacity' or a 'higher and impossible test' by introducing the element of understanding of consequences. As indicated above, Dr. Shulman and Dr. Gilley similarly describe the elements of capacity and an understanding of the consequences is key. As Dr. Shulman said, capacity involves the decision-making process, not the decision itself."

still concludes[228] that she is satisfied with the evidence and does not have to worry about the burden in this instance with no further comment on point provided.

Ultimately, Justice Kiteley reviews and acknowledges the standards or factors to be applied in determining requisite decisional capacity, but does not apply any particular factors, standard or "test" per se. Instead, Her Honour relied on the evidence before the court and concluded that Mr. Chuvalo was decisionally incapable of reconciliation at the time of the application and perhaps on a preliminary basis since it appears that the divorce proceedings are still the subject matter of a further hearing/trial before the Court.

6. International Perspective on Predatory Marriages

Professor Albert Oosterhoff's article, "Predatory Marriages", provides an excellent review of international efforts to address the harms done by predatory marriages. He found that in the U.S.A., very few states have retained the revocation-upon-marriage provisions in their probate legislation.[229] Professor Oosterhoff also found that some states permit a relative to contest the validity of a marriage by an incapacitated elderly family member before the death of that family member, and in Texas, their legislation permits post-death contests.[230]

Below is a recent American case. While it did not culminate in marriage, it clearly involved a predatory relationship and the court examines it from the unique perspective of federal tax rules:

Alhadi v. Commissioner of Internal Revenue (United States)[231]

[228] At para. 24.
[229] Albert Oosterhoff, "Predatory Marriages" (2013) 33 ETPJ 24 at p. 54.
[230] *Ibid*. at p. 57.
[231] 2016 TC Memo 74, United States Tax Court, Docket No. 17696-10, April 21, 2016 [*Alhadi*].

In this 2016 U.S. tax case a caregiver defrauded an older adult of over $1 million under the guise of providing "caregiving" services. The Commissioner of Internal Revenue posited that the $1 million were proceeds of undue influence and elder abuse and wanted the caregiver to pay tax on the funds and pay a fraud penalty. The caregiver alleged they were nontaxable gifts or loans. The case addressed the issue of what is "undue influence" as a matter of federal tax law and how it affected donative intent.[232]

The older adult, Dr. Arthur Marsh, was born in 1915, had never married, and lived very frugally resulting in over $3 million in his retirement fund. In 2007 his health declined dramatically and he could no longer care for himself in his second floor apartment. The much younger Ms. Angelina Alhadi met Dr. Marsh when he was in the hospital and offered to provide homecare services for him. Very quickly Ms. Alhadi took advantage of this new relationship. Dr. Marsh agreed to pay her $6000.00 a month (even though the going rate was $3750.00) and also gave her $1000.00 a month for his groceries (even though he only needed about $400 a month in food and his tiny fridge only fit about $50 worth). She began to pressure Dr. Marsh to pay for her mortgage payments. By the end of November 2007 Dr. Marsh had written cheques totaling over $400,000.00. Ms. Alhadi spent this money on paying off her ex-husband, and paying for furniture, landscaping and $73,000.00 on a new pool "complete with a spa and therapeutic turtle mosaic". When she presented Dr. Marsh with an invoice of $22,000.00 for digging the hole for the pool, Dr. Marsh responded "Who the hell is going to pay it?" However, Dr. Marsh relented and paid it, later saying he felt he had to "because the work was already done and he had to accommodate his caregiver".

Ms. Alhadi increasingly kept him isolated from his friends and started to manipulate him emotionally, telling him four or five times a day that she "loved" him and tried to pressure him into marrying her and moving in with her. She would cry in front of him about how she was struggling financially and worried about how she was going to survive and provide for her children. A neuropsychiatrist, Dr. Mueller, who had interacted with Dr. Marsh testified that there was a "real, if sad, emotional bond between Dr. Marsh and Ms. Alhadi.

[232] *Alhadi* at para. 26.

. . Dr. Marsh wanted to rescue her, wanted to be a good person, and wanted to feel loved for the rest of his days on earth." Dr. Marsh told Dr. Mueller that it was "impossible to imagine how it feels being 90 years old and feeling loved for the first time".[233]

Ms. Alhadi no longer let his niece or other family members speak to him, telling them that Dr. Marsh was sleeping or unavailable whenever they called. Also, Ms. Alhadi was not keeping up her caregiving duties. The house was filthy with "trails of ants", food on the floor that was rotten, greasy pots and pans and the apartment was stained with urine as Dr. Marsh could not get to the bathroom on time.

In the summer of 2008 Ms. Alhadi told Dr. Marsh that she had "won" a cruise and wanted him to come along with her. She left him sitting alone in the sun while she went off with her children. Later, it was discovered that Dr. Marsh had paid for the whole cruise ($25,000.00) even though he did not remember writing the cheque.

By the end of 2008 Dr. Marsh had written cheques to Ms. Alhadi totaling nearly $800,000.00. Then she pressured him even more and got him to sign five more cheques each for $100,000.00. This is when her financial abuse was discovered. The mutual fund company found Dr. Marsh's account activity to be suspicious and called to express concern. The company records all of its phone calls. In the background Ms. Alhadi could be heard yelling, cajoling, and threatening Dr. Marsh that he was going to get her in trouble if he didn't admit that he wrote the cheques. The mutual fund company refused to honor the cheques and sent a letter to Dr. Marsh explaining why. However, Dr. Marsh was homebound and completely at the mercy of Ms. Alhadi. Ms. Alhadi intercepted the mail.

Ms. Alhadi then took Dr. Marsh to a lawyer, trying to get a power of attorney in her favour. The lawyer refused to get involved. Dr. Marsh told the lawyer that Ms. Alhadi was pressuring him to name her in his will and that he needed a separate trust for her so that

[233] *Alahadi* at para. 28, footnote 6.

his family members wouldn't be able to interfere. The lawyer refused and the Public Guardian filed a petition to put Dr. Marsh under a temporary conservatorship.

Dr. Marsh died in February 2009 and at the funeral Ms. Alhadi tried to "crawl in the coffin" and "was screaming".

The trustee of a trust that Dr. Marsh had created several years earlier (as a substitute for a will) settled a suit brought against Ms. Alhadi, but recovered only $310,000.00 in cash. She had lost her house to foreclosure and had spent the rest of the money, gave it away, or rendered it untraceable. When the trust filed its tax returns it noted the money paid to the caregiver Ms. Alhadi, which she did not claim on her tax return. This is when the IRS got involved.

The Tax Court found that Ms. Alhadi exercised undue influence on Dr. Marsh and that all the money she received from him was taxable to her. While non-family taxpayers in "generous-elder" cases who rely on their own testimony can succeed in proving that a transfer was a gift, the issue is one of fact and the burden of proof rested on Ms. Alhadi. She did not meet this burden as all she had was uncorroborated testimony and the word "gift" written on the memo lines of some of the cheques. Furthermore, there was medical evidence that Dr. Marsh had dementia and suffered from cognitive decline, including poor short term and long term memory, was unable to perform simple arithmetic, and demonstrated persistent deficiencies in visuospatial analysis. These problems made him vulnerable. California (where Dr. Marsh resided) has codified its definition of undue influence as:

- The use of a confidence or (real or apparent) authority for the purpose of obtaining an unfair advantage over someone;
- Taking an unfair advantage of another's weakness of mind; or
- Taking a grossly oppressive and unfair advantage of another's necessities or distress.[234]

[234] Cal. Civ. Code sec 1575 (West 1982)

For the specific purpose of elder abuse, California law defines undue influence as the "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity".[235]

The Tax Court found Ms. Alhadi exerted undue influence over Dr. Marsh:

> She was in a confident relationship with Dr. Marsh as his sole caregiver. He relied on her just to get downstairs, to go to the doctor, to be fed, and even to bathe. Dr. Marsh was in extremely poor health; he suffered from heart problems, hearing and vision loss, a broken hip, and dementia, among other handicaps. Ms. Alhadi knew all of this. She used her relationship with Dr. Marsh to isolate him from his family and financial advisers and to wring money out of him . . .We also can't close our eyes to Dr. Marsh's emotional life. Ms. Alhadi preyed on his loneliness.

The Court also found Ms. Alhadi liable for self-employment tax, and held that her tax returns were fraudulent.

Oliver (Deceased) & Oliver (Australia)[236]

Like Canada, Australia has also struggled to balance the autonomy of vulnerable adults with the necessity of protecting them from predatory marriages. Unlike Canada, Australia has met this challenge by legislating the factors required to determine capacity to marry. However, Australia's legislation is somewhat limited in that it requires the marrying parties to have the mental capacity to understand the effect of the *ceremony*, not an understanding of the nature of marriage as an institution with all its consequences.[237] Some scholars have suggested that the legislation would be more effective if it required the understanding of the property consequences of marriage, yet judicial comment in Australia suggests that few people, if any, truly understand all the consequences of marriage.[238]

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[235] Cal. Welf. & Inst. Code sec. 15610.70 (West 2014)
[236] *Oliver (Deceased) & Oliver* [2014] FamCA 57 (AustLII).
[237] *Marriage Act 1961* (Cth) subsection 23B(1)(d); see also Jill Cowley, "Does Anyone Understand the Effect of 'The Marriage Ceremony'? The Nature and Consequences of Marriage in Australia" [2007] SCULawRw 6; (2007) 11 Southern Cross University Law Review 125.
[238] Cowley, *ibid.* at p. 170 – 171

In a recent decision in New South Wales, *Oliver v. Oliver*, Australia's Family Court declared that the April 2011 marriage between the 78 year-old Mr. Oliver (deceased), and the 49 year-old Mrs. Oliver was invalid.[239] In doing so, the court reviewed the common law factors for capacity to marry as it developed in England and the subsequent enactment of the statutory factors in Australia. While the relevant legislation and common law factors differ from those applied in Canada, the facts, described below, are instantly recognizable as those of a predatory marriage.

Mr. Oliver had suffered alcohol-related capacity issues dating back to 2001. His first wife, Mrs. E, had also suffered from alcohol-related dementia, and in 2004 the New South Wales Guardianship Tribunal considered the issue of Mrs. E's guardianship and held that Mr. Oliver lacked the capacity to manage Mrs. E's affairs.

Mrs. E died in August of 2010. The Respondent attended the funeral as the daughter of a friend of Mr. Oliver, and she referred to Mr. Oliver as "Uncle." Although Mr. Oliver's daughter had made arrangements for Mr. Oliver to receive in-home care from a community organization, the Respondent later cancelled that service. Mr. Oliver had previously granted a power of attorney to his son-in-law, Mr. H., but the Respondent made arrangements to assist Mr. Oliver with his financial affairs. Mr. H had not begun to exercise his authority as an attorney for property, but in January and February of 2011, Mr. Oliver became increasingly suspicious of Mr. H and accused him of wanting to take all his money and control his life.[240]

From February 2011 to April 2011, the Applicant (Mr. H's daughter and Mr. Oliver's granddaughter), tried on numerous occasions to speak with Mr. Oliver, but the Respondent always answered the phone. The Applicant was rarely able to speak with him. However, in late February or early March of 2011, Mr. Oliver did come to the phone and told the Applicant he was getting married. The Applicant said, "How are you getting

[239] *Oliver (Deceased) & Oliver* [2014] FamCA 57, para 213 (cited to AustLII)
[240] *Ibid*. at paras 39 and 40

married? I didn't even realize you had a girlfriend." Mr. Oliver said, "Neither did I."[241] The Respondent then took the phone and advised that they would be married in June of 2011.[242]

In February of 2011, the Respondent took Mr. Oliver to see his general practitioner, Dr. G, who certified that the deceased was of sound mind and capable of making rational decisions about his affairs.[243] A few days later, the respondent and Mr. Oliver attended the office of a solicitor and executed a Will in contemplation of marriage (but not conditional on the marriage taking place) that named the solicitor his Executor and left his entire estate to the Respondent.[244] The Respondent moved in with Mr. Oliver the next day.

The Respondent and Mr. Oliver were married in April of 2011, not June, as the Respondent previously told Mr. Oliver's relatives. None of Mr. Oliver's family were invited or notified; only the Respondent's sister and parents attended. In her testimony the Respondent had no explanation as to why Mr. Oliver's relatives were not invited. The ceremony celebrant, Mrs. Q, gave evidence that Mr. Oliver stated he was pleased to be getting married.

In May of 2011, three weeks after the wedding, Mr. Oliver fell in his home, fractured his hip, and was hospitalized. The social worker, Mrs. U, assessed Mr. Oliver and noted his dementia and vulnerability. Mrs. U spoke with the Respondent twice. The Respondent initially informed Ms. U that Mr. Oliver had no relatives other than a niece living out of state, and had no attorney for property. Mrs. U recommended that the New South Wales Public Trustee and Guardian be appointed as Mr. Oliver's guardian of property. The New South Wales Public Trustee and Guardian was so appointed in August of 2011.

The Applicant commenced her application under section 113 of the Family Law Act 175 just prior to Mr. Oliver's death for a declaration about the validity of the marriage. She

[241] *Oliver* at para 25.
[242] *Ibid*.
[243] *Ibid*.at para 73.
[244] *Ibid*. at para 74.

argued that Mr. Oliver was mentally incapable of understanding the nature and effect of the marriage ceremony as provided for in section 23B(1)(d)(iii) of the Act. The Act further provides standing to the Applicant to make the Application.[245] Mr. Oliver died in September of 2011. The Respondent did not inform Mr. Oliver's family.

The court had the benefit of an expert's report that reviewed Mr. Oliver's voluminous health records and provided an opinion, summarized by the court, as follows:

> *As to whether the deceased was capable of understanding the nature of the contract (marriage) that he was entering into, free from the influence of morbid delusions, upon the subject Dr Z says that is a difficult question to answer. There was clear evidence of long-standing cognitive impairment prior to April 2011, which may have influenced the deceased's capacity in this regard. Dr Z notes:*
>
> > *... in relation to the specific issue of "morbid delusions", information provided by his family suggests he was experienced delusions and paranoia through December 2010 into the New Year, including his belief sometimes that his first wife, [Ms E], was still alive and also his belief that Mr [H] was being too controlling of his money. Moreover, there is a long history documented in hospital notes of paranoid delusions and treatment for these, dating back to 2001, especially during times of delirium. As such, it is possible (but I cannot be certain) that [the deceased] was experiencing some degree of delusions around this time and that this might have influenced his thinking, especially if he had certain inaccurate beliefs about some family members and if he was being unduly influenced by them.*[246]

The Court observed that the English common law factors for determining capacity to marry had been supplanted by the statutory factors in the *Marriage Act 1961* (Cth), as amended, and noted the following:

> *On the face of it the English common law test and the Australian statutory test are different, particularly because of the Australian test requiring that for a valid consent a person must be mentally capable of understanding the effect of the marriage ceremony as well as the nature of the ceremony. …*

[245] *Oliver* at paras 5 and 6; There is no similar legislation that confers standing on anyone to contest the validity of a marriage. However, the common law allows persons with an interest to contest the validity of a marriage for lack of capacity, but not for undue influence or duress. See further footnote 9380, *supra*.
[246] *Oliver* at para 185.

> *In the 32 years since the legislative test has applied, there has not been a plethora of decisions of the Australian courts as to its interpretation. There are only 2 reported decisions that I was referred to and I located no others. … The current test of "mentally incapable of understanding the nature and effect of the marriage ceremony" was applied in both cases.*
>
> …
>
> *It is clear from the authorities that the law does not require the person to have such a detailed and specific understanding of the legal consequences. Of course if there were such a requirement, few if any marriages would be valid.*[247]
>
> …

The Court reviewed judicial commentary on capacity to marry in Australia, and in particular, Justice Mullane's application of the authorities in *Babich & Sokur and Anor*, as follows:

> *… it is in my view* ***significant that the legislation not only requires a capacity to understand "the effect" but also refers to "<u>the</u> marriage" rather than "<u>a</u> marriage". In my view taken together those matters require more than a general understanding of what marriage involves*** *[emphasis added]. That is consistent with consent in contract being consent to the specific contract with specific parties, consent in criminal law to sexual intercourse being consent to intercourse with the specific person, and consent to marriage being consent to marriage to the specific person.*[248]

In *Babich*, Justice Mullane held that the vulnerable adult in question had a general understanding of "a" marriage, but she was incapable of understanding the effect her marriage would have on *her*.[249]

In *Oliver*, Justice Foster found that Mr. Oliver may have been aware that he was participating in a marriage ceremony to the Respondent, or at least some sort of ceremony with the respondent, but nothing more.[250]

7. Predatory Marriages: Consideration of Equitable and Other Remedies

[247] *Oliver* at paras 244, 245, 246
[248] *Ibid*., at para 202, citing para 255 of *Babich & Sokur and Anor* [2007] FamCA 236 (cited to AustLII) [*Babich*].
[249] *Babich* at para 256.
[250] *Oliver*, *supra*, at para 210

Since contesting the validity of a marriage on the ground of incapacity is an imperfect approach, it has become apparent to the authors as advocates, that we need to explore other potentially available rights and remedies to react to what is actually happening in today's society. The purpose of this section is to consider other grounds, including equitable grounds, upon which a court has the jurisdiction to set aside a predatory marriage as a nullity, that is, to declare it void *ab initio*, as if it never happened, and also to remedy the wrongs caused by a predator spouse.

Recent cases have awarded equitable and common law remedies in cases of financial elder abuse, [251] but so far such remedies have not yet been applied in Canada in cases of predatory marriages.

The Doctrine of Undue Influence

The equitable doctrine of undue influence is often relied on to set aside a will or *inter vivos* gifts that was procured by undue influence. The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions when an individual exerts such influence on the grantor or donor that it cannot be said that his/her decisions are wholly independent.

We propose that the same doctrine, if proved, may be used to set aside a predatory marriage. While the older adult may not be giving actual gifts to the predatory spouse, the consequence of the marriage effectively results in a gift to the predator. In *Ross-Scott v. Potvin*,[252] discussed above, the only surviving relatives of the deceased, Mr. Groves, sought to have his marriage annulled on grounds of undue influence and lack of capacity.

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[251] See for example: *Gironda v. Gironda*, 2013 ONSC 4133, additional reasons 2013 ONSC 6474 – undue influence; *Fowler Estate v. Barnes*, 1996 CarswellNfld 196 (SC TD) – undue influence and rescission; *Granger v. Granger*, 2016 ONCA 945, reversing 2015 ONSC 1711, 9 E.T.R. (4th) 281, and 2015 ONSC 6238 – unjust enrichment, undue influence, and equitable compensation; *Servello v. Servello*, 2015 ONCA 434, 9 E.T.R. (4th) 169, affirming 2014 ONSC 5035 – undue influence, failure to provide independent legal advice, *non est factum*, and mistake, as well as the maxim that he who comes into equity must come with clean hands, and denial of a claim for contribution; *Danilova v. Nitiyuk*, 2017 ONSC 4016 – damages for breach of fiduciary duty; *Stewart v. Stewart*, 2014 BCSC 766 – unjust enrichment with equitable set-off; *Waruk v. Waruk*, 1996 CarwellBC 2463 (C.A.) – injunctive relief.

[252] 2014 BCSC 435

Justice Armstrong applied the common law factors for determining requisite capacity to marry and ultimately dismissed all of the claims, despite compelling medical evidence of diminished capacity and vulnerability. With respect to undue influence, Justice Armstrong had this to say:

> I have concluded that the burden of proof regarding a challenge to a marriage based on a claim of undue influence is the same as the burden of proving a lack of capacity. The plaintiffs must prove the defendant's actual influence deprived Mr. Groves of the free will to marry or refuse to marry Ms. Potvin. The plaintiffs have failed to meet the burden of proving that Mr. Groves was not able to assert his own will.[253]

While the evidence was not sufficient for the Court to find undue influence in this situation, if proved, the undue influence doctrine should be available to set aside a predatory marriage.

The Doctrine of Unconscionability

The doctrine of unconscionability is typically used to set aside a contract that offends the conscience of a court of equity. However, unconscionability is not restricted to the law of contracts. And, while it is closely related to undue influence, they are separate and distinct. A claim of undue influence attacks the sufficiency of consent. Unconscionability arises when unfair advantage is gained by an unconscientious use of power by a stronger party against a weaker. In order to be successful, such a claim will need proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker party, which left him or her in the power of the stronger party and proof of substantial unfairness of the bargain. This creates a presumption of fraud which the stronger party must rebut by proving that the bargain was fair, just and reasonable.[254]

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[253] *Ross-Scott* at para 240.

[254] *Morrison v. Coast Financial Ltd*. (1965), 55 D.L.R. (2d) 710 (B.C.C.A.), at p. 713. See also the case of *Smith v. Croft* 2015 CanLII 3837 (ONSCSM) where the Ontario Small Claims Court set aside a transaction as unconscionable where a neighbour purchased an antique truck valued at $18,000 from an elderly neighbour with dementia for $2000.00.

A predatory marriage can be characterized as unconscionable where one party takes advantage of a vulnerable party, on the ground that there is an inequality of bargaining power and accordingly it would be an improvident bargain if the predator would be entitled to all of the spousal property and financial benefits that come with marriage.[255]

Using a Statute as an Instrument of Fraud

The principle that one may not use a statute as an instrument of fraud should also be available as a tool to combat the unfair consequences of predatory marriages. In the context of trusts of land, the *Statute of Frauds*[256] provides that a declaration or trust of land is void unless it is proved by writing, signed by the maker. If it is not in writing and the beneficiary seeks to have it enforced, the transferee may claim to hold title absolutely and defend the proceedings by relying on the Statute. However, equity will not allow the Statute to be used as an instrument of fraud and the court will direct that the property is held on a constructive trust for the beneficiary if the oral express trust is proved. A marriage is also based on, and sanctioned by, legislation.[257] The predator relies on the statutes to enforce his or her claim. However a predator spouse's claim is fraudulent because the predator persuaded his or her spouse by devious means to enter into the marriage. A court of equity should not allow the statute to be used in this way, and should restore the property the predator received to the rightful heirs.

No One Shall Profit from His or Her Own Wrongdoing

Instead of the remedy of attacking the validity of the marriage itself, another tool that could reasonably be applied in attacking the injustice of predatory marriages is challenging the predator spouse's right to inherit from the older adult's estate either under a will or under

[255] See *Juzumas v. Baron* 2012 ONSC 7220, *Morrison v Coast Finance Ltd*., 1965 CarswellBC 140 (S.C.J.)
[256] (1677), 29 Car.2.c.3, s.7. and see RSNB 1973, c.S-14, s.9; RSNS 1989, c 442,s5; RSO 1990, c.S.19, s.9.
[257] See, e.g.. *Marriage Act*, R.S.A. 2000, c. M-5; R.S.B.C 1996, c. 282; C.C.S.M., c. M50; S.N.L. 2009, c, M-1.02; R.S.N.B. 2011, c. 188; R.S.N.W.T. 1988, e. M-4; R.S.N.W.T. (Nu.) 1988, c. M-4; R.S.O. 1990, c. M.3; R.S.P.E.I., 1988, c. M-3; R.S.Y. 2002, c. 146; *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436.

legislation. Seeking a declaration that the predator spouse is barred or estopped from inheriting is a remedy based in public policy. “No one shall profit from his or her own wrongdoing” is a principle that is applied in cases in which a beneficiary, who is otherwise sane, intentionally kills the person from whom the beneficiary stands to inherit under the deceased’s will, on the deceased’s intestacy, or otherwise. Canadian courts have found that the property does pass to the beneficiary, but equity imposes a constructive trust on the property in favour of the other persons who would have received the property.[258] It is also clear that a beneficiary will not inherit if the beneficiary perpetrated a fraud on the testator and as such obtained a legacy by virtue of that fraud,[259] or where a testator was coerced by the beneficiary into making a bequest.[260] The comparable common law principle is *ex turpi causa non oritur actio*, i.e., a disgraceful matter cannot be the basis of an action. It is discussed below.

Two New York decisions provide a compellable analysis of these concepts and their applicability to predatory marriages and relied upon them. The facts in *In the Matter of Berk,*[261] and *Campbell v. Thomas,*[262] are quite similar. In both cases a caretaker used her position of power and trust to secretly marry an older adult when capacity was an issue. After the older person’s death, the predator spouse sought to collect her statutory share of the estate (under New York legislation surviving spouses are entitled to the greater of 1/3 of the estate or $50,000). The children of the deceased argued that the marriage was “null and void” as their father lacked capacity to marry. The court at first instance held that even if the deceased was incapable, under New York estate legislation the marriage was only void from the date of the court declaration and as such, not void *ab initio.* The predatory spouse maintained her statutory right to a share of the estate.

[258] *Lundy v. Lundy* 1895 24 SCR 650.
[259] *Kenell v. Abbott* 31 E.R. 416].
[260] *Hall v. Hall* (1868) L.R. 1 P.& D. 48].
[261] *In the Matter of Berk,* 71 A.D. 3d 710, NY: Appellate Div., 2nd Dept., 2010.
[262] *Campbell v. Thomas,* 897 NYS2d 460 (2010).

In both appeal decisions (released concurrently) the court relied on a "fundamental equitable principle" in denying the predator's claims: "no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." This principle, often referred to as the "Slayer's Rule", was first applied in in New York in *Riggs v. Palmer*,[263] to stop a murderer from recovering under the Will of the person he murdered. Pursuant to this doctrine, the wrongdoer is deemed to have forfeited the benefit that might otherwise flow from his wrongdoing. New York courts have also used this rule to deny a murderer the right to succeed in any survivorship interest in his victim's estate.

The court recognized that while the actions of the predatory spouses were not as "extreme" as those of a murderer, the required causal link between the wrongdoing and the benefits sought was, however, even more direct. A murdering beneficiary is already in a position to benefit from his victim's estate when he commits the wrongdoing, but it was the wrongdoing itself (the predatory marriage) that put the spouse in a position to obtain benefits. The court held that the predator spouse should not be permitted to benefit from this wrongful conduct any more than a person who coerces his way into becoming a beneficiary in a Will.[264]

Arguably, such an approach ought to be available in Canada to defend/attack against these predatory entitlements and this principle should also be used to invalidate a predatory marriage.

[263] *Riggs v. Palmer*, 115 N.Y. 505,511 [1889].
[264] Note that the dispute in *Matter of Berk* is still ongoing. In one subsequent decision the court determined the standard and burden when relying on the equitable doctrine that one should not profit from her wrongdoing: the children of the deceased bear the burden of proving wrongdoing by a preponderance of evidence: See *Matter of Berk*, 133 AD 3d 850 (2015) and 2016 NY Slip Op 76663(U). Most recently in May of 2017 the Surrogate Court barred the wife from testifying at trial. At issue was a New York statute colloquially called the "Dead Man's Statute" which bars testimony from individuals with a pecuniary interest in the estate from testifying. See *Matter of Berk*, 2488/2006 and Amaris Elliott-Engel "Testimony of Wife Barred in Surrogate Court Case", New York Law Journal (May 19, 2017) online: http://www.law.com/newyorklawjournal/almID/1202786791972/

Unjust Enrichment

The principle of unjust enrichment is well developed in Canadian law, initially largely in the context of co-habitational property disputes. To be successful in unjust enrichment, one must satisfy a three-part test:

1. that the defendant was enriched;
2. that the plaintiff suffered a corresponding deprivation; and
3. that the enrichment was not attributable to established categories of juristic reason, such as contract, donative intent, disposition of law, or other legal, equitable or statutory obligation.[265]

In the New York case of *Campbell,* discussed above, the Appellate Division noted also that because the predatory spouse altered the older adult's testamentary plan in her favour, equity will intervene to prevent the unjust enrichment of the wrongdoer predator spouse.[266] The principle of unjust enrichment should also be used to invalidate a predatory marriage in Canada and restore the property to the rightful heirs. The existence of the marriage should not be considered to be a juristic reason to deny relief, since the marriage was motivated by the wrongful desire to obtain control of the older adult's property.

Civil Fraud / Tort of Deceit

An approach based in fraud, either common law fraud or equitable/constructive fraud is also worthy of consideration. In the usual predatory marriage situation, the predator spouse induces the older adult to marry by perpetrating a false representation that the marriage will be a "real" marriage (which the predator spouse knows is false, a trick, a misrepresentation). The older adult relies on the representation, marries the predator spouse, and suffers damage as a result (either through money given to the predator

[265] See *Becker v. Petkus* (1980), 117 D.L.R. (3d) 257, [1980] 2 SCR 834 (SCC); *Garland v. Consumers' Gas Co.* (2004), 237 D.L.R. (4th) 385 (S.C.C.).
[266] *Campbell*, supra at p.119.

spouse, or through the various rights that a spouse takes under legislation, which deprives the older adult of significant property rights. A case could be fashioned so that the predator's behavior meets the required elements to qualify and succeed in an action of civil fraud as a result of the following:

1) A false representation made by the defendant;
2) Some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
3) The false representation caused the plaintiff to act (inducement); and
4) The plaintiff's actions resulted in a loss.[267]

Canadian jurisprudence has many decisions analyzing civil fraud/tort of deceit in the context of marriage in "immigration fraud" cases where one spouse falsely represents that he/she is entering into a "true" marriage when in fact the marriage was entered into simply to attain Canadian residency.[268] The Courts have been reluctant to set aside this type of marriage as a fraud.

In *Ianstis v. Papatheodorou,*[269] the Ontario Court of Appeal confirmed that civil fraud will not usually vitiate consent to a marriage, *unless* it induces an operative mistake. For example, a mistake as it relates to a party's identity, or that the ceremony was one of marriage.[270] This case has been cited with approval many times and continues to be considered as the leading case.[271] The Courts' reluctance to find that civil fraud will vitiate consent to a marriage appears to have prevented opening the floodgates to more litigation.[272] Alleging fraud when one party to the marriage has character flaws not

[267] *Bruno v. Hyrniak* 2014 SCC 8 at para. 21
[268] See for example *Torfehnejad v. Salimi* 2006 CanLII 38882 (ONSC) upheld 2008 ONCA 583; *Grewal v. Kaur* 2011 ONSC 1812; *Raju v. Kumar* 2006 BCSC 439; and *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)
[269] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)
[270] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.) at pp. 248 and 249
[271] See *Torfehnejad v. Salimi* 2006 CanLII 38882 (ONSC) upheld 2008 ONCA 583; *Grewal v. Kaur* 2011 ONSC 1812; *Raju v. Kumar* 2006 BCSC 439; and *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.).
[272] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)

anticipated by the other is not something the court wishes to advance as is evinced by the following select comments of the Court:

> [23] "First, on a principled approach it may be difficult to differentiate immigration fraud from other types of fraud. In *Grewal v. Sohal* 2004 BCSC 1549 (CanLII), (2004), 246 D.L.R. (4th) 743 (B.C.S.C.) the fraud consisted of the defendant fraudulently representing his marital intentions for immigration purposes and fraudulently representing that he did not have an alcohol or drug addiction. **One can think of many other misrepresentations such as related to education, health or assets that might induce a decision to marry and which could be made fraudulently. If a fraud as to fundamental facts that ground the decision to marry is generally a ground for annulment, this certainly raises the spectre of an increase in the volume of costly litigation**.
>
> [24] Even assuming that the law can logically extend to permit annulment on the basis of immigration fraud and not on other grounds of fraud, it remains that this may simply promote increased and expensive litigation. [emphasis added]"[273]

The Court's message is, effectively, "*caveat emptor*" – the spouses ought to have conducted their due diligence before marriage.[274] Predatory marriages are easily distinguishable from immigration fraud cases if for no other reason than that a person under disability may and likely is not, for many obvious reasons, in a position to conduct any due diligence.

Although it may be difficult for an older spouse to have a marriage set aside on the grounds of civil fraud/tort of deceit, he/she may be able to seek and receive damages for the fraud perpetrated. The case of *Raju v. Kumar* [275], involved a wife who was awarded damages for civil fraud in an immigration fraud case where the court notably stated:

> [69] "The four elements of the tort of deceit are: a false representation, knowledge of its falsity, an intent to deceive and reliance by the plaintiff with resulting damage. [. . .]
>
> [70] I find the defendant misrepresented his true feelings towards the plaintiff and his true motive for marrying her order to induce her to marry him so he could emigrate to Canada.

[273] *Grewal v. Kaur* 2009 CanLII 66913 (ONSC) at paras. 23-24
[274] *A.A.S. v. R.S.S.,* 1986 CanLII 822 (BC CA) at para. 25.
[275] *Raju v. Kumar* 2006 BCSC 439

> I find the plaintiff married the defendant relying on his misrepresentations of true affection and a desire to build a family with her in Canada.
>
> [71] The defendant's misrepresentations entitle the plaintiff to damages resulting from her reliance on them."

The Court limited damages to those incurred for the wedding (cost of the reception, photos and ring), supporting the groom's immigration to Canada (including his application, immigration appeal and landing fee) and the cost of her pre- and post-marriage long distance calls.[276]

In *Juzumas,* discussed above, had the older adult continued with his claim for an annulment of his marriage and the Court was open to allowing a claim of fraud in this context, the older adult would have had to prove that the predator spouse knowingly made a false representation to the older adult, with an intent to deceive him and on which he relied, causing him damage. It could be argued that the predator spouse falsely represented to Juzumas that she would look after and care for him. Juzumas relied on that representation when he chose to marry her and he suffered damages. It is unlikely that a claim in civil fraud could be made out in *Banton supra*, unless it was raised before the older adult passed away.

[276] *Raju v. Kumar* 2006 BCSC 439 at para. 72. See also the ase of *RKS v. RK* 2014 BCSC 1626, where the Court dismissed a claim alleging the tort of deceit. A wife alleged that she was induced into marrying her husband on false representations that he was heterosexual, while in fact he was not. The wife also sought an annulment of the marriage citing non-consummation. The Court dismissed the claim and refused to grant an annulment as there was no evidence that the groom or groom's family made any false representations to either the bride or her family with an intent to deceive the plaintiff into marrying him. Prior to the wedding the plaintiff and her family had asked many questions about the defendant's background, his education, his financial situation and the kind of woman he was looking to marry. The Court found that the wife's claim for damages for the tort of deceit had to fail as it found that the husband never made any representations, prior to the wedding, about his sexual orientation. Furthermore the wife could not prove with medical or other evidence that the marriage was not consummated. The husband testified that it had been consummated. The Court denied the wife's claim for an annulment and granted a divorce instead.

Ex Turpi Causa Non Oritur Actio

The legal principle, *ex turpi causa*, acts as a defence to bar a plaintiff's claim when the plaintiff seeks to profit from acts that are "anti-social"[277] or "illegal, wrongful or of culpable immorality"[278] in both contract and tort. In other words, a court will not assist a wrongdoer to recover profits from the wrongdoing. Arguably a Court should not assist a predatory spouse to recover the benefits from a marriage that was obtained through the predator's devious, unscrupulous and anti-social means. The unscrupulous predator should not be entitled to financial gain arising from the "anti-social" or "immoral" act of a predatory marriage. A predatory spouse alters an older adult's life and testamentary plan by claiming entitlements in the same manner as if he/she coerced the testator to add his/her name to a Will.

Non Est Factum

Non est factum is the plea that a deed or other formal document is declared void for want of intention and has been used to set aside contracts when a party signs a document with a fundamental misunderstanding about the nature or effect of the document.[279]

Non est factum is a defence developed in common law and not the court of equity. However, it could be applicable to a predatory marriage situation when the predator attempts to enforce some right arising from the marriage and the victim entered into the marriage with a fundamental misunderstanding about the nature or effect of executing the marriage document.

Lack of Independent Legal Advice

The older adult in predatory marriages is often deprived of the opportunity to seek and obtain independent legal advice before marrying. Lack of independent legal advice is an oft-considered factor in the setting aside of domestic contracts. Whether such arguments

[277] *Hardy v. Motor Insurer's Bureau* (1964) 2 All E.R. 742.
[278] *Hall v. Hebert* 1993 2 S.C.R. 159.
[279] *Marvco Colour Research Ltd. v. Harris*, 1982 CanLII 63 (SCC), [192] 2 SCR 774.

could be extended to set aside the marriage itself is a consideration worthy of a court's analysis.

Courts have consistently held that "*marriage is something more than a contract*".[280] Thus, there could well be judicial reluctance to extend contract law concepts and use them as a vehicle to set aside actual marriages, as opposed to simply setting aside marriage contracts. It is unclear whether such arguments extend to parties other than those to the marriage. If the victim dies, such arguments may be difficult to pursue. However, parties such as children of the older adult are impacted by the union. This is a different approach to that of cases where capacity is challenged on the grounds of incapacity and the marriage is then declared to be void *ab initio,* since these unions can be challenged by other interested parties.[281]

CONCLUSION

In the absence of clear legislation defining the requisite decisional capacity to marry, the common law remains unclear. In Canada, *Banton* and *Re Sung Estate* cite *Browning v. Reane* and *Re Spier*, which both suggest that the requisite capacity to manage one's person *and/or* one's property, or both are a component for determining the requisite capacity to marry. These cases and other very recent cases including Hunt, appear to be moving in the direction of developing an appropriate consideration of factors for ascertaining the capacity to marry—one which best reflects and accords with the real-life financial implications of death or marital breakdown on a marriage in today's ageing society.

[280] See *Ciresi (Ahmad) v. Ahmad*, 1982 CanLII 1228 (ABQB); *Feiner v. Demkowicz (falsely called Feiner),* 1973 CanLII 707 (ONSC); *Grewal v. Kaur*, 2009 CanLII 66913 (ONSC); *Sahibalzubaidi v. Bahjat*, 2011 ONSC 4075; *Iantsis v. Papatheodorou*, 1970 CanLII 438 (ONCA); *J.G. v. S.S.S.*, 2004 BCSC 1549; *Torfehnejad v. Salimi*, 2006 CanLII 38882 (ONSC) at para. 92; and *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 (H.L.).

[281] *Ross-Scott v. Potvin* 2014 BCSC 435 at para. 73

Still, it would appear that our courts continue to be haunted by the old judicial adage that "the contract to marry is a very simple one." We see this approach in *Ross-Scott v. Potvin* and most recently in *Devore-Thompson v Poulain*.

Australian case law seems to suggest that statutory factors for determining the capacity to marry can be a useful tool in cases of elder abuse, but such legislation should specifically reference the marrying parties' understanding of the property consequences of marriage. Indeed, the *Oliver* case illustrates the value of the capacity provisions in Australia's *Marriage Act*.

The consequences of Canada's ongoing deference to the common law factors are as puzzling as they are problematic from a social perspective and a public policy perspective. Essentially, this means that a person found incapable of making a Will may revoke his/her Will through the act of marriage. As well, in refusing to require that a finding of capacity to manage property forms a prerequisite to a finding of capacity to marry gives free reign to would-be (predatory) spouses to marry purely in the pursuit of a share in their incapable spouse's wealth, however vast or small it may be. After all, as stated, a multitude of proprietary rights flow from marriage.

Until our factors to determine the requisite capacity to marry are refined, so that they adequately take into consideration the financial implications of marriage, all those with diminished decisional capacity will remain vulnerable to exploitation through marriage. This is likely to become an ever increasing and pressing problem as an unprecedented proportion of our society becomes, with age, prone to cognitive decline. It is to be hoped that we will see some of the suggested equitable approaches gaining some traction in the near future.

Where should the law go from here? While many provinces and states have abolished the "revocation–upon–marriage" provisions in their succession or probate statutes, this is merely one small step towards the development of a more cohesive approach to preventing financial abuse through predatory marriages.

There are many further developments could potentially assist in the remedy of the wrongs done by these unions including, to mention but a few: by creative legislative reform which could prevent these marriages from taking place; by introducing legislated caveats to prevent the issuance of a marriage license and the solemnization of marriage in cases where capacity is lacking, which British Columbia has done; and by making marriage commissioners more accountable. These marriages perpetrated under false and fraudulent, deceitful pretences rob our elderly of their dignity and their intended heirs, of the gifts for their loved ones.

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TAB 2

THE SIX-MINUTE Estates Lawyer 2018

Tips for Gifts to Charities in Wills and Dealing with Charities in an Estate Administration

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Cunningham Swan LLP

Avoiding confusion (and claims) when making charitable bequests

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THE SIX-MINUTE ESTATES LAWYER 2018

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Tips for Gifts to Charities in Wills and Dealing with Charities in an Estate Administration

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There are two points at which the practice of an estate solicitor is likely to intersect with charities law: when drafting provisions of a will for a gift to charity by a client will-maker, and when administering an estate of which a charity is beneficiary. This paper consequently falls into two parts, dealing with those two points of intersection. At both stages, the starting point for the advice you give to your clients will be the intention of the donor.

Gifts to Charities in Wills

Although there are undoubtedly clients who have a fixed and clear idea of the giving they intend to make in their wills, many will appreciate a discussion about how their charitable gifts might be shaped. In discussing drafting gifts for charities in wills, and dealing with charities in an administration, I have, therefore, offered some tips for dealing with the preliminary discussion with clients about planning their charitable gift. Planning well with the client informs your drafting, since if you have not asked the critical questions in your interview, you will not be able to draft gift provisions that fulfill your clients' intentions.

Advising

1. **Raise the question –** Many clients may not have considered a charitable gift in their wills. It is appropriate for you to ask about charities at two places in the intake interview. First, raise

charitable gifts in discussing legacies, since many clients will want to set aside a fixed amount for a charity that they have supported, even if the residue of their estate is ear-marked for family.

The second place where will-makers should be encouraged to think about charity is where there is going to be a "common disaster" clause. In a large family, where there are children and grandchildren spread around the globe, this clause may not be used. But where there is a small family – a young couple with children who travel together, for example – a clause to deal with what happens if the immediate beneficiaries have predeceased or died shortly after the will-maker is advisable. Many will want wealth to revert to more remote family – parents, siblings, nieces and nephews, etc. But others, faced with a situation where those they care most about are gone, will consider a charitable gift.

As a drafter, you mat want encourage a charitable beneficiary in this instance, in part because if individuals are named, it will be necessary to consider in each case what to do if the named individual has also predeceased, and the complexity of the planning and drafting is frequently disproportionate to the likelihood of the gift.

2. **Consider unrestricted funds -** The website Charity Intelligence rates charities in Canada on donor accountability, financial transparency, needs funding (cash and investments relative to what it cost to run charity programs), and cost-efficiency.[1] Interestingly, they ascribe only 5% of their weighting to administrative overhead (including staff salaries), which is an obsession with some donors. The research indicates, however, that low administrative cost is not necessarily equated with better results, and in fact may mean that the charity is not well run,

[1] https://www.charityintelligence.ca/.

since unpaid volunteers may be less accountable than paid staff, and inattention to administration an invitation to mismanagement.[2]

When donors wish to give to a charitable cause, however, they need to understand the cost of delivering the service, much as a will-maker needs to understand the payment of executor's compensation or administrative fees for an investment advisor.

It may be appropriate to restrict the use of the funds being left to a charity, but consider that 5 – 35% of a charity's budget may legitimately be needed for staff salaries and other administrative overhead.[3] Moreover, restricted funds may create problems, both in drafting and administration.[4] At the very least, clients will need to understand – and you need to be able to explain - how a restricted fund works, and why an unrestricted gift may be a better way to help the charitable cause they support.

3. **Legacy v. residue –** Should the gift to the charity be a legacy in a fixed amount, a gift of a particular asset, or a share of residue? In the end, this is a question the client needs to answer, but the discussion can be framed in the context of the following factors:

    a. A gift of residue is likely to be slower in arriving, and be subject to holdbacks.

[2] See Kate Bahen, "Charity Salaries: A Donor Hot Topic but a Useless Metric in Intelligent Giving," https://www.charityintelligence.ca/images/Ci-position-on-Charity-Salaries-2015-data.pdf .
[3] This is the range Charity Intelligence considers acceptable. See also Mark Blumberg, "How Much Should A Canadian Charity Spend on Overhead such as Fundraising and Administration?" September 15, 2008, https://www.canadiancharitylaw.ca/blog/how_much_should_canadian_charity_spend_on_overhead, and "Best Practices in Charity Annual Reporting, Smith School of Business, Queen's University, https://smith.queensu.ca/insight/system/files/Best%20Practices%20Charity%20Annual%20Reporting.pdf.
[4] See Terence S. Carter, "Considerations in Drafting Restricted Charitable Purpose Trusts, " STEP Canada 19th National Conference, June, 2017.

b. A residuary beneficiary is entitled to review the accounts and will need to approve the accounts of the executor, including compensation for the executor. Some charities have been aggressive in this regard.[5] Contamination of the old common law rule that trustees were not to be paid, which has remained the rule in Ontario, as least with regard to the directors of a charitable corporation, may lead some charitable representatives to feel that executors should not be paid for their work. *The Trustee Act*, however, specifically altered the common law, allowing for trustees to be paid "fair and reasonable" compensation,[6] and further allows the instrument creating the trust to fix the trustee's compensation. And there is a long line of cases establishing the basis for proper payment of a trustee in Ontario.[7]

c. A legacy that is very generous when a will is prepared may seem small many years later when the will is actually executed.

The real test is where the client's beneficence is focussed. Ask what they prefer in each of two scenarios: if funds are depleted by large medical costs, whose share should be protected? On the other hand, if the client wins the lottery, who should reap the windfall? If the answer is charity, a gift of residue is appropriate; but if it is family, charitable gifts should be made as legacies.

It is, or course, also possible to consider designating life insurance or registered plans to charity. Life insurance is easy, especially if there is a policy that the client is considering

[5] See, for example, *Armitage v. The Salvation Army*, 2016 ONCA 971 (CanLII), <http://canlii.ca/t/gwl3h> and *The Estate of Bereskin*, 2016 MBQB 209 (CanLII), <http://canlii.ca/t/gvs32>, retrieved on 2018-04-15.
[6] *Trustee Act*, R.S.O. 1990, c. T.23, s. 61.
[7] *Re Toronto General Trust v. Central Ontario Railway Co.* (1905), 6 O.W.R. 350; *Jeffery Estate (Re)* (1990), 39 E.T.R. 173 (Ont. Surr. Ct.); *Laing Estate v. Hines*, 1998 CanLII 6867 (ON CA), 41 OR (3d) 571; 167 DLR (4th) 150; 25 ETR (2d) 139; [1998] OJ No 4169 (QL); 113 OAC 335; 41 OR (3d) 571; 167 DLR (4th) 150; 25 ETR (2d) 139; [1998] OJ No 4169 (QL); 113 OAC 335.

cancelling. Life annuities and charitable remainder trusts may offer some immediate tax relief to the client. Although charities are understandably inclined to prefer an immediate gift, however, clients are better able to be generous when they will no longer need or be able to control funds.

4. **Avoid small endowments** – Endowment is a rather slippery term. Most clients do not really understand it, and even those working in the field can disagree about what it means.[8] But it does seem clear that endowed funds will be held and invested over a lengthy period. Not all charities, however, are well set up for this. Determining what constitutes income and what constitutes capital, for example, can be quite a sophisticated process, even for financial institutions. Community foundations, which exist largely for holding endowed funds, may have the accounting infrastructure for this purpose, but many small charities will not and even large charities may be challenged. When charities hold small funds over long periods of time, they may also have problems in fulfilling the purposes. For example, a scholarship endowed for students from a specified geographical area at a University might be so small that the amount generated by the income on the fund is insufficient to provide any meaningful assistance to the student. Yet the terms may not permit funds to be accumulated over two or three years so that the fund is more substantial.

   Endowed funds do not, however, need to be invested separately thanks to specific provisions in the *Charities Accounting Act.* [9]

[8] See Terence S. Carter, "Considerations in Drafting Restricted Charitable Purpose Trusts, "STEP Canada 19th National Conference, June, 2017.
[9] *Charities Accounting Act*, R.S.O. 1990, c. C.10 Regulation 4/01.

Even if the client wants to have funds held for a period of time, - as a memorial, for example – consider allowing the capital to be consumed after the lapse of a set period.

5. **Understand how restricted charitable purpose trusts work -** There is a lively debate over how a charity holds a fund designated to a purpose within the charity, and what language is needed to clarify the nature of the holding.[10] It is, however, uncontroversial that a charitable corporation holds the funds given to it without restriction beneficially for its. Funds dedicated to a special purpose, on the other hand, are held as trustees.[11] Whether it is necessary to use the words "in trust" in order to create a charitable purpose trust, a prudent drafter will use trust language where the intention is to create funds to be held over time and dedicated to a particular purpose.

   You may wish to explore with your client, however, whether they truly intend to create a endowment, under which only the interest may be expended, and the capital is to be held in perpetuity. You may wish to explore the risk of decreasing value of the capital gift, and the burden that retaining it places on a charity. More useful may be a fund allowing both income and capital to be expended on the purposes of the charity, and allowing the charity to identify which purposes are most critical at the time. If the client desires a named fund, explore with the charity whether this can be accomplished in the context of a "drawdown" fund.

[10] See Terence Carter, "Considerations In Drafting Restricted Charitable Purpose Trusts", STEP Canada 19th National Conference, Toronto, June 12, 2017 for a much fuller discussion of the challenges of drafting a charitable purpose trust.

[11] *Christian Brothers of Ireland in Canada (Re)*, 2000 CanLII 5712 (ON CA), <http://canlii.ca/t/1fb5m>, retrieved on 2018-04-1547 OR (3d) 674; 184 DLR (4th) 445; 6 BLR (3d) 151; 17 CBR (4th) 168; [2000] CarswellOnt 1143; [2000] OJ No 1117 (QL); 132 OAC 271.

6. **Avoid discriminatory provisions** - Sometimes the client's request is for terms that may be discriminatory. For example, in a recent case, the client wished to benefit "Caucasian (white) male, single, heterosexual students" and "a hard-working, single, Caucasian white girl who is not a feminist or lesbian."[12] The provisions were very carefully crafted and clearly showed the will-maker's understanding that they might well be found to be discriminatory. On an application, the court found that the gift in which the offensive language occurred was void as contrary to public policy. Other provisions, however, were not voided, the court finding the language in them less offensive.[13]

   If your client is insistent on discriminatory provisions, even after having understood the risk of a court application and the possibility that the provisions will be found void – and if you are still willing to act for such a client - you can, as was done in the *Western* case, provide an alternative gift if the first is found to be discriminatory.

   You should not, however, discouraged your clients from any gifts that might appear to be controversial. A gift that promotes a cause with reference to past discrimination is not discriminatory,[14] and will-makers may have a genuine desire to distinguish and assist certain groups with whom they identify.

7. **Understand the tax structure and GRE.** Although charitable gifts are probably motivated largely by a desire to further the purposes of the charity, and not by tax considerations, a

[12] *Royal Trust Corporation of Canada v The University of Western Ontario et al*., 2016 ONSC 1143 (CanLII).
[13] For an excellent analysis and summary of the law on voiding will provisions on the grounds of public policy, see the Court of Appeal in *Spence v BMO Trust Company*, 2016 ONCA 196 CANLII, 129 OR (3d) 561.
[14] *Re The Esther G. Castanera Scholarship Fund*, 2015 MBQB 28 (CanLII).

client is entitled to competent advice on how to maximize the tax benefits available. Since 2016, the rules governing how and when charitable credits may be claimed by an estate have been closely connected with whether or not the estate is a graduated rate estate. While you may certainly advise executors to retain competent accountants in order to maintain the GRE status of the estate, as a drafter, you need to ensure that charitable gifts are drafted in such a way that the GRE is available.

Since January 1, 2016, the value of a charitable gift is determined at the time that it is made by the estate, not at the date of death. If the estate is a graduated rate estate (GRE), the tax credit may be claimed in the year the gift was made, any preceding taxation year of the estate, the will-maker's year of death, or the year before the will-maker's year of death. It may also may be spread across more than one year. A gift must be made within 60 months after the will-maker's death, and the estate must be a GRE when the gift is made, if the credit is to be used on the will-maker's return. The credit may be claimed in the year the estate makes the gift, the year of death, or the year preceding the year of death. If the estate would have qualified as a graduated rate estate, and makes a charitable gift after the GRE period has expired but still within 60 months, the charitable credit can be claimed in the year the estate makes the gift, any prior year in which the estate was a GRE, the year of death, or the year before the year of death.

Where there is a life interest before the charitably gift, and a deemed disposition occurs on the death of the life tenant, there is also a deemed year-end for tax purposes. If the trust makes the gift within 90 days after the end of the calendar year in which the spouse dies, the credit can be applied in the year the gift is made, the deemed year-end, or one of the 5 years following the year the gift is made.

Involve an accountant and actuary if necessary – where tax is a motivating factor, it is prudent to involve a competent accountant to calculate the tax effect of the contemplated gift, and an actuary may be helpful when a charitable gift is to take place after a life interest. Contacting the charity may be especially useful here, since larger charities may have gift planners to assist in the tax aspects of gift and gift planning.

8. **Don't create a "white elephant"** - Sometimes the clients wish to donate a particular asset to the charity. In these circumstances it is especially important to connect with the charity to find out whether the gift is acceptable in the form proposed. For example, most charities will not hold real estate or buildings, however beautiful the donor's idea for a classical Academy or homeless shelter to be housed there. So, if the gift is property in kind, you should canvass the charity and explain to the client that it will almost certainly be sold. Where the asset is appreciated publicly-listed securities, there is good reason to make the donation in kind, given the tax incentives.

   A recent case from B.C. illustrates the predicament that owning property can create for a charity. The Land Conservancy of B.C., finding itself in financial difficulties, applied to court to be allowed to sell a piece of property, but the court turned them down, pointing out that the land was held on a specific purpose trust, to keep and preserve the building, and consequently it could not be sold.[15] This might have been what the donor wanted, or thought she wanted, but ion the end, feeding the white elephant impoverished the king.

[15] *TLC The Land Conservancy of British Columbia (Re)*, 2014 BCSC 97 (CanLII).

9. **Charity a residuary beneficiary**. If your client wants to make a charity that you would consider to be aggressive a residuary beneficiary, explore whether this is a strong commitment to the purposes of the charity, but bear in mind that it is the client's decision how the estate will be distributed, not yours. Discuss the process by which compensation is to be awarded. If the will-maker wants to be sure that compensation is not challenged, consider using a compensation agreement in the same way that trust companies do, or setting compensation as a fixed percentage of the probateable value of the estate. If the concern is that the executor should not be required to prepare accounts in passing form, set out the form the accounts should take. There are standard administrative clauses that allow executors to delegate executor's duties and have them paid from the estate, and that provide higher levels of protection for executors. Although it is not possible to completely insulate an executor,[16] you can provide some loosening of the standard to which they will be held. Include a provision that allows for executor's insurance to be purchased from the estate.

If you are to be the named executor, do not draft the will yourself.

Drafting

1. **Contact the charity –** Even if your client has recently been in touch with the charity, making a telephone call allows you to confirm some important issues.

[16] Armitage v. *Nurse*, [1997] N.L.O.R. No. 229, (CA).

a. Is the proposed use for which the funds are to be given within the purposes of the charity? If it is not, the charity will not be able to accept the gift, and you may be facing a court application to determine what happens to the gift.[17]

b. If the funds are to be given to a fund that the client has already set up with the charity, confirm the correct name of the fund. For example, if the charity holds the Sam Smith Fund, the will should not have the gift directed to the Sam Smith Family Fund.

c. Will the charity accept the fund on the terms? For example, if the policy of the charity is that named funds must be over $25,000, leaving $10,000 for a named fund may result in the gift failing.

Clients are sometime reluctant to contact charities themselves, fearing that they will become the target of aggressive marketing by the charity. You can make the approach anonymously, and act as an intermediary. But consider the benefits that a client (and you) may reap from direct contact with the charity. Some major charities will meet donors and do periodic updates, so that if the will needs revision because of a change at the institution, you will be alerted. Donors may also enjoy updates on developments at the charity – news about new equipment at a hospital, for example, or research at a university. Sophisticated charities are quite sensitive to donors' preferences about the level of contact they receive.

Charities are also usually very happy to provide suggested wording for a will in which they are to be named. Even if you think your drafting is just fine, the opportunity to have an alternate wording may be useful.

[17] *Victoria Order of Nurses for Canada v. Greater Hamilton Wellness Foundation*, 2011 ONSC 5684 (CanLII).

2. **Confirm the Name of the Charity -** Clients often use names for a charity that are not correct – they may be nicknames, or an approximation of the name. But the correct name is important, because without it the gift may fail, or you may have an court application to interpret the will and determine which charity the will-maker meant to benefit. Part of your drafting routine should be to check the Canada Revenue Agency listing of registered charities for all charitable gifts.[18] Not only will you get the correct name, but also the registration number of the charity, which will help to ensure that you have the right institution. If the named charity does not show up on the CRA listing, you will need to investigate further. Is it, in fact, a charity? Clients may not distinguish a not-for-profit corporation from a charity. Make sure your client understands that gifts to not-for-profits and charities outside Canada will not usually qualify for a Canadian tax credit.

3. **Gift to the charity, not the fund –** Gift should be made to the charity with the charitable registration number, even if the use is to be restricted to one part of that charity's operation, since it is only the registered charity that can give a donation receipt. Consider, for example, what might happen if a gift were made to nursing programme at a local college. The programme has since been incorporated into a health services programme, that encompasses not only nursing, but midwifery, and alternative medicine. Where will these funds go? The college cannot put them to the stipulated use since there is no nursing programme per se. Can it even accept the gift in these circumstances? Or is it good enough that nursing continues to be taught, albeit as part of a modified programme? The gift should be made to the college for

[18] https://www.canada.ca/en/revenue-agency/services/charities-giving/charities-listings.html.

the purpose of supporting the programme, with a power for the college to vary the purposes is necessary.

4. **Include a cy-pres clause - E**ven where you have correctly named to the charity intended by the will-maker, you need to consider what is to happen if the chosen charity no longer exists at the date of the testator's death, or has changed its purposes or merged with another charity. In recent years we have seen hospitals merge, and churches close. Where a gift has been made to one of these institutions, there may be a successor institution that is the proper place for the gift to be made, but not always. The first question is whether the client had a general charitable purpose. If, for example, the charity named was one with which the will-maker had a long and close relationship, it may be that if that charity has failed, the will-maker would prefer the gift to fail. For others, however, even if the named charity fails, the general charitable intent means that the gift can be applied to another charity under the doctrine of cy-près. You may apply to have the court approve diverting the gift so it may be used to achieve an object as close as possible to that set out by the testator. Alternatively, the executors can be give the power to select an alternate charity, so that no court application is required. The standard clause for this purpose should not, however, be used if the will-maker does not have a general charitable intention.

5. **Take care that the purposes of the trust are charitable.** When you make an outright gift to a charitable corporation, it will belong beneficially to the corporation. But when the gift is a special purpose trust, and the funds are to be held by the corporation as a trust for the stated purposes, you are creating a charitable purpose trust. For charitable gifts to be valid, they

must either be gifts to a charitable institution beneficially, or trusts for a charitable purpose. Not every worthy cause, however, is legally charitable. The definition of charity derives from a statute passed in 1601 in the reign of Elizabeth I,[19] and although it has been somewhat rationalized and modified over time,[20] it does not necessarily comply with what a will-maker of the 21st century thinks of as charitable.[21]

If not all of the purposes of the trust are charitable, the gift will fail. Consider the Newfoundland case,[22] in which Mr Butler left "20 per cent of my Residuary Estate income to be donated to other worthwhile causes." The problems is that worthwhile causes may not necessarily be charitable. The court found that the gift failed, because of uncertainty of the objects of the trust. *Butler* relied on *Chichester Diocesan Fund*, where the will left funds "for such charitable institution or institutions or other charitable or benevolent object or objects … as [my executors] should select."[23] There, the House of Lords concluded that the mixing of charitable and non-charitable ("benevolent") objects was fatal, and the funds, which had

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[19] *The Statute of Charitable Uses,*1601 (43 Eliz I, c 4). The preamble to the statute, which was passed to prevent the misuse of funds meant for charitable purposes, lists those purposes for which gifts said to be charitable had been given. It is, thus, a list of what donors in the 17th century were willing to give money for: "some for Releife of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Universities, some for Repaire of Bridges Portes Havens Causwaies Churches Seabankes and Highewaies, some for Educacion and prefermente of Orphans, some for or towardes Releife Stocke or Maintenance for Howses for Correccion, some for Mariages of poore Maides, some for SupportacionAyde and Helpe of younge Tradesmen, Handiecraftesmen and persons decayed, and others for releife or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitants concerningepaymente of Fifteenes, settinge Out of Souldiers and other Taxes . . ."

[20] In particular, in *The Income Tax Commissioners v Pemsel*,[1891] AC 531 (HL), *sub nom Pemsel v Special Commissioners of Income Tax*,[1891] 3 TC 53, [1891-94] All ER 28 (HL).

[21] For example, an organization assisting immigrant women to network and find jobs is not charitable, nor is a newspaper run by and for homeless people, but an organization providing free Internet access to the public is. See *Vancouver Society of Immigrant and Visible Minority Women v MNR*,[1999] 1 SCR 10, 59 CRR (2d) 1, [1999] 2 CTC 1, *BriarpatchInc v The Queen* (1996), 96 DTC 6294, [1996] 2 CTC 94, 197 NR 229 (Fed CA), and *Vancouver Regional FreeNet Assn v MNR*, [1996] 3 FC 880, respectively.

[22] *In Re: Last Will and Testament of Gordon Butler*, 2007 NLTD 105 (CanLII), 2007 NLSCTD 105; 268 Nfld & PEIR 137; [2007] CarswellNfld 181.

[23] *Chichester Diocesan Fund v. Simpson and others* [1994] 2 All E.R. 60 (H.L.).

already been distributed, had to be recovered from the many charities that the executors had already paid.

Just to illustrate the point, Canadian income tax law allows amateur sports organizations some of the same benefits as charities have traditionally enjoyed,[24] but they are not charities under trust law. If your clients want to benefit amateur sports, they should make an outright gift to an existing registered Canadian amateur athletic association, rather than setting up a special purpose trust, which may fail.

6. **Avoid "Double Legacies".** Where a couple intend for a legacy to be paid from the estate of the last to die, it is important to use language to prevent a "double legacy" if they die within the survivorship period. Survivorship clauses (typically 30 days) in mirror wills prepared for a couple can result in a legacy being paid out twice if both spouses die within the survivorship period.

Double wills can also raise problems with regard to payment of legacies. If the assets passing in the probateable will are kept minimal (as is intended) but the estate covered by that will contains the liquid assets from which legacies are most easily paid, there may be insufficient assets to pay for the charitable legacy in the probated will. You will have to draft provision that allows for the estates to be meshed, such as a "top-up" provision in the unprobated will indicating that any deficiency in legacies under the probated will is to be paid from the unprobated estate.

[24] *AYSA Amateur Youth Soccer Assn v Canada (Revenue Agency)*,[2007] SCJ No 42, [2007] 3 SCR 217, 2007 SCC 42, 287 DLR (4th) 4, [2008] 1 CTC 32, 367 NR 264, EYB 2007-124583, JE 2007-1894, 160 ACWS (3d) 567, [2007] DTC 5527.

7. **Include a power to vary clause** - A common problem can arise after the gift has been completed if there are changes within the charity or the social environment so that the original purposes cannot be fulfilled or are difficult to fulfil. If it can be established that the original purpose is impossible or impracticable to undertake, the court may exercise its scheme-making jurisdiction and change the terms of the charitable trust. This also, of course, involves an application to court. Clients often misunderstand the effect of making a gift to a charity and believe that their family or their executors will be able to assist in these circumstances. In fact, not even the charity itself can make changes to the use of funds once they have been dedicated to a particular charitable purpose. Although charities are naturally sensitive to the opinion of the family of a deceased donor, the family has no power whatsoever to determine the use of the funds or vary the terms of the trust unless this power has been specifically reserved to them in the original gift.

   Perhaps the most useful thing you can do for charities where you are drafting a gift with any purposes or specific provisions is to include a power for the governing body of the charity to vary the specific purposes in certain circumstances. While it may be tempting to make these tracks the "impossible or impracticable" terms that would justify the exercise of the court's jurisdiction, this is an opportunity to be more flexible. There may be many situations where the specified use of the funds is not strictly impossible or impracticable, but would seriously vitiate the usefulness of the funds and undermine the intention of the donor. In these

circumstances, it makes sense to have the order of the charity able to redirect special-purpose funds provided that they respect the original intention of the donor.[25]

8. **Gifts after a life interest - I**t seems clear that a gift made after an intervening life interest will no longer be treated as a "gift by will." Under the new tax rules, the gift will be receipted in the year it is made – that is, following the death of the intervening life interest. In this case, the charities are receiving an entitlement under the will. Since at common law a gift must be voluntary, unless the Trustees have discretion, rather than a direction to make the gift, the charitable credit will not be allowed. Both the identity of the charity or charities and the amount of the gift can be left to the executor's discretion, but if there are family beneficiaries of residue as well, a discretion to determine how much is paid to charities may put the executor in a very difficult position.

9. **Ensure the validity of the will and the gift.** As with any other will you draft, a will containing a gift to charity must be properly prepared. You must be satisfied that the will-maker has capacity, and - especially if the gift is the result of conversations with a charity – interview the will-maker separately from any representative of the charity to ensure that he understands the effect of the gift, especially if there are family members who may expect to inherit. Ensure that there is no undue influence, from the charity or anyone else. You must include standard clauses that will facilitate an efficient administration, including allowing for

[25] For sample clauses both allowing the executors to re-direct a charitable gift and allowing charities to vary the purposes in appropriate circumstances see the clauses in Appendix A. A much fuller discussion of restricted gifts and the particular drafting issues they raise is contained in Terrence Carter's "Considerations in Drafting Restricted Charitable Purpose Trusts," STEP National Conference, Toronto, June 2017.

gifts in kind, and for the estate to be kept as a GRE. You must ensure that the will is properly executed, and that an affidavit of execution is prepared and stored with the will. Do not allow a representative of the charity to act as a witness to the will.

You may also have to explain to your client, and include in a reporting letter, a warning against self-help probate planning. If the residue of an estate is to go to charity, it may be severely diminished if the donor is persuaded to put a family member as joint owner of accounts in order to avoid probate. At the least, there will be a fight to establish whether the funds were intended to be given to the family member.

Dealing with Charities in an Estate Administration

1. **Provide notice early –** Especially where it is contemplated that the gift to the charity will me made in whole or in part as appreciated securities, it is important to contact the charity early. Where an application is being made A Certificate of Appointment of Estate Trustee With a Will ("COA"), charities, like other beneficiaries, will be notified as part of the application process. If it appears, however, that the application may be delayed for any reason, and certainly if the will is to be administered without a certificate of appointment, the charity, like any other beneficiary, should be informed as soon as possible of their beneficial interest in the estate. In this respect, charities are no different from other beneficiaries. They are entitled to be kept informed of progress in the administration of the estate if they are residuary beneficiaries, and they are entitled to have their legacy paid within the executor's year or to have interest paid on it if they are not.

There is an additional reason, however, that contacting a charity early is helpful. Especially where the charitable interest is a large one, charities will want to include the funds in their projected budgeting. Unlike individuals, charities have reporting obligations, programmes to run, and staff to pay, so information about incoming donation funds will assist their planning. Moreover, if there are particular purposes attached to the gift, it is important to determine whether they can be met by the charity; if they cannot, the sooner you become aware of any need to make an application to the Court, the better. Not only will this assist the charity, but it will prevent unnecessary delays in the administration and in distributions to other beneficiaries.

Charities also will frequently request to be put in touch with the executor or family members. While we may cynically suppose that this is for the purposes of extracting more donations, responsible charities take very seriously their obligation to respect the provisions of the gifts that are made to them. Family are often able to assist in formulating particulars of the program to be funded. For example, a gift to a national charity for cancer research may be meaningfully informed by the fact that the donor's spouse died of brain cancer.

It is no longer required to give notice of a charitable gift in a will to the Public Guardian and Trustee.[26]

[26] Charities Accounting Act
1 (1) Where, under the terms of a will or other instrument in writing, real or personal property or any right or interest in it or proceeds from it are given to or vested in a person as executor or trustee for a religious, educational, charitable or public purpose, or are to be applied by the person for any such purpose, the person shall give written notice to,
(a) the person, if any, designated in the will or other instrument as the beneficiary or as the person to receive the gift from the executor or trustee; and
(b) the Public Guardian and Trustee, **in the case of an instrument other than a will**.

2. **Respect the obligation of the charity to examine accounts and approve compensation**. Like any other residuary beneficiary, charities are entitled to call the executors to account. The difference is that, unlike individual beneficiaries, charities themselves have a fiduciary duty with respect to the gifts made to them. They have a responsibility, if funds were dedicated to charitable purposes by a deceased person, to see that the intentions are respected, and this include seeing that the gift arrives whole. Moreover, major charities are repeatedly beneficiaries of many and various estates. They will have sophisticated in-house clerks and lawyers who thoroughly understand the proper administration of an estate and the calculation of executor's compensation. While family members may be prepared to accept the estate lawyer as the authority, a charity is less likely to do so. They will often examine accounts with care and ask pointed follow-up questions. This is not necessarily an accusation against the executors, merely the charity fulfilling its obligations. Executors should be guided through the process of responding civilly and completely to legitimate enquiries. There are, of course, egregious examples of overreaching in this regard, and where several charities divide a gift, it is advisable for them to agree, since unreasonable costs incurred by one of them may well delay and reduce the gift made to the others. As with any other beneficiary, a free flow of information is the best prophylactic for subsequent challenges and difficulties.

As estate solicitor, you need to understand thoroughly what is and is not a legitimate expense of the estate, what transactions are executor's work delegated to you as solicitor (and consequently to be paid from executor's compensation not from the estate), and what percentages are appropriately levied on each accounting entry; and you need to be prepared to advise the executor appropriately where expenses are challenged. There are, of course, many cases in which the accounts of an executor have been challenged by the residuary

beneficiaries before the court on a passing application. Just as it is unconscionable for family members to be deprived of their inheritance through incompetent administration or sloppy accounting, so is it that the charitable purposes that a deceased wished to benefit should be so deprived. The estate solicitor's obligation in advising executors is to make sure that they understand what is and is not compensable.

3. **Respond to requests for information**. As mentioned above, charities have budgets and expenses. If they have been informed that they are to receive funds from an estate, they will want to track when the funds are likely to arrive, and this may mean that they write periodically to ask about progress in the administration. Failing to respond to these enquiries is likely to raise anxiety that the estate administration has been derailed. Your executors should be advised to respond in a timely and informative manner, to charities as to any other beneficiary.

4. **Charitable beneficiary of residue** – If you are advising an executor of an estate with a charity that you believe will be reluctant to agree to standard compensation or inclined to challenge accounts and actions that you believe are justifiable, discuss with your client the advisability of obtaining executor's insurance, even if it is not paid from the estate. Advise your executor early to be meticulous in record keeping. Make sure that accounts and calculation of compensation presented for review to the beneficiaries are accurate and reflect proper law on the allocation of expenses between executor's compensation and expenses of the estate. Be prepared for legal accounts to be presented as well, since it is legitimate for any beneficiary to determine whether the vouchers support the legitimacy of the expense. And, of

course, make sure that you explain – preferably in your retainer letter – that where you or your staff are asked to do delegated executor's work, the fee is properly paid from the executor's compensation. Be prepared to divide your dockets so that legal and delegated executor's work are billed separately. And remember that advising executors on how to protect themselves personally from legitimate enquiries may not be a proper expense of the estate.

Working with a charitably inclined client can be among the most satisfying work for an estate lawyer. There is scope for imagination in the structuring of the gifts – especially if the client has some wealth or interesting property – and there truly is no limit on the number of way gifts can be made that will benefit society. As beneficiaries, charities are frequently a delight to work with – unlike family members, they are free from "baggage", and more likely to approach the matter of having an estate settled in a businesslike manner. They are also a source of support in providing drafting hints and review of documents, and education in guiding an advisor through the rich variety of programmes they offer.

Appendix A – Some Helpful Clauses

Power for Charity to vary

If circumstances make the specified use of this gift no longer practical or desirable, the board of [Directors/Trustees] of the charity is hereby authorized to make changes in its use in keeping as far as possible with the spirit and general intent of the gift.

Power for Executor to make gifts in kind

Without limiting the discretion of my Trustees, I request them to satisfy all or part of this legacy by transferring publicly traded securities if the accrued capital gains otherwise payable by my estate can thus be exempted from income tax.

Charitable Receipts

For the purposes of this will the receipt of any person purporting to be the proper officer of an institution named as a beneficiary shall be a full discharge to my Trustees.

Power for Executors to Choose another Charity

If, at the time of distribution, any charity or institutional beneficiary named in this will does not exist, never existed, or has amalgamated with another institution or has changed its name or objects, any provision for it in this will shall not fail and I declare that, notwithstanding the particular form of the bequest, my paramount intention is to benefit a general charitable purpose and my Trustees are authorized in their absolute discretion to pay the bequest to the [charitable] organization that they consider most closely fulfills the objects I intend to benefit.

Avoiding confusion (and claims)
when making charitable bequests

Many wills include one or more bequests to charitable or religious institutions. In spite of the testator's good intentions, these bequests often lead to claims when there is confusion over which institution was to receive the bequest. These mistakes often come to light only when the estate is being distributed – and they can lead to costly and time-consuming litigation when charities fight over the bequest.

Many of the claims reported in this area could be avoided if lawyers took steps to confirm that the information given by the testator is correct when the will is being drafted.

Often testators will give the lawyer a name for the charity that is outright wrong or doesn't include an indication of its corporate status. For example, the client says "Niagara Cat Shelter" but the real name is "Niagara Falls Cat Shelter Inc."

In other situations there is ambiguity about which institution was to receive the bequest. For example, a legacy to "the ALS Society" is unclear. Does the testator intend that the bequest go to the provincial association or the national body?

Similarly, a bequest to St. John's Church can be quite confusing if there is more than one church with the same name in the region. There can also be confusion if the church or charity no longer exists. For this reason, including an address and phone number in the will can be helpful.

It is imperative that lawyers taking instructions for a will ensure that the beneficiary of the bequest exists and that the beneficiary is referred to by its full legal name in the will. Go beyond the name of the charity and ask for an address and phone number. Cross-check the information provided to make sure the charity the testator intends the bequest to go to is properly named. There are a multitude of resources available to confirm the names and addresses of charitable entities. Many charities have websites, and most are referenced in various government and non-government directories.

Taking the time to check the proper name of an entity and confirming that information with the testator can avoid a potential negligence claim in the future.

Pauline Sheps is claims counsel specialist with LawPRO.

Common real estate pitfalls to avoid

Condominium parking and lockers:
Handle with care

Your client buys a condo with two parking spaces and a locker. Usually the parking spaces and locker are separate units with their own PINs. When you're looking at the draft transfer and mortgage, make sure they include all the PINs, unit and level numbers.

Our claims experience has shown that it's easy to overlook the omission of these units from a document. Once a purchase closes, or a mortgage goes into default, it may be hard to get a correcting transfer or mortgage for the missing units.

The same principle applies when a non-condominium property has more than one PIN. Make sure the draft transfer or mortgage includes the PINs and legal descriptions of everything your client expects to obtain. If the property is shown on a plan, this can easily be double-checked when reviewing the plan with your client.

Purchasing real property:
What does your client have in mind?

Many clients buy properties with the intention of building on them, or changing the use. For instance, a house with a large back yard may seem ideal for a swimming pool or garage, but sewers or other utility easements make it impossible. Or the zoning may not permit a home-based business or multiple dwelling units.

When clients bring you agreements of purchase and sale, ask what they want to do with the property. Otherwise, they may never tell you, only to find out later that they can't do what they expected – and blame you for not warning them sooner. Once you know their intentions, you can put a condition in the agreement or, if it's already signed, explain their options. They may want you to do a zoning search, or get title insurance with a future use endorsement. Get their instructions in writing. That way, there are no surprises after closing – for them or you.

Lisa Weinstein is director, national underwriting policy for the TitlePLUS program.

Law Society of Ontario | Barreau de l'Ontario

TAB 3

THE SIX-MINUTE Estates Lawyer 2018

Checklist - Errors in an Application for a Certificate of Appointment of Estate Trustee With a Will

Checklist - Errors in an Application for a Certificate of Appointment of Estate Trustee Without a Will

Ontario Superior Court of Justice

Submitted by:
Satie Seeraj, Registrar and Supervisor of Court Operations,
Ontario Superior Court of Justice, Bankruptcy/Commercial, Estates and Assessments

May 3, 2018

cpd Continuing Professional Development

Ontario Superior Court of Justice
330 University Avenue, 7th floor
Toronto Ontario M5G 1R7

Please ensure that corrections made to a document are also applied to any related document(s), and recheck the entire file before submitting it to the court office. This will reduce unnecessary delays in processing documents.

Date:
Recipient's name and address:

ERRORS IN AN APPLICATION FOR A CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITH A WILL

Estate of ..... File No. .....

The application cannot be processed because it is incomplete for the reason(s) indicated below. Please return the completed application to the Superior Court of Justice at the above address. Please note that it is your responsibility to ensure that your application meets all legislative requirements. Your application may be returned to you again if another error is found.

- ☐ The estate forms prescribed by the *Rules of Civil Procedure* (rules of court) have not been used. Many of the estates forms under Rule 74 are provided in a pre-formatted and fillable format at: www.ontariocourtforms.on.ca/english/civil/pre-formatted-fillable-estates-forms. The content of all regulated forms may be found at the following website: www.ontariocourtforms.on.ca/english/civil. The forms must be in compliance with Rule 4, the rule governing the format and content of court documents. To access an electronic version of the *Rules*, visit: www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm.

- ☐ Proof of death must be filed, such as a death certificate issued by the Registrar General, a certificate in respect of death issued by a funeral director, or an order made under the *Declarations of Death Act, 2002.* Proof of death documents must be originals or certified /notarial copies.

- ☐ Insert the name and address of solicitor, or applicant if acting in person, in the space near the top of form 74.4 where the form states “This application is filed by”.

- ☐ Answer all questions on the Application (form 74.4). However, answer the question on form 74.4 about whether the spouse elected to receive entitlement under section 5 of the *Family Law Act* only if the applicant is the spouse of deceased.

- ☐ Questions on form 74.4 regarding the persons entitled to an interest in the estate, or entitled to apply for the certificate, must be answered correctly or an explanation must be provided.

- ☐ Form 74.11 Renunciation of Right to a Certificate of Appointment of Estate Trustee (or Succeeding Estate Trustee) with a Will must be filed and the renunciation information must be stated on the application and certificate of appointment.

- ☐ Deceased, estate trustee(s) and beneficiaries’ names on all documents should be exactly the same as on the will/codicil, or indicate “also known as” name on all documents.

- ☐ The date of the will, date of death, occupation of the deceased, occupation of the estate trustee(s), and/or each individual’s address must be completed and must be the same on all documents.

- ☐ All changes to the application and any affidavit must be initialled by the same commissioner for taking affidavits.
- ☐ Memorandum required to be filed as stated in the will/codicil. If no memorandum can be found, provide an affidavit indicating none was found/in existence.
- ☐ All beneficiaries must be served with a form 74.7 Notice of Application, or an explanation must be given in form 74.6 Affidavit of Service of Notice as to why a beneficiary has not been served (e.g. address unknown, beneficiary has died, gift given prior to the deceased's death or gift no longer exists).
- ☐ The applicant is not named as estate trustee in the will. Consent to the Applicant's Appointment (form 74.12) must be given from beneficiaries who, together, have a majority share in the value of the assets of the estate.
- ☐ If an estate trustee(s) named in the will or codicil is not an applicant by reason of death or renunciation, state this information on the application and the Certificate of Appointment of Estate Trustee with a Will.
- ☐ Form 74.7 Notice of Application must be marked as "**Exhibit 'A'**" to the Affidavit of Service of Notice (form 74.6). The exhibit must be stamped and signed by the same commissioner for taking affidavits.
- ☐ The original will must be marked as "**Exhibit 'A'**" to the affidavit in form 74.4 and the exhibit must be stamped and signed by the same commissioner for taking affidavits. The exhibit stamp should appear on the back of the signing page of the original will.
- ☐ The address of the second witness must be given on the Affidavit of Execution (form 74.8).
- ☐ A bond must be filed per *Estates Act* section 35, or dispensed with. See *Estates Act* on the e-laws website: http://www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e21_e.htm. See also Rule 74.11 of the *Rule of Civil Procedure* at the website listed above.
- ☐ Where the applicant seeks an order dispensing with the requirement to file a bond, consent to Applicant's Appointment as Estate Trustee with a Will (form 74.12) must be received from **all** beneficiaries and filed with the court.
- ☐ To dispense with a bond, applicant must file an affidavit stating that the debts have been paid, or list all the debts outstanding, and provide information about whether the deceased owned any businesses.
- ☐ The draft order dispensing with a bond must contain both the prescribed header and proper backsheet. The content of prescribed forms may be found at the following website: www.ontariocourtforms.on.ca/english/civil.
- ☐ Incorrect amount of tax or no tax paid. The formula for calculating the amount of tax is set out in the *Estate Administration Tax Act, 1998* as follows: $5 for each $1,000, or part thereof, of the first $50,000 of the value of the estate and $15 for each $1,000, or part thereof, of the value exceeding $50,000.
- ☐ On form 74.13, the address of the court must be typed under the Registrar's signature line. The address is listed at the top of this notice.
- ☐ Please file a new certificate (form 74.13) and **do not** fill in the date.
- ☐ Please file a plain, unmarked copy of the will.
- ☐ In completing the affidavit at the end of form 74.4, the applicant's surname must be set out first.
- ☐ An affidavit must be filed explaining why no Affidavit of Execution (form 74.8) has been filed and the efforts made to find the missing persons who witnessed the testator's signature on the will.
- ☐ Other:

Please return this notice with your documents.

Ontario Superior Court of Justice
330 University Avenue 7th Floor
Toronto Ontario M5G 1R7

Please ensure that corrections made to a document are also applied to any related document(s), and recheck the entire file before submitting it to the court office. This will reduce unnecessary delays in processing documents.

Email- Toronto.estates@ontario.ca

Date:
Recipient's name and address:

ERRORS IN AN APPLICATION FOR A CERTIFICATE OF APPOINTMENT OF ESTATE TRUSTEE WITHOUT A WILL

Estate of ..... File No. .....

The application cannot be processed because it is incomplete for the reason(s) indicated below. Please return the completed application to the Superior Court of Justice at the above address. Please note that it is your responsibility to ensure that your application meets all legislative requirements. Your application may be returned to you again if another error is found.

- ☐ The estate forms prescribed by the *Rules of Civil Procedure* (rules of court) have not been used. Many of the estates forms under Rule 74 are provided in a pre-formatted and fillable format at: www.ontariocourtforms.on.ca/english/civil/pre-formatted-fillable-estates-forms. The content of all regulated forms may be found at the following website: www.ontariocourtforms.on.ca/english/civil. The forms must be in compliance with Rule 4, the rule governing the format and content of court documents. To access an electronic version of the *Rules*, visit: www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm.

- ☐ Proof of death must be filed, such as a death certificate issued by the Registrar General, a certificate in respect of death issued by a funeral director, or an order made under the *Declarations of Death Act, 2002.* Proof of death documents must be originals or certified /notarial copies.

- ☐ Insert the name and address of solicitor, or applicant if acting in person, in the space near the top of form 74.14 where the form states “This application is filed by”.

- ☐ Answer all questions on the Application (form 74.14).

- ☐ Deceased’s name should be exactly the same on all documents, or indicate “also known as” name on all documents.

- ☐ The occupation of deceased and/or the estate trustee(s) must be the same on all documents.

- ☐ An answer to a question on the application indicates that it is unclear whether an earlier marriage of the deceased person had been terminated by divorce. Please attach a schedule to the application with more information including the date of the marriage, date of divorce and steps that have been taken to verify that the divorce has taken place.

- ☐ On form 74.14, where the applicant explains why he or she is entitled to apply for the certificate of appointment of estate trustee, information must be added relating to consent given by persons who are entitled to a share in the distribution of the estate and who, together, have a majority interest in the value of the assets of the estate.

- ☐ Form 74.18 Renunciation of Prior Right to a Certificate of Appointment of Estate Trustee without a Will must be filed.
- ☐ On form 74.14, where persons entitled to share in the estate are listed, a person is listed who is not a spouse, child, parent, brother or sister of the deceased. Set out the family relationship between the deceased and that person which explains why he or she is entitled to share in the estate.
- ☐ All persons entitled to share in the estate must be served a form 74.17 Notice of Application, or an explanation must be given in form 74.16 Affidavit of Service of Notice as to why a person has not been served.
- ☐ A bond must be filed per section 35 of the *Estates Act*, or dispensed with by court order. See *Estates Act* on the e-laws website: www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e21_e.htm. See also Rule 74.11 of the *Rule of Civil Procedure* at the website listed above.
- ☐ Where the applicant seeks an order dispensing with the requirement to file a bond, consent to the Applicant's Appointment as Estate Trustee Without a Will (form 74.19) must be received from **all** persons entitled to share in the estate and filed with the court.
- ☐ The applicant has sought an order to dispense with the requirement to post a bond, or reduce the amount of the bond. The applicant must file an affidavit stating that the debts have been paid, or list all the debts outstanding, and provide information about whether the deceased owned any businesses.
- ☐ The draft order dispensing with a bond must contain both the prescribed header and proper backsheet. The content of prescribed forms may be found at the following website: www.ontariocourtforms.on.ca.
- ☐ All changes to the application must be initialled by the same commissioner for taking affidavits.
- ☐ On form 74.20, the address of the court must be typed under the Registrar's signature line. The address is listed at the top of this notice.
- ☐ In completing the affidavit at the end of form 74.14, the applicant's surname must be set out first.
- ☐ Estate administration tax must be paid. See the *Estate Administration Tax Act, 1998* on the e-laws website: www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_98e34_e.htm.
- ☐ Incorrect amount of tax or no tax paid. The formula for calculating the amount of tax is set out in the *Estate Administration Tax Act, 1998* as follows: $5 for each $1,000, or part thereof, of the first $50,000 of the value of the estate and $15 for each $1,000, or part thereof, of the value exceeding $50,000.
- ☐ Please file a new certificate (form 74.20) and **do not** fill in the date.
- ☐ The applicant must be an Ontario resident. See section 5 of the *Estates Act* on the e-laws website: www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90e21_e.htm.
- ☐ Form 74.17 Notice of Application must be marked as "Exhibit 'A'" to the form 74.16 Affidavit of Service of Notice. The exhibit must be stamped and signed by the same commissioner for taking affidavits.
- ☐ Other:

Please return this notice with your documents.

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TAB 4

THE SIX-MINUTE Estates Lawyer 2018

The Current State of Cross-Border Planning: The Only Thing That is Constant is Change

Paul Taylor
Borden Ladner Gervais LLP

May 3, 2018

cpd Continuing Professional Development

The Current State of Cross-Border Planning:

The Only Thing That is Constant is Change

The Six-Minute Estates Lawyer 2018

Paul W. Taylor[1]

1) Introduction

As noted in last year's paper and talk, this topic is broad enough to encompass one or more entire conferences (which it often does), so in my paper and presentation I will focus on three of the most significant topics affecting Ontario lawyers.

The first, similar to last year, is information sharing (last year we dealt with the Common Reporting Standard in particular). This year we will deal with increased steps taken by the Canada Revenue Agency ("CRA") in respect of information sharing and overall trends.

The second is some interesting international case law on the rights of beneficiaries, in particular in cross-border structures.

The third is the recent tax changes in the United States.

Given the breadth of the topics covered, my comments will necessarily be general in nature and, as always, applicable statutes and case law should be consulted to deal with a particular client's issue. Also, as multiple jurisdictions are inherently involved in cross-border estate planning, it is important to involve local counsel to ensure proper compliance with all applicable laws.

2) Information Sharing

The current trend among taxation authorities is the expansion of information sharing measures.

The best example of this is the Common Reporting Standard ("CRS"), which the Organisation for Economic Co-operation and Development has described as follows:

> The Common Reporting Standard (CRS), developed in response to the G20 request and approved by the OECD Council on 15 July 2014, calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. It sets out the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions.[2]

The foundational pillars of the CRS are "(1) a common standard on information reporting, due diligence and exchange of information, (2) a legal and operational basis for the exchange of information, and (3) common or compatible technical solutions."[3] A more detailed analysis of

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[1] Paul W. Taylor is an associate in the tax group of Borden Ladner Gervais LLP in Ottawa. His practice focuses on trust, estate and incapacity planning and administration.

[2] OECD, http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/

[3] OECD (2014), *Standard for Automatic Exchange of Financial Account Information in Tax Matters*, OECD Publishing; accessed online: http://dx.doi.org/10.1787/9789264216525-en; p. 13.

these standards can be found in last year's paper. For our purposes, we will deal with Canada's movement to adopt the CRS.

It should be noted that the CRA has published a guidance on the CRS.[4] While this is directed at financial institutions and their advisors, it is nonetheless a useful guide to the CRA's views. Canada has implemented the CRS and indicated that it would be undertaking its first exchange of information under the CRS in 2018.[5] The first reporting deadline for Canadian financial institutions is May 1, 2018.

In the Department of Finance's Budget 2018, additional measures in respect of information sharing were included as well, as part of this trend. The government proposes the following measures:

- To allow existing legal tools available under the Mutual Legal Assistance in Criminal Matters Act ("MLACMA") (which is administered by the Department of Justice) to be used with respect to the sharing of criminal tax information under Canada's tax treaties and tax information exchange agreements ("TIEAs"), and the Convention on Mutual Administrative Assistance in Tax Matters;

- To enable confidential information under Part IX of the Excise Tax Act and the Excise Act, 2001 to be disclosed to Canadian police officers in respect of offences where such disclosure is currently permitted in respect of taxpayer information under the Income Tax Act; and

- To enact measures including enhanced sharing of information sharing through multilateral instruments. In 2017, Canada, along with 71 other jurisdictions, became signatories to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (known as the Multilateral Instrument or MLI). The MLI is intended to allow participating jurisdictions to modify their existing tax treaties to include measures developed under the OECD/G20 BEPS project without having to individually renegotiate those treaties. Steps will be taken in 2018 to enact the MLI into Canadian law and ratify it as needed to bring it into force.

With the overall trend towards more information sharing, many jurisdictions are implementing trust beneficiary registers. This is in line with the collection of information required under CRS, though it is noted that some jurisdictions (mainly civilian jurisdictions in Europe) are adopting public versions of these registers. The United Kingdom, whose Courts of Equity first recognized the trust, has adopted a trust beneficiary register (though not a public one). One item you may recall from our discussion of the CRS last year was what would be done with beneficiaries of discretionary trusts (many of whom may not even know they are beneficiaries). The UK government has confirmed that, for the time being, their policy will be to require the disclosure of

[4] https://www.canada.ca/en/revenue-agency/services/tax/international-non-residents/enhanced-financial-account-information-reporting/reporting-sharing-financial-account-information-other-jurisdictions/guidance-on-common-reporting-standard-part-income-tax-act.html

[5] It should be noted that this list does not mean each country will have implemented exchanges with all other countries on the list. Rather, that they will have commenced implementing exchanges with at least one of the other countries.

those beneficiaries who have actually received a benefit from the trust, even where the other beneficiaries (who have not yet received a benefit) are known to the trustees.[6]

3) Case Law on the Rights of Beneficiaries

Two international cases form an interesting juxtaposition on the rights of beneficiaries.

Jersey, one of the Channel Islands, is a well-known jurisdiction for international trust planning due to its well-developed case law (based on its English connections) and advantageous tax rates. In a world where increasing information sharing and disclosure of beneficiary information is becoming the norm, the case of *In the Matter of the C Settlement*, [2017] JRC035A will likely continue this trend. It is worth noting that as this is a common law jurisdiction, this case would be persuasive in Canada.

There is a general principle in respect of trusts that trustees have a duty of disclosure when a beneficiary attains the age of majority.[7] While the trust deed can provide otherwise, in this case evidently it did not. At issue was the disclosure of the existence of a trust of over £75,000,000, the principal beneficiary of which was just over 18 years old. There was to be a settlement of a breach of trust action, and the two other beneficiaries consented to the settlement. An application was brought to withhold information in respect of the trust from him until he was 21, with evidence from his mother that knowledge of the existence of the trust would be "a harmful and damaging burden".

The Court contemplated the trustee's discretion and requirement to act in the beneficiaries' best interests, and concluded that in some cases this could justify non-disclosure. The Court found that, "The view may be reached by settlor or trustee that such a reaction to knowledge of the details of potential benefit will be less likely when the person in question has achieved greater maturity."[8] In this case, the trustees were permitted to withhold fundamental information (the existence and size of the trust) from the beneficiary, but it should be noted that this was only on the evidence adduced with respect to the potential detriment to him and in this case the request was for a time-limited withholding of information.

This case, among other things, reminds us of the importance of including appropriate provisions in respect of the disclosure of information in drafting trusts.

The discretion of trustees to withhold information is not, however, absolute. A recent case from the England and Wales High Court, *Lewis v Tamplin* (2018 EWHC 777 Ch), provides a useful counterpoint. In this case, a testamentary trust was being administered on behalf of the families of the testator's six children and her issue. Three of the remaining beneficiaries were not trustees and sought to obtain information in respect of negotiations in respect of some land held by the trust valued around £10,000,000. They were also concerned distributions were made to some beneficiaries, but not to them.

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[6] https://www.lexology.com/library/detail.aspx?g=d0862d31-869d-43a6-b009-585e6b7892b2.
[7] Hawkesley v May [1956] 1 QB 304 (UK Queen's Bench).
[8] *Ibid* at para. 23.

The Court found that in refusing to provide adequate information, the trustees had:

> …taken an extreme and in my judgment indefensible approach to disclosure in this case, first by denying (on a very weak basis) that the claimants were beneficiaries at all, and then by putting forward a series of hopeless arguments against giving information to the beneficiaries… [The beneficiaries sought the information for] precisely the right reasons, namely, to hold the trustees to account, and thus to vindicate their own beneficial interests, by way of an action for breach of trust if need be.
>
> I do not accept the argument for the trustees that the court should not order disclosure of particular categories of documents merely because in the opinion of the trustees the beneficiaries already have had sufficient information'…

While one of these cases found that the beneficiary was not entitled to fundamental information, and the other found that they were entitled to information that was far more nuanced than the trustees considered necessary, the common thread is consistent: there is one overriding principle in the administration of a trust, and that is the best interests of the beneficiary.

4) U.S. Issues

Last year, it was noted that President Trump promised to change the Estate and Gift tax system. While the President and the Congress dominated by his party have appeared to have difficulty bringing significant legislation into law, the exception to this is a fairly broad series of tax changes that have significantly increased the US deficit and reducing taxes on corporations and wealthy individuals in the hopes of spurring growth.

Estate and Gift Tax

As you will be aware, in Canada, there is a deemed disposition and deemed reacquisition of all of an individual's assets on death, subject to the ability to roll those assets over to a spouse or qualifying spousal trust.

The United States does not have a parallel system in this regard. Rather, in addition to taxes at state levels (which should be verified on a case-by-case basis with local counsel), there is a federal Estate and Gift tax on all property "wherever located" by "U.S. Persons", who include a citizen or resident of the United States.[9] The Estate and Gift tax rate is 18-40% depending on the value of the property valued.[10]

The historical intention of the Estate and Gift tax is to reduce income inequality and larger intergenerational transfers of wealth, rather than to apply as a tax of general applicability. Accordingly, a number of credits serve to ensure it will not apply to most U.S. Persons. In 2001, this main credit was $675,000 (meaning that no tax would be applied to the first $675,000 of a person's gross estate). By 2011, it had increased to USD$5,000,000 and remained there (indexed to inflation) until now.

[9] *Internal Revenue Code*,[1986]; [*"IRC*"] at § 7701(a)(30).
[10] Additional information about US estate and gift tax is included in my paper of last year.

The credit of USD$5,490,000 (in 2017) was doubled in the recent tax changes, to USD$11,180,000.

The "gross estate" of an individual for these purposes includes certain trusts. In planning for beneficiaries of an estate who are U.S. persons whose assets (including the inheritance) will approach the exemption, it may be appropriate to provide their inheritance through a trust limited in certain regards, including by having an independent trustee where appropriate.

The expanded credit significantly reduces the number of individuals and families to whom the US Estate Tax applies.

Corporate Tax Changes

US corporate taxes had ostensibly been 35%, far higher than Canada and many other jurisdictions. However, the reality was that with a plethora of deductions very few corporate tax payers ever paid that amount. The US tax changes of late last year lowers that rate to 21% and changing the system from a progressive rate system to a single flat tax. The changes also now greatly expands the ability to depreciate certain business property.[11]

The combined changes make the US a far more desirable jurisdictions in which to hold assets for high net worth private clients. Aside from ensuring appropriate advice is obtained, in my view, the biggest potential risk is that political winds in the United States change, and the rules will change to either lower the limit or change the manner in which US Persons are taxed on death more broadly.

[11] For a broader summary of other issues, see: https://www.bdo.com/insights/tax/federal-tax/corporate-tax-reform-summary-of-new-laws

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TAB 5

THE SIX-MINUTE Estates Lawyer 2018

Increasing the Odds of an Effective Mediation

Clare Burns
WeirFoulds LLP

May 3, 2018

cpd Continuing Professional Development

INCREASING THE ODDS OF AN EFFECTIVE MEDIATION

BY

CLARE E. BURNS[1]

Mediation is an art not a science. It cannot be reduced to a one-size fits all formula that necessarily results in the settlement of litigation. Nowhere is this more true than in trust, estate and guardianship matters which routinely involve issues that trigger highly emotional responses from the parties to the litigation. There are certain things that counsel can do to make a trust, estate or guardianship mediation more effective. However, in measuring effectiveness, attention must be given both to those situations where mediation will be a waste of time and resources and those where it can lead to an enforceable settlement. Accordingly, this paper first considers the matter of how to identify those cases which should not be mediated. Thereafter, it will address the question of how to make mediations of suitable cases more likely to be successful.

SCREEN THE MATTER: CAN IT ACTUALLY BE MEDIATED?

Mediation can help resolve the vast majority of cases where the issues involve trusts, estates, powers of attorney or guardianships. However, there are cases that are simply not suitable for mediation. Counsel and mediators have a responsibility to screen out those matters so as not to do more harm to the parties and/or needlessly waste time and resources.[2] Examples of such cases include those where there is a documented history of physical or mental abuse by one party of another[3] and cases where one or more parties arguably do not have the ability to express their interests or weigh the consequences of the decisions they will be asked to make at a mediation.[4] Additionally, the facts of the case itself may mean that mediation is not a suitable method of trying to solve a matter. This could arise, for example, in a case involving an alleged homicide by one spouse of the other where what is at issue is the distribution of the deceased spouse's

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[1] Partner, WeirFoulds LLP.

[2] Davis, A.M. and R.A. Salem, "*Dealing with Power Imbalances in the Mediation of Interpersonal Disputes"*(1984), 6 Mediation Q. 17ff.

[3] For example, where there has been a repeated pattern of police involvement or third party professionals [such as doctors, nurses, and social workers] who have recorded concerns about abuse in the course of a treating relationship with one or more of the parties.

[4] This does not include situations in which such parties are represented by a litigation guardian or section three counsel pursuant to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as am. or the *Substitute Decisions Act*, 1992, S.O. 1992, c.30, as am.

estate. Counsel must be sure to address their mind to these issues and to address them with the mediator well before a mediation proceeds. Ultimately, it may be necessary to seek an order excusing the parties from attending mediation in jurisdictions where mediation is mandatory.[5]

Once a case is screened as suitable for mediation there are a number of practical steps that counsel can take that will increase the odds of a mediation resulting in an enforceable settlement. A non-exhaustive set of such practical steps is set out below.

CHOOSING A MEDIATOR

It is very important to consider what kind of mediator will be best suited to conduct the mediation.

One consideration is whether you want a mediator who is evaluative or not. That is, will it be helpful to have a mediator who is experienced in estates and trust litigation, either as counsel or a judge, so that they can be asked to offer their views about the strengths and weaknesses of the case. This can often be helpful in situations where clients or counsel are not being realistic about their litigation risk. Sometimes there is one or more party who simply wants "to have their day in court". In these situations serious consideration should be given to employing a retired judge as the mediator. Generally speaking, retired judges are evaluative in their mediation style but this is precisely what these kinds of parties want and need.

It is important to be mindful, however, that there are estate and trust disputes where the root of the problem is not differing evaluations of litigation risk based on the evidentiary record but rather a long subsisting dysfunctional family dynamic. In these cases a mediator with excellent de-escalation and communication skills is what is needed. This can involve looking beyond the domain of lawyers and retired judges and considering whether a senior social worker with mediation training would be better suited to the role. Consideration can also be given to using such a person as a co-mediator.

Another thing to think about is whether a proposed mediator will be sensitive to the cultural context of the parties and the issues. This is imperative because a mediator needs to understand that there may be cultural or community norms that will inform how a settlement can be

[5] In Ontario, see Rule 75.1.04 of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, as am.

structured . A mediator with this skill set can avoid proposing ideas for settlement structures that end up escalating a dispute because they violate those norms.

Similarly, thought should be given to the issue of whether the mediator needs local knowledge. In this context local knowledge means an awareness of the personalities, reputations and styles of the lawyers involved. That knowledge can be enormously helpful to a mediator and, therefore, to achieving a successful resolution because the mediator will be familiar with the individuals' negotiating styles.

Finally, cost should be a consideration when choosing a mediator and the principle of proportionality must be observed. I have been involved in mediations that cost $33,000 per day and in mediations that cost $4,500 for the day. Both have been highly effective and both were appropriate to the matters in dispute.

In summary, careful thought as to who should mediate a particular case is both warranted and likely to increase the odds of a mediation being successful.

AGREEING A FORMAT

The format of a mediation can contribute substantially to the likelihood of a settlement being reached. Counsel should discuss what format they want to use among themselves and with the mediator in advance of the mediation. There are no right and wrong answers as to how a mediation process should be constructed and there is room for enormous creativity in the design process. What follows are a few matters to consider. A first question might be whether there should be a plenary session or not. In some cases, counsel may conclude that having family members together at the outset will be unhelpful. However, many mediators will insist on this so that all the parties know who is present. If there is to be a plenary session, another question should be whether non-parties who are nevertheless present at mediation in a support role [such as spouses of siblings] will be permitted in the plenary session. Again, this will be a question of whether this will increase or decrease the emotional temperature among the parties. Another important matter to consider, if there is to be a plenary session, is whether there will be opening statements. These often simply serve to polarize parties. Finally, consideration should be given

to whether there will be a limit on the size or content of the mediation briefs.[6] All these questions should be examined relative to the issues in dispute and the personalities of the parties and counsel involved. Once the format is agreed, counsel and the parties can then commence their preparation for the mediation.

THE MEDIATION BRIEF

In my experience, one of the biggest mistakes that counsel make is not spending enough time on their mediation briefs. A well-crafted brief, or better yet, well-crafted briefs from all counsel, significantly enhances the chances of a mediation succeeding.

A great mediation brief contains the following:

a) an overview that is fewer than three pages long that:

   i. identifies in the first sentence what the issue or issues are to be determined;
   ii. is not cluttered up with defined terms [you can define them in the main text];
   iii. tells the mediator why your client has the better case; and
   iv. identifies any outstanding offer to settle that your client has made;

b) a family tree [there is lots of free software on the internet to help you draw one];

c) an organizational chart of corporate interests or complicated trust structures [including shareholding details and before and after charts where there is an impugned transaction];

d) a chart of the assets and liabilities at the date of death or the material start date [i.e. commencement of the period of the attorneyship or guardianship];

e) a chart of the assets and liabilities as close in time as possible to the mediation;

f) a chronology chart if the dates are important;

g) a concise statement of the facts that includes a précis of the terms of the testamentary documents or *inter vivos* documents that are at issue and, more importantly, a summary of what each party will get depending upon the litigation outcome;

[6] Note that in Ontario, rule 75.01.08 of the *Rules of Civil Procedure*, ibid., requires that a mediation brief be prepared for all mandatory mediations.

h) a concise statement of the legal issues ; and

i) key documents. (The important word here is "key").

What a great mediation brief does not contain is inflammatory statements that will escalate the emotional intensity of the conflict, thus making it much more difficult to reach a mediated solution. To that end, word choice is critical. For example, rather than saying that there was an extra-marital affair, counsel should simply put the dates of the alleged relationships in the brief and let the mediator work out that the relationships overlapped. Finally, only include facts that will drive up the emotional intensity if they are relevant. So if one party's husband had an affair with another party's wife, do not put that in the brief unless it is relevant to the dispute. This sort of detail can always be shared with the mediator in a caucus session.

Counsel sometimes say that a brief with these items in it is simply too expensive to produce relative to the amount of money or items in dispute. The fact is that without this information counsel cannot be giving proper legal advice as they cannot assess proportionality or properly assess the merits of the case. Accordingly, drafting the brief should simply be a matter of getting this material down on paper. Moreover, including this material both keeps the cost of the mediator's preparation down and can speed up the mediation itself as it gives the opposing parties an opportunity to digest the position of those opposite in advance of the day of mediation. In summary, a good mediation brief materially increases the likelihood of settlement.

GET TAX ADVICE AND LINE UP TAX HELP FOR THE DAY OF MEDIATION

Even the simplest piece of trust or estate litigation requires a consideration of tax matters when structuring a settlement. What clients need to know in deciding if a proposed settlement structure is acceptable to them is what the value to them is of the assets they are being offered. Far too often counsel forget that that value will depend upon whether the structure of the settlement has tax consequences. By way of example, if in the proposed settlement the house is going to the deceased's spouse then there will be a rollover pursuant to the *Income Tax Act*[7] and the estate will pay no tax. If, however, it is proposed that the house be distributed to a child then there will be no rollover and the estate will have to pay tax on any capital gain arising from the

[7] *Income Tax Act*, R.S.C. 1985, c.1 (5th Supplement), as am.

deemed disposition at death. Therefore, if a client is settling for a percentage of the estate, the tax treatment on the house may be material to them. When having discussions about a proposed settlement structure, it is also important to know what tax filings have already been made relative to various assets and what will happen if those tax filings need to be amended. (That is, will refiling of tax returns be necessary and will that result in interest and penalties being payable.) If counsel is not comfortable with giving advice about tax outcomes and/or running the relevant numbers, it will be wise for counsel to discuss different settlement scenarios with the client's accountant in advance of the mediation.

It is only in rare cases that it will be necessary to have the client's accountant attend in person at the mediation. However, it is prudent to have arranged in advance to be able to reach the client's accountant during the mediation so that they can give advice about the after tax outcome of any proposed settlement arrangement. Being able to receive immediate advice about the likely financial outcome of various proposed settlement structures reduces the likelihood of a mediation having to be postponed to seek such advice and thus promotes a successful mediation.

ABOUT THE PERSONALTY

Many mediations of estate and trust litigation matters founder on the shoals of arguments about the personal items of the deceased. In my experience these arguments (about things as diverse as Royal Doulton figurines, the bed, the washing machine, the framed lithograph of dogs playing poker, and a stuffed deer's head[8]) are never about the financial value of the items. Rather, they are largely about the emotional value of the items to the parties. In the result, the discussions about these items are highly likely to escalate a dispute and reduce the likelihood of settlement.

There are several ways to neutralize this problem. First, counsel should have their clients deliver a definitive list to counsel of what items of personalty the client wants. If at all possible, that list should be accompanied by photos of every item on the list. That list and the photos should then be included as an appendix to the mediation brief. In this way all the parties to the mediation will know exactly which items are in dispute. The photos are helpful in this respect as they eliminate confusion where, for example, there are multiple Royal Doulton figurines. Next, counsel should make sure that their clients have a realistic view of the financial value of the

[8] These are all real life examples.

items so that the client can make a reasoned decision as to what economic benefit they are prepared to forego in order to receive the personal items as part of the settlement. Finally, counsel should have a realistic discussion with their client about the likelihood of receiving all the items and/or recovering allegedly missing items. This conversation should happen as far in advance of the mediation as possible so as to allow the client time to process the fact that they may not be able to settle on the basis of getting all the personal items they want. All of these steps relative to the question of the personal items of the deceased person will increase the likelihood of a successful mediation.

COSTS

Far too often counsel arrive at trust, estate and guardianship mediations without information as to the professional costs that their clients have incurred in the litigation to date. This is a serious impediment to a mediator trying to assist the parties to come to a settlement. To be colloquial, a good mediator will always want to understand what a party will "have in their jeans pocket" if a particular settlement proposal is adopted. That is, the mediator will want to know if the party will take anything home after they have paid their lawyers and other professional advisers. Most mediators will strongly discourage the making of settlement offers that see a party taking nothing home after the payment of professional fees because very few parties will ever accept such an arrangement. Accordingly, it is important for counsel to attend at mediation knowing the total amount billed to their client together with a reasonable estimate of outstanding WIP and disbursements. This figure should include the costs of all previous counsel and any experts or other advisors, such as accountants. Having that information to hand will avoid the giving and receiving of offers that are likely to be received as insulting and thus the unnecessary escalation of the dispute.

Where a claim being mediated involves a claim for costs against a lawyer, as for example, in the case of a will interpretation application where it is alleged that the application is necessary because of poor drafting by a lawyer, then counsel should also bring their bills and dockets. This is because LawPro's adjusters and counsel will inevitably take the position that they need to test the reasonableness of the costs the insurer is being asked to pay by examining detailed bills or dockets. Such information must include timekeeper identification and hourly rates charged. Once again, taking these steps will increase the likelihood of a successful mediation.

HAVE A FIRST OFFER WORKED OUT

The first two hours of the mediation is not the first time that counsel should be giving their client a realistic assessment of the strengths and weaknesses of their case and/or giving advice about what constitutes a settlement that counsel would recommend. In order for a mediation to succeed, a client needs to have had time to process the legal advice they have received and consider what they are prepared to accept in settlement. It is, therefore, advisable for counsel to meet with their clients in advance of the mediation, discuss the case, the other parties' mediation briefs and the first offer to settle the client is prepared to make relative to the basis on which they would like the matter to settle. Counsel taking this step substantially increases the likelihood of a successful mediation.

HAVE DRAFT MINUTES OF SETTLEMENT AND RELEASES

In order for a mediation to be truly successful, terms of settlement have to be agreed and memorialized in a way that is enforceable. It is very useful, therefore, for counsel to arrive at the mediation with draft minutes of settlement and releases already on their laptops. Even if the draft minutes only have the requisite recitals drafted,[9] that is a substantial timesaver and that reduces the time period in which parties can decide to resile from the settlement before it is signed. It is important to avoid recitals which are controversial: they should be drafted in as neutral a fashion as possible. Where counsel do have minutes and releases drafted in advance, it accelerates the final stages of the mediation and allows for the successful conclusion of the process.

CONCLUSION

The focus of this paper has been practical steps that counsel can take to make mediation more likely to succeed. These steps will not result in a mediated settlement in every case. That is as it should be as some cases still require adjudication either because of the legal issues they engage or because of the personalities of the clients involved. It will be ever thus.

[9] These should include details of the parties, the instruments in dispute, the proceedings (including court file numbers), and any material orders made in the proceedings etc.

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TAB 6

THE SIX-MINUTE Estates Lawyer 2018

Hotchpot Clauses

Debra Stephens, Firm Counsel to WEL Partners
WEL Partners

May 3, 2018

Continuing Professional Development

LAW SOCIETY OF ONTARIO
SIX-MINUTE ESTATES LAWYER

MAY 3, 2018

HOTCHPOT CLAUSES

Debra L. Stephens

www.welpartners.com

HOTCHPOT CLAUSES*

Hotchpot clauses have existed for hundreds of years. The concept is simple, and the rationale sound. So why are they so seldom used today? The answer to that question may be found in the case law, which highlights not only difficult evidentiary matters but also the challenge in drafting clear and comprehensive hotchpot clauses to address all of the possible issues that can arise. It should however be noted that most of the case law related to hotchpot clauses are pre-twentieth century English decisions. This paper will examine issues related to hotchpot clauses, and review some of the leading Canadian cases related to such clauses.

Overview

The purpose of including a hotchpot clause in a will is to ensure that the testator's beneficiaries (usually residuary) are treated equally in the distribution of the testator's estate, by taking into account any advances or gifts made to them by the testator during his/her lifetime. In essence, a beneficiary's entitlement to the estate will be reduced by the amount so advanced or gifted. A provision cancelling or releasing any debt owed by a beneficiary to the deceased is usually combined with a hotchpot clause.

Theobold writes:

> In many cases the instrument contains a direction that advances made by the testator are to be brought into hotchpot. This means that, what the instrument directs the division of a fund between the recipient of the advance and another, or others, the advance must be notionally added back into the fund, and the fund as notionally increased then divided, with the recipient giving credit for what he has already received. The recipient must put back into the pot what he has already received, and the pot then shared out. [1]

The following illustrates how a hotchpot clause works. Consider the following scenario:

- X, the testator has 3 children, A, B and C

*The author gratefully acknowledges the research for this paper undertaken by Katherine Stephens, student-at-law.

[1] Theobold on Wills, 17th Edition, (London: Thompson Reuters Ltd., 2010), p. 854, 36-034

- X dies in 2017 leaving an estate of $3 million to be divided equally among A, B and C
- X left a will dated January 12, 2012 which included a hotchpot clause, and a provision cancelling any debts owed to X by A, B or C ("release clause")
- X loaned $1,000,000 to A in 2010
- X gifted $120,000 to B in 1999
- X loaned $200,000 to C in 2005

If there were no hotchpot or release clauses each of A, B and C would receive one-third of the estate, or $1 million. However, in the above example, the hotchpot clause requires that the value of the gift and loans to A, B and C be brought into account to determine the value of the estate as follows:

	$ 3,000,000.00	
	+$ 1,000,000.00	– loaned to A
	+ $ 120,000.00	– gifted to B
	+ $ 200,000.00	– loaned to C
TOTAL	$ 4,320,000.00	- this is the hotchpot amount

For the purpose of the hotchpot clause the estate value is $4,320,000.00 and each of A, B and C would notionally be entitled to one third of that amount, or $1,440,000.00. However, the hotchpot and release clauses operate to equalize the benefit to each child by deducting what each beneficiary has already received. Accordingly, each of A, B and C would receive the following:

- A would receive $1,440,000 million less the $1 million loaned, (and now repaid), so $440,000
- B would receive $1,440,000 million less the $120,000 gifted, so $1,320,000

- C would receive $1,440,000 million less the $200,000 loaned, (and now repaid), so $1,240,000

The total of the amounts paid to each of A, B and C is $3 million, consistent with the actual value of the estate available for distribution.

Failing to include both the hotchpot and release clauses in the will could create unintended prejudice for some beneficiaries and a windfall for others. The hotchpot clause in and of itself does not operate to release the beneficiaries from the obligation to repay any debts owed by them to the testator's estate. Even if the debts are greater than the beneficiary's entitlement under the will, the beneficiary must still repay his debt unless the will provides otherwise. [2]

As Theobold states:

> "…a hotchpot clause is primarily a charging and not a discharging clause, so that in cases where an absolute interest in the share is not given to the debtor [thus a gift] some further expression of intention on the part of the testator to release the debt will be required to discharge the debtor from his liability." [Author's addition] [3]

Consider the effect on the distribution of X's estate in the above scenario if only the hotchpot, but not the release clause, was included in the will.

The estate would now total $4,200,000 as each of A and C would have had to pay the estate the amount loaned, being $1,000,000 and $200,000, respectively. The hotchpot amount of $1,320,000.00 would then be added which would increase the estate for the purpose of determining the hotchpot value to $5,520,000.00. Based on this amount, each of A, B and C would be entitled to one third of that amount or $1,840,000.00. However, the amount advanced to each would still have to be deducted from each beneficiary's entitlement as follows:

[2] *Re Horn, Westminster Bank Ltd. v Horn* [1946] Ch. 254.
[3] Theobold on Wills, *supra*, p. 858, 36-045.

-A would get $1,840,000.00 less the $1,000,000.00 loaned to him for a total of $840,000.00. However, given that A is required to repay the $1,000,000.00 loan, he would actually be in a deficit position.

-B would get $1,840,000.00 less the $120,000.00 gifted to him, or $1,720,000.00.

-C would get $1,840,000.00 less the $200,000 loaned to him, or $1,640,000.00. However, given that C is required to repay the $200,000 loan, the net effect of his entitlement would be $1,440,000.00.

As you can see from the net results above, the total paid to A, B and C equals the revised value of the estate ($4,200,000.00) but there is great prejudice to A and much greater children equally and might result in an application to the court for directions, or worse, a claim against the drafting solicitor.

One of the significant advantages of bringing a loan given to a beneficiary into hotchpot is that it has the effect of neutralizing any limitation period with respect to the debt. If the testator had loaned money to a child twenty years before his death, and during the intervening period made no effort to collect it, nor did the child acknowledge the debt, any claim to have the child pay the debt to the estate could be statute barred. The hotchpot clause may solve this problem. [4]

A testator may, by including a hotchpot clause, even be able to neutralize the bankruptcy of the debtor beneficiary. While section 178(2) of the *Bankruptcy and Insolvency Act* [5] would normally provide a full release of the debt owed to the testator when the child is discharged from bankruptcy, if the testator files proof of the debt in the bankruptcy, the balance of the loan outstanding at the time of the testator's death will be brought into hotchpot when determining the child's entitlement to his father's estate. [6]

[4] *Poole v. Poole*, (1871) Ch. App 17.
[5] *Bankruptcy and Insolvency Act*, RSC 1985, e-B-3.

The Rule Against Double Portions and the Presumption of Ademption by Advancement

Hotchpot has sometimes been referred to as the rule against double portions, or the presumption of ademption by advancement. However, unless the will provides to the contrary, only advances made during the testator's lifetime are brought into hotchpot. Where advances are made after the will is executed, the rule against double portions and the presumption of ademption by advancement are often invoked. It should be noted however, that the rule against double portions and the presumption of ademption by advancement apply only between the testator and his/her child, or a person for whom the testator stands in *loco parentis.*

Ademption by advancement is when the testator, after executing his will, subsequently gifts all or part of the property the beneficiary is to receive pursuant to the testator's will. However, if the will does not contain a hotchpot clause which indicates the testator's intention to distribute the residue of his estate equally among his beneficiaries, the strength and application of these principles have generally been discounted in Canadian case law. The following cases indicate that the above presumptions have little or no place in current Canadian jurisprudence in such circumstances. Only if there is ambiguity in the will, which necessitates the introduction of extrinsic evidence as to the testator's intention to take advances made in the deceased's lifetime into account in distributing the estate, will such principles be considered. Even so, the rule against double portions, like the presumption of ademption by advancement, are only presumptions, which can be rebutted by evidence of a contrary intention on the part of the testator.

In a 2004 decision of the Alberta Court of Appeal, in dealing with gifts made by the testator to his son after he executed his will, the court reviewed the rule and stated:

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[6] *Ainsworth, Re* [1922] Ch 22.

> "…[though] equity presumes that the donee cannot take both the full gift and the full bequest…legal research shows so many exceptions to that "rule" that nothing remains of it in this case…Any "rule" about double portions is a presumption at best,…not strong, and is easily rebutted. [7]

The Court went on to note:

> "The decided cases on the presumption against double portions, are English and old; few Canadian cases can be found. The cases put a narrow construction on what is a portion or an advancement triggering the presumption.
> … [as it is a] branch of the doctrine of ademption…it arises only if there is some similarity between the bequest in the will and the asset transferred before death. In particular, a gift of land cannot adeem a bequest of money (or vice versa). So the presumption does not apply to land..(Indeed the authorities conflict on whether the presumption can even apply to a bequest of the residue…" [8]

In *Re Cross Estate* [9] the will provided that the residue of the testator's estate was to be held in a spousal trust and then distributed on the death of the wife. The will also provided that the trustees were to be given discretion to advance $5,000 to the testator's son to establish him in business and that upon attaining the age of thirty, the son was to receive a legacy of $10,000. The trustees sought the advice and direction of the court as to whether the $5,000 was to be treated as an advance on the legacy, thus reducing the amount the son would receive at thirty years of age, from $10,000 to $5,000.

The Court ruled that the advance of $5,000 was a charge against the capital of the residuary estate and not the legacy. As the son had no claim, either direct or contingent, to the residue of the estate, there was no "advancement" to be taken into

[7] *Plamondon v Czaban*, 2004 ABCA 161, as cited in *Campbell v. Evert*, 2018 ONSC 593, 2018 CarswellOnt 988. (See also *Campbell v Evert*, 2018 ONSC 2258, 2018 CarswellOnt 5960 re costs awarded)
[8] *Ibid*, paragraph 45.
[9] *Cross Estate, Re*, 1965 CarswellBC 29, 51 W.W.R. 377 (BCSC).

account. More importantly, Justice Wootton held "…where there is no hotchpot clause none will be implied." [10]

The recent Ontario decision *Campbell v. Evert* [11] underscores the need to include a hotchpot clause in a will if the intent is to bring advances into account to equalize the beneficiaries' entitlements. A party, who seeks to argue that a testator who advanced monies to some of the beneficiaries of his estate during his lifetime but did not include a hotchpot clause in his will intended to treat all of them equally, will now find it very difficult to rely on the rule against double portions and the presumption of ademption by advancement.

In 1990, Dr. Evert gratuitously transferred the family cottage (then valued at $145,000) to Peter. She also executed a will in 1990 which provided her daughter, Monica, with a $145,000 bequest. She then divided the residue of her estate equally between Monica and Peter.

Issues subsequently arose between Monica and Peter related to the management of their mother's care and assets. Dr. Evert created an *inter vivos* trust in 2000. She was the beneficiary during her lifetime but on her death the document provided that Monica would receive a legacy of $150,000, and the balance remaining in the trust would be divided equally between Monica and Peter. In 2001, Dr. Evert transferred her home to Peter for no consideration.

At the time of Dr. Evert's death, the trust was valued at $550,000 and the estate $190,000. Monica received $150,000 from the trust and the balance was divided equally between Monica and Peter. Monica then sought her legacy of $145,000 from the estate before the balance was divided between Peter and her. There was no dispute regarding the validity of any of the documents or transfers executed by Dr. Evert.

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[10] *Ibid*, paragraph 5.
[11] *Campbell v. Evert, supra.*

Peter took the position that Monica was not entitled to the $145,000 legacy under the will and that the intent of his mother was that the $150,000 under the trust was in lieu of the $145,000 bequest in the will, and not in addition to it. He relied on the rule against double portions and the presumption of ademption by advancement.

Lococo, J., citing the analysis by the Alberta Court of Appeal in *Plamondon* with approval, stated that there was absolutely nothing in the language of the trust agreement or the will connecting the two amounts to be paid to Monica under each document. The trial Judge noted that he was bound by the principles enunciated in *Re Robinson,* [12] which clearly state that "…as a general rule, extrinsic evidence as to the testator's intention is not permissible to contradict the clear and unambiguous language of a testamentary document." [13] Even if he allowed extrinsic evidence to be admitted related to Dr. Evert's intention, His Honour determined that the presumption against double portions would not apply as the evidence related to Dr. Evert's transfer of the cottage and family home to Peter, rebutted the presumption.

These decisions can be contrasted with those of *Re Prittie* and *Re Barrett,* discussed later in this paper.

What Constitutes an "Advance"?

As can be seen, loans, gifts, transfers, and conveyances may all be subject to hotchpot. However, there can be some very difficult practical and evidentiary issues. Is a small or nominal gift (subjective of course to the testator and/or beneficiary) to be taken into account? [14] Who has a record of such a gift? Is a gift of jewellery from a mother to a

[12] *Rondel v. Robinson Estate*, 2010 ONSC 3484.
[13] *Campbell v. Evert, supra*, paragraph 58.
[14] It has been held that the advances "….*must be sufficiently large to give rise to a presumption that they are a permanent provision for the beneficiary, and perhaps form a large part of the estate of the person making the advance."* Williams on Wills, 9th ed. (London: LexisNexis Butterworths, 2008) page 926, [100.6]; also see *Re George's Wills Trusts*, [1949] Ch 154.

daughter to be taken into account? How do you value the jewellery – is it insurance, replacement or fair market value? If fair market value, is it the value when it is gifted or the value on the mother's death? Should interest be calculated and paid on advances? Can real property be considered when calculating the advance? If real property is conveyed do you take into account the value as at the date of the conveyance or at the date of death? What if the beneficiary has improved the property or sold it before the testator's death? Theobold states that advances for the purpose of determining what comes into hotchpot do not ordinarily include real property unless the testator evidences a contrary intention to include it. [15] (However see *Re Nordheimer* discussed later in this paper).

These and many similar questions have created difficulties for estate trustees and the court in determining precisely what goes into hotchpot, and how to value such advances.

It is beyond the scope of this paper to address all of these questions and other issues that arise when dealing with, and interpreting, hotchpot clauses. What follows highlights the most significant principles which have evolved from English and Canadian decisions pertaining to hotchpot clauses.

Valuing the Advance

Clearly the starting point with respect to any hotchpot clause, is the document itself, whether it be a will or other trust document. One of the oldest reported Ontario decisions dealing with hotchpot clauses answers the question of "when" the advance to the beneficiary applies for the purpose of bringing it into hotchpot.

Re Nordheimer [16] deals with hotchpot clauses in both a testator's a will and in marriage settlement trusts for his daughters (such marriage settlements being similar to a trust

[15] *Theobold on Wills, supra,* page 855, 36-036.
[16] *Nordheimer, Re,* 1913, CarswellOnt 848, 14 D.L.R. 658.

deed), which were executed by the testator. Generally under each of the marriage settlements, the testator settled specific assets in a trust for the daughter so that she could enjoy the income from the settlement during her lifetime, with the capital available to her spouse and issue on her death.

The marriage settlement for each daughter was completed at different times. One was settled at the first daughter's (A's) marriage, and the other well after the second daughter's (B's) marriage. The testator transferred both land, stocks and bonds to A's settlement trust, while the testator transferred only stocks and bonds to B's marriage settlement trust. Further, while B was entitled to all of the income generated from her settlement trust, A was limited to receive only $1,500.00 per year of the income generated by her trust. There were additional differences in the terms of each of the settlements, but both contained hotchpot clauses stating that the daughter would not take any share in the deceased's residuary estate without first bringing the value of the assets transferred to the trusts into hotchpot, and accounting for them.

The estate trustees sought the assistance of the Court to ask whether the advances made by the testator to each daughter under the marriage settlements were to be brought into hotchpot in determining their respective entitlement to the deceased's estate, and if so, what amount was to be accounted for.

Middleton, J., quoting Thornton on Gifts and Advancements (Ed. of 1893, pages 605-606) stated:

> It is astonishing how little authority is to be found upon the question. In Thornton…., the matter is thus dealt with: "Shall the advanced distributee be charged with the property advance at its value in advanced, or when the intestate dies, or when the final distribution of the estate is made?....The advanced distributee shall be charged with the value of the property as of the date of its advancement. This is eminently proper; for the property, especially if personality, might be of little value at the death of the intestate or the time of the final distribution; and it would be manifestly unfair to the other distributees that the advanced distributee might have the use of the property for many years, and then be required to

> account only for its value less the decrease in value from wear and tear and usage. " [17]

His Honour, having noted that the trustees were given full power to change the investments of each marriage settlement, determined that the value of the assets at the time they were transferred by the deceased to the daughter's respective marriage settlement, was the amount that was to be taken into hotchpot and deducted from each daughter's entitlement to the testator's estate. Middleton J. concluded:

> "In other words, the testator, by making the advancement, desires the capital sum advance to be treated as a payment *pro tanto* on account of the ultimate portion of the child. He foregoes the enjoyment of the income of this fund during the rest of his life, but neither income nor any increment of the settled fund is, in the absence of special direction, to be credited upon the ultimate portion." [18]

Clearly, this is authority for the principle that only the amount actually advanced should be brought into hotchpot. This is easily done with respect to assets which have a specific ascertainable value as at the date of the advance. This includes cash, stocks, bonds, etc. However, where real property or other assets which would normally be appraised, are transferred or gifted, without attaching a specific value to them, this creates more difficulty. However, retrospective analyses or appraisals can usually provide a fairly definitive value for the purpose of the hotchpot amount.

If the testator, in his will, or in another document, specifies the amount that is to be taken into hotchpot, then that amount must be included, even if the advance was a loan that had been partially repaid by the time the testator dies. [19] However, if there is no amount stated in the document, the actual amount of the loan outstanding at the time of the testator's death is the only amount that should be included in hotchpot. [20]

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[17] *Ibid*, paragraph 22.
[18] *Ibid*, paragraph 26.
[19] *Re Wood, Ward, v Wood*, (1886) 32 Ch D 512.
[20] *Re, Kelsey, Woolley v. Kelsey* [1905] 2 Ch 465.

What if the advance/gift is made after the date of the testator's will? What if it is made after the testator's death? The 1940 Ontario decision, *Re Prittie,* [21] and the 2013 Alberta decision in *Re Barrett Estate*, [22] address these issues. In each case, the court carefully examined that wording of the hotchpot clause before making its decision.

In *Re Prittie* the testator died January 30, 1928, leaving a will dated March 18, 1924. His widow died July 8, 1939, leaving a will which was a mirror image of the testator's will. The testator's will provided that his widow was to receive the income from a spousal trust comprising the residue of his estate, and that on her death (after payment of some legacies) the residue was to be divided equally among their surviving children, provided that:

> "….in arriving at the shares of the residue of my estate, my Executor and Trustee, shall take into account all conveyances, transfers of any property, real and personal, made to any Trustees or Trustee by me or by my said wife or at our or either of our directions for the benefit of any of my children, and also any gift made by me or by my said wife to any of my children unless in the making of such gift a contrary intention is expressed". [23]

While the will does not expressly state it is a hotchpot clause, the effect of the provision is that anything advanced to the children by the deceased or his wife was to be taken into hotchpot.

The estate trustee sought the direction of the court with respect to whether the hotchpot clause operated as at the date of the testator's death, or as at the date of the widow's death. Further, he questioned whether gifts made by the widow in her will were also to be taken into hotchpot. The deceased had made gifts in varying amounts to their children during his lifetime. His widow had done so as well, and had also made gifts in varying amounts to the children in her will.

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[21] *Prittie, Re*, 1940 CarswellOnt, [1940] O.W.N. 28.
[22] *Barrett Estate, Re*, 2003 CarswellAlta 1787, 2003 ABQB 986, 4 E.T.R. (3rd) 163.
[23] *Prittie, Re*, *supra*, paragraph 10.

Kelly, J. held that his first duty was to examine the language of the will itself to ascertain the testator's intent. If "…that intention plainly appears and is capable in law of being carried out…," [24] then case law and principles of construction would not come into play. After reviewing the testator's will he concluded that it was evident that the testator, by using very broad and sweeping language, including not only "all conveyances, transfers and gifts", but also anything that benefitted his children, clearly intended to achieve equality among his children with respect to the disposition of his estate.

The Judge then went on to find that by including all transfers/gifts made by his wife, and knowing that one of the two would predecease the other, the testator could only have intended that all advances made by both of them during their lifetimes were to be brought into hotchpot. Further, as the testator did not restrict the meaning of "gifts" in any way, and made no reference to his or his wife's "lifetime", Kelly, J. found that gifts made by the wife to the children under her will also fell within the clause and were to be brought into hotchpot. The testator's intent (as gleaned from the wording of the clause) was to equalize all benefits provided to their children at any time, so that each child would receive the same amount from his/her parents' global estate. The Court held if the testator had intended otherwise he would have expressed an intention to the contrary in his will.

In *Re Barrett*, the Alberta Court of Appeal dealt with a will which also did not explicitly refer to a hotchpot clause. In Mr. Barrett's will he directed that the residue of his estate was to be divided equally among his three sons, "…taking into account amounts lent or given to each of my sons as per the attached list by myself or my wife adjusted to present value at the date of my death using the Consumer Price Index as an inflation factor." [25] The wife predeceased the testator, but as in *Re Prittie,* her will was a mirror image of the testator's will.

[24] *Ibid*, paragraph 12.
[25] *Barrett Estate, Re*, *supra*, *paragraph 2.*

At the time of the testator's death three lists were discovered – one list in the testator's handwriting which was executed before the will was signed (the "Pre-Will List"); and two lists which post-dated the execution of the will; one in each of the testator's and the wife's handwriting (the "Post-Will Lists").

The estate trustee sought the advice and direction of the Court as to whether the advances referred to in each of the Pre-Will List and the Post-Will Lists were to be taken into hotchpot. As the Pre-Will List existed prior to the will, was referred to in the will, was confirmed to be in the testator's handwriting, and was found with the original of the will, the advances set out in the list were deemed to be included through the doctrine of incorporation by reference. In fact the Pre-Will List was submitted to probate as part of the will proved in solemn form. [26] Further, despite a claim by one of the sons that he had repaid a portion of the amount advanced to him as set out in the Pre-Will List, the full amount advanced to the son as stated in the Pre-Will List, was brought into hotchpot, consistent with the principle set out in *Wood, Ward v. Wood,* referred to earlier, where it was held that if the amount to be included in hotchpot is specifically set out in the will (and it was when the Pre-Will List became part of the probated document), there is no reduction for any amount alleged to be repaid to the testator.

The issue which created the most difficulty for the estate trustee was with respect to the Post-Will Lists. The hotchpot clause referred to an "attached list" which of course was the Pre-Will List. On what basis could it be said that the testator intended that the Post-Will Lists advances also be taken into hotchpot? The Court held that as there was some ambiguity as to whether the advances set out in the Post-Will Lists were to be taken into hotchpot, it allowed extrinsic evidence to be admitted to assist the Court in making its determination. This evidence included the drafting lawyer's affidavit which included:

a) His discussions with the testator regarding loans he had made to his sons, and in particular one son, who he felt was irresponsible with money;

[26] *Ibid*, paragraphs 28-29, see also *Tucker v Tucker*, 168 A.P.R. 102 (Nfld. T.D.).

b) The instructions he had received from the testator to include not only the hotchpot clause but also the CPI clause to ensure fairness, due to the timing and extent of the loans;
c) That the testator kept a notebook (which the lawyer saw on a number of occasions) detailing each loan, and that the testator, at times, provided the lawyer with copies of pages of the notebook;
d) That the testator gave him a copy of the same Pre-Will List that was found with the original will, and;
e) That the testator would from time to time give him sheets which reflected the original Pre-Will List, but which had been updated to reflect the additional advances. The lawyer confirmed that the wife also provided him with her Post-Will List and that both Post-Will Lists were in his files at the time of the testator's death.

The other evidence before the Court was that two of the sons admitted that they had received all of the advances listed on the Post-Will Lists. The son who had received the greatest amount of advances under the Post-Will Lists tendered no evidence at all (including denying he received the advances listed) but simply took the position that the testator had not intended to include these amounts in hotchpot, and also that he had repaid a portion of any amounts so advanced.

Coutu, J. found on a balance of probabilities that all of the Post-Will transactions did occur, and that this raised the rule against double portions. The Court held that the testator was presumed to have wanted all of these transactions to be taken into account by creating the lists, to equalize the benefits to be received by each of his sons. The son who opposed their inclusion, failed to rebut the presumption inherent in the rule. Further, the Court, invoking the equitable doctrine of presumption of ademption by advancement, determined that regardless of the presumption, the joint intention of the testator and his wife, in not knowing who of them would predecease the other,

evidenced their joint intent that the estate "…on the last of them to die would be adjusted for all advances made by either of them to each of their three sons." [27]

Accordingly, if there is a hotchpot clause (which normally applies only to pre-will advances unless it specifically refers to gifts in a will), it can extend to post will advances through the rule against double portions and the presumption of ademption by advancement. If there is evidence of the intent to equalize all advances, and provided there is nothing in the will or otherwise to support a contrary intention on the part of the testator, all advances will be brought into hotchpot.

Interest on Advances

In *Re Barrett*, the testator specifically required the estate trustee to adjust to "…present value at the date of my death using the Consumers Price Index as an inflation factor". [28] Again, the executor was required to look to the particular wording of the will in adding this amount to each advance before bringing it into hotchpot. But what if there is nothing in the will about interest on the advances? As seen in *Re Nordheimer*, it has long been established, that absent a requirement in the will, neither income nor a growth in the value of capital advanced can be added to the original advance when determining the hotchpot amount.

While it is thus clear that no income or capital growth can be added to the advance for the purpose of hotchpot unless the will states otherwise, the Courts have held that interest is to be added to advances from the date of the testator's death to the date of distribution to the beneficiaries. [29] The English decision of *Re Willoughby, Willoughby v. Decies* [30] sets out the principles regarding interest:

> "(1) that no interest is charged against an advanced child prior to the testator's death; (2) that where the period of distribution of the testator's

[27] *Ibid*, paragraph 43.
[28] *Ibid*, paragraph 2.
[29] *Stewart v Stewart*, (1880) 15 Ch D 539.
[30] *Re Willoughy, Willoughy v Decies*, [1911] 2 Ch 581 CA.

> property is at the testator's death [i.e. the estate is immediately distributable], interest is charged against an advanced child from the death and not from the subsequent date at which in fact the distribution takes place; (3) that if the period of distribution is at the expiration of a period of accumulation or of a prior life interest, interest is charged not from the date of death but from the period of distribution; and (4) that the effect of a charge upon the residue, such as a life annuity secured by a fund set apart to meet it, does not alter the period of distribution." [31]

The decision of *Re Poyser*, [32] as cited in *Re Willoughby*, provides authority for the rate of interest that is to be charged. As noted above, this can be from the date of the testator's death if there is no life interest in the estate, or from the death of the life tenant. The rate in these cases is stated to be four (4) percent per annum, unless the will specifically provides for a different rate.

While the principles set out in *Re Willoughby* were followed by Kelly, J. in *Re Prittie*, as he calculated interest from the date of the wife's death (she had a life interest in the testator's estate), His Honour applied a rate of five (5) rather than four (4) percent on the advances. It is not clear from the reasons whether this rate was set out in the will or whether he felt it was a more applicable rate in 1940.

What can be Brought into Hotchpot and by Whom?

As noted earlier, the wording of the hotchpot clause is paramount in determining what comes into hotchpot, and when. The advances can be limited to those made during the testator's lifetime, but can also include gifts under the testator's will. Theobold states that:

> "A direction that, if a parent should during his life advance or pay any sum for the benefit of his children, the sums are to be brought into account, does not include a share taken under the father's intestacy nor benefits

[31] *Ibid*, at page 597.
[32] *Poyser, Re* [1908] 1 Ch 828.

> given by his will. But the direction may be so framed as to include gifts by will…." [33]

Advances can also include property that passes to the beneficiary on the testator's death by right of survivorship, or as a designated beneficiary. [34] The amount to be brought into hotchpot may also include advances made by others (such as the testator's spouse) as seen in *Re Prittie* and in *Re Barrett*. However, it could also include advances made by other family members (such as grandparents, aunts, uncles, etc.), or from trusts or other entities.

In *Northmark Mechanical Systems Inc. v. Watson Estate* [35] the Court had to deal with the following clause:

> "Before any of my children, including without limitation my son, Richard Watson, takes a share in my residuary estate, he or she is to take into account and hotchpot all amounts due and owing to me by him or her at the date of my death." [36]

While the facts are too complex to go into in detail in this paper, the testator loaned her son Richard, significant amounts of money to invest in the stock market, both on his and on her behalf. These investments were undertaken only through her brokerage account. Richard took the funds loaned to him by his mother and put them into his company, Northmark, who then acquired the investments. The corporate records and financial statements of Northmark were quite convoluted and their accuracy was questioned by the estate trustees (the deceased's daughters), The estate trustees asserted that Richard had improperly organized his and Northmark's affairs to defeat the hotchpot clause by manipulating the Northmark shareholder loan account related to the purchase of the stock investments. Richard disputed that he owed the estate any

[33] Theobold on Wills, *supra*, page 855, 36-035.
[34] *Falconer Estate, Re*, 1949 CarswellBC 102, [1949] 2. W.W. R. 1171 (BCSC).
[35] *Northmark Mechanical Systems v Watson Estate*, 2010 BCSC 176, 2010 CarswellBC 293 (BCSC).
[36] *Ibid*, paragraph 3.

monies and commenced a claim on behalf of Northmark, asserting that his mother's estate owed Northmark over $400,000.

The issue before the Court was whether the claim by Northmark against the estate could proceed independently of the action commenced by the estate against Richard. The Court concluded that the two matters had to be heard together.

> "…the determination as to what is owing under the hotchpot, how it will be satisfied, and what portion of the proceeds are available to be used in that regard will be decided in the probate action. The relationship of the allocation of those proceeds to the shareholder's loans has been raised in …this action." [37]

What if a Beneficiary Predeceases the Testator?

The wording of the will is also key in determining whether the advance will be brought into hotchpot if the person to whom the advance was made predeceases the testator. If the will divides the residue among the testator's children, with a gift over to the issue of any child who predeceases the testator, any advance made to the deceased child will not be taken into hotchpot against the deceased child's issue unless the will specifically states that it is to be so taken into account. [38]

Hotchpot and Intestacy

Hotchpot is a concept so entrenched in the common law, that it has been extended (in some circumstances) to intestate succession. Section 25 of the *Estates Administration Act* [39] provides that where there is evidence that the deceased advanced property to a child during his lifetime, and the advance is equal to or greater than the share the child (or his or her issue) is entitled to on intestacy, then such advance will be taken into account in the distribution of the intestate's estate. For an excellent discussion on this

[37] *Ibid*, paragraph 73.
[38] Theobold on Wills, *supra*, page 857, 36-041.
[39] *Estate Administration Act*, R.S.O. 1990, c. E22.

topic and others related to hotchpot clauses, see Corina S. Weigel's paper, "Hotchpot Clauses – A Primer" [40]

Summary

Hotchpot clauses can be very useful in estate planning. They can also however, be a drafter's nightmare and a litigator's dream. It is difficult to craft a hotchpot clause which covers all issues and future contingencies. With the advent of multiple wills, multi-jurisdictional wills, and alter ego and joint partner trusts, it is increasingly difficult to draft such clauses. Further, even a well drafted clause can be affected by claims made against the estate such as equalization under the *Family Law Act*, and dependent's relief claims under the *Succession Law Reform Act*.

Without doubt, extreme care must be taken by the solicitor who is asked to include a hotchpot clause in a will. Thankfully there are a number of valuable resources available which analyze the components of hotchpot clauses and provide excellent precedents. These include:

1. Corina S. Weigel, "Hotchpot Clauses – A Primer" (referred to earlier in this paper)
2. Jordan Atin, "Wills and Estates Practice Basics", Law Society of Upper Canada CPD (March 27, 2017)
3. Williams on Wills, 9th edition, (London: LexisNexis Butterworths, 2008) (including clauses which are intended to exclude hotchpot, and the rule against double portions)

[40] *Corina S. Weigel, "Hotchpot Clauses – A Primer"* Fourth Annual LSUC Estates and Trust Forum (Nov. 20-21, 2001).

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TAB 7

THE SIX-MINUTE Estates Lawyer 2018

Beneficiary Designations and Minor Children

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cpd Continuing Professional Development

Beneficiary Designations and Minor Children

Susan J. Stamm & Kiran Arora, Counsel, Office of the Children's Lawyer[1]

Children are often named as beneficiaries of life insurance and investments (such as TFSAs, RRIFs or RRSPs). Because children are parties under a disability, they cannot (and should not) receive the funds directly. The funds are typically received by a trustee who holds the funds for the child until the child reaches majority.

Typically, the signing of a beneficiary designation is not done with the same formality as a will (even though the insurance or investment may be large) and very seldom is a lawyer involved in the signing process. In some cases, the forms are signed when a person commences employment and is signing a large number of forms. Little to no advice is provided when forms are signed. As such, it is questionable how carefully the person signing the designation reads it, and whether he or she understands what will become of the funds designated to the child.

The Trustee Clause

When a person fills in his or her beneficiary designation, it is the fine print on the form that determines whether there is a trustee, and what that trustee's powers are. Most forms contain a space whereby the person signing the form can name a trustee to receive the funds for the child.

The forms differ, and they tend not to offer options. Some forms allow the trustee to encroach on the funds for the beneficiary during his or her minority; other forms are silent. The encroachment terms are set in a short paragraph (typically in "fine print") under the trustee clause. Either the fine print is there, or not. One cannot check off the option or cross it out. It is standard to the policy or RRSP or investment.

Where forms are silent on the trustee's powers, the form creates a "bare trust". The trustee may hold and invest the funds, but cannot pay out any amount for the minor child (for education, for sports, for counselling, for orthodontics etc.).

The other item of note is that the trustee clause on these forms is always limited to the age of majority. The clauses never permit the holding of the funds beyond the age of 18. As such, when the child turns 18, he or she is entitled to receive his or her funds.

A trust can be drawn up, as part of an estate plan, or separately in order to provide the trustees with powers not contemplated by the forms. However, based upon what we see at the Office of the Children's Lawyer ("OCL"), such trusts are rarely prepared for beneficially designated insurance or investments, even when the amount of the fund is significant.

[1] This paper is an update of the paper which was presented at the LSUC Six Minute Estates Lawyer in 2011.

It is not clear what insurance companies and investment companies advise trustees when they send them the cheque "in trust for" the minor child. The cover letters that we see offer no advice or direction at all. As such, it may be that trustees are not specifically advised of their responsibilities or whether they have the power to use the funds for the beneficiary. This can become a serious problem down the road.

Further, it may be that such trustees are never advised to keep accounts or records concerning their investment and encroachment on the trust, or even remit taxes.

No Trustee

In some cases, a child is beneficially designated, but no trustee is named to receive the funds. Where the money or personal property payable to the child exceeds $10,000, the insurer or investment company must either pay the funds to the Accountant of the Superior Court of Justice ("ASCJ") to be held to the credit of the minor, or to a court-appointed guardian of property[2].

Where the funds payable to the child do not exceed $10,000, subsections 51(1) and 51(1.1) of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 ("*CLRA*"), permit payment of the funds directly to the child, if he or she has a legal obligation to support another person, or to the child's parent or legal custodian. Subsection 51(4) provides that the parent or legal custodian who receives these funds "has the responsibility of a guardian for the care and management of the money or personal property".

Funds may be paid into court (to the ASCJ) by way of an affidavit under subection 36(6) of the *Trustee Act*, R.S.O. 1990, c. T.23 setting out the name, address and date of birth of the minor child, the reason the child is entitled to receive the funds, and the name and address of the child's parent or custodian.

Section 220 of the *Insurance Act*, R.S.O. 1990, c. I.8, requires insurance funds in excess of $10,000 to be paid to the ASCJ if no trustee is named, or to a guardian of property appointed by court order.

If a dependant minor is a beneficiary of a Registered Retirement Savings Plan ("RRSP"), it is sometimes financially advantageous to purchase an annuity with the RRSP proceeds to reduce the income tax payable on disposition[3]. Failing to designate a trustee for an RRSP means that there is no person with authority to purchase the annuity, and a guardianship application may be necessary in order to purchase the annuity, even if the annuity payments are to be paid to the ASCJ.

Insurance companies, banks and investments advisors often provide a standard form letter advising the parent or custodian of the child that because no trustee was named, the funds

[2] Caldwell, E.D., Romanko, C. M., & Southall, A., "Kids' Stuff: Minors' Property Issues in Ontario, Manitoba and British Columbia", [2007] 26 ETPJ 229 at pp 230-232.
[3] Caldwell, E.D. et al, *supra,* at p 234

will be paid to the ASCJ, unless the parent or custodian obtains a guardianship judgment under the *CLRA*.

If funds are paid to the ASCJ, the OCL is notified. If a parent (or anyone else) makes application for a guardianship judgment, the OCL is served. The OCL responds to the application on behalf of the child.

Guardianship Judgments and Accounting

In many cases, the OCL is notified of the existence of the insurance or investment payable to the child through a guardianship of property application[4].

A parent is automatically a guardian of a child's person, but not guardian of a child's property[5]. In order to become a guardian of property, the parent (or "any other person") must apply, on notice to the OCL for his or her appointment as guardian of property for the child under section 47 of the *CLRA*.

Unlike the *Substitute Decisions Act*, S.O. 1992, c. 30 ("*SDA*"), the *CLRA* does not have a standard form management plan. However, section 49 of the *CLRA,* which sets out the criteria for appointment of a guardian, includes "the merits of the plan proposed by the applicant for the care and management of the property of the child", among other things.

An application for guardianship may either be brought in the Ontario Court of Justice or in the Superior Court of Justice[6]. However, only the Superior Court of Justice has jurisdiction to grant a guardianship judgment that permits a guardian to encroach upon the children's funds[7]. Accordingly, if use of the funds, for any reason other than reasonable management fees and expenses is proposed, application must be made to the Superior Court of Justice[8].

In Toronto, under the Practice Direction Concerning the Estates List of the Superior Court of Justice, guardianship applications brought in the Superior Court of Justice should be filed on the Estates List (not the Family Law List).

In some cases, we discover that the person bringing the application (usually the child's parent or guardian who was not named as trustee) has little understanding of his or her options. Common misconceptions include concerns that funds with the ASCJ are poorly managed and concerns that funds will be entirely inaccessible.

By the time the OCL receives the guardianship application, the drafting lawyer has incurred fees, which he or she often expects to recoup from the minor's funds. In many

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[4] See Seo, B. "Guardianship of Property Applications Involving Minor Children", 35th Annual OBA Institute: Trusts & Estates Law – Grave Consequences: Traps and Pitfalls in Contemporary Estates Law, February 16, 2010, for a more complete discussion of this issue
[5] Seo, B., *supra*, at p 1
[6] Family Law Rules, O.Reg 114/99, rule 1(2)(a)(iii)
[7] *CLRA*, s 59(1*)*
[8] *Green v. Green Estate*, 1993 CarswellOnt. 1771 (Ont Prov Div)

applications, the OCL cannot consent to the guardianship. Further, the OCL is often of the view that it is not appropriate for the minor child to pay for the cost of a guardianship application, especially when it does not succeed.

Common problems are as follows:

1. The person seeking to manage the funds has a conflict of interest because he or she, as parent/guardian of the child, wants to access the funds to defray his or her own support obligations to the child.

2. The person seeking to manage the funds has no experience managing money, has a history of poor financial management and/or cannot obtain a bond.

3. The person seeking to manage the funds proposes a scheme that is more beneficial to him or herself (for example purchasing a home, cottage or car for the family unit with the funds) than for the child.

4. The person seeking to manage the funds proposes a scheme that is very risky (investing in his or her own business venture, for example).

The court has discretion to dispense with the posting of a bond for a parent/guardian of the child[9]; however, in many cases, the OCL insists on it.

The OCL provides information to guardianship applicants, on the pros and cons of being a guardian as compared to paying funds to the ASCJ. The OCL also has sample judgment terms to assist counsel in drafting the guardianship judgment and management plan. We require guardians to sign the management plan which is a schedule to the judgment. Sample terms for a guardianship of property judgment and a management plan are attached to this paper.

Many guardians are keen to be appointed, but over time, find being a guardian paper-intensive, and complex with respect to keeping accounts. Section 52 of the *CLRA* provides that a guardian "may be required to account or may voluntarily pass the accounts in respect of the care and management of the property of the child in the same manner as a trustee under a will may be required to account". The OCL insists on a paragraph in the guardianship judgment requiring every guardian to account for his or her management of the guardianship assets, to provide informal accounts to the OCL by a certain date, and pass accounts if required. However, our files are replete with excuses from guardians who failed to keep accounts. Some guardians claim never to have received a copy of the judgment from their own counsel or advise that they did not know they were required to keep accounts, or manage the funds in accordance with a management plan.

[9] *CLRA*, s 55(2)

The OCL typically follows the guardianship to the child's 18th birthday. Depending on the circumstances, we may insist on annual accounting, less frequent accounting, and when informal accounts reveal problems, we require a court passing of accounts.

The costs of this process can be staggering. Recent cost decisions in guardianship disputes concerning incapable adults, suggest that in cases where an adult seeks guardianship inappropriately, the costs of doing so may well be paid by the guardian personally, and not the minor child beneficiary through his or her trust[10].

Finally, a guardianship under the *CLRA* comes to an end at age 18, regardless of whether the child has capacity to receive the funds. A further guardianship judgment, under the *SDA*, is required for an adult (over 18) if he or she is incapable of managing his own property. For all other children, they are entitled to receive their funds at 18.

Payment to the ASCJ

There appears to be a common misconception that payment of the funds to the ASCJ is not a good thing. Common misconceptions include:

- funds paid into court are inaccessible;
- funds paid into court are not invested; and
- the cost of management of funds paid into court is high.

In practice, payment of funds to the ASCJ is often the best outcome for a child and his parent[11].

Payment to the ASCJ can render funds that were beneficially designated to a minor child, without a trustee, or to a trustee without authority to encroach, accessible for the child's needs through the OCL's Minors' Funds program, established pursuant to rule 72.03(3) of the *Rules of Civil Procedure*. Information concerning the Minors' Funds program is attached.

The ASCJ is a professional investor and can manage a child's funds without any conflict of interest or emotion.

The ASCJ charges fees in accordance with the Office of the Public Guardian and Trustee ("OPGT") Fee Schedule, as follows:

- no fees are payable on the initial receipt of funds;

[10] See for example, DeVries, J., "Making Sense of Cost Awards in Estate and Guardianship Litigation: a Witches Brew", pp. 26-32; Whaley, K. A., "Costs: Discretion, Proportionality, Access to Justice and Other Considerations", pp. 16-22, 25-33, 34-36 and Martin, J. "Costs and the New Order – Clear as Mud", pp. 10-11, 36th Annual OBA Institute: Trusts & Estates Law - Brave New World: Building a Thriving Trusts and Estates Practice in the 21st Century, February 3, 2011

[11] *Jones (Guardian at litem of) v. Downing*, 2001 CarswellOnt 1180 (Ont SCJ)

- it is the policy of the OPGT never to encroach on the capital of a minor's trust funds;
- although the authorized fees are 3% on receipts and disbursements and 3/5 of 1% as a care and management fee, fees are waived by the OPGT to the extent that total monthly fees exceed the amount of income earned on the minor's trust funds, eg. if total monthly fees were $75.00 and the income earned on the trust was $50.00, the fee payable would be reduced to $50.00 for the month. This is particularly advantageous to children in times of low interest rates.

The ASCJ operates a Fixed Income Fund, Canadian Income and Dividend Fund and a Diversified Fund. The allocation of the minor's funds will be partially determined by the minor's age and the payout date for the funds. More information on funds held by the ASCJ can be found at:

https://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/ascj.pdf

The PDF document answers a lot of common questions about accounts held by the ASCJ.

And, the ASCJ keeps meticulous accounts.

No Notification to the OCL

When a certificate of appointment is applied for in an estate, and a minor child is a beneficiary, the OCL must be served. Staff at the OCL review the will (or the distribution under intestacy), and in certain circumstances follow up with the estate trustee or his or her lawyer to confirm that the minor beneficiary's funds are invested in accordance with the will, or paid to the ASCJ or a court-appointed guardian of property.

The OCL may also inquire of the estate trustee concerning assets passing outside of the estate, in order to ensure that joint assets that should be estate assets are included in estate accounts.[12] In some cases, through these inquiries, the OCL learns of beneficially designated assets for minor children. However, an estate trustee might not know of the insurance or investment asset that was designated to the child if a different person is named trustee. If we learn of insurance or investment assets designated to a child, or jointly held assets that pass to a child, we do inquire as to whether the funds were properly received and invested by the trustee, confirm whether the trustee has encroachment powers, and if no trustee is appointed, confirm that the funds are paid to the ASCJ or a court-appointed guardian.

When a trustee for a minor child is named on a beneficiary designation, the OCL is not notified when the trustee applies for the funds. As such, there is no check against improper conduct by the trustee. The OCL is often contacted years after the payment of funds to a trustee to try to find out what happened to the trust funds.

[12] *Pecore v Pecore* , [2007], SCJ 17 and *Madsen Estate v Saylor,* [2007] SCJ 18.

In many cases, we discover that the trustee never saw the actual beneficiary designation, and may not have known whether or not he or she had the legal authority to encroach upon the trust funds for the minor child's benefit. It can be many years later, when a person calls the OCL to complain about the trustee, or inquire about the funds, that it comes to light that the trustee never did have this authority (and claimed not to know about it). Further, the trustee may not have known to keep accounts, or did not keep accounts.

In such cases, the OCL may compel a passing of accounts.

Separation Agreement Issues

Separated spouses often have a lot more problems with beneficially designated assets. Most separation agreements require the payor spouse to have life insurance while he or she is required to support his or her children.

These clauses tend not to be the main concern of parties when they are separating and commonly the clauses say that payor spouse shall hold $x in life insurance designated (or irrevocably designated) to the other spouse "in trust for the children" while he or she is obligated to pay child support.

Common problems arise:

1. The receiving spouse gets $x in trust. She has 3 children. It would be the rare case where she created 3 separate trust funds, one for each child, kept meticulous records and then transferred the remaining funds to the child at 18.

2. While the main reason for having the insurance is presumably support replacement, the clause does not actually give the receiving spouse authority to encroach on the funds, and appears as a bare trustee clause.

3. Was a trust really intended? If the receiving spouse was supposed to just receive the funds and use them as s/he saw fit, why not just make him or her the beneficiary and do away with the trust terms?

4. What if the children are almost finished school or no longer entitled to support? Do the children get the funds directly?

5. Are the funds payable directly to the children at 18 (as under a bare trust) or when the children are no longer entitled to receive support from the deceased parent?

6. The payor spouse changed the beneficiary designation and named someone else as beneficiary (commonly, a new spouse or new children) or named the children as beneficiaries directly, rather than the children's other parent.

7. Or the payor spouse never changed the original beneficiary designation and the funds went to the recipient spouse directly and not in trust (and she now takes the position that these are her funds, not "trust" funds for her children).

8. Despite the fact that the recipient spouse is given the right to check on the beneficiary designation (or irrevocable beneficiary designation), it appears that this right is seldom exercised, and the problem is only discovered post-death.

9. Another child is subsequently born to a new partner, and brings a support claim against the estate and requests that these funds be clawed into the estate to provide support.

This last scenario was considered last year by the Court of Appeal for Ontario in *Dagg v Cameron Estate*.[13] The deceased was required, by court order, to designate his former spouse and mother of his two children as irrevocable beneficiary under the deceased's life insurance policy as security for child and spousal support. The deceased also left behind a new partner and a child who was born three months after his death. The new partner applied for dependant's relief under Part V of the *Succession Law Reform Act*, R.S.O. 1990 c. S.26 (*SLRA*), and sought a declaration that the proceeds of the life insurance policy form part of the estate under section 72(1) of the *SLRA*, and be available to satisfy the claim for support.

Both the application judge and the Divisional Court allowed the claw back, making the life insurance funds available for the support claim of the new partner and her child. However, the Court of Appeal allowed the appeal brought by the former spouse, an appeal which was moot by the time it was heard as the parties had settled. The Court held that the former spouse was a creditor in accordance with s. 72(7) of the *SLRA* and that the portion of the policy's proceeds needed to satisfy the deceased's spousal and child support obligations was not subject to claw back under subsection 72(1) of the *SLRA*.

For more information concerning life insurance as security for support, see "Update of Trust Issues for Family Law Practitioners" by the former Children's Lawyer, Debra L. Stephens and E. Dianne Caldwell[14].

Drafting Issues

In some of our cases, the OCL sees estate plans that appear to assume that insurance or investments are passing through the estate. The will, for example, may include carefully drafted trust provisions requiring the estate trustee to hold the funds for the child beyond age 18, and often well into adulthood, with encroachment provisions and stepped inheritance.

[13] *Dagg v Cameron Estate*, 2017 ONCA 366.
[14] Stephens, D. L. and Caldwell, E. D. "Update of Trust Issues for Family Law Practitioners", 3rd Annual Family Law Summit (LSUC; June 11, 2009)

However, the estate may ultimately receive very little in the way of assets and the insurance or investment assets may pass to a trustee outside of the estate. In such cases, the estate trustee may decide not to apply for a certificate of appointment, and the OCL would therefore receive no notice of the estate or insurance fund at all.

In such cases, the insurance and investment assets pass outside of the estate, often to a named trustee, in accordance with the beneficiary designation. While we cannot know the intent of the person signing the designation, it is hard to believe that a person who paid a lawyer to draft a will with trust provisions to age 35, intended for the child to receive funds at 18, and intended for the trustee to hold those funds under a bare trust. One can only wonder what advice the person signing the will or designation obtained at the time.

If a person is appointed as an estate trustee and also receives funds as trustee for a child beneficiary, the person often does not appreciate that he or she is trustee under two separate trust documents. For example, the will may direct the trustee to hold the funds to age 25 and provide authority to encroach, while the beneficiary designation may create a bare trust payable to the child at 18, or also gives authority to encroach, but in different circumstances from the will. Furthermore, the estate assets, unlike the beneficially designated assets, are not immune from estate creditors[15]. If the funds are intermingled and held in the estate account, the immunity could be severely compromised. If a person is to be trustee under two (or more) trusts, he or she must understand the difference, keep the funds separate from one another, and maintain separate accounts.

Accordingly, when drafting wills, a lawyer should make sure the client understands what is to become of beneficially designated assets. If a trust is needed for these assets, the trust should be drafted (and the insurance company, or investment company, should be given a copy of the trust). Alternatively, the funds could pass into the estate, even though Estate Administration Tax would be payable on the funds[16].

Summary

Beneficiary designations are usually signed in a less formal environment than wills or trusts. Further, beneficially designated assets pass with less formality than estate assets, and often without any notice to the OCL or the court. Trustees who receive these funds appear to be rarely advised as to their responsibilities as trustees.

Lawyers can and should ensure that they understand about all assets of their client when preparing an estate plan, and should never gloss over beneficially designated assets. The biggest loser in such a case can be the child, named as beneficiary of the policy, either because the legal fees of a guardianship (and subsequent accounting proceedings) are sought to be charged to his or her fund, or because a trustee, unwatched or unadvised, or both, improperly manages his or her trust fund.

[15] *Amherst Crane Rentals* v. *Perring*, 2004 CanLII 18104 (Ont. C.A.), leave to appeal to S.C.C. denied.
[16] *Estate Administration Tax Act*, S.O. 1998, c.34

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TAB 8

THE SIX-MINUTE Estates Lawyer 2018

Evolution of Orders Appointing Estate Trustee During Litigation (ETDL) – What Should be Covered?

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May 3, 2018

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Evolution of Orders Appointing Estate Trustee During Litigation (ETDL) – What Should be Covered?

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The Appointment of Estate Trustees During Litigation

An Estate Trustee During Litigation (formerly and elsewhere known as an "administrator *pendente lite*") is appointed to manage and preserve the assets of an estate for its beneficiaries. Such an appointment is most common in circumstances in which the validity of a testamentary document is in issue, such that no other person possesses the authority to act as estate trustee.

Where a will or codicil has been alleged to be invalid by the filing of a Notice of Objection or commencement of a court application, or where a Certificate of Appointment of Estate Trustee has been ordered to be returned, the authority of an estate trustee named in a will or codicil becomes unclear and an Estate Trustee During Litigation may be appointed to act in the interim, pending resolution of the dispute by settlement or trial.

What is the Purpose of an Estate Trustee During Litigation?

The appointment of an Estate Trustee During Litigation may facilitate early steps in the administration of an estate, such as ascertaining its assets, attending to payment of liabilities, making interim distributions, and/or liquidating assets to be later made available for distribution. The goal in appointing an Estate Trustee During Litigation has been summarized as being "to bring independent, transparent, and accountable stewardship to [an] estate while the questions raised between the parties are being resolved ... to protect the estate and its beneficiaries."[1]

Section 28 of the *Estates Act* provides the statutory authority for the appointment of an Estate Trustee Litigation within the context of a will challenge. This section provides as follows:

> Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Superior Court of Justice has jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the administrator so appointed has all the rights and powers of a

[1] *Mayer v Rubin*, 2007 ONSC 3498 (CanLII) at para 2.

> general administrator, other than the right of distributing the residue of the property, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper.[2]

This section of the *Estates Act* is considered to have the following implications:

- The jurisdiction to appoint an Estate Trustee During Litigation under the *Estates Act* only extends to those situations in which the validity of a will is being challenged;
- The appointment of an Estate Trustee During Litigation by the court is a discretionary matter;
- An Estate Trustee During Litigation can administer an estate in the same fashion as an normal estate trustee, except that:
    - An Estate Trustee During Litigation typically lacks the authority to distribute the estate; and
    - The court has discretion whether or not to award compensation to an Estate Trustee During Litigation.[3]

An Estate Trustee During Litigation may be appointed by the court on an application or motion for directions, pursuant to Rule 75.06 of the *Rules of Civil Procedure*.[4] Historically, the appointment of an Estate Trustee During Litigation outside of the context of a will challenge was rare. More recently, however, courts have recognized the utility of appointing a neutral third party to administer an estate while litigation is ongoing in different circumstances. The recent trend toward the appointment of Estate Trustees During Litigation in cases where the validity of a testamentary document is not in issue is discussed below.

The appointment of an Estate Trustee During Litigation is a discretionary matter for the court's determination. The proposed appointment of an Estate Trustee During Litigation should only be

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[2] RSO 1990, c E.21.
[3] David M. Smith, “The Estate Trustee During Litigation”, *Estate Administration For Law Clerks* (Toronto: Law Society of Upper Canada, 2002) at 3-2-3-3 [Smith].
[4] RRO 1990, Reg 194, r 75.06(3)(f) [*Rules*].

refused "in the clearest of cases."[5] Courts will typically favour the appointment of an Estate Trustee During Litigation unless the administration of the estate in question is so highly straightforward that it does not warrant the appointment of an individual or institution to manage the assets of the estate while litigation is ongoing.[6]

It may not be necessary to seek the appointment of an Estate Trustee During Litigation where the authority of the personal representative is not at issue.[7] For example, even where certain terms of a Last Will and Testament may be unclear and/or subject to scrutiny, the parties may nevertheless agree that the named estate trustee possesses authority to administer the estate. This may be the case where, for instance, the issue of the interpretation of other terms of the will (unrelated to the appointment of the trustee and/or the validity of the will as a whole) has been raised.

In What Circumstances Should an Estate Trustee During Litigation be Appointed?

The court will generally exercise its discretion to appoint an Estate Trustee During Litigation when there are assets to be managed and liabilities to be paid, as is generally the case when litigation arises and may otherwise put these basic steps in the administration of the estate on hold.[8] In some estates where assets are all in liquid form (for example, cash or cash equivalents) and few, infrequent, steps are required to administer the estate, a court may find it altogether unnecessary to appoint an Estate Trustee During Litigation.[9] Courts are often concerned about the cost of appointing an Estate Trustee During Litigation, such that, where the

[5] Jordan M. Atin, "The Estate Trustee During Litigation" in Brian A. Schnurr, ed. *Estate Litigation*, 2nd Ed (Toronto: Carswell, 1994) at 24.2 [Atin], as adopted by Greer J. in *McColl v McColl et al.*, 2013 ONSC 5816 (CanLII).
[6] *Ibid*.
[7] *Ibid* at 24.2.
[8] *Ibid*.
[9] *Ibid*.

size of an estate is limited, they may refuse to appoint an Estate Trustee During Litigation in recognition that "every effort should be made to minimize the cost of the litigation."[10]

In *Re Lloyd,*[11] the court held that, even in the case of will challenge proceedings, if a court is satisfied that the appointment of an Estate Trustee During Litigation is not necessary for the preservation of the assets of the estate, an Estate Trustee During Litigation need not be appointed. In that case, the majority of the estate assets were shares in closely-held private businesses, which were being well-managed and appreciating in value. The court found that there was no need to appoint an Estate Trustee During Litigation in the circumstances. In contrast, in *Re: Groner Estate,*[12] an Estate Trustee During Litigation was appointed, notwithstanding that one of the parties' lawyers was acting as *de facto* administrator for an uncomplicated estate. Greer J. held that:

> Assets cannot be administered in a vacuum. Someone or some company must administer them on a daily basis to protect them for the beneficiaries who inherit when the litigation is over. Tax returns must be filed each year and proper accounts kept and investments made. These tasks can only be performed by a knowledgeable Administrator.[13]

While the authority of courts to appoint Estate Trustees During Litigation within the context of a will challenge pursuant to Section 28 of the *Estates Act* has long been recognized, recent years have seen an increase in frequency of such appointments in other contexts, which are not explicitly contemplated by the *Estates Act*. In *Mayer v Rubin,*[14] Myers J. referred to the broad and inherent powers of the court to supervise the management of estates and the ability to appoint an Estate Trustee During Litigation to protect parties to other types of estate litigation. It follows from the court's clear authority to add trustees and to remove both trustees and estate trustees under the *Trustee Act*, that the court may assist parties in a less intrusive manner by

[10] *Ibid*.
[11] (1980), 6 ETR 10 (Ont Surr Ct).
[12] [1994] OJ No 140 (SC (Gen Div)).
[13] *Ibid* at para 11.
[14] *Supra* note 2.

appointing an Estate Trustee During Litigation by way of "an exercise of the court's inherent jurisdiction to do justice among the parties before the court."[15] Although no issue regarding the validity of the will had been raised, Justice Myers appointed an Estate Trustee During Litigation to protect the assets of an estate while litigation amongst the named estate trustees was ongoing.

Who Should Act as Estate Trustee During Litigation?

Generally, a party unconnected to the litigation is the most appropriate candidate for appointment as Estate Trustee During Litigation. This principle was confirmed by the Ontario Court of Appeal in *Re Bazos.*[16] Accordingly, the following individuals would not be suitable candidates for the role of Estate Trustee During Litigation:

- beneficiaries with a direct financial interest in the outcome of the litigation;
- named executors; and
- potential witnesses to the litigation.[17]

The party opposing the appointment of a neutral Estate Trustee During litigation must meet a substantial burden in order to successfully do so.[18] Factors that support the appointment of a neutral party and, in particular, a corporate trustee, as Estate Trustee During Litigation, may include the following:

- the ability to secure a bond (or have such a requirement waived);
- income tax issues;
- the extent and complexity of the assets of the estate;
- assets that warrant experienced management;

[15] *Ibid* at para 31.
[16] [1964] 2 OR 236 (CA).
[17] Atin, *supra* note 5 at 24.2.
[18] *Ibid.*

- the capacity to properly insure estate assets; and
- the proportionality of compensation claimed.[19]

In *Re Taylor Estate,*[20] the importance of appointing a neutral third party was emphasized. In that case, the deceased appointed her two children as estate trustees. Litigation ensued, with the daughter seeking the sale of the deceased's house (in which the son was still living), certain repayments by the son to the estate, and her own appointment as sole estate trustee. The son applied to the court for directions. The court held that appointing both siblings as Estate Trustees During Litigation would be a "recipe for disaster" and had the potential to paralyze the administration of the estate, while appointing only one of the two siblings was considered likely to increase mistrust between the parties. The court elected to appoint a neutral third party as Estate Trustee During Litigation, and provided the parties time to agree on the selection and appointment of a mutually-agreeable neutral third party.

Although, generally, an Estate Trustee During Litigation should not have an interest in the litigation, exceptions may apply. For instance, in *Salisbury v Dell,*[21] one of two co-executors named under a will was nevertheless appointed as Estate Trustee During Litigation due to the limited nature of his inheritance, the absence of any allegations of impropriety against him, and the court's expectation that he would continue on as estate trustee following the conclusion of litigation in any event. Moreover, in *Re Wood Estate*, the following factors were considered by the court in appointing a party with an interest in the outcome of the litigation as Estate Trustee During Litigation:

- All other interested parties, aside from the objecting co-executor, had either provided their consent to, or indicated that they did not oppose, the appointment;

[19] *Ibid.*
[20] 2007 CanLII 23178 (Ont SC).
[21] (1993), 50 ETR 19 (Ont SC (Gen Div)).

- The named estate trustee had been administering the estate since the deceased's death (approximately nine months earlier), and there had not been any allegations of impropriety or criticism raised as to the manner in which the estate had been administered to date;

- Regardless of the outcome of the litigation, the Estate Trustee During Litigation was named as trustee in both the disputed will and a codicil to the previous will of the deceased. Accordingly, the appointee was not considered to have a vested interest in the outcome of the litigation; and

- The estate was relatively modest and it was argued that, if an independent Estate Trustee During Litigation were to be appointed, the appointee would have been required to pass accounts for the administration of the estate to date, which would have resulted in what was considered to be an unnecessary expense to the estate.[22]

In *Buswa v Canzoneri,*[23] Stinson J. heard a motion with respect to the appointment of an Estate Trustee During Litigation. The deceased had died intestate and was survived by seven siblings and two children. The deceased's sisters and his daughter all sought appointment as Estate Trustee During Litigation so that they could make funeral arrangements and/or dispose of the deceased's remains. Stinson J. considered Section 29(1)(b) of the *Estates Act* in appointing the daughter, the deceased's next-of-kin, as Estate Trustee During Litigation under Section 28 of the Act. This decision suggests that blood ties may be relevant to the selection of an Estate Trustee During Litigation.

What is the Procedure for Appointing an Estate Trustee During Litigation?

If the appointment of an Estate Trustee During Litigation is sought, the related motion should, ideally, take place as soon as possible after the date of death and prior to any significant steps in the administration by the named estate trustee(s).[24]

The appointment of an Estate Trustee During Litigation typically results from a motion or application for directions under Rule 75.06(3)(f) of the *Rules of Civil Procedure*. The material

[22] Atin, *supra* note 5 at 24.2.
[23] 2010 ONSC 7137 (CanLII).
[24] Atin, *supra* note 5 at 24.2.

filed should include the consent of the proposed Estate Trustee During Litigation, an affidavit, and a binding compensation agreement. Ideally, the affidavit will:

- outline the relationship of the parties;
- explain why it is necessary to appoint an Estate Trustee During Litigation (and highlight the need for a neutral trustee, if appropriate);
- list the known assets and liabilities of the estate;
- describe outstanding administrative duties;
- identify why the appointment of a party as Estate Trustee During Litigation is inappropriate (if that is the case) and/or would result in a conflict;
- detail the anticipated duties of the Estate Trustee During Litigation;
- explain any criticism of the current trustee's administration; and
- propose the security required (or that such a requirement be waived in respect of the appointment of a trust company) by the Estate Trustee During Litigation.[25]

The draft Order appointing an Estate Trustee During Litigation should clearly set out the authority of the Estate Trustee During Litigation, including any relevant limitations. Sometimes the Order appointing an Estate Trustee During Litigation will contain a number of provisions regarding his or her powers and duties, such as clauses addressing the disclosure of medical, financial, or solicitor's records. In addition to outlining the compensation to which the Estate Trustee During Litigation will be entitled, the party seeking the appointment may wish to consider seeking his or her related costs should the appointment of an independent Estate Trustee During Litigation be opposed. A precedent Order Giving Directions with respect to the appointment of an Estate Trustee During Litigation is attached as an Appendix to this paper.

[25] *Ibid*.

Once the Order is issued and entered, a Certificate of Appointment of Estate Trustee During Litigation may be obtained.[26] Generally, third parties will rely upon the authority of the Order, without the necessity of the Certificate of Appointment. However, this is not the case with respect to real estate transactions and the Certificate of Appointment of Estate Trustee During Litigation is typically required in order to sell an estate property.[27]

What are the Duties of an Estate Trustee During Litigation?

Rather than a mere nominee or agent of the parties, an Estate Trustee During Litigation is an officer of the court.[28] The Estate Trustee During Litigation has all of the ordinary rights and powers of a general administrator, other than the right to distribute the residue of the estate. The Estate Trustee During Litigation is also subject to the immediate control and direction of the court. The duties of the Estate Trustee During litigation generally include the management of assets, gathering of evidence, payment of liabilities (and other payments directed by the court Order appointing an Estate Trustee During Litigation) and, sometimes, assisting the parties in negotiating a resolution of the litigation.[29]

An Estate Trustee During Litigation has authority to deal with all the assets of the estate. Specifically, he/she/it has authority to value, sell, hold, maintain, and lease the assets. However, an Estate Trustee During Litigation should remain mindful of his/her/its role as the custodian of the assets of the estate and administer those assets only in a manner that is consistent with the potential outcomes of the litigation, without taking any steps that may disregard the succession rights of the parties.[30] The Estate Trustee During Litigation should avoid taking any action that

[26] *Rules*, *supra* note 4, r 74.10.
[27] Smith, *supra* note 3 at 3-11.
[28] Ian M. Hull and Suzana Popovic-Montag, *MacDonell, Sheard, and Hull on Probate Practice*, 5th Ed. (Toronto: Carswell, 2016) at 396.
[29] Smith, *supra* note 3 at 3-11.
[30] *Ibid* at 3-12.

may interfere with the rights of potential beneficiaries, as the eventual distribution of property typically will not be determined until the conclusion of the litigation.[31]

An Estate Trustee During Litigation should not dispose of any property except where there is no other alternative and, only then, with court approval.[32] The Estate Trustee During Litigation may otherwise be removed and/or replaced. In *Re Knoch*, the court held that:

> Insofar as was reasonable, the duty of the trust company was to maintain the status quo, and that did include balancing the need to sell to pay succession duty and income tax against the need to maintain all of the assets until settlement of the probate action.[33]

Another crucial function of the Estate Trustee During Litigation is to assist the parties in obtaining evidence relevant to the litigation. Generally, the Order appointing an Estate Trustee During Litigation will authorize it to compel production of medical notes and records, solicitor's notes and financial records from third parties.[34]

The Estate Trustee During Litigation should behave in an even-handed manner towards all parties. This obligation extends to court-ordered productions. Any material that an Estate Trustee During Litigation receives should be circulated to all parties, and all parties should be apprised of the status of the administration on a regular basis.[35]

An Estate Trustee During Litigation should ensure that all legitimate estate liabilities and debts are promptly paid during the litigation. The Estate Trustee During Litigation should calculate and pay income tax and other usual debts, such as funeral expenses. Section 28 of the *Estates Act*,

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[31] *Ibid*.
[32] *Ibid*.
[33] (1982), 12 ETR 162 (Ont Surr Ct) at para 8.
[34] Smith, *supra* note 3 at 3-13.
[35] *Ibid*.

together with Section 48 of the *Trustee Act*, provide an Estate Trustee During Litigation with the authority to settle claims against the estate in good faith.[36]

When the settlement of a claim affects the parties directly (for example, by reducing the size of the residue of the estate), a motion incorporating the term of settlement into a judgment should be considered.[37] Even with the consent of the parties, an Estate Trustee During Litigation should be cautious when attending to distributions of the residue of the estate to its beneficiaries, as this is not authorized by Section 28 of the *Estates Act*. It is nevertheless not uncommon for the parties to sign Minutes of Settlement authorizing the Estate Trustee During Litigation to distribute the estate assets and act in compliance with the Minutes of Settlement.[38] In such circumstances, it may be advisable for an Estate Trustee During Litigation to request that the parties obtain a court Order directing the Estate Trustee During Litigation to do so before assisting in the implementation of such terms of settlement.

An Estate Trustee During Litigation may also play a role in the negotiation of a settlement. Often, an Estate Trustee During Litigation will attend at mediation to provide relevant information regarding the assets of the estate and the status of its administration. Further, the Estate Trustee During Litigation may be able to provide an unbiased view regarding the evidence that has been presented if he or she has been involved in the gathering of evidence and/or examinations for discovery.[39]

The duties of the Estate Trustee During Litigation persist until the completion of the litigation. At that time, the responsibilities of the Estate Trustee During Litigation cease, and it must transfer the assets of the estate to another estate trustee. Generally, the Estate Trustee During Litigation should also pass accounts. This is especially advisable if there is any dispute as to the

[36] *Ibid* at 3-14.
[37] *Ibid* at 3-14, 3-15.
[38] *Ibid*.
[39] *Ibid*.

compensation and/or legal fees claimed by the Estate Trustee During Litigation or its conduct in administering the estate. The Estate Trustee During Litigation will typically hold back some estate assets until the accounts are passed to cover any expenses relating to the passing of accounts and/or contingent tax liabilities.

Compensation of Estate Trustees During Litigation

Compensation is a matter of the court's discretion. An Estate Trustee During Litigation's entitlement to compensation is not absolute.[40] Any compensation paid is generally calculated on the same basis as under the *Trustee Act*, or pursuant to a fee schedule agreed upon by the parties and incorporated into the court Order appointing the Estate Trustee During Litigation. Generally, the formula used for compensation of an Estate Trustee During Litigation is a percentage of the receipts and disbursements, as well as a care and management fee.[41] Pre-taking of compensation is generally not permitted.

Liability of Estate Trustees During Litigation

As an Estate Trustee During Litigation is a fiduciary, he or she may be liable for any failure to carry out his or her duties properly. An Estate Trustee During Litigation is not normally subject to personal liability for third-party claims, as he or she has indemnity rights from the estate for expenses incurred during the appointment. However, a passing of accounts may further protect the Estate Trustee During Litigation from claims by beneficiaries concerning the manner in which the estate was administered.

[40] *Ibid* at 3-16.
[41] *Ibid* at 3-17.

Lawyer as Estate Trustee During Litigation

Before a lawyer accepts the role of Estate Trustee During Litigation, due diligence should be undertaken. Before agreeing to act, a lawyer should consider requesting the following documents for review:

- a copy of the death certificate;
- details of the estate dispute;
- copies of the contested will(s);
- a description of the estate assets (including their location);
- a draft Consent to act as Estate Trustee During Litigation; and
- a draft Order Giving Directions.[42]

Furthermore, it is advisable to avoid the following risks related to assuming the role of Estate Trustee During Litigation:

- consenting to act without full disclosure of the scope of work to be undertaken, the nature of the litigation and assets be administered (including where they are located);
- agreeing to act before considering any potential conflicts of interest;
- overextending oneself or one's law practice; and
- wading into the administration slowly. It is best to take control of the file, gain knowledge and insure that all necessary steps safeguard the estate are considered.[43]

A lawyer should request that all of his or her duties are outlined within the Order appointing him or her as Estate Trustee During Litigation. Terms should be included to cover issuing fees,

[42] John O. Krawchenko, "Solicitor as Estate Trustee During Litigation: Practical Considerations", *Solicitors as Attorneys, Trustees, and Estate Trustees: What You Need to Know* (Toronto: Law Society of Upper Canada, 2010) at 4.
[43] *Ibid* at 5.

compensation, expenses, and the timing of any payments to the lawyer and/or any beneficiaries.[44]

Should the estate assets comprise of real property and chattels, it is a good idea to attend at the estate property (or properties) with an independent witness.[45] Before and after photos are helpful both for insurance purposes and to demonstrate the amount of work performed by the Estate Trustee During Litigation.[46] All mail should be directed to the office of the Estate Trustee During Litigation. Arrangements should also be made for ongoing property maintenance, and the locks on the property should be changed.[47] It is essential to take steps to ensure that the property is properly insured. If a property is being sold, it is advisable to seek input from all interested parties in distributing chattels.[48] If parties disagree regarding the administration or disposal of the contents of the property, the Estate Trustee During Litigation may need to make arrangements to store them until the issue has been settled or is otherwise adjudicated.

Liquid assets may be consolidated in a firm trust account so that arrangements for the payment of bills can easily be made.[49] Any motor vehicles should have their license plates removed and insurance status reviewed.[50]

An Estate Trustee During Litigation can ask for further directions from the court, if necessary. However, it may not always be practical to do so. It may be most efficient to instead consult with the parties and build a consensus on uncontentious issues. If required to bring an application or motion for directions, the requested direction should be specific, and a full evidentiary record should be made available for judicial consideration.[51]

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[44] *Ibid* at 7.
[45] *Ibid*.
[46] *Ibid*.
[47] *Ibid*.
[48] *Ibid* at 8.
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*.

Conclusion

An Estate Trustee During Litigation can play an important role in making litigation run more smoothly, assisting in the gathering of evidence and encouraging settlement. Most importantly, an Estate Trustee During Litigation can protect the assets of the estate for the benefit of the parties while litigation is ongoing. When approached to assist parties as an Estate Trustee During Litigation, it is important to agree to do so only with an understanding of what the role will entail and the inherent risk of personal liability associated with the role. An effective Estate Trustee During Litigation should maintain neutrality and attempt to foster areas of common ground between the parties whenever possible and appropriate.

APPENDIX

Court File No. 12345/67

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE ESTATE OF JOHN SMITH, deceased.

THE HONOURABLE	)	MONDAY, THE 1st DAY OF
JUSTICE	)	
	)	APRIL, 2018

B E T W E E N:

JANE SMITH

Applicant

- and -

EMILY SMITH

Respondent

ORDER GIVING DIRECTIONS

THIS APPLICATION, made by the Applicant for, *inter alia*, directions, was heard this day at 330 University Avenue, Toronto, Ontario, in the presence of counsel for the Applicant and counsel for the Respondent.

ON READING the Notice of Application, the Affidavit of Jane Smith sworn March 2, 2018, and upon hearing the submissions of counsel for the Applicant and counsel for the Respondent,

1. **THIS COURT ORDERS** that the issues to be tried are as follows:

(a) With respect to the Last Will and Testament of John Smith, deceased (the "**Deceased**"), dated August 1, 2015 (the "**Will**"):

(i) The Applicant, Jane Smith ("**Jane**"), denies and the Respondent, Emily Smith ("**Emily**"), affirms that the Deceased had testamentary capacity on the date of execution of the Will;

(ii) Jane denies and Emily affirms that the Deceased had knowledge and approved of the contents of the Will;

(iii) Jane affirms and Emily denies that the Will was procured by undue influence; and

(iv) Jane affirms and Emily denies that the Will was made under suspicious circumstances.

Estate Trustee During Litigation

2. **THIS COURT ORDERS** that A. Lawyer, with the law firm of Hull & Hull LLP, shall be and is hereby appointed Estate Trustee During Litigation, without security, of all singular property of the Estate of the Deceased, pending final resolution of the litigation herein and that a Certificate of Appointment of Estate Trustee During Litigation shall be issued to A. Lawyer, subject to the filing of the necessary supporting Application.

3. **THIS COURT ORDERS** that, subject to further review by the Court, if necessary, A. Lawyer, in her capacity as Estate Trustee During Litigation (the "**Estate Trustee During Litigation**") shall receive out of the assets of the Estate of the Deceased reasonable

remuneration, which shall be calculated on the basis of A. Lawyer's hourly rate in the amount of $500.00 per hour.

4. **THIS COURT ORDERS** that all property and assets forming part of the Estate of the Deceased shall be and are hereby vested in the Estate Trustee During Litigation from the date of this Order Giving Directions.

5. **THIS COURT ORDERS** that the Estate Trustee During Litigation shall forthwith make all necessary inquiries to ascertain what assets and debts properly form part of the Estate with all powers granted by the within Order to compel information from third parties who are authorized to give such information to the Estate Trustee During Litigation as if the Deceased had requested provision of same.

6. **THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby authorized to exercise those powers given by law to an administrator including such powers under the *Estates Act*, R.S.O. 1990, c. E.21, as amended, and without limiting the generality of the foregoing, the Estate Trustee During Litigation is hereby specifically authorized to do the following:

(a) to gather and take full account of the assets and liabilities of the Deceased and of the Estate;

(b) subject to any list or memorandum of the Deceased, to sell any articles of personal, domestic or household use or ornament comprising the assets of the Estate;

(c) to pay all just debts, funeral and testamentary expenses and all income taxes of the Deceased and of the Estate, including any costs associated with the unveiling of the Deceased’s gravestone, and excluding any

income taxes or taxes of any nature or kind in respect of whose ownership or beneficial entitlement may be in dispute;

(d) to obtain information, records and files relating to the assets and liabilities of the Deceased in the same manner and to the same extent the Deceased would have been able if he were alive;

(e) to invest any assets of the Estate in guaranteed investment certificates, money market investments, treasury bills or other equivalent types of investments at her discretion;

(f) to obtain two (2) real estate appraisals of any real property comprising the assets of the Estate and to possibly sell any such real property, including the house at 20 Toronto Street, Toronto, Ontario; and

(g) to appoint an agent or agents (including legal counsel) and to seek such assistance from time to time as the Estate Trustee During Litigation may consider necessary for the purpose of performing her duties hereunder and to pay those agents and representatives, including legal counsel, from the capital of the Estate.

7. **THIS COURT ORDERS** that the Estate Trustee During Litigation shall not distribute any assets from the Estate without the agreement of all parties or Court Order, with the exception of monthly payments of $1,000.00 to each of Emily and Jane, to be paid on the last day of each month out of the assets of the Estate, in the manner which the parties agree is most tax efficient.

8. **THIS COURT ORDERS** that the Estate Trustee During Litigation may sell any Estate holdings held as an asset without having to seek prior approval of the Court.

9. **THIS COURT ORDERS** that the Estate Trustee During Litigation shall, within sixty (60) days of this Order, deliver to the parties and file with the Court a Statement of Assets of the Estate of the Deceased, setting out the nature and value of the Estate as at the day before the date of death of John Smith.

10. **THIS COURT ORDERS** that Emily and Jane shall make available for inspection by the Estate Trustee During Litigation all documents and records relating to the assets and administration of the Estate that are in their possession or control and shall provide copies of any such documents and records to the Estate Trustee During Litigation as are requested by her within ten (10) days of such request. The charges for the costs of such copies shall be paid out of the assets of the Estate, subject to further Court Order and reserved to the Trial Judge.

11. **THIS COURT ORDERS** that Emily shall forthwith forward to the Estate Trustee During Litigation all correspondence that she has or may in the future receive that was meant for or directed to the Deceased or his Estate.

Prior Will

12. **THIS COURT ORDERS** that any party with knowledge of any prior or subsequent Will, codicil or other testamentary documents of the Deceased shall advise the Estate Trustee During Litigation of the details of same and shall provide the original copy to the Estate Trustee During Litigation and the Estate Trustee During Litigation shall circulate a copy to the parties.

Production of Medical Records

13. **THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby entitled to compel production of all medical records, notes and files relating to the Deceased at any time commencing January 1, 2015 to the date of death, from any person or physician, institution, hospital, health care facility or health care provider in possession of such medical

records, in the same manner and to the same extent as the Deceased would have been able if he were alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid out of the assets of the Estate, at first instance, and the final determination as to payment of such costs and expenses shall be reserved to the Trial Judge.

Production of Solicitor Records

14. **THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby entitled to compel production of all solicitors' records, notes and files relating to the Deceased from any solicitor or law firm in possession, power or control of such records, in the same manner and to the same extent the Deceased would have been able if he were alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid out of the assets of the Estate, at first instance, and the final determination as to payment of such costs and expenses shall be reserved to the Trial Judge.

15. **THIS COURT ORDERS** that any party is hereby granted leave pursuant to Rule 31.10 of the *Rules of Civil Procedure* to examine for discovery John Johnson, the solicitor who prepared the Will, including and relating to conversations had with the Deceased, instructions for and preparation of drafting and execution of any Wills, Powers of Attorney or any other testamentary documents of the Deceased, the costs of the examination to be reserved to the Trial Judge. John Johnson shall be paid at his hourly rate for his attendance and work performed in this regard, out of the assets of the Estate, at first instance, subject to further Order and reserved to the Trial Judge.

Production of Financial Records

16. **THIS COURT ORDERS** that the Estate Trustee During Litigation be and is hereby entitled to compel production of all financial records and files relating to the assets held by the Deceased at any time commencing January 1, 2015 to the date of death or under attorneyship, either solely or jointly by the Deceased with another, from any financial or banking institution or agency, whether in Canada or elsewhere, in the same manner and to the same extent as the Deceased would have been able, if he was alive. The charges for the production of the financial records and files shall be paid out of the assets of the Estate, at first instance, and the final determination as to payment of such costs and expenses shall be reserved to the Trial Judge.

Waiver of Privilege

17. **THIS COURT ORDERS** that any claim of privilege and duty of confidentiality respecting solicitor, medical, financial or banking records enjoyed by the Deceased in respect of the Deceased be and is hereby waived.

Mediation

18. **THIS COURT ORDERS** that the Applicant, the Respondent, and the Estate Trustee During Litigation (the "**Mediating Parties**") shall attend Mediation pursuant to Rule 75.1 of the *Rules of Civil Procedure* within ninety (90) days of the date of this Order, and makes the following directions:

(a) the Mediating Parties shall mediate their dispute before a mediator mutually agreed upon amongst counsel for the Mediating Parties;

(b) the issues to be mediated are those set out in the Order Giving Directions herein;

(c) the Notice of Mediation giving the date, place and time of the Mediation shall be served upon the Mediating Parties by an alternative to personal service pursuant to Rule 16.03 of the *Rules of Civil Procedure*;

(d) the fees of the Mediator shall be paid out of the Estate at first instance; and

(e) any matters arising out of the mediation requiring further direction of the Court shall be referred to a Judge of this Honourable Court.

19. **THIS COURT ORDERS** that the parties shall adhere to the following schedule, unless otherwise agreed upon by the parties in writing:

(a) affidavits of documents to be exchanged within sixty (60) days of the date of mediation; and

(b) examinations for discovery and/or cross-examinations on all affidavits to be conducted within ninety (90) days of the date of mediation.

20. **THIS COURT ORDERS** that the parties and the Estate Trustee During Litigation are hereby granted leave to move for further directions as may appear advisable or necessary.

21. **THIS COURT ORDERS** that the deadlines set out in this Order Giving Directions shall be subject to the contrary written agreement of the parties through their solicitors.

22. **THIS COURT ORDERS** that the issues be tried by a Judge without a jury at Toronto on a date to be fixed by the Registrar, and that the Record shall consist of this Order Giving Directions and any other Order for Directions made by this Court.

23. **THIS COURT ORDERS** that the costs of and incidental to the Applicant in the bringing of this Application shall be reserved to the Trial Judge.

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#1516853

Law Society of Ontario | Barreau de l'Ontario

TAB 9

THE SIX-MINUTE Estates Lawyer 2018

Interim Orders for Dependant Support: A Primer

Carol Craig
Nelligan O'Brien Payne LLP

May 3, 2018

cpd Continuing Professional Development

Interim Orders for Dependant Support: A Primer

Carol Craig
Nelligan O'Brien Payne LLP

Introduction

Many experienced estate litigation lawyers are familiar with the process for applications for dependant support. Section 58(1) of the *Succession Law Reform Act* ("*SLRA*")[1] provides that where a deceased has not adequately provided for the proper support of their dependants, the court, on application, may make an order that proper support be paid to the deceased's dependants from their estate. However, a final determination of an opposed application for support can take months or years, often leaving the applicant struggling in the interim. Thankfully, section 64 of the *SLRA* enables an applicant to move for interim support:

> Where an application is made under this Part and the applicant is in need of and entitled to support but any or all of the matters referred to in section 62 or 63 have not been ascertained by the court, the court may make such interim order under section 63 as it considers appropriate.[2]

Who is Entitled to Interim Dependant Support?

To obtain an order for interim dependant support, the onus is on the applicant to establish some degree of entitlement to, and the need for, interim support. To do this, the applicant must show that:

i. The applicant falls within one of the qualifying relationships set out in section 57 of the *SLRA*;
ii. The deceased was, immediately before his or her death, either:
    a. providing support to the applicant; or
    b. under a legal obligation to provide support to the applicant; and
iii. The deceased did not make adequate provision for the applicant's proper support, in the sense that the applicant is in need of support.[3]

[1] RSO 1990, c S.26 [*SLRA*].
[2] *SLRA*, *supra* note 1 at s 64.
[3] *Perkovic v McClyment*, [2008] OJ No 3976, 2008 CanLII 52315 (Ont Sup Ct J) at para 6 [*Perkovic*]; *Corredato v Corredato*, 2016 ONSC 6252 (Div Ct) at para 13 [*Corredato*].

i. Qualifying Relationships

Section 57 of the *SLRA* stipulates that a "dependant" means:

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.[4]

The definitions of "child" and "parent" in section 57 of the *SLRA* are extended to include grandchildren and grandparents. Further, where a person has demonstrated a settled intention to treat someone as their child, those parties are included in the definitions of "parent" and "child" respectively. Excluded from the definitions are those situations where a parent has placed a child in foster care for "good consideration".

The definition of "spouse" in section 57 of the *SLRA* includes those who were married, separated, divorced, or in a common law relationship with the deceased. A common issue that arises is whether the applicant qualifies as the deceased's common law spouse. Often the dispute centers around whether the applicant was living with the deceased prior to their death. This is particularly common where older adults re-partner later in life but maintain separate residences.[5] In determining whether the applicant and the deceased have co-habited, courts have used the factors enumerated in *Molodowich v Penttinen*[6] to guide their analysis.[7]

ii. The Deceased was Providing Support or Had a Legal Obligation to do so

The *Family Law Act* ("*FLA*") creates legal obligations for spouses to provide support to each other, parents to support their minor children, and adult children to support their parents, albeit with some qualifications.[8] Therefore, if the applicant was a spouse or minor child of the

[4] *SLRA*, *supra* note 1.
[5] For good examples of this situation, see: *Perkovic*, *supra* note 4; *Ly v Chiofalo*, 2017 ONSC 2444 (Ont Sup Ct J) [*Ly*].
[6] [1980] OJ No 1904, 17 RFL (2d) 376.
[7] *Perkovic*, *supra* note 4 at para 39; *Blair v Allair Estate*, 2011 ONSC 498, [2011] OJ No 211 at para 10.
[8] RSO 1990, C F.3, ss 30-32 [*FLA*].

deceased, this requirement is likely met. However, grandparents, grandchildren, brothers, and sisters of the deceased must establish that the deceased was, in fact, providing support to them immediately before death.

Notably, even where the deceased had an obligation to support the applicant before his or her death, courts may still consider evidence, or the lack thereof, regarding whether the deceased was providing support to the applicant before death.[9] Such evidence is relevant to establishing the next requirement, namely, that the applicant is in need of interim support.[10]

iii. The Applicant is in Need of Support

When considering an applicant's need for support, courts will inquire into the applicant's:

- current income;
- future income;
- current assets;
- capacity to generate assets; and
- needs, measured by the applicant's accustomed standard of living.[11]

In addition, courts will also consider the other factors enumerated in sections 62(1) and 63(2) of the *SLRA*, including:[12]

- the dependant's age and physical and mental health;
- the dependant's capacity to contribute to his or her own support;
- the proximity and duration of the dependant's relationship with the deceased;
- whether the dependant has a legal obligation to provide support for another person;
- the circumstances of the deceased at the time of death;
- any previous distribution or division of property made by the deceased in favour of the dependant by gift or agreement or under court order;
- the claims that any other person may have as a dependant.

[9] *Perkovic*, *supra* note 4 at para 58.
[10] *Ibid*.
[11] *Perkovic*, *supra* note 4 at para 57; *Romero v Naglic Estate*, [2009] OJ No 2299, 71 RFL (6th) 168 at para 27 [*Romero*].
[12] *Perkovic*, *supra* note 4 at para 57; *Romero*, *supra* note 12 at paras 27-28; *SLRA*, *supra* note 1.

The Strength of the Applicant's Case

The strength of the case that the applicant must put forth on each of the three elements has been described in various ways as:

- "[C]redible evidence from which one could rationally conclude that the applicant could establish his claim for support";[13]
- "[T]he Plaintiff is not required to provide the court with definitive proof of the inadequacy of the provisions made for him in the will…What is clear, however, is that *some* evidence must be put forward to address this issue";[14]
- "[A] *prima facie* case";[15]
- "A good arguable case";[16] or
- The existence of a "triable issue."[17]

However, courts do not only consider the evidence filed by the applicant in determining whether this evidentiary burden had been met. Courts may also consider the opposing party's rebutting evidence in determining the overall strength of the applicant's claim:

> In making the determination as to whether [the applicant] has established a prima facie case of sufficient merit, it is not enough that she has set out sufficient facts to demonstrate she has a meritorious claim for dependants' relief which can succeed. Such allegations, can, as here, be rebutted. Where, as here, responding evidence is filed rebutting the claim, it is incumbent on the court to examine the entire record before determining whether a prima facie case for dependants' relief has been made out.[18]

Therefore, where the opposing party directly disputes the applicant's entitlement, such as whether the applicant was a dependant of the deceased, a court may decline to award interim support.[19] This may be especially so where the record consists only of conflicting untested

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[13] *Perkovic, supra* note 4 at para 9; *Hockley v McKillop Estate*, 2013 ONSC 6195, [2013] OJ No 4964 at para 13 [*Hockley*].
[14] *Hockley, supra* note 16 at para 14 [emphasis in original].
[15] *Corredato*, *supra* note 4 at para 14.
[16] *Sturgess v Shaw*, [2002] OJ No 3759, 31 RFL (5th) 453 at para 9, as cited in *Hockley, supra* note 16 at para 14 and *Perkovic*, *supra* note 4 at para 8; *Corredato, supra* note 4 at para 38.
[17] *Kraus v Valentini Estate*, [1993] OJ No 3276 at para 4 (Ont Gen Div), as cited in *Hockley, supra* note 16 at para 14 [*Kraus*]; *Perkovic, supra* note 4 at para 8.
[18] *Ly v Chiofalo, supra* note 6 at para 14.
[19] Schnurr, *supra* note 2 at 4.6 Interim Orders.

affidavit evidence from the parties which raises credibility issues.[20] However, there is precedent in Ontario for granting interim support even where the respondents disputed the applicant's entitlement and alleged that the deceased's domicile was outside Ontario.[21]

Types of Evidence that Should be Filed

Evidence that courts usually consider on interim motions for dependant support includes:

- Affidavits from the parties and anyone else having knowledge relevant to the claim;
- Transcripts from cross-examinations (if any);
- Documentary evidence, such as:
    - Financial documents, e.g. bills, account statements, leases, tax returns, and pension statements;
    - Other documents, e.g. medical notes, photos, letters, obituaries of the deceased, wills, and solicitor's notes from preparation of the deceased's will.

The Ontario Superior Court of Justice in *Romero v Naglic Estate* elaborated on the types of financial evidence that should be provided:

> "Evidence about one's financial means and resources constitutes key information any claimant must adduce in support of such a motion. The type of information a court expects to see from a claimant includes statements of income and expenses for the years before and after the passing of the deceased, verified and supported by relevant documents, including income tax returns and pay stubs to demonstrate employment income, as well as net worth statements for that period of time. The financial statements published under Rule 13 of the *Family Law Rules* provide useful guides for organizing and presenting this type of evidence."[22]

Determining the Quantum

In determining the quantum of the support order, courts consider the factors in sections 62(1) and 63(2) of the *SLRA* and have discretion in determining the amount, duration, and structure of the support order (e.g. installments or lump sum payments).[23] Ultimately, these features of the order will depend on the facts of the case and the evidence put forth.

[20] *Ly, supra* note 6 at para 19.
[21] *Puliver*, (1982), 39 OR (2d) 460 (QL).
[22] *Romero, supra* note 12 at para 59.
[23] *SLRA, supra* note 1, ss 58, 62-63.

Interim Costs

Another issue that may arise where an impecunious dependant is in immediate need of support is that they may not be able to pay their counsel's legal fees. Where an applicant's financial need compromises their ability to pursue the dependant relief claim, it may be appropriate to ask for an interim costs order for their legal fees and disbursements at the interim support motion.

A court may make an order for interim costs to fund the applicant's legal fees if the following three-part test is met. The applicant must:

a) Be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case;
b) Establish a prima facie case of sufficient merit to warrant pursuit; and
c) Show special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.[24]

Although the test has been formulated as requiring the party to be *deprived* of being able to proceed with their case, courts have considered this requirement met where the applicant would be "prejudiced" or would have to "depend on the generosity of counsel."[25] Typically, if the first two elements of the test are satisfied, a court will consider the third element met.[26] Further, courts may consider whether there would be prejudice to the estate or anyone else as a result of awarding interim costs.[27] The size of the costs award can be commensurate with the apparent strength of the applicant's case.[28]

Selected Case Summaries

The following four case summaries illustrate many of the issues that arise on motions for interim support.

[24] *Kalman v Pick*, 2013 ONSC 304, [2013] OJ No 182 (Ont Sup Ct J) at para 5 [*Kalman*].
[25] *Kalman, supra* note 26 at para 11; *Kraus, supra* note 20 at para 15.
[26] *Kalman, supra* note 26 at para 12; *Kraus, supra* note 20 at paras 15-17; *Zhao v Ismail Estate*, [2006] OJ No 5221, 29 ETR (3d) 315 (Ont Sup Ct J) at paras 12-13.
[27] *Kalman, supra* note 26 at para 11; *Kraus, supra* note 20 at para 15.
[28] *Kraus, supra* note 26 at para 17.

***Perkovic v McClyment*[29]**

The deceased passed away testate in 2007, leaving her estate to her children and grandchildren. After a large portion of the estate had already been administered, the applicant commenced an application for dependant support and brought a motion for interim support and $25,000 in interim legal costs.

The applicant alleged that the deceased had been his common law spouse of 14 years, supported him, and failed to make adequate provision for him. The respondents, step-children of the deceased, opposed the application, disputing that the deceased had ever cohabited with or supported the applicant.

The applicant deposed that he had moved in with the deceased in 1993, they slept in the same bed, took vacations together, and attended family functions together. However, the applicant had always maintained his own apartment, they did not change their marital status on their tax returns, they did not share any joint bank accounts, and the deceased's obituary listed the applicant only as her "dear friend". According to the notes of the solicitor who prepared the deceased's will, the deceased did not wish to leave anything to the applicant, but she was aware that if the relationship became more permanent, he may be able to assert a dependant's claim against the estate.

The applicant refused to produce most of his tax returns and any of his banking records since 1993. There were also several inconsistencies in his evidence, such as how much his income was and what assets he owned. He deposed that he could no longer afford to travel, and his apartment was in a state of disrepair, but yet he had continued to pay rent for his apartment and, on cross-examination, admitted to travelling to Florida for two months after the applicant's death.

The Court applied the three-part test and found that there was credible evidence that the deceased and the applicant had been residing as a common law couple at the time of her death, which would mean that the deceased had a legal obligation to support the applicant. However, the Court also found that there was no credible evidence to show that the deceased had been providing support to the applicant before her death, due to the lack of disclosure and inconsistencies in the

[29] *Perkovic, supra* note 4.

financial evidence. This same lack of evidence also prevented a finding that the applicant was in need of support.

The Court declined to award interim costs for the applicant's legal fees as a result of his lack of full and fair financial disclosure but did order the estate to pay for the costs of an upcoming mediation.

***Romero v Naglic Estate*[30]**

The deceased had been murdered in 2004. The applicant commenced a claim for dependant support in 2005, alleging that he had been living in a same-sex relationship with the deceased before his death. The deceased had left a substantial portion of his estate to the applicant in his 1997 will, revoked these gifts in a 2000 codicil, then reinstated some gifts in a 2004 will, namely his Mercedes and an option to purchase a one-half interest in a corporation which owned a boat in Florida.

However, shortly after commencing his claim, the applicant was arrested and charged with the deceased's murder and remained in custody until he was acquitted in 2008. Shortly after his acquittal, the applicant renewed his motion for interim support. The estate trustee opposed the motion, alleging: the applicant was not a dependant; the estate could not afford dependant support payments; and the applicant had, in fact, murdered the deceased. The estate had commenced a wrongful death action against the applicant. Despite these contentious circumstances, the Court granted the order for interim support, using the three-part test articulated in *Perkovic*.

The deceased had met the applicant while vacationing in Cuba and helped the applicant immigrate to Canada through an arranged marriage. The applicant worked in the deceased's nightclub business and they commenced living together in 1996. The estate trustee, who had been the deceased's accountant for 15 years, acknowledged that the applicant had been living with the deceased before his death, but said that the deceased had ended the relationship shortly before his death when he found out that the applicant had married a woman. The Court found

[30] *Romero, supra* note 12.

that there was credible evidence demonstrating that the applicant had lived with the deceased before his death in a common-law relationship.

The deceased and the applicant had led an extravagant lifestyle together, frequently taking vacations and buying lavish personal items. The evidence showed that a large portion of the funds used to fund their lifestyle came from the deceased's businesses. As such, the deceased had been supporting the applicant immediately before his death.

However, the evidence disclosed that some of the business funds used to fund this lifestyle had been unclaimed income from the deceased's businesses, and the estate now faced significant tax liabilities. Further, there were significant gaps in the applicant's financial disclosure. Accordingly, the Court ordered a modest amount of interim support of $1,500 monthly.

***Gefen v Gefen*[31]**

The deceased passed away testate, leaving three adult sons and a widow. He left behind a sizeable estate, the exact value of which was unknown, but was estimated to be anywhere between $3,000,000 and $30,000,000. The deceased's wills left the entirety of his estate to his elderly wife.

The applicant was an adult son of the deceased who suffered from childhood polio and its many complications and had never worked for an arm's-length employer in his life. He was 64 years old, and his last employment had been working for his father's carpet store over 18 years ago. His only ongoing source of income was from his Canada Pension Plan ("CPP"), which only covered a third of his rent.

The applicant tendered uncontradicted evidence to show that his father had given him large sums of money, which he had claimed as "business income" on his tax returns, and this income ceased after his father died. The Court accepted that the applicant was a child of the deceased and that the deceased had been providing support to his son immediately before his death.

The Court also engaged in an analysis of the applicant's means and needs. It was clear that his CPP did not cover even the most basic of his needs. The mother, who was the respondent, argued

[31] 2015 ONSC 7577, [2015] OJ No 7300.

that he did have the ability to work. The Court decided that, given the evidence of the applicant's health conditions and the fact that he had never worked for an arm's-length employer, the question of his ability to work was best left to trial.

The Court ordered $5,000 monthly in interim support payments and a further $5,000 lump sum for the applicant's pressing medical and dental needs.

***Corredato v Corredato*[32]**

The applicant, an adult grandson of the deceased, commenced an application seeking dependant support and a declaration that a property that the grandmother owned at her death was held in trust for him. Shortly after, the applicant brought a motion for interim support and interim legal costs. The motions judge dismissed the application, and the applicant sought leave to appeal the motion judge's order at the Divisional Court of Ontario.

The Divisional Court refused to grant leave to appeal. As the deceased's grandchild, the applicant fell within the *SLRA*'s extended definition of "child". However, the applicant had not made a good arguable case that the deceased had been supporting him immediately before her death.

The applicant had held various jobs as a model, actor, security guard, and valet from 2009 to 2011 and had not worked since. He tendered a psychiatric report saying that he could not work, but the author of the report did not give a diagnosis, relied on the reports of others, including the applicant, and had only met the applicant on one occasion. The applicant also provided no banking records from 2015, claiming he had no bank account.

The applicant provided evidence showing that the deceased had written several cheques payable to him between 2009 and 2011. However, there was limited evidence showing that the deceased had provided money to the applicant after that, leading up to her death in 2015. In fact, the applicant had signed an acknowledgement around 2011 that he would not unexpectedly visit the deceased anymore. Further, the deceased removed the applicant from her will in 2009, claiming to her solicitor that the applicant was wasting her money and not living up to her expectations.

[32] *Corredato, supra* note 4.

While the applicant claimed he was living with the deceased, Community Care Access Workers described her as living alone.

The Divisional Court upheld the motion judge's decision that the applicant was not a dependant, as the record as a whole did not contain credible evidence of a *prima facie* case demonstrating the applicant's entitlement to interim support.

Conclusion

To obtain an order for interim dependant support, the applicant must make a *prima facie* case that they are entitled to support. Firstly, the applicant must demonstrate that they were a dependant of the deceased, in that they fall within one of the qualifying relationships in section 57 of the *SLRA* and that the deceased either was supporting them or had a legal obligation to support them immediately before their death. Then, the applicant must show that the deceased did not make adequate provision for their support, in the sense that the applicant is in need. If the applicant is impecunious to the point that their ability to pursue their claim is jeopardized, they have made out a *prima facie* case of entitlement, and if special circumstances exist, they may also be entitled to an award of interim legal costs and disbursements.

While applicants need only provide evidence of a *prima facie* case to entitlement, it is important to put forth as strong an evidentiary record as possible at the motion. Since courts will assess both parties' evidence in determining the overall strength of the claim, including contradictory evidence, a fulsome evidentiary record will help meet this threshold. Courts are skeptical of applicants who fail to make full and fair disclosure, particularly as it relates to financial matters, so a detailed record may remove some of this hesitancy to grant an interim order. Further, if an applicant puts forth a strong case at the motion, this may assist in settling the case before it proceeds further through the full litigation process.

Therefore, counsel who ensure that their clients are fully prepared for the motion give their clients a better chance at obtaining an order for interim dependant support.

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TAB 10

THE SIX-MINUTE Estates Lawyer 2018

Privilege & the Duty of Confidentiality

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cpd Continuing Professional Development

PRIVILEGE & THE DUTY OF CONFIDENTIALITY

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I. Introduction[1]

It is trite to say it is trite law that privilege is an essential component of our legal system. That being said, it is important that legal practitioners remain ever mindful of the essential roles that privilege and the related ethical duty of confidentiality play. This paper will attempt to provide a brief, non-exhaustive overview of certain species of privilege that are thought to be most relevant to a lawyer's day-to-day practice, together with a similar analysis focused on the duty of confidentiality. It will attempt to remind the reader of their often overlooked importance, hopefully forming the basis for a lively and practical discussion to follow.

II. What is Privilege

Privilege, in general terms, can be described as a legal principle that seeks to protect from disclosure into evidence certain classes of information. In *R v. McClure*,[2] Major J., and writing for the Court, provided that:

> The law recognizes a number of communications worthy of confidentiality. The protection of these communications serves a public interest and they are generally referred to as privileged.[3]

This enunciation by the Supreme Court, and in the context of a criminal matter, hints too at the rationale behind the principle. For it must be remembered that where certain, and even relevant, classes of information are protected, the truth finding function of a court may be compromised. Madam Justice L'Heureux-Dubé outlined the delicate balancing in play in *R. v. Frosty*[4]:

> One of the primary aims of the adversarial trial process is to find the truth. To assist in that search, all persons must, if requested, appear before the courts to testify about facts and events in the realm of their knowledge or expertise…If the aim of the trial process is the search for truth, the public and the judicial system must have the right to any and all relevant information in order that justice be rendered. Accordingly, relevant information is presumptively admissible. Exceptions may be found both in statutory form, and in the common law rules of evidence, which have developed in order to exclude evidence that is irrelevant, unreliable, susceptible to fabrication, or which would render the trial unfair. *Courts and legislatures have also been prepared to restrict the search for truth by excluding probative, trustworthy and relevant evidence to serve some overriding social concern or judicial policy. The latter are the source of privileges for certain private communications*.[5] [Emphasis added]

Privilege, then, finds its origins in the common law rules of evidence. It is a rule that, contrary to the primary aim of the trial process, curbs fact-finding by rejecting otherwise probative, trustworthy and relevant evidence to serve a larger societal good.

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[1] This paper was written by Justin de Vries and Ronald Neal (student-at-law) both of de VRIES LITIGATION LLP

[2] [2001] 1 SCR 445, 2001 SCC 14 (CanLII) [*McCLure*].

[3] *Ibid* at para. 26.

[4] [1991] 3 SCR 263, 1991 CarswellMan 206 [*Frosty*].

[5] *Ibid* at para. 64.

Justice Dickson, as he then was, took great pains to explore the history and rationale behind privilege in the seminal Supreme Court decision of *Solosky v. The Queen*.[6] There, he described how:

> The history of privilege can be traced to the reign of Elizabeth I…It stemmed from respect for the 'oath and honour' of the lawyer, dutybound to guard closely the secrets of his client, and was restricted in operation to an exemption from testimonial compulsion. Thereafter, in stages, privilege was extended to include communications exchanged during other litigation, those made in contemplation of litigation and finally, any consultation for legal advice, whether litigious or not.[7]

Given its relatively ancient history, what, then, is this larger societal good or "overriding social concern or judicial policy" informing a court's willingness to check its own *raison d'être*? Again, one can look to the Supreme Court for neat and clean expressions of the bigger picture.

III. Categories of Privilege

Not all types of privilege are created equal.

Returning to Major J. and the Supreme Court:

> There are currently two recognised categories of privilege: relationships that are protected by a "class privilege" and relationships that are not protected by a class privilege but may still be protected on a "case-by-case". See *R. v. Gruenke,* 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263, *per* Lamar C.J., at p. 286, for a description of "class privilege":
>
> > The parties have tended to distinguish between two categories: a "blanket", *prima facie*, common law, or "class" privilege on the one hand, and the "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognised at common law and one for which there is a *prima facie* presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should <u>not</u> be privileged (i.e., why they should be admitted into evidence as an exemption to the general rule). Such evidence is excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence.[8]

For a relationship to be protected by a class privilege, then, it must be shown to fall under the umbrella of a traditionally protected class. Only then can it claim the protection of a *prima facie* presumption of inadmissibility. Solicitor-client privilege, for example, has long been regarded as falling within a class privilege.[9] Other examples of class privileges, though falling outside the

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[6] *Solosky v. The Queen*, [1980] 1 SCR 821, 1979 CanLII 9 (SCC).
[7] *Ibid* at 835.
[8] *McClure*, *supra* note 1 at para. 27.
[9] *Frosty*, *supra* note 3 at para. 34.

scope of this paper, are spousal privilege (now codified in s. 4(3) of the *Canada Evidence Act*[10]) and informer privilege (which is a subset of public interest immunity).[11]

For all those relationships falling outside of the protective cover of a class privilege, all hope is not lost. Those relationships may still find cover on a case-by-case basis. For those relationships, and instead of there being a *prima facie* presumption of inadmissibility, a court will consider each one on a case-by-case basis before deciding whether to extend privilege or not. What has come to be known as the "Wigmore test" has come to govern the circumstances under which privilege is extended to that which is not traditionally sheltered by class privilege and contains four criteria:

> 1) The communications must originate in a confidence that they will not be disclosed.
> 2) The element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties.
> 3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
> 4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.[12]

Examples of such relationships have traditionally included doctor-patient, psychologist-patient, journalist-informant, and clergy-parishioner.[13]

Much of what is to follow will involve a discussion on one of those species of privilege that are considered class-privilege. That does not mean, however, that having regard to case-by-case privilege is not important or helpful. New and emerging claims of privilege arise not infrequently. Moreover, we know that even well-established species of privilege (i.e. solicitor-client privilege) have been allowed to evolve and develop over time.

IV. Solicitor-Client Privilege

A. Scope and Rationale

Solicitor-client privilege is the "highest privilege recognised by the courts"[14] and is a logical place to begin our review.

A quick canvassing of Supreme Court decisions on this particular species of privilege provides insights into its meaning and importance.

For example, Fish J, and writing for majority of the Court, put the privilege thusly:

> The solicitor-client privilege has been firmly entrenched for centuries. It recognises that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone

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[10] R.S.C. 1985, c. C-5.
[11] *McClure*, *supra* note 1 at para. 28.
[12] *Ibid* at para. 29.
[13] *Ibid*.
[14] *Smith v. Jones,* [1999] 1 SCR 455, 1999 CanLII 674 (SCC) at para. 44 [*Jones*].

> can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between solicitor and client is a necessary and essential condition of the effective administration of justice.[15]

Binnie J. in *R. v. Campbell*[16], provided the following insight:

> The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional experience. Access to Justice is compromised where legal service is unavailable.[17]

Finally, Binnie J., and writing for the Court, provided that:

> Solicitor-client privilege is fundamental to the proper functioning of our legal system. The complex of rules and procedures is such that, realistically speaking, it cannot be navigated without a lawyer's expert advice. It is said that anyone who represents himself or herself has a fool for a client, yet a lawyer's advice is only as good as the factual information the client provides. Experience shows that people who have a legal problem will often not make a clean breast of the facts to a lawyer without an assurance of confidentiality "as close to absolute as possible"…
>
> It is in the public interest that this free flow of legal advice be encouraged. Without it, access to justice and the quality of justice in this country would be severely compromised.[18]

The very administration of justice, then, is in play when considering solicitor-client privilege. Simply put, justice cannot be administered if people with legal problems cannot "make a clean breast" of the facts of their particular case to their lawyer. Lawyers, in turn, cannot provide expert advice, expertise that requires years of legal training to acquire, if members of the general public cannot trust that what information they provide to their lawyer will be held in confidence.

Indeed, solicitor-client privilege has been recognised by the Supreme Court as being a principle of fundamental justice, and one which applies equally to both civil and criminal law.[19] One ought not to be surprised, then, that it is the privilege "which the law has been most zealous to protect and the most reluctant to water down by exceptions".[20]

It must be remembered, however, that the privilege belongs to the client, never the lawyer, and can only be asserted or waived by the client or through his or her informed consent.[21]

B. The Test

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[15] *Blank v. Canada (Minister of Justice),* [2006] 2 S.C.R. 319, 2006 SCC 39 (CanLII) at para. 26 [*Blank*].
[16] [1999] 1 S.C.R. 565, 1999 CanLII 676 (SCC).
[17] *Ibid* at para. 49.
[18] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health,* [2002] 2 S.C.R. 574, 2008 SCC 44 (CanLII) at para. 9 [*Blood Tribe*].
[19] *Maranda v. Richer*, [2003] 3 S.C.R. 193, 2003 SCC 67 (CanLII) at para. 57.
[20] *Jones, supra* note 13 at para. 50.
[21] *Lavallee, Rackel & Heintz v. Canada (Attorney General), White, Ottenheimer & Baker v. Canada (Attorney General); R. v. Fink,* [2002] 3 S.C.R. 209, 2002 SCC 61 (CanLII) at para. 39.

Justice Dickson, as he then was, outlined the criteria necessary to establishing the presence of solicitor-client privilege in the aforementioned *Solosky v. The Queen* as:

1) A communication between solicitor and client;
2) Which entails the seeking or giving of legal advice; and
3) Which is intended to be confidential by the parties.[22]

Although previously restricted to communications exchanged in the course of litigation, solicitor-client privilege has been extended in more recent years to cover any consultation for legal advice, whether litigious or not.[23] Generally, it will apply as long as the communication between the solicitor and client falls within the usual and ordinary scope of the professional relationship and, once established, it is considerably broad and all-encompassing.[24] The Court in *Descôteaux v. Mierzwinski* described the scope thusly:

> All information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality. This confidentiality attaches to *all* communications made within the framework of the solicitor-client relationship, to the lawyer as well as to his [or her] employees. It arises even before the retainer is established, as soon as the client takes the first steps in approaching the law firm. It may be invoked in any circumstances where such communications are likely to be disclosed without the client's consent.[25] [Emphasis added]

C. Exceptions to Solicitor-Client Privilege

As Cory J. observed:

> Just as no right is absolute so too the privilege, even that between solicitor and client, is subject to clearly defined exceptions. The decision to exclude evidence that would be both relevant and of substantial probative value because it is protected by solicitor-client privilege represents a policy decision. It is based upon the importance to our legal system in general of the solicitor-client privilege. In certain circumstances, however, other societal values must prevail.[26]

What, then, are those other societal values, ones that are so important that they must prevail over a principle of fundamental justice?

The Supreme Court of Canada has affirmed on many occasions that solicitor-client privilege should be set aside only in the most unusual of cases.[27] A rare exception, for example, is that:

> …no privilege attaches to communications criminal in themselves or intended to further criminal purposes…The extremely limited nature of the exception emphasises, rather than dilutes, the paramountcy of the general rule whereby

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[22] *Pritchard v. Ontario (Human Rights Commission),* [2004] 1 S.C.R. 809, 2004 SCC 31 (CanLII) at para. 15 [*Pritchard*].
[23] *Ibid.*
[24] *Ibid* at para. 16.
[25] [1982] 1 S.C.R. 860, 1982 CanLII 22 (SCC) at para. 862 [*Descôteaux*].
[26] *Jones, supra* note 13 at para. 51.
[27] *McClure*, *supra* note 1 at para. 46.

> solicitor-client privilege is created and maintained "as close to absolute as possible to ensure public confidence and retain relevance…[28]

Moreover, McLachlin C.J., as she then was, and Abella J. for the Court provided in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*[29] that:

> [S]olicitor-client privilege has been held to be all but absolute in recognition of the high public interest in maintaining the confidentiality of the solicitor-client relationship…The only exceptions recognised to the privilege are the very narrowly guarded public safety and right to make full answer and defence exceptions.[30]

It seems, then, that in the case of solicitor-client privilege that the categories of exception are restricted and, indeed, quite narrow.

D. The Wills Exception

So important is solicitor-client privilege that courts have long stipulated that it even survives the death of a client and enures to his or her next of kin, heirs, or successors.[31] An exception has developed, however, and in addition to those described above, that permits lawyers to give otherwise privileged information as evidence in wills cases.

The reasons for carving out this unique exception may seem readily apparent to some. Where a person seeks to set aside a will by alleging lack of capacity or undue influence, the documents and communications exchanged between the lawyer who drafted the will and the will-maker would be relevant and speak to the latter's capacity and intentions. That will-maker, however, may no longer be available to waive privilege and thus this highly relevant information may be otherwise lost to time.

The Supreme Court decision of *Goodman Estate v. Geffen*[32] provided reasons for allowing an additional exception to this otherwise near-sacrosanct species of privilege. Wilson J. provided that:

> The general policy which supports privileging such communications is not violated. The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were…In summary, it is, in the words of Anderson Surr. Ct. J. in *Re Ott*…"in the interests of justice" to admit such evidence.[33]

Though the privilege remains with the client and even survives his or her death, this exception was created as it was seen to benefit the client where they have passed away and are no longer available to clarify or shed light on their capacity or intentions at the time they executed their last will and testament.

It is important to note that in the context of a wills variation that the rationale expressed above will likely not apply. A line of decisions stemming from the Supreme Court of British Columbia speak

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[28] *Blood Tribe, supra* note 17 at para. 10.
[29] [2010] 1 S.C.R. 815, 2010 SCC 23 (CanLII) [*Criminal Lawyers' Association*].
[30] *Ibid* at para. 53.
[31] *Goodman Estate v. Geffen,* [1991] 2 S.C.R. 353, 1991 CarswellAlta 557 at para. 58 [*Geffen*].
[32] *Ibid.*
[33] *Ibid* at para. 65.

to the idea that an application to vary a will does not so much benefit a deceased client by attempting to ascertain their intentions, but rather seeks to thwart or defeat those intentions. As provided for by the Court in *Gordon v. Gilroy*[34]:

> The purpose of seeking confidential communications in this case is not for the purpose of determining the testator's true intentions or even the reasons for them…but rather for the purpose of attempting to defeat those intentions…I suspect that it would surprise and distress a client if told by the solicitor whom that person retained to give advice and to prepare a will concerning the disposition of lack of disposition to the client's children that after his or her death the solicitor would be obliged to disclose the discussions which the client had in confidence with the solicitor in the event the children were dissatisfied with the will and chose to commence an action…[35]

V. Litigation Privilege

A. Scope and Rationale

Litigation privilege protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation.[36] It is a class privilege, and one that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non-disclosure applies.[37] Classic examples of litigation privilege are the protection of the lawyer's file and the protection of oral or written communications between a lawyer and third parties, such as witnesses or experts. It, like solicitor-client privilege, is a common law rule of English origin, and was introduced to Canada in the 20th century as a privilege linked to solicitor-client privilege.[38]

Gascon J., in his English version of the Judgement of the Court in *Lizotte*, cited the oft-cited case of *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27, to explain the purpose of litigation privilege, once known as the "lawyer's brief" rule:

> Turning to the "lawyer's brief" rule, the reason for the rule is obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepared can be taken out of his file and presented to the court in a manner other than that contemplated when they are prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.[39] [Emphasis added by Gascon J.]

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[34] *Gordon v. Gilroy,* 1994 CarswellBC 792, 1994 CanLII 829 (BC SC).
[35] *Ibid* at paras. 24-25.
[36] *Lizotte v. Aviva Insurance Company of Canada,* [2016] 2 S.C.R. 521, 2016 SCC 52 (CanLII) at para. 1 [*Lizotte*].
[37] *Ibid* at para. 4.
[38] *Ibid* at para. 20
[39] *Ibid.*

Like solicitor-client privilege, litigation privilege serves to secure the effective administration of justice according to law.[40] More specifically, it ensures the efficacy of the adversarial process, and maintains a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate.[41]

Unlike solicitor-client privilege, litigation privilege is neither absolute in scope nor permanent in duration[42] as once the litigation has ended, there is little to no purpose in maintaining the privilege. As Fish J. explained in *Blank*:

> [T]he principle "once privileged, always privileged", so vital to solicitor-client privilege, is foreign to the litigation privilege…Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary".[43]

B. Distinguishable from Solicitor-Client Privilege

Since *Blank* was decided in 2006, it has been settled law that solicitor-client privilege and litigation privilege are distinguishable.[44] In addition, then, to the differences and similarities discussed above, Gascon J., and summarizing the court's findings in *Blank*, provided the following list of differences between litigation privilege and solicitor-client privilege:

1) The purpose of solicitor-client privilege is to protect a relationship, while that of litigation privilege is to ensure the efficacy of the adversarial process;
2) Solicitor-client privilege is permanent, whereas litigation privilege is temporary and lapses when the litigation ends;
3) Litigation privilege applies to unrepresented parties, even where there is no need to protect access to legal services;
4) Litigation privilege applies to non-confidential documents; and
5) Litigation privilege is not directed at communications between solicitors and clients as such.[45]

C. Exceptions to Litigation Privilege

To start, the Court has held that the exceptions that apply to solicitor-client privilege are all applicable to litigation privilege, given that solicitor-client privilege is the "highest privilege recognised by the courts".[46] For further clarity, these include the exceptions relating to public safety, to the innocence of the accused and to criminal communications.[47]

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[40] *Ibid at para. 24.*
[41] *Ibid*.
[42] *Blank*, *supra* note 14 at para. 37.
[43] *Ibid* at paras. 35 and 37.
[44] *Lizotte, supra* note 30 at para. 22.
[45] *Ibid.*
[46] *Ibid* at para. 41.
[47] *Ibid*.

One exception unique to litigation privilege, and one recognised by the Supreme Court in *Blank*, is one that relates to misconduct on the part of any side to the litigation. As Fish J. observed:

> The litigation privilege would not in any event protect from disclosure evidence of the claimant party's abuse of process or similar blameworthy conduct. It is not a black hole from which evidence of one's own misconduct can never be exposed to the light of day…Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed.[48]

Other exceptions may be identified in the future, but they will always be based on narrow classes that apply in specific circumstances given the fact that litigation privilege is considered a class privilege.[49] One final note is warranted before leaving litigation privilege:

> While solicitor-client privilege has been strengthened, reaffirmed and elevated in recent years, litigation privilege has had, on the contrary, to weather the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process.[50]

VI. Settlement Privilege

A. Scope and Rationale

In her reasons for the Court in *Sable Offshore Energy Inc. v. Ameron International Corp.*[51], Abella J. provided succinctly that the purpose of settlement privilege was to promote settlement.[52] She observed that:

> Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible…The settlement privilege created by the "without prejudice" rules was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed.[53]

With the above being said, it is important to note that settlement privilege extends beyond documents and communications expressly designated to be "without prejudice", for although the privilege is often referred to as the rule about "without prejudice" communications, those precise words are not required to invoke the privilege.[54] What matters instead, the courts have found, is the intent of the parties to settle the matter – any negotiations with this purpose are inadmissible.[55]

Cavanagh J., for the Ontario Superior Court of Justice in *Singh v. Progressive Conservative Party of Ontario et al,* observed that:

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[48] *Blank*, *supra* note 14 at paras. 44 and 45.
[49] *Lizotte, supra* note 30 at para. 42.
[50] *Blank*, *supra* note 14 at para. 61.
[51] [2013] 2 S.C.R. 623, 2013 SCC 37 (CanLII) [*Sable*].
[52] *Ibid* at para. 2.
[53] *Ibid* at para. 13.
[54] *Ibid* at para. 14.
[55] *Ibid.*

> Settlement privilege is a class privilege that protects communications between parties in furtherance of settlement even if the communications do not result in settlement. Where privileged communications are included in an affidavit or notice of motion, r. 25.11 requires that the privileged communications be struck from the record to protect the privilege…The privilege belongs to all parties of the communication, whether they made or received the communications. No single party to the communication can unilaterally waive the privilege.[56]

Finally, in *Sable*, the Court provided that:

> In my judgement this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and *whether or not settlement is reached*. This is because, as I have said, a party communicating a proposal related to settlement, or resulting to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.[57] [Emphasis added by Abella J.]

If a communication is protected by settlement privilege, then, the protection is against disclosure of the communication, including to strangers, and evidence of the communication is inadmissible.[58]

B. The Test

In *Hollinger Inc. (Re),* it was thought to be well established that the law will protect from disclosure communications made where:

1) There is a litigious dispute;
2) The communication has been made "with the express or implied intention it would not be disclosed in a legal proceeding in the event negotiations failed"; and
3) The purpose of the communication is to attempt to effect a settlement.[59]

C. Exceptions to Settlement Privilege

As settlement privilege is a class privilege, there is a *prima facie* presumption of inadmissibility. Exceptions will be found, however, "when the justice of the case requires it".[60]

As described by Abella J. in *Sable*, to come within those exceptions, one must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement."[61] The courts have decided throughout the years that such interests include allegations of

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[56] 2017 ONSC 4168 (CanLII), 2017 CarswellOnt 10387 at paras. 60 and 61 [*Singh*].
[57] *Sable, supra* note 45 at para. 16.
[58] *Singh, supra* note 50 at para. 62.
[59] 2011 ONCA 579 (CanLII), 107 OR (3d) 1 at para. 16 [*Hollinger*].
[60] *Sable, supra* note 45 at para. 12.
[61] *Ibid* at para. 19.

misrepresentation, fraud or undue influence, and preventing a plaintiff from being overcompensated.[62]

VII. Common Interest Privilege

A. Scope and Rationale

Once upon a time, if a privileged document was disclosed to a third party, regardless of how it was disclosed, then privilege in that document was lost.[63] Indeed, there are a number of authorities in support of the principle that once a privileged document is disclosed in any way to a third party the privilege is lost.[64] In *Derco*, the British Columbia Court of Appeal, quoting from Wigmore's *Evidence in Trials at Common Law*, stated the matter thus:

> The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but no more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are largely in the client's hands and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of privilege.[65]

There is now recognition by the courts, however, that privilege is not lost when an opinion was disclosed to another party with a common interest in completing a commercial transaction.

In *Maximum Ventures Inc. v. De Graaf*, the British Columbia Court of Appeal stated that:

> Recent jurisprudence has generally placed an increased emphasis on the protection from disclosure of solicitor-client communications including those shared in furtherance of a common commercial interest…Where legal opinions are shared by parties with mutual interests in commercial transactions, there is sufficient interest in common to extend the common interest privilege to disclosure of opinions obtained by one of them to the others within the group, even in circumstances where no litigation is in existence or contemplated.[66]

Common interest privilege, then, can be viewed as a sub-species of solicitor-client privilege that creates room for disclosure of a privileged document to third parties where once that was viewed as intolerable. This is, however, a new and emerging type of privilege. The Federal Court of Appeal only this year recognised common interest privilege as follows:

> There may well be "common interest privilege" available in circumstances where no litigation is in existence or even contemplated. In commercial transactions, legal opinions are often disclosed and shared among various parties to the transaction

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[62] *Ibid.*
[63] *Iggillis Holdings Inc. v. Canada (National Revenue),* 2018 FCA 51 (CanLII), 2018 CarswellNat 702 at para. 20 [*Iggillis*].
[64] *Derco Industries Ltd. v. A.R. Grimwood Ltd.,* 1984 CarswellBC 1498, [1984] B.C.W.L.D. 3122 at para. 3 [*Derco*].
[65] *Ibid.*
[66] 2007 BCCA 510 (CanLII), 247 BCAC 214 at para. 14 *[Maximum Ventures*].

> who all have a common interest in the successful completion of the transaction. In certain commercial transactions, this sharing of opinions is for the purpose of putting the parties on an equal footing during negotiations and in that sense the opinions are for the benefit of multiple parties even though the opinions may have been prepared for a single client. The parties in those circumstances would expect that the opinions would remain confidential as against outsiders and that mere disclosure in that context would not necessarily result in the privileged status of the legal opinions being lost.[67]

All told, the Federal Court of Appeal concluded on the strength of cases such as *Maximum Ventures*, quoted above, that common interest privilege "is strongly implanted in Canadian law and indeed around the common-law world".[68] On the strength of that conclusion, the Court decided that solicitor-client privilege is not waived when an opinion provided by a lawyer to one party is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions.[69] Moreover, it provided that:

> This principle applies whether the opinion is first disclosed to the client of the particular lawyer and then to the other parties or simultaneously to the client and the other parties. In each case, the solicitor-client privilege that applies to the communication by the lawyer to his or her client of a legal opinion is not waived when that opinion is disclosed, on a confidential basis, to other parties with sufficient common interest in the same transactions.[70]

Despite its being "strongly implanted in Canadian law", common interest privilege is still a relatively new and evolving species of privilege. As a result, its test and the exceptions to its applicability are not nearly as well defined and considered as the other species of privilege discussed in this paper. The courts will need time to consider it before a clearer understanding of its boundaries and applicability can be arrived at by the profession.

VIII. Duty of Confidentiality

A. Scope and Rationale

The duty of confidentiality owed by a lawyer to his or her client is as sacred, if not more so, than solicitor-client privilege. The duty itself is articulated by the Law Society of Ontario in rule 3.3-1 of its *Rules of Professional* Conduct:

> A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless:

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[67] *Iggillis, supra* note 59 at para. 38.
[68] *Ibid* at para. 40.
[69] *Ibid* at para. 41.
[70] *Ibid.*

a) expressly or impliedly authorised by the client;
b) required by law or by order of a tribunal of competent jurisdiction to do so;
c) required to provide the information to the Law Society; or
d) otherwise permitted by rules 3.3-2 to 3.3-6.[71]

One can see from this articulation, one issued by the body responsible for the self-regulation of lawyers and paralegals in Ontario, that the duty imposed is one that is broader in scope than privilege. This is not simply a rule of evidence, but rather a strict ethical onus that applies to every facet of a lawyer's professional relationship with his or her client.

The rationale informing the duty is much the same as that informing privilege. Simply put, a lawyer cannot render effective professional service to a client unless there is full and unreserved communication between them.[72] The very administration to justice, then, and in a similar vein to privilege, cannot function properly if a client cannot proceed on the basis that what he or she tells their lawyer will be held in strict confidence.

The lawyer owes the duty of confidentiality to every client, without exception, and the duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act.[73] The lawyer owes the duty even to those who are not clients in the strictest sense, but are rather simply seeking advice or assistance on a matter involving a lawyer's professional knowledge.[74] Unless the situation dictates otherwise, a lawyer should not discuss having even spoken with a person about a particular matter, let alone having been potentially retained.[75]

B. Exceptions to the Duty of Confidentiality

Just as no privilege is absolute, there are exceptions to the duty of confidentiality. These exceptions too, however, are narrowly guarded so as not to disrupt the larger social good that this duty aspires to serve.

The *Rules of Professional Conduct* outline when disclosure of confidential client information may be justified or permitted. To start, it notes that although confidential information shall be disclosed when required by law, the lawyer shall disclose no more information than is absolutely necessary.[76] This is an important foundational concept and informs the other grounds for justified or permitted disclosure. Even when required to disclose confidential information, a lawyer must still carefully guard that information and adhere to his or her duty as close as possible. Simply because a lawyer may be required to disclose by law does not mean that he or she can dispose of his or her duty entirely. Rather, these justified or permitted instances of disclosure permit a lawyer to bend the duty, but never break it.

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[71] Law Society of Ontario, *Rules of Professional Conduct* (1 October 2014; amendments current as to January 25, 2018), online: <https://www.lsuc.on.ca/lawyer-conduct-rules/> at r. 3.3-1. [*Rules of Professional Conduct*].
[72] *Ibid*.
[73] *Ibid*.
[74] *Ibid.*
[75] *Ibid*.
[76] *Ibid* at r. 3.3-1.1.

The following are the instances of justified or permitted disclosure that are permissible under the *Rules of Professional Conduct*:

> **Imminent Risk of Death or Serious Bodily Harm**
> **3.3-3** A lawyer may disclose confidential information, but must not disclose more information than is required, when the lawyer believes on reasonable grounds that there is an imminent risk of death or serious bodily harm, and disclosure is necessary to prevent the death or harm.[77]
>
> **Defence Against Allegations of Wrongdoing**
> **3.3-4** If it is alleged that a lawyer or the lawyer's associates or employees
>
> a) Have committed a criminal offence involving a client's affairs;
> b) Are civilly liable with respect to a matter involving a client's affairs;
> c) Have committed acts of professional negligence; or
> d) Have engaged in acts of professional misconduct or conduct unbecoming a lawyer
>
> the lawyer may disclose confidential information in order to defend against the allegations, but shall not disclose more information than is required.[78]
>
> **Collection of Fees**
> **3.3-5** A lawyer may disclose confidential information in order to establish or collect the lawyer's fees, but the lawyer shall not disclose more information than is required.[79]
>
> **Securing Legal Advice**
> **3.3-6** A lawyer may disclose confidential information to another lawyer to secure legal advice about the lawyer's proposed conduct.[80]
>
> **Detect and Resolve Conflicts of Interest**
> **3.3-7** A lawyer may disclose confidential information to the extent reasonably necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a law firm, but only if the information disclosed does not compromise the solicitor-client privilege or otherwise prejudice the client.[81]

Despite the Law Society of Ontario's efforts toward clearly articulating and defining the limits of the duty of confidentiality, one should never take it lightly. Lawyers will always be confronted with new and novel cases which may stretch the boundaries of their understanding. Perhaps it is best to sign off with J. Macdonald J.'s observation on the matter, so as to best ensure the reader departs with a proper appreciation of the duty's certain nuances:

> The concept of confidentiality is a chameleon, taking different legal hues from the circumstances in which it is found. It may arise in respect of information because of the nature of the information itself, because of the nature of the relationship

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[77] *Ibid* at r. 3.3-3.
[78] *Ibid* at r. 3.3-4.
[79] *Ibid* at r. 3.3-5.
[80] *Ibid* at r. 3.3-6.
[81] *Ibid* at r. 3.3-7.

> between the persons giving and receiving the information, or both. In some cases, confidentiality gives rise to an obligation resting on the recipient to maintain the secrecy in which the information was shrouded before it was communicated to the recipient. Secrecy may also be required of a recipient despite relatively widespread knowledge of the information. Confidentiality may also give rise to an obligation resting on the recipient not to disclose or to make use of commercial information even though that information is so widely known that it is public knowledge.[82]

IX: Conclusion

Though perhaps trite to say, lawyers must never forget that the very administration of justice depends on privilege and the duty of confidentiality for its proper functioning. To that end, lawyers should continually engage and re-engage with the relevant texts and jurisprudence so as not to disremember the important roles that privilege and the duty of confidentiality actually play in the legal profession. It is hoped that this paper has gone some way toward assisting those in attendance in that regard.

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[82] *Stewart* v. Canadian *Broadcasting Corp.,* 1997 CanLII 12318 (ON SC), 150 DLR (4th) 24 at para. 106.

Law Society of Ontario | Barreau de l'Ontario

TAB 11

THE SIX-MINUTE Estates Lawyer 2018

Proportionality as a Factor in Cost Awards

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May 3, 2018

cpd Continuing Professional Development

Proportionality as a Factor in Cost Awards

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> *"I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it…."*
>
> US Supreme Court Justice Potter Stewart in trying to explain what pornography was.

The meaning of "proportionality" in litigation is similarly elusive. While Judges tend to know it when they see it, and have identified it as a "critically important concept",[1] defining it in a meaningful way creates a tricky exercise for Courts.

A lot of excellent material has been written about costs in estate matters in recent years.[2] The limited purpose of this brief paper is to examine the interpretation of the concept of "proportionality" in determining costs in estate matters.

"Proportionality" is codified in the *Rules of Civil Procedure*:

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[1] *Grier (Litigation Guardian of) v Grier (Litigation Guardian of),* 2016 ONSC 6329 at para 40

2 Justin de Vries "Making Sense of Cost Awards in Estate and Guardianship Litigation: A Witch's Brew?"; Kimberly A Whaley "Discretion, Proportionality, Access to Justice and Other Considerations"; Jane E Martin: "Costs and the New Order – Clear as Mud" All from OBA Institute 2011

> *Proportionality*
>
> (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.[3]

How do the courts apply this concept when it comes to awarding costs?

In estate matters, the issue typically arises when costs are being awarded against an unsuccessful litigant or when costs are being sought to be paid from an estate, trust, or incapable person's property.

Courts are granted broad discretion to award costs by section 131 of the *Courts of Justice Act*.[4] Rule 57 of the *Rules of Civil Procedure* outlines additional factors which a Court may consider when rendering its decision on costs.

> 57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,
>
> (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
>
> (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
>
> (a) the amount claimed and the amount recovered in the proceeding;
>
> (b) the apportionment of liability;
>
> (c) the complexity of the proceeding;

[3] RSO 1990, Reg 194, r 1.04(1.1) ["*Rules of Civil Procedure*"]
[4] RSO 1990, c C 43

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs.[5]

In essence, proportionality in cost matters relates to the amount of costs sought in light of the issue at stake in the litigation. Many of the factors in section 57, however, inform and influence the overall concept of proportionality. The Ontario Divisional Court acknowledged proportionality's interconnectedness with such factors in *Culligan Springs Ltd. v Dunlop Lift Truck (1994) Inc.*[6]

> "The principles of proportionality and the reasonable expectations of the parties are, to a degree, intertwined. The principle of

[5] *Rules of Civil Procedure*, *supra* note 3, r 57.01(1)
[6] [2006] OJ No 1667 (Ont Div Ct)

> proportionality engages a more objective analysis given the issue and the amount in dispute, whereas the reasonable expectation principle requires the judge to examine the particular facts of the case and the subjective expectations of the parties."[7]

In *Booy-Bos v Douglas*,[8] the Ontario Superior Court addressed proportionality within the context of fairness and reasonableness. Its particular phrasing in this regard nearly conflates the three concepts.

> "The Court must, first and foremost, be fair and reasonable when exercising its discretion to award costs. Proportionality is of fundamental import."[9]

The *Toronto Estates List Practice Direction* addresses proportionality in a similar context of reasonableness:

> The following principles shall guide all proceedings conducted on the Estates List:
>
> - The time and expense devoted to a proceeding should be proportionate to what is at stake in the proceeding; and,
> - Co-operation, communication, civility and common sense should prevail amongst all parties and counsel. [10]

The Court has further clarified that the principle of proportionality exists harmoniously with the principle that a case should be determined on its merits. In *Grier (Litigation Guardian of) v Grier (Litigation Guardian of),* the Court stated the following:

> Rule 1.04(1) of the *Rules of Civil Procedure*, suggests that proportionality can be achieved without sacrificing determinations

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[7] *Ibid* at para 33
[8] *Booy-Bos v Douglas,* 2016 ONSC 7392
[9] *Ibid* at para 17
[10] Ontario Superior Court of Justice, "Consolidated Practice Direction Concerning the Estates List in the Toronto Region" (1 July 2014), Part II at 2, online: <http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/estates>

> on the merits… [these] are not mutually exclusive concepts, but ones that work in tandem to achieve just results.[11]

By definition, proportionality ultimately balances two factors:

1. the issue at stake; and

2. the resources expended.[12]

Issue at Stake:

Where proportionality is invoked, Courts have referred to the amount of money in issue.

> "…the concept of proportionality must be kept in mind when Costs are being fixed. In the case before me, the damages being claimed against the Defendants are monumental."[13]

> "The amount of the estate herein was modest - in the range of $40,000. Thus, even if I had awarded costs on a substantial indemnity basis, I would not have awarded more than $15,000 or $16,000 in order to comply with the proportionality requirement"[14]

Importantly, however, the Court has noted that proportionality "should not be used as a sword to undercompensate a litigant" when costs have been legitimately incurred.[15]

With respect to the importance of a given issue, Courts have assessed this factor on a subjective, rather than an objective, basis:

> "The estate of his mother and father was a very significant matter for him and the Redcar home was its most significant asset. It represented financial security for Lynn Reid in his old age. Accordingly, the issue at stake in the litigation was very important

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[11] *Grier, supra* note 1 at para 42
[12] *David v TransAmerica Life Canada*, 2016 ONSC 1777 at para 20
13 *Lipsitz v Ontario*, 2010 ONSC 5232 at para 14
14 *Borisko v Borisko*, 2010 ONSC 3760 at para 9
[15] *Cataraqui Cemetery Company v Cyr*, 2017 ONSC 7359 at para 14

> to Lynn Reid and the amount of money at stake was very significant to him."[16]
>
> "…there is no issue that the outcome of these proceedings was exceedingly important to the parties, so important, that the issue of ownership over … the appellant's property has lasted over twenty years and survived the appellant who sadly passed away only about a month after this appeal was argued."[17]

Further, courts have recognized that the amount recovered is not the only component of proportionality.

> "I observe that, while proportionality is a principle to consider, and that I have certainly considered the relationship of the cost claimed to the amount of the award throughout this decision, the principle of proportionality does not create a cap on the quantum that can be allowed for costs. Indeed, in *Jomar Cattle Feeders Inc. v. Murphy*, *supra*, the damage claim was for $53,274.96, the award was $49,997.10 less a set off, the cost claim was for $95,641.50, and the cost award was $58,000.00. I am aware of many other cases in which a court, for various reasons, have awarded costs which were higher than the damage award." [18]

Similarly, in the recent case of *Grieves v Parsons*,[19] the Ontario Superior Court stated the following with respect to assessing proportionality in costs:

> "The total costs must be proportional to the amount awarded, but costs may exceed the award of damages in appropriate circumstances. "Proportionality should not override other considerations, and determining proportionality should not be a purely retrospective inquiry based on the award": *Doyle v Zochem Inc.*, 2017 ONSC 920, at para. 26."[20]

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16 *Reid v Reid*, 2010 ONSC 3800 at para 16
17 *Barbour Estate v Bailey,* 2016 ONCA 334 at para 11
18 *Volchuk Estate v. Kotsis*, 2007 CarswellOnt 8027 at para 26, 36 E.T.R. (3d) 239
19 2018 ONSC 1905 [*Grieves v Parsons*]
20 *Ibid* at para 72

The complexity of the issues can also inform the Court's determination of whether a given quantum of costs is proportionate. In *Barbour Estate v Bailey,*[21] the Ontario Court of Appeal stated:

> Certainly, a large cost award as claimed by the parties is not unreasonable, unfair or disproportionate in light of the following factors: the first trial lasted 19 days and the second trial took 13 days; there were numerous pre-trial motions and other proceedings; complicated and technical expert evidence was presented by both sides; and there were a myriad of difficult legal issues fiercely argued by the parties before both judges.[22]

Notably, *Barbour Estate* suggests that while complex issues may influence the proportionality of a larger cost award, a party's actions in the context of these issues can also affect proportionality. The Court in *Barbour Estate* made the following comments with respect to the respondent's behaviour in the matter:

> "… the respondent's actions in these proceedings were neither proportionate nor reasonable. While the amount of costs claimed is understandable in the circumstances of this case, it is truly regrettable that the proceedings carried on to this point … had the respondent accepted [the appellant's 1995 offer] or a similar offer, all of these proceedings could have been avoided. In the face of the correspondence from the appellant's lawyers, the respondent never questioned but stubbornly maintained the erroneous position that she owned the entirety of [the property at issue]."[23]

This concept will be addressed further under the "Resources Expended" section of this paper.

In guardianship cases, courts recognize the importance of non-financial interests being at stake.

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[21] *Barbour Estate v Bailey, supra* note 17
[22] *Ibid* at para 10
[23] *Ibid* at para 12

> "…Although I recognize that in cases like this where the competency and guardianship of a vulnerable elderly person is in issue, that there can often be issues that transcend monetary values, counsel and their clients must always keep a proper perspective."[24]

It is a rare case indeed where the court says that the issue at stake was unimportant to the parties.

Resources Expended

Rather than focussing on the subjective importance of an issue to the litigants, Courts instead focus primarily on the resources expended in applying the concept of proportionality.

> "Having said all that, the bottom line is that the proposed costs are excessive. They are excessive from two perspectives: costs of this magnitude will make litigation inaccessible as a method of dispute resolution; costs of this magnitude are also disproportionate to the value of the legal work necessary to represent a client in this dispute. If counsel do not use more restraint in deciding how much to invest in litigation, they will put both the bar and the Courts out of business which will profoundly harm the public whom we both serve."[25]

> "From my perspective, if lawyers wish to expend such grossly inordinate amounts of billable hours on relatively routine cases, they may feel free to do so subject to their client's approval, but they cannot expect judges to encourage such inefficient expenditures of time when their costs are to be fixed following trial. Judges and assessment officers have a duty to fix or assess costs at reasonable amounts and in this process they have a duty to make sure that the hours spent can be reasonably justified. The losing party is not to be treated as a money tree to be plucked willy nilly by the winner of the contest."[26]

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24 *Ziskos v Miksche*, 2007 CarswellOnt 7162 (Ont SCJ) at para 61
25 *Buchanan v Geotel Communications Corp*, [2002] OJ No 3063 at paras 10-11 (Ont SCJ)
26*Pagnotta v Brown* 2002 CarswellOnt 2666 at paras 24-25 (Ont SCJ)

The Ontario Superior Court has acknowledged that both the actual resources expended, and the resources that could have reasonably been expected to have been expended are important factors in determining proportionality:

> "The concept of proportionality… includes at least two factors:
>
> (a) The amount claimed and the amount recovered in the proceeding; and,
>
> (b) The amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed"[27]

Re Medynski Estate[28] provides an example. Although in *Medynski,* the Court found that the defendant/objector was liable to pay costs to the Applicant, who claimed costs in excess of $260,000.00, the Court limited the amount payable to $69,000.00 plus disbursements. The Court reasoned:

> [The Defendant] and her counsel could not have reasonably foreseen that this passing of accounts, a summary proceeding, would generate costs in excess of $260,000.00 on the part of the trustee…
>
> A beneficiary who is considering making objections on a passing of accounts would certainly not imagine the possibility of a costs award against herself/himself requiring the payment, if unsuccessful, in excess of $260,000.00. An award of that magnitude becomes an access to justice issue. It would have a chilling effect on most potential objectors.
>
> … Given all of the foregoing, with particular emphasis on reasonableness, fairness, proportionality and the reasonable expectation of the unsuccessful party, I have concluded that an award of costs … must be limited to $69,000.00 plus disbursements of $7,325.72. Any amount beyond that would be both excessive and unreasonable.[29]

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[27] *David, supra* note 12 at para 18
[28] *Re Medynski Estate*, 2016 ONSC 4257
[29] *Ibid* at paras 18, 21, 23

As the Court highlighted in *Barbour Estate*,[30] the losing party's behaviour can influence proportionality, particularly if this behaviour necessitated the expenditure of excess resources. Unreasonable actions by one party can tip the scale for costs in favour of the other party. The Ontario Superior Court of Justice addressed such a principle in *Cimmaster Inc. v Piccione:*

> "…The principle of proportionality is important, and must be considered by any judge in fixing costs... However, in my view, the principle of proportionality should not normally result in reduced costs where the unsuccessful party has forced a long and expensive trial. It is cold comfort to the successful party, who has been forced to expend many thousands of dollars and many days and hours fighting a claim that is ultimately defeated, only to be told that it should obtain a reduced amount of costs based on some notional concept of proportionality. In my view... the concept of proportionality appropriately applies where a successful party has over-resourced a case having regard to what is at stake, but it should not result in a reduction of the costs otherwise payable in these circumstances."[31]

A major factor considered by the Court in determining whether excess resources were applied is the delegation to less expensive professionals:

> "That said, there is a corollary to the acceptance of hourly rates reflecting Downtown Toronto market conditions. The principle of proportionality, as applied to the assessment of costs, requires a demonstration by the party seeking an award of costs that reasonable efforts were made to delegate, where feasible, work from a higher-billing lawyer to a lower-billing one, or to articling students and law clerks. As is evident from the Bill of Costs, no such delegation occurred in this case. Of the 160.3 hours of legal work recorded on the Bill of Costs, [senior counsel], the senior lawyer, performed 143 of them. No doubt that resulted in part from [senior counsel]'s familiarity with the file since he would have acted for the respondent had the matter gone to trial. It may well be that the client,

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[30] *Barbour Estate*, *supra* note 17

31 *Cimmaster Inc v Piccione*, 2010 ONSC 846 at para 19

> the estate trustee, desired [senior counsel] to perform virtually all of the work on the file. Nevertheless, when it comes to a court considering the reasonableness of a cost award *against an opposing party*, a court should give effect to the principle of proportionality by reducing the costs sought where a party has not taken reasonable steps to delegate work to lower billing time-keepers. Rare is the case which would necessitate the singular attention of senior counsel, and this certainly is not one of those rare cases."[32]

In *Tarantino v Galvano,*[33] the Ontario Superior Court addressed proportionality of costs in circumstances where the behaviour of each of the party to the proceeding contributed equally to the amount of costs at issue. The Court stated:

> While there are some other minor Estate assets, it is clear that the fees of this litigation will deplete the Estate. The only beneficiaries of the Estate are the three participants in this lawsuit. They collectively decided, by the way they chose to advance this litigation, to incur fees that deplete the Estate. This cannot be proportionate to the amounts and issues raised in the proceeding.[34]

The Applicants in *Tarantino* sought costs in excess of $343,000.00 and $292,000.00 on a substantial and partial indemnity basis, respectively. The Respondent sought costs in excess of $172,000.00 on a partial indemnity basis. Ultimately in *Tarantino*, the Court awarded costs exclusively to the Applicants in the sole amount of $53,000.00 from the Estate, to compensate for the disbursement costs of an expert report. In rendering this decision, the Court identified "the lack of proportionality, the fact that the three Estate Trustees are the sole beneficiaries, unreasonableness, and self-interest" as being important elements of the holding.[35]

In *Re Kaptyn Estate,*[36] the Court began its decision on costs as follows:

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[32] *Pytka v Putka Estate*, 2010 ONSC 6406 at para 21
[33] *Tarantino v Galvano*, 2017 ONSC 6635
[34] *Ibid* at para 18
[35] *Ibid* at para 24
36 *Re Kaptyn Estate*, 2011 ONSC 542

> "$4,435,050.18 - that is the total amount of costs sought by the parties to these two consolidated applications requesting the opinion, direction and advice of the court on the interpretation of the two multiple wills of the testator, the late John Kaptyn (collectively the "Interpretation Applications"). "

One need not even read the rest of the decision to predict that the Court felt that the cost claims were disproportionate to the issue at hand.

CONCLUSION

Estate cases are rarely only about the money, and often have as much to do with family memory as family money. Nevertheless, Courts in Estates matters routinely pay at least lip service, and often more, to the concept of proportionality in awarding costs.

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TAB 12

THE SIX-MINUTE Estates Lawyer 2018

The Estate Solicitor as Estate Trustee: Conflicts and Related Issues

Prepared and presented by:
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cpd Continuing Professional Development

The Estate Solicitor as Estate Trustee: Conflicts and Related Issues

by Mari Maimets and Brendan Donovan, Wagner Sidlofsky LLP*

Contents

A solicitor retained by an estate trustee is the solicitor for the estate trustee and not for the estate.[1] Where a solicitor *is* the estate trustee, she will likely end up wearing at least two hats: first, as the executrix of the estate, with duties to the beneficiaries and to the estate's creditors, and second, as legal advisor to herself and to potential co-trustees. In some instances, the solicitor-trustee is also the lawyer who drafted the will appointing herself as executrix and fixing her own compensation. It is easy to see how the person acting in such a multiplicity of roles might find herself in a conflict of interest, even if acting in good faith. As Mr. Justice Myers recently observed:

> "Such is the insidiousness of conflict of interest that people with no doubt as to their own *bona fides* can allow themselves to commit significant wrongdoing without thinking that they are doing anything wrong."[2]

It is presumably for this reason that the Law Society of Ontario ("LSO") *Rules of Professional Conduct* prohibit a lawyer from acting for a client where there is "conflict of interest,"[3] which it defines as a substantial risk rather than any actual disloyalty:

> "[T]he existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer."[4]

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[1] *Smith, Re*, [1972] 2 OR 256, 1972 CarswellOnt 462 at para 38 (Surr Ct), citing *Sharp v Lush* (1879), 10 Ch D 468; *Bott Estate (Trustee of) v Macaulay* (2005), 75 OR (3d) 422, 2005 CarswellOnt 3743 at para 19 (Sup Ct) [*Bott Estate*].

[2] *Mayer* v. *Rubin*, 2017 ONSC 3498 at para. 13.

[3] Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2000 (as amended), s 3.4-1.

[4] *Ibid*, s 1.1. See also the commentary under Rule 3.4-1: "Even a well-intentioned lawyer may not realize that performance of his or her duties has been compromised. Accordingly, the rule addresses the risk of

The first section of this paper summarizes the general principles that govern estate trustees and estate solicitors, and the relationship between them, with a focus on the principles surrounding compensation. The second section of the paper provides several case studies that illustrate how the general principles have been considered and applied in circumstances where solicitor-trustees have faced allegations of acting in a conflict of interest or having breached their fiduciary obligations. The paper concludes with an analysis of the factors that courts or tribunals will pay particular attention to when called upon to decide whether a solicitor-trustee has acted in a conflict of interest, or whether the solicitor-trustee is entitled to compensation.

General principles

This section focuses on the one issue most likely to attract allegations that a solicitor-trustee is acting in a conflict of interest: compensation.

A. Source of entitlement to compensation

In Ontario, estate trustees may take compensation for their work based either on the provisions of the *Trustee Act*, or on the terms of the testamentary instrument. Section 61 of the *Trustee Act* provides that, unless a trustee's allowance is fixed by the instrument creating the trust,[5] the trustee is entitled to "such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice."[6] Where the trustee is also a solicitor who has rendered necessary professional services to the estate, section 61(4) of the *Trustee Act* provides that the allowance "shall be increased by such amount as may be considered fair and reasonable in respect of such services."

Section 61(4) of the *Trustee Act* is not the only mechanism by which a solicitor can obtain payment for legal services rendered to the estate. She may also issue a bill for legal services, which is payable according to the terms of the solicitor's retainer.[7] Absent any special agreement between the estate trustee and the solicitor, the solicitor is generally only entitled to charge on the usual *quantum meruit* basis.[8] Solicitor-trustees should advise co-estate trustees of the dispute resolution methods available to them regarding any legal fees.[9]

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impairment rather than actual impairment. The expression 'substantial risk' in the definition of 'conflict of interest' describes the likelihood of the impairment, as opposed to its nature or severity. A 'substantial risk' is one that is significant and plausible, even if it is not certain or even probable that it will occur."

[5] RSO 1990, c T23, s 61(5).

[6] *Ibid*, s 61(1). The general rule of thumb which courts apply to this provision of the *Trustee Act* is that executors are entitled to 2.5% of the estate's capital and revenue receipts and disbursements and, where justified, a 0.4% annual care and management fee, subject to adjustment on the basis of five factors set out in *Toronto General Trusts Corp v Central Ontario Railway* (1905), 6 OWR 350, 1905 CarswellOnt 449 (Ont Weekly Court) [*Toronto General Trusts*] (see *Re Jeffery Estate* (1990), 39 ETR 173, 1990 CarswellOnt 503 at para 16 (Ont Surr Ct)).

[7] See *Re Schroeter Estate* (2001), 57 OR (3d) 8, 2001 CarswellOnt 4351 at paras 26-27 (Sup Ct).

[8] *Bott Estate*, *supra* note 1 at para 35.

[9] Jennifer Jenkins et al, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* (Toronto, ON: Thomson Reuters Canada Limited, 2014) (loose-leaf revision updated 2014, release 13), ch 7 at 7-8.

The estate trustee, and not the estate, is personally liable to the solicitor for the solicitor's fees, and may challenge those fees by way of an assessment under the *Solicitors Act*.[10] Alternatively or in addition, the estate trustee's claim for reimbursement for solicitor's fees is reviewable by a court on a passing of the estate trustee's accounts.[11] Interested parties who challenge the compensation or fees payable to a solicitor acting as estate trustee and estate solicitor may also challenge the enforceability of a compensation provision in the testamentary instrument on the basis of unconscionability or on the basis that the testator had been unduly influenced or had lacked the requisite understanding of the provision when the testamentary instrument was executed.[12] Where the solicitor-trustee was also the drafter of the testamentary instrument, a challenge is more likely, due to risk that the solicitor, knowing she was to be appointed as estate trustee, preferred her own interests to the interests of the testator when drafting the compensation provision.

B. Nature of work giving rise to compensation

Where the trust instrument does not set out the compensation payable to the solicitor-trustee, the solicitor-trustee is only entitled to charge her professional rate for the legal services she renders to the estate (and not for "those services not actually professional in nature").[13] In other words, she will be entitled to receive executor's compensation, and not solicitor's fees, with respect to executor's work (work such as "writing ordinary letters, attendances and paying premiums on policies, attending at the bank to make transfers, and other ordinary attendances; services which an ordinary layman ought to do...").[14] A body of case law has developed that delineates the roles of estate solicitors as compared with estate trustees.[15]

As stated by Maguire J.A. of the Saskatchewan Court of Appeal in *Re McIntosh*:

> "It has long been established that a professional man, be he solicitor, accountant or otherwise, will not be granted compensation on the basis of professional charges for services rendered in respect of those services not actually professional in nature, which an executor not being a solicitor, could perform without legal advice …"[16]

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[10] RSO 1990, c S15.
[11] *Bott Estate*, *supra* note 1 at paras 20-21; *Re Smith*, *supra* note 1 at para 38.
[12] Such a challenge was made, unsuccessfully, in *Cheney v Byrne*, *infra* note 31.
[13] *Re McIntosh* (1964), 46 DLR (2d) 416, 1964 CarswellSask 106 at para 11 (Sask CA); for a case in which the trust instrument specifically provided that a solicitor-trustee was entitled to his hourly rate even for services not within the normal sphere of professional services, due to a clear provision in the will, see *Re Rustig Estate*, 2002 NSSC 210, 2002 CarswellNS 369.
[14] *Re Smith*, *supra* note 1 at para 38, citing *Sharp v Lush*, *supra* note 1. See also *Rooney Estate v Stewart Estate* (2007), 161 ACWS (3d) 177, 2007 CarswellOnt 6560 at paras 17-24 (Ont Sup Ct).
[15] For more detailed reading on this topic, see Suzana Popovic-Montag, "Delineation of Roles Between Lawyers and Estate Trustees" (Paper delivered at The Six-Minutes Estate Lawyer 2017, Law Society of Upper Canada, 8 May 2017).
[16] *Re McIntosh*, *supra* note 13 at para 11 (CA).

Or, as more colourfully put by Justice Sheard in *Re Taafe Estate*:

> "[T]he trustee appears to charge his professional salary rate to his time spent as trustee. That is wrong in principle, just as it would be wrong for any trustee, whether a lawyer, surgeon or major league baseball player to be paid compensation at what may happen to be the earning rate achieved in the performance of his professional skills or talents."[17]

A solicitor "is under a clear duty scrupulously to keep separate and apart the work he does for the estate, as represented by the executor, and the work he does which the executor could and should have done himself."[18] A solicitor who acts both as executor and as solicitor for the estate must keep separate dockets for her legal work (which is usually compensable at higher rates) and for her executor's work (which, absent a contrary provision in the testamentary instrument, is subject to compensation in the ordinary course).[19] The solicitor bears the onus to satisfy the court that there has been no duplication of services in the accounts for legal services and the accounts for executor's work, and if the solicitor cannot provide a satisfactory breakdown of the services performed, her account may be disallowed, in whole or in part.[20] If a solicitor (or her firm) performs administrative or executor's work on behalf of the executor, the costs of these services may be deducted from the executor's compensation,[21] and (unless the testamentary instrument otherwise provides)[22] are subject to the approval of the court.

C. Timing of compensation

Estate trustees may "pre-take" compensation if the testamentary instrument permits it, the court approves it, or the beneficiaries of the estate consent. If the executor "pre-takes" compensation improperly, he or she must, at the very least, pay interest to the estate with respect to the amount taken out of the estate.[23]

The next section will address how the foregoing general principles have been applied in cases dealing with alleged conflicts of interest or breaches of fiduciary duty by solicitor-trustees.

Three Case Studies

Law Society of Upper Canada v. Paul John Anderson

This first case study is instructive because of its analysis of the issue of whether the estate solicitor had acted in a conflict of interest, contrary to the *Rules of Professional Conduct*. *Law*

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[17] *Re Taaffe Estate* (1992), 36 ACWS (3d) 709, 1992 CarswellOnt 2039 at para 40 (Ont Ct J (Gen Div)).
[18] *Re Briand Estate* (1995), 10 ETR (2d) 99, 1995 CarswellOnt 1123 at para 27 (Ont Ct J (Gen Div)).
[19] See *Schnurr v Dunbar* (2000), 98 ACWS (3d) 1142, 2000 CarswellOnt 2740 (Ont Sup Ct) at para 33.
[20] *Ibid* at paras 33 and 36.
[21] See *Re Mountain* (1982), 15 ACWS (2d) 273, 1982 CarswellOnt 3840 at paras 19 and 29 (Ont Sup Ct); *Re Freeman Estate* (2007), 34 ETR (3d) 157, 2007 CarswellOnt 5654 (Ont Sup Ct).
[22] See e.g. *Re Conrade Estate* (2005), 21 ETR (3d) 140, 2005 CarswellOnt 7058 at para 30 (Ont Sup Ct).
[23] See *Re Goldlust Estate* (1991), 44 ETR 97, 1991 CarswellOnt 546 at para 39 (Ont Ct J (Gen Div)).

Society of Upper Canada v. Paul John Anderson ("*LSUC v. Anderson*")[24] dealt with a Law Society complaint by the daughter of a deceased testatrix. The daughter (referred to in this subsection as the "Trustee") had been appointed as sole executrix and trustee under the will. She and her sister were each one-half residual beneficiaries of the will. The Trustee retained the lawyer (referred to in this subsection as the "Lawyer") to provide legal and administrative services for the estate; as such, the Trustee delegated some of her executrix's duties to the Lawyer.

The Lawyer's impugned conduct included the following actions, which were alleged to constitute acting in a conflict of interest:

- Without making full disclosure to the Trustee of the Lawyer's interest, or ensuring that the Trustee received independent legal advice, the Lawyer had the Trustee enter into a compensation agreement with ABB Inc., a private corporation he controlled, which provided non-legal services in estate administration. Pursuant to the terms of the compensation agreement, ABB Inc. would charge the Trustee 3% of capital and 3% of revenue for "general services performed in [the Trustee's] capacity as the executor, trustee, co-executor or co-trustee of the estate",[25] and would pre-take compensation without obtaining the approval of the beneficiaries and prior to any court passing of accounts (despite there being no provision in the will for the pre-taking of compensation);
- Without authorization from the Trustee, the Lawyer set up an estate account, into which he transferred substantially all of the estate's liquidated assets, and out of which he made an unauthorized payment of $45,571.38 to ABB Inc.;
- Prior to issuing his account for legal services, the Lawyer took payment from the estate in the amount of $18,546.32 for two accounts, which included his and his law clerk's time for performing executor's work. The hearing panel found that there was "enormous duplication" between the estate administration services reflected in the legal accounts and the services purportedly provided to the estate by the ABB Inc. in exchange for the $45,571.38 payment the Lawyer had taken under the compensation agreement;
- The Lawyer withdrew $18,000 from trust on account of his legal bill for the Trustee without ensuring that he had earned the fees and delivered an account; and
- The Lawyer failed to maintain proper books and records by (among other things) failing to include the estate bank account in his monthly trust reconciliations for his law practice.

The hearing panel of the Law Society of Upper Canada (as it then was) found that the Lawyer had preferred his own interests over those of his client, the Trustee, leaving the Trustee exposed to risk of personal liability to the estate.

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[24] 2009 ONLSHP 13, 2009 CarswellOnt 17196, additional reasons at 2009 ONLSHP 70[*LSUC v Anderson* (2)], 2009 CarswellOnt 17195, aff'd 2010 ONLSAP 4.

[25] This was contrary to the general rule of thumb that executors are entitled to 2.5% of the estate's capital and revenue, subject to adjustment on the basis of the five factors set out in *Toronto General Trusts*, *supra* note 6.

As the sanction for his serious misconduct, the Lawyer's license was suspended for seven months. He was also ordered to pay the Law Society's costs in the amount of $50,000.[26]

Fareed v. Wood

Fareed v. Wood dealt with allegations that the solicitor-trustee (and attorney for property) had breached his fiduciary duty to the deceased during her lifetime and to the beneficiaries of her estate following her death.[27] Mr. Wood had been the deceased's solicitor for many years prior to her passing. At the age of 83, the deceased appointed Mr. Wood as her attorney, and her last will and testament, previously executed, appointed him as the executor and trustee for her estate. After the deceased's death, Mr. Wood did not apply for a certificate of appointment of estate trustee or administer the estate in "any meaningful way", despite numerous requests by the deceased's stepdaughter, Ms. Fareed, and her solicitor.[28] Ms. Fareed brought an application to compel Mr. Wood to pass his accounts pursuant to both the *Estates Act*[29] and the *Substitute Decisions Act, 1992*[30] and, after the statement of accounts was delivered, she served a notice of objection to the accounts in which she challenged both the accounts and the compensation Mr. Wood had claimed and pre-taken.

A chartered accountant prepared the accounts. These accounts disclosed over $275,000 in identified disbursements and over $300,000 in unidentified disbursements from the estate over the course of approximately seven years, such that the remaining balance of the estate was under $4,000. Mr. Wood had not maintained any records with respect to the estate account, and numerous bank documents were no longer available as they exceeded the banks' usual retention period. The estate had been depleted to the extent that insufficient funds remained to pay testamentary gifts. Considerable amounts had been transferred to a non-party during the deceased's lifetime, without explanation. Without going so far as to find Mr. Wood directly responsible for the transfers of funds to the non-party, the court found that, at the very least, Mr. Wood had failed to make any effort to prevent the depletion of funds.

The court found that Mr. Wood had breached his fiduciary duty to the deceased while she was alive. The court held that his duty arose whether or not the deceased was competent or incompetent, and went on to find that Mr. Wood had a duty, as attorney for property, to ensure that the deceased's property not be disposed of (even by herself), during her lifetime, to the extent of frustrating a testamentary gift.

In his time records and invoices, Mr. Wood documented services (such as monitoring bank accounts, conferring with an investment advisor, transferring funds, and attending at the bank) which were more appropriately characterized as services as attorney rather than services as a solicitor. His files contained inadequate explanations to justify the legal accounts for which he

[26] *LSUC v Anderson* (2), *supra* note 24.
[27] *Fareed v Wood* (2005), 140 ACWS (3d) 225, 2005 CarswellOnt 2572 (Ont Sup Ct).
[28] *Ibid* at paras 5-6.
[29] RSO 1990, c E21.
[30] *Supra* note 5.

had taken compensation. The court found also that Mr. Wood had breached his fiduciary duty to the deceased to keep accurate records and to clearly differentiate his services as solicitor from his services as attorney. The court found, further, that Mr. Wood had also fallen below the lowest standard of a solicitor, failing utterly to act in the best interests of his client.

Mr. Wood had pre-taken payment in the amount of $130,373 in the seven years in which he acted as the deceased's attorney. As noted above, his invoices did not distinguish between the services he provided as solicitor and those he provided as attorney. The court found that given the simplicity of the deceased's financial situation prior to her death, the time Mr. Wood had docketed, and the fees he had charged, were "unconscionable" and "shocking". The court declined to approve the compensation that Mr. Wood had pre-taken, and held that he was required to repay the entirety of his pre-taken compensation of $130,373 to the estate, together with pre-judgment interest. The court stated at the conclusion of its decision that Mr. Wood might also be liable to the estate for payments made by the deceased to others, though the issue had not been litigated.

Cheney v. Byrne (Litigation Guardian of)

The case of *Cheney v. Byrne (Litigation Guardian of)* ("*Cheney* v. *Byrne*") dealt with claims by the estate's solicitor-trustees for compensation at solicitors' rates in circumstances where the trust instrument (the will) expressly permitted this.[31] The Public Guardian and Trustee (the "PGT") objected to the compensation scheme on behalf of the deceased's incapable widow, for whom the solicitor-trustees were the attorneys for personal care and the court-appointed guardians of property.[32] The PGT argued, among other things, that the solicitor-trustees had placed themselves into a conflict of interest with the testator in devising the compensation scheme set out in the will, and had failed to ensure that he obtained independent legal advice with respect to the compensation scheme. The PGT argued that the compensation scheme ought to be struck down on the basis of undue influence and/or unconscionability. On the basis of these allegations, the PGT challenged the compensation pre-taken and claimed by the solicitor-trustees.

The deceased and his wife had no children and no friends who were willing to take on the role of estate trustee for the deceased, and the deceased had specifically requested that the solicitors act as his estate trustees. According to one of the solicitor-trustees (who had drafted the will), the issue of trustee compensation had been specifically negotiated because the solicitor-trustees would not have taken on the role absent the testator's agreement to compensate the estate trustees at their professional hourly rates as solicitors and to permit

[31] *Cheney v Byrne (Litigation Guardian of)* (2004), 9 ETR (3d) 236, 2004 CarswellOnt 2674 (Ont Sup Ct) [*Cheney v Byrne*].

[32] Prior to the deceased's death, the widow had been found capable of executing a continuing power of attorney for personal care, but not a continuing power of attorney for property. After the deceased's death, the solicitor-trustees assumed the deceased's obligations as attorneys for personal care for his widow, and they were also appointed as guardians of the widow's property. The court found that the solicitor-trustees had done an exemplary job as the widow's attorneys/guardians.

them to pre-take compensation. The deceased's last will and testament contained the following clauses dealing with trustee compensation:

> *Executor's Compensation*
> I DECLARE that any Trustee of my Will who is a barrister-at-law or solicitor shall be entitled to charge and to be paid all professional fees or other charges for any business or act done by her or her firm in relation to my estate or to the trusts declared by my Will or by an [sic] Codicil to it in addition to such compensation and allowances as she would be entitled to receive, were she not a barrister-at-law or solicitor, for acting as one of my Trustees.
> I AUTHORIZE my Estate Trustee to take and transfer at reasonable intervals from the income and capital of my estate amounts on account of compensation which my Estate Trustee reasonably anticipates will be requested at the end of the accounting period in progress, either upon the audit of the estate accounts or on approval by the beneficiaries of my estate. If the amount subsequently awarded on Court audit or agreed to by the beneficiaries is less than the amount so taken, the excess shall be repaid to my estate without interest.[33]

The court accepted the drafting solicitor-trustee's evidence that she had specifically explained to the testator the difference between compensation calculated according to the foregoing paragraphs, as compared to compensation calculated according to the customary percentages, and that the testator had agreed to the alternative compensation scheme. Although the testator had not received independent legal advice with respect to the compensation clause, the court found that the testator, who had been a senior executive with a life insurance company until his retirement, was "a business person of great experience, who can be assumed to have known the implications of the simple compensation clause".[34] The court found no evidence of undue influence, and found that there was no inequality of position between the solicitor-trustees and the deceased, which defeated the unconscionability argument.

The court went on to find that the administration of the deceased's estate was of unusual difficulty and complexity. The deceased had a large and varied investment portfolio, which he had managed himself in an extremely disorganized fashion. Share certificates and other important documents were intermingled and hidden amongst old newspapers and magazines in the deceased's cluttered apartment, and many of his investments did not come to light until statements came in via mail. The estate trustees had to devote concerted time and effort to sort and clean the deceased's residence and to track down the investments. They retained a financial advisor to assist them and advise them with the management of the estate's assets. The court found that as a result of the solicitor-trustees' efforts, the deceased's investment portfolio had significantly outperformed the stock market.

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[33] *Cheney v Byrne*, *supra* note 31 at para 8.
[34] *Ibid* at para 13.

On the facts of the case, the court did not find that the solicitor-trustees had acted in a conflict of interest. The court went as far as to state:

> "The fact that the Estate Trustees have looked after their self-interest is appropriate. Solicitors have learned early on in the practice of law that if they do not look after their own interest, no one else will. In this case, the applicants were expecting a much smaller and organized Estate than what they received. Nevertheless, they did not hesitate to throw all of their resources and manpower to meet their duties, and the Estate of Lawrence Patrick Byrne benefited from that decision …"[35]

The court declared that the estate accounts were passed, and confirmed that the solicitor-trustees were entitled to take periodic compensation, in amounts calculated by multiplying their time spent by their professional hourly rates. The court made minor adjustments to the compensation claimed and disallowed in part the payments the solicitor-trustees had made to the financial advisor, but awarded the bulk of the compensation that the solicitor-trustees claimed.

Analysis

The foregoing cases illustrate that when asked to determine whether a solicitor-trustee acted in a conflict of interest, or whether to accept a solicitor-trustee's claim for compensation, a court or tribunal will consider several factors, including the relative sophistication of the client, the success attending to the administration of the estate, and the diligence with which the solicitor-trustee has kept records and accounts.

In *LSUC v. Anderson*, the relative lack of sophistication of the estate trustee and the lawyer's failure to ensure that his client obtain independent legal advice regarding the compensation scheme was among the factors that led the Law Society hearing panel to find that the lawyer had acted in a conflict of interest. In *Cheney v. Byrne*, the sophistication of the testator was a determinative factor in the court's decision to find that the drafting solicitor-trustee had not acted in a conflict of interest, and to uphold the compensation provision set out in the will.

The failure in the administration of the estate, resulting from the depletion of the estate assets without adequate explanation, was a determinative factor in the court's decision to deny trustee compensation in *Fareed v. Wood*, whereas the success attending to the administration of the estate in *Cheney v. Byrne* no doubt made it easier for the court to uphold the compensation provision in the will and award most of the compensation claimed.

In both *LSUC v. Anderson* and *Fareed v. Wood*, the lack of appropriate records severely impacted upon the solicitors, who were both found to fall well short of their fiduciary duties.

[35] *Ibid* at para 129.

Conclusion

Solicitor-trustees wear at least two hats. As trustees, they owe fiduciary and other duties to the beneficiaries, and as solicitors, they owe fiduciary and other duties to themselves and their co-trustees. Solicitor-trustees who drafted the trust instrument will also have fiduciary duties to the settlor of the trust, and potentially to beneficiaries. The cases surveyed in this paper demonstrate that solicitor-trustees are targets for claims that they have acted in a conflict of interest or breached their fiduciary obligations.

It might be that there is a lower threshold used by the Law Society in cases like *LSUC* v. *Anderson* in determining whether a lawyer has acted in a conflict of interest than the threshold employed by the courts in cases like *Cheney* v. *Byrne* in determining whether the solicitor-trustee is entitled to compensation. Different threshold or no, solicitors should be attentive to the risks and be careful to: (i) thoroughly understand the terms of the testamentary instrument; (ii) keep separate dockets with respect to the legal services and the trustee services performed; (iii) maintain complete records relating not only to the administration of the estate, but also to instructions obtained and advice given; (iv) consider to what extent they should ensure that there are no circumstances surrounding the drafting of the instrument that could vitiate the testator's consent to the compensation arrangement in the instrument; and (v) where appropriate, recommend that the clients obtain independent legal advice.

CITING REFERENCES

Legislation

Estates Act, RSO 1990, c E21.
Solicitors Act, RSO 1990, c S15.
Trustee Act, RSO 1990, c T23.

Jurisprudence

Bott Estate (Trustee of) v Macaulay (2005), 75 OR (3d) 422, 2005 CarswellOnt 3743 (Sup Ct).
Cheney v Byrne (Litigation Guardian of) (2004), 9 ETR (3d) 236, 2004 CarswellOnt 2674 (Ont Sup Ct).
Fareed v. Wood (2005), 140 ACWS (3d) 225, 2005 CarswellOnt 2572 (Ont Sup Ct).
Law Society of Upper Canada v Paul John Anderson, 2009 ONLSHP 13, 2009 CarswellOnt 17196.
Law Society of Upper Canada v Paul John Anderson, 2009 ONLSHP 70, 2009 CarswellOnt 17195.
Paul John Anderson v Law Society of Upper Canada, 2010 ONLSAP 4, 2010 CarswellOnt 18800.
Re Briand Estate (1995), 10 ETR (2d) 99, 1995 CarswellOnt 1123 (Ont Ct J (Gen Div)).
Re Conrade Estate (2005), 21 ETR (3d) 140, 2005 CarswellOnt 7058 (Ont Sup Ct).
Re Freeman Estate (2007), 34 ETR (3d) 157, 2007 CarswellOnt 5654 (Ont Sup Ct).
Re Goldlust Estate (1991), 44 ETR 97, 1991 CarswellOnt 546 (Ont Ct J (Gen Div)).
Re Jeffery Estate (1990), 39 ETR 173, 1990 CarswellOnt 503 (Ont Surr Ct).

Re McIntosh (1964), 46 DLR (2d) 416, 1964 CarswellSask 106, (Sask CA).
Re Mountain (1982), 15 ACWS (2d) 273, 1982 CarswellOnt 3840 (Ont Sup Ct).
Re Rustig Estate, 2002 NSSC 210, 2002 CarswellNS 369.
Re Schroeter Estate (2001), 57 OR (3d) 8, 2001 CarswellOnt 4351 (Sup Ct).
Re Taaffe Estate (1992), 36 ACWS (3d) 709, 1992 CarswellOnt 2039 (Ont Ct J (Gen Div)).
Rooney Estate v Stewart Estate (2007), 161 ACWS (3d) 177, 2007 CarswellOnt 6560 (Ont Sup Ct).
Schnurr v Dunbar (2000), 98 ACWS (3d) 1142, 2000 CarswellOnt 2740 (Ont Sup Ct).
Smith, Re, [1972] 2 OR 256, 1972 CarswellOnt 462 (Surr Ct).
Toronto General Trusts Corp v Central Ontario Railway (1905), 6 OWR 350, 1905 CarswellOnt 449 (Ont Weekly Court).

Secondary Material

Jennifer Jenkins et al, *Compensation & Duties of Estate Trustees, Guardians & Attorneys* (Toronto, ON: Thomson Reuters Canada Limited, 2014) (loose-leaf revision updated 2014, release 13).
Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2000 (as amended).
Suzana Popovic-Montag, “Delineation of Roles Between Lawyers and Estate Trustees” (Paper delivered at The Six-Minutes Estate Lawyer 2017, Law Society of Upper Canada, 8 May 2017)

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Law Society of Ontario | Barreau de l'Ontario

TAB 13

THE SIX-MINUTE Estates Lawyer 2018

Accommodating Clients with Disabilities

Alexander Procope
Perez Bryan Procope LLP

May 3, 2018

cpd Continuing Professional Development

Accommodating Clients with Disabilities

Six-Minute Estates Lawyer Program by the Law Society of Ontario scheduled for May 3, 2018

Alexander Procope
Barrister & Solicitor
Perez Bryan Procope LLP

Does your business model disadvantage people that need more time because of a disability? If the answer is yes, it is time to review whether your practice is compliant with your obligations under the Rules of Professional Conduct ("Rules")[1], the *Ontario Human Rights Code* ("*Code*")[2] and the *Accessibility for Ontarians with Disabilities Act* ("*AODA*")[3].

This paper focusses on human rights obligations in Ontario and barriers to clients accessing estate planning legal services. I will provide an overview of our obligations to accommodate disabilities; provide some examples of disabilities that could easily impact an estate planning engagement; and, finally, consider the challenging issue of reconciling an hourly billing business model with the obligations to accommodate disability.[4]

The *Ontario Human Rights Code*

Under the *Code*, every person has a right to equal treatment with respect to the provision of services without discrimination because of disability, among other protected grounds.[5] Legal Services are services for the purposes of the *Code*.

Disability is defined broadly in the *Code* as follows:

> (a) Any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
>
> (b) A condition of mental impairment or a developmental disability,
>
> (c) A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> (d) A mental disorder, or

[1] *Rules of Professional Conduct*, online: Law Society of Ontario <https://www.lsuc.on.ca/lawyer-conduct-rules/> (last accessed 16 April 2018) ("*Rules*")
[2] *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19 ("*Code*")
[3] *Accessibility for Ontarians with Disabilities Act*, 2005, S.O. 2005, c. 11 ("*AODA*")
[4] I wish to thank Kate Sellar, Jane Meadus and Laura Tamblyn-Watts for the helpful discussions on this topic and to Mercedes Perez for her review and comments on a draft of this paper.
[5] *Code*, section 1

(e) An injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act, 1997*…[6]

The right to equal treatment without discrimination protects not only those with actual disabilities but also those with perceived disabilities. [7] This could include disabilities that family members or other involved persons might communicate to the lawyer or personal notions that the lawyer has about the client or potential client.

Declining representation is not, in and of itself, a breach of the *Code*, but if the denial of services was based in part on disability, that would be discrimination.[8] The intention or motivation of the service provider's conduct is irrelevant. An intent to discriminate is not a factor when assessing whether conduct is discriminatory; rather it is the result or effect of the alleged discriminatory action that is significant.[9]

The duty to accommodate is an obligation on the service provider to enforce the right to equal treatment free from discrimination set out in the *Code*. Accommodation is required unless it cannot be provided without undue hardship on the person responsible for providing accommodation.[10]

The duty to accommodate includes both a procedural duty and a substantive duty. The procedural duty includes the gathering of relevant information about the necessary accommodations required to meet the service provider's obligation. The substantive duty is the obligation, short of undue hardship, to take steps to avoid discrimination.[11]

The Ontario Human Rights Commission in its e-learning page on the duty to accommodate for service providers[12] provides a helpful list of relevant considerations:

- be alert to the possibility that a person may need an accommodation even if they have not made a specific or formal request
- accept the person's request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
- get expert opinion or advice where needed (but not as a routine matter)
- take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated, and canvass various forms of possible accommodation and alternative solutions
- keep a record of the accommodation request and action taken
- communicate regularly and effectively with the person, providing updates on the status of the accommodation and planned next steps
- maintain confidentiality

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[6] *Code*, section 10(1), definition of "disability"
[7] *Code*, subsection 10(3)
[8] See, for example, *Chen v. Human Rights Legal Support Centre*, 2014 HRTO 59 (CanLII) at para 15
[9] *Al-Dandachi v. SNC-Lavalin Inc*., 2012 ONSC 6534 (CanLII) at para 13
[10] *Jaffer v. York University*, 2010 ONCA 654 (CanLII) at para 36
[11] *Metropolitan Toronto Condominium Corporation No. 946 v. J.V.M.*, 2008 CanLII 69581 (ON SC) at para 89
[12] Discrimination based on disability and the duty to accommodate: Information for service providers, online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/discrimination-based-disability-and-duty-accommodate-information-service-providers> (last accessed 16 April 2018)

- limit requests for information to those reasonably related to the nature of the limitation or restriction, to be able to respond to the accommodation request
- consult with the person to determine the most appropriate accommodation
- implement accommodations in a timely way, to the point of undue hardship
- bear the cost of any required medical information or documentation (for example, the accommodation provider should pay for doctors' notes, assessments, letters setting out accommodation needs, etc.)
- bear the cost of required accommodation.

Business inconvenience is not a defence to the duty to accommodate. While costs may lead to undue hardship, they have to be quantifiable, shown to be related to the accommodation, so substantial that they would alter the essential nature of the enterprise, or so significant that they would substantially affect its viability.[13] Undue hardship must be confirmed by evidence reached prior to the accommodation refusal and cannot be based on speculative concerns.[14]

Outside sources of funding are considered when assessing undue hardship but, in any event, the client is not responsible for any accommodation costs.[15] Requiring a client to pay for his or her accommodation would be akin to asking a patron in a wheelchair to pay for a ramp into a store.

The *Rules of Professional Conduct*

There are several specific sections and commentaries in the *Rules* that speak to lawyers' human rights obligations.

Commentary 4.1 to Rule 2.1-1 states:

> A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario.

More directly, Rule 6.3.1-1 mirrors the enumerated grounds in the *Code*, stating:

> A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.

The Commentaries to Rule 6.3.1-1 are very helpful and, among other things, confirm that this Rule is to be interpreted in accordance with the provisions of the *Code* and related case law.[16]

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[13] *Boucher v Black & McDonald Ltd.*, 2016 ONSC 7220 (Div. Ct.) (CanLII) at para 38
[14] *Ibid*. at para 40 and *DGA Group Consultants Inc. v. Lane*, 2008 CanLII 39605 (ON Div. Ct.), at para. 117
[15] *Code*, subsection 17(2)
[16] Commentary 3 to Rule 6.3.1-1

The Rules further confirm that no client can be denied services or receive inferior service on the basis of the grounds set out in Rule 6.3.[17]

Rule 3.2-9 addresses clients with diminished capacity as follows:

> When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

I interpret the Rule reminding lawyers of clients with diminished capacity to maintain a normal relationship as an attempt to mitigate any ableist tendencies to pay less attention to the other Rules. Notably, extra attention can always be paid to the duties to maintain confidentiality[18]; of loyalty and avoidance of conflicts of interest[19]; and to act on instructions and represent the client's interest resolutely[20].

The *Accessibility for Ontarians with Disabilities Act*

The *AODA* was intended to make Ontario accessible to everyone, including persons with disabilities.[21] *AODA* regulations establish accessibility standards that apply to persons or organizations that provide services.[22] The *Integrated Accessibility Standards Regulation* ("*AODA* Regulation")[23] applies to every person or organization that provides services to the public or other third parties and has at least one employee.[24] There are some differences in the obligations that apply to small organizations and to large ones (organizations of fifty or more employees).[25]

Among other things the *AODA* Regulation obliges law firms to create an accessibility policy[26]; provide *Code* training to employees, volunteers and whoever is developing the firm's policies[27]; and provide accessible communication formats[28]. A fulsome review of all of the obligations under the *AODA* applicable to law firms is beyond the scope of this paper but it is worth reviewing in detail along with its regulation.

Disabilities that may impact an estate planning engagement

Mobility disabilities – Mobility disabilities are the most straightforward to deal with as they do not necessarily affect the lawyer's communication with the client. Accommodation respecting mobility issues includes the removal of physical or architectural barriers to law offices or alternatively, the lawyer meeting the client at some other accessible location. Accommodation must minimize indignity, so

[17] Rule 6.3.1-2
[18] Rules, rule 3.3
[19] Rules, rule 3.4
[20] Rules, rule 5.1
[21] *AODA*, section 1
[22] *AODA*, section 6
[23] O. Reg. 191/11 ("*AODA* Regulation")
[24] *AODA*, subsection 1(3)
[25] See *AODA*, section 2 definitions of "large organization" and "small organization"
[26] *AODA* Regulation, section 3
[27] *AODA* Regulation, section 7
[28] *AODA* Regulation, section 12

precaution should be taken to ensure the client is comfortable meeting at the client's home if that is the next best alternative to a fully accessible lawyer's office.

Vision disabilities – Visual impairments can have a significant impact on legal services because we often rely heavily on written communication to convey large amounts of dense information. Large-print fonts may adequately accommodate clients with some but limited vision. It is worth nothing however, that not every client will be quick to point out if he or she cannot read something. For clients with complete visions loss, assistive technology may be available to enable written communication. In any event, it is likely that additional time will be necessary for meetings with visually impaired clients. Where the necessary accommodations are not clear to either the lawyer or the client, the lawyer could consider reaching out to an expert organization such as the Canadian National Institute for the Blind.

Hearing disabilities – Clients with limited hearing abilities often have their own hearing aids but there are assistive devices that a lawyer can bring to assist with in-person meetings if the client does not have adequate hearing aids. A teletypewriter (TTY) is a common technology accommodation similar to an electronic chat. More commonly, email communication is sufficient. For clients that have lost hearing completely, qualified American Sign Language (ASL) interpreters can be arranged for in-person meetings. Clients that have never had any hearing develop language distinctly and lawyers should take extra precautions to confirm that the client understands the advice provided and instructions given. Lawyers should keep in mind that not all deaf clients require the same form of accommodation. Persons who lost their hearing before learning a spoken language and who received education in ASL may require ASL interpretation. Some deaf people are not fluent in the English language such that written communications will not be helpful. Some deaf people who lose their hearing later on in life may communicate best through written communication. Again, it might be necessary to engage the necessary expertise if the client and lawyer are not sure of what accommodations are required.

Cognitive, learning or intellectual disabilities – These types of disabilities may be the most challenging to the lawyer-client relationship as they can impact the fundamental question of whether a client has the capacity to instruct you to do the work that the client wants you to do. Having a particular diagnosis or symptom will not necessarily lead to incapacity to instruct. Capacity is task specific so a client may be incapable of instructing a lawyer to do one thing but capable of instructing on something else. If the lawyer is concerned about a client's ability to understand information relevant to a retainer, the lawyer should make efforts to accommodate even if the client cannot articulate an accommodation request. While being careful to avoid the inappropriate disclosure of confidential information, a lawyer might consider making inquiries with care providers on the best strategies for effective communication. There are many other techniques that can be utilized, such as repetition; short repeated visits; speaking slowly using plain language; avoiding times of day when a person's cognition may be worse due to medication, fatigue or the course of a cognitive illness; and providing written summaries of issues discussed at an in-person meeting. The client or a purported supportive family member or friend may want the support person involved in the instructions. Involving support persons brings its own risks as any involvement of other people in your meetings with your client could be scrutinized by anyone alleging undue influence in the future.

Communication disabilities – Disabilities resulting in limited or no speech are common and can be caused by conditions such as a stroke or Parkinson's disease. Presuming the person's cognition is sufficiently intact, communication devices can often assist but the lawyer may need some training in

order to become efficient with such devices. Alternatively, a communication intermediary trained by Communications Disabilities Access Canada may be available to facilitate communication with a client that has a communication disability.[29]

Respecting all disabilities that impact a lawyer-client relationship, it is important to tailor accommodation to the client's specific needs and circumstances.

Reconciling an hourly billing business model with the duty to accommodate

As the above review of potential accommodations makes clear, the lawyer may be spending a significant amount of extra time communicating with a client resulting directly from the client's disability.

For lawyers that charge for their time by the hour, it is difficult to draw clear distinctions between time that should be charged and time that should not be charged. For example, can you charge a client with short-term memory issues for the multiple meetings it took you to feel comfortable preparing a will for the client? There is no comparable amount of time that every client without the disability would need to prepare his or her will, which might have assisted in identifying the extra accommodation-related time.

These issues do not appear to have been litigated yet so the interplay of human rights obligations on lawyers and their billing practices has been critically reviewed. The *Rules* do not provide any more direct guidance. Lawyers may however consider some or all of the following suggestions when looking at how they accommodate disabilities that result in additional lawyer time being spent:

- Stop charging by the hour. Set a price for the preparation of a will that shares the cost of occasionally spending extra time among all clients not just the ones that require the extra time due to their disabilities.
- Continue charging by the hour but estimate a discount on your time and attribute it to accommodation when billing the client. Much like the previous suggestion, this may require an adjustment of your standard hourly rate in order to share the costs indiscriminately.
- Unbundle your legal services. Separate your engagement and pricing for the confirmation of capacity and set a separate more standard amount of time for the preparation of the will itself. As the cognitive issue is the specific reason that the engagement to determine capacity may require more time, it is arguable that charging for that time does not result in discrimination.

Not charging clients for accommodation is a crucial part of ensuring that everyone in Ontario has equal access to lawyers and we are all obliged to ensure that our human rights laws are complied with when providing legal services. Hopefully, further Human Rights Commission, Human Rights Tribunal or judicial guidance on dealing with these difficult issues is available soon.

[29] Joanna Birenbaum and Barbara Collier, "Serving Clients with Speech and Language Disabilities", pages 5 and 6, Law Society of Upper Canada, ENHANCING ACCESS TO THE COURTS: Accommodating Mobility, Learning and Communication Disabilities program material, 26 May 2015

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TAB 14

THE SIX-MINUTE Estates Lawyer 2018

Resolving Grave Disputes

Jason Ward
Wards Lawyers [PC]

May 3, 2018

cpd Continuing Professional Development

THE LAW SOCIETY OF ONTARIO

THE SIX-MINUTE ESTATES LAWYER 2018

RESOLVING GRAVE DISPUTES

Jason Ward
WARDS LAWYERS[PC]
www.wardlegal.ca

May 3, 2018
9:00 a.m. to 12:00 p.m.

Giovanni Room,
University of Toronto – Chestnut Residence and Conference Centre
89 Chestnut Street
Toronto, Ontario

RESOLVING GRAVE DISPUTES

Jason Ward
Wards Lawyers PC

Bereavement Sector Legislation:

In Ontario, entitlement to decide both the place and manner of disposal of a deceased person's body and cremated remains is governed by common law.

However, Ontario's *Funeral, Burial and Cremation Services Act* ("FBCSA")[1] promulgates certain limitations fettering that decision-making authority both directly and collaterally, by establishing broad parameters for the governance of cemetery, crematorium, funeral home (including funeral directors[2], preplanners[3] and sales representatives) and transfer service operators[4] and their performance of "*licensed services*"[5] and delivery of "*licensed supplies*"[6] and, specifically, for the place and manner of disposal of "*human remains*"[7] by interment (burial)[8], cremation[9] or "*alternative processes or methods*".[10] Effectively the FBCSA establishes the "*framework for the regulation of the bereavement sector*"[11], notably by regulating:

- the creation, maintenance and operation of cemeteries, crematoria, funeral establishments, transfer services and burial sites[12];
- the licensing of any person selling or offering licensed supplies or services, including the operators (and their sales representatives) of cemeteries, crematoria, funeral establishments (including funeral directors), transfer services and other "*bereavement activity*"[13] and embalming, pre-planning and other sales-related services[14];
- a code of ethics governing funeral service providers[15];
- procedures for complaints, inspections and investigations regarding licensed operators[16];
- bereavement-focused consumer protection[17] for the conduct of, or dealings with, licensed operators, including regarding false advertising, soliciting, disclosure obligations, contract requirements and cancellation rights, including for interment and scattering rights[18];
- prohibited conduct by licensees and the public regarding the place and manner for the disposal of remains[19];
- trust funds and accounts required by licensed operators, including a "*care and maintenance fund*" by cemetery operators (to "*generate income for the care and maintenance of the cemetery*"), and the duty of operators to apply to pass accounts before the Superior Court, if directed to do so[20]; and

- a "*Funeral Services Compensation Fund*" to benefit those aggrieved if, for example, "*licensees have failed to comply with a code of ethics*"[21].

The FBCSA is primarily administered and enforced by the Bereavement Authority of Ontario ("BAO"), an independent, not-for-profit, arm's-length "*Delegated Administrative Authority*", acting on behalf of and subject to oversight by, the Ministry of Government and Consumer Services.[22] Effectively the BAO is responsible for "*ensuring that funeral, cremation and cemetery licensees comply with the* [FBCSA]"[23].

Commonly when arrangements for the disposition of a deceased person must be made, uncertainty and disputes potentially arise. For example, an estate trustee may not yet be aware of his or her appointment by the deceased or, if aware, that person may be uncertain of his or her responsibilities generally. There may also be confusion or disagreement about the decision-maker authorized to act, particularly if the validity of the deceased's will is challenged by a disappointed beneficiary, for example. An appointed trustee may also be incapable or unwilling to act, or he or she may renounce, potentially causing more emotionally-charged incertitude in commonly time-sensitive circumstances.

If a dispute arises regarding the place of, or manner for, the disposition of a deceased person's body or remains, including about the person having authority to decide, the FBCSA does not offer resolution directly, other than codifying the sector restrictions generally[24]. Rather, the common law is activated and, if necessary, the assistance of the Superior Court may be appropriate. Accordingly, for a dispute of this nature that is not directly resolved by the FBCSA, the BOA will generally recommend the licensed operator, often a funeral establishment, or any other interested party, seek necessary legal assistance.

Decision-Making Authority for Disposition of the Deceased:

(a) ***Prima Facie* Valid Will Exists – Primacy of Appointment by the Deceased**:

If a validly-executed, last will and testament[25] appointing an estate trustee exists, the authority of the trustee to act is derived from the will.[26] The estate trustee[27] appointed by the *prima facie*, valid will of a deceased person is empowered to exercise dominion over, and the right to control the place, manner and arrangements for the disposal of, the body of the deceased – the trustee assumes not only the duty, or obligation, to dispose of the deceased's body, but a corresponding, incidental and rightful custody of the body for disposal lawfully, even if there is a surviving spouse[28] - this duty and accompanying possessory right continue after disposition[29]. This entitlement also arises regardless if the will of the deceased is "*probated*" by the Superior Court.[30]

An estate trustee cannot "*own*" a dead human body – generally, there is "*no property in a dead body*"[31], subject to the narrow exceptions discussed briefly below, which operate to limit or fetter the appointed estate trustee's *prima facie* duty, custodial power and decision-making authority.

Practically, arrangements for final disposition are commonly made by, or at least involve, the deceased's family members.[32] However, if a dispute arises, the testamentary trustee appointed by the deceased is lawfully authorized to exercise broad discretion and unilaterally determine the manner, place and arrangements for the disposal of the deceased and, unless that exercise of authority offends the sector restrictions prescribed by the FBCSA or is "*wholly unreasonable*" or capricious[33], it will not, save for the "*most exceptional circumstances*", be subject to judicial scrutiny.[34]

Not only the deceased's dead body, but by extension the disposal of his or her cremated human remains, if any, is subject to the estate trustee's authority and possessory right. Transforming the corporeal quality of the deceased into remnant ashes inherently creates more opportunity for disputes to arise.[35] However, cremating remains may also offer greater flexibility for resolving disputes "*because ashes can be divided, housed and spread in ways that a body cannot*"[36],

particularly if a dispute about the disposition of the deceased's ashes arises between equally-ranked, appointed co-trustees, or if a trustee seeks to proactively resolve competing claims by family members. While other jurisdictions, legislatively or at common law, distinguish between the disposal of a body and ashes and the control of each, respectively, no practical difference exists in Ontario – the appointed estate trustee may exercise dominion and exclusive decision-making authority for both.

(b) **No Will (No Trustee Appointment) or No Capable/Willing Trustee – Judicial Appointment of an "*Administrator*" by the *Estates Act*[37]**:

If a deceased person had no will and no conflict arises among those interested in, or affected by, the deceased's death, or among those entitled to share in the distribution of the estate, if any, any person may apply to be appointed an "*estate trustee without a will*"[38] by filing, among other things:

- a prescribed "*renunciation*" form by "*every person who is entitled in priority to be named as estate trustee*"; and
- a prescribed consent form by "*persons who are entitled to share in the distribution of the estate and who together have a majority interest in the value of the assets of the estate at the date of death*,"[39]

in which case an estate trustee may be appointed by the Superior Court, effectively on consent of those interested, subject to whether this consensually-based process would adequately accommodate the respectful and timely disposition of the deceased, if those interested cannot also agree on disposition of the deceased before the Certificate of Appointment is granted.

However, if, for example:

- the deceased had no will;
- the deceased had a will, but did not appoint an estate trustee; or

- the deceased's will appoints an estate trustee, who refuses to act or prove the will or is incapable of doing so,

and a dispute arises, exacerbated by the need to dispose of the deceased without unreasonable delay, subject to its "*ultimate discretion*" and based on who it "*thinks fit*", any interested person may apply to and request the Superior Court to exercise its discretion, statutorily conferred by the *Estates Act*, to grant the "*administration of the property of the deceased*", without pre-determined priority, to:

(a) the deceased's married spouse or "*person with whom the deceased was living in a conjugal relationship outside marriage*" immediately before the date of death;
(b) the next of kin of the deceased, individually or jointly[40]; and/or
(c) the person in (a) above and the next of kin "*as in the discretion of the court seems best*". [41]

While there is no pre-determined or priority hierarchy, the Superior Court may be inclined to appoint as administrator the person living in a conjugal relationship with the deceased, particularly if that person is a married spouse, rather than next of kin, noting that an Ontario non-resident cannot be appointed.[42] Invariably the Court is likely to consider, for example: (i) if any conflict may exist between the spouse and the estate, such as a potential claim by the spouse against the estate, or if the spouse may have an interest adverse to the estate; (ii) the implications, if any, of the intestacy distribution provisions in the *Succession Law Reform Act*[43], particularly any preferential share in the estate to which the deceased's spouse may be entitled statutorily; and (iii) any other conflicts that exist, or that potentially may arise, as between the interested parties.[44]

Furthermore, by its "*general power*", the Court may appoint an estate trustee to administer the property of the deceased under "*special circumstances*", which may arise, for example, if:

- the deceased dies "*wholly intestate*" as to his or her property;[45]
- the deceased had a will to administer property, but no estate trustee is appointed, or the appointed trustee is not "*willing and competent to take probate*";

- the estate trustee appointed by the will is resident outside of Ontario at the time of death;
- there is a will, but the authority of the appointed trustee to act is challenged; and/or
- there is a will, but the trustee lawfully renounces, is inactive, unwilling to act or refuses to act or prove the will,

and it appears to the Court to be necessary or convenient to appoint an administrator by reason of the insolvency of the estate of the deceased, or other special circumstances.[46] In this case, the Court may appoint a trustee as set out above, but may also appoint a trust company, on its own or jointly with another appointee.[47]

If an administrator for the estate is appointed by the Court, that person is inherently authorized to "*dispose of and make those decisions as to the disposal of the human remains*".[48]

(c) **No Will (No Trustee Appointment) and No Estate Administrator Appointed – the *Prima Facie* (or Potential) Administrator**:

A decision for the disposition of a dead body usually must be made without unreasonable delay, to the extent that the judicial process for appointing a trustee on consent or, alternatively, appointing an administrator for the estate pursuant to the *Estates Act*, could not reasonably be accommodated, or the parties to the litigation seeking judicial resolution for the place or manner of disposition of the deceased may not expressly seek such appointment as administrator for the estate.

In this case, when a dispute arises regarding the disposal of the deceased for which a party seeks judicial intervention in a timely manner, it is likely that the person who "*would be most likely to be appointed administrator of the estate without a will*" (or, alternatively, the person who would have the highest entitlement to be appointed administrator of the estate) would be authorized by the Court to dispose of the body, as if that person had been formally appointed as administrator for the estate following the litigation process required by the *Estates Act* and, in such time-sensitive circumstances, *prima facie* deference may be given to the "*lawful spouse to have priority in that regard*".[49]

Generally, if there is no estate trustee appointed by will and no administrator appointed under the *Estates Act*, when determining who should be appointed *prima facie*, or potential, administrator, the person who consequently assumes the duty of disposal and right to custody of the deceased's body, the Court will likely adopt a narrow view by resisting any assessment of the merits (and trappings) of competing cultural and spiritual beliefs and practices, primarily to avoid judiciously sanctioning any religion or belief over another, especially when the parties' contentions may be equally entrenched, sacred, sincere and justified, respectively. Rather, the Court is likely to identify, to the extent reasonably possible, the person with the highest entitlement to appointment under the *Estates Act* and to bestow authority for final disposition to that person.

Of course, urgency will not arise if the dispute relates to the disposition of previously cremated remains only; rather, the decision could be delayed until an administrator for the estate is properly appointed by the Court, pursuant to the *Estates Act*.[50]

(d) **Challenge to Validity of Will or Need to Protect/Preserve Estate - ETDL**:

If an estate trustee is appointed by the deceased's will, but a dispute arises about the validity of the will and, therefore, the trustee's authority to determine the final arrangements for the deceased, it may be appropriate, or necessary, to appoint an Estate Trustee During Litigation ("ETDL").

Statutorily the Court may, on application by an interested party, appoint "*an administrator of the property of the deceased person*" (*i.e.*, an ETDL) if:

(a) the validity of the deceased's will is challenged (effectively suspending the estate trustee's decision-making authority, including to determine final arrangements, pending the outcome of the litigation)[51]; or

(b) in any matter of "*obtaining, recalling or revoking any probate or grant of administration*"[52].

The prevailing view is that the Court, by both its own, inherent power and pursuant to the *Rules of Civil Procedure*[53], may appoint an ETDL beyond these specific and limited circumstances, if appointing a neutral, independent third party is necessary to preserve, protect and manage the assets of, or to facilitate a transparent, orderly administration of, an estate, or even to minimize the expenses of and to protect the parties to the litigation, including in the context of a challenge to an estate trustee's authority to act, the removal of a trustee or a dispute regarding disposal of the deceased's remains.[54]

While the appointment of an ETDL will generally be preferred if, for example, the administration of the estate pending the outcome of the dispute may be endangered or at risk, any appointment is subject to the discretion of the Court, depending on the circumstances.[55] Except with the consent of those involved in the dispute, a litigant party is very unlikely to be appointed ETDL.[56] An ETDL has "*all the rights and powers of a general administrator*", except for the "*right of distributing the residue of the property*"[57], and is "*an officer of the Court and not merely an agent of the parties at whose instance he or she or it, is appointed*."[58]

In exercising its discretion, the Court will consider and weigh:

- the balance of convenience and ensuring "*fairness to the participants*" of the dispute;
- practicality and the interests of the parties to the dispute, and those potentially effected by the dispute, including the need to immunize the estate from tactics employed by litigating parties;
- achieving a level playing field, including to ensure a litigating party cannot unilaterally take undue advantage of another by wielding control over the estate to benefit themselves or to prejudice another party;
- if the appointment may protect against "*insidious*", inherent conflicts potentially affecting the trustees and, accordingly, their capacity to exercise and maintain neutrality, impartiality and to exercise their fiduciary duty in a balanced, even-handed manner; and
- that the appointment of an ETDL is not extraordinary and, where an estate may be at risk, it ought to be favoured unless the administration of the estate is particularly straightforward and uncomplicated.[59]

For the place and manner of disposal of a deceased, an ETDL may exercise the same power and decision-making authority as would an estate trustee appointed by will or otherwise by the Court.[60]

(e) **No Will**, **No Willing Trustee**, **No Spouse or Next of Kin**, **No Application Made to be Estate Administrator – Trustee of Last Resort**:

If no will exists, or an estate trustee appointed by will is incapable of acting, or refuses to act, and the deceased had no spouse, children or next of kin – the need for a trustee arises.

Subject to statutory guidelines, the Office of the Public Guardian and Trustee ("OPGT") may be appointed as estate trustee (*i.e.*, be granted "*letters of administration or letters probate*") by the Court if the deceased: (a) died in Ontario (or was an Ontario resident, but died elsewhere); (b) died intestate (*i.e.*, without a validly-executed will) for part or all of his or her property, or the deceased's will does not appoint an estate trustee "*willing and able to administer the estate*"; and (c) had no known next of kin of the age of majority residing in Ontario, who are willing and able to administer the estate or, alternatively, nominate another person to do so.[61]

While the OPGT may have an obligation to apply for trusteeship if these conditions exist[62], it has developed its own policies, ostensibly due to the significant need for its services[63], including that it will only administer an estate as the trustee of "*last resort*" and if the net value of the estate is at least ten-thousand dollars.[64] The OPGT cannot be appointed without notice to it or without its consent, in writing.[65] If so, the OPGT may seek an order removing it as estate trustee.[66]

Generally, if these conditions exist, before it is appointed the OPGT will expand the investigation to attempt to locate another interested party who may agree to act, such as a creditor, next of kin residing outside Ontario or a person nominated by the deceased's next of kin.

While conducting this further investigation, the OPGT may "*arrange for* [the deceased's] *funeral*"[67]. If subsequently appointed, the OPGT retains authority for decision-making for the deceased's manner of disposal, as if the OPGT had been appointed by the deceased's will.[68]

However, if there is no estate or no testamentary trustee is appointed by will, or otherwise acting, and no person applies for authority to dispose of the deceased pursuant to the *Estates Act*, or otherwise, a deceased's surviving spouse, even if separated at death, may have a duty at common law to dispose of his or her deceased spouse and, if the deceased spouse leaves no estate, or insufficient assets, the surviving spouse may also be responsible for the cost of the disposition[69].

(f) **Synopsis – Priority of Decision-Makers for Disposition of the Deceased**:

In Ontario, the person with the duty to dispose of the deceased's human remains, and the corresponding right to possession of the remains for that purpose, is, in order of priority: the estate trustee appointed by the deceased's validly-executed will, if willing and able to act; the person appointed by the Superior Court as the administrator (or ETDL) of the deceased's estate, pursuant to the *Estates Act*; if no estate trustee is appointed by will and an administrator is not yet appointed, *prima facie*, the person with the highest entitlement to be appointed administrator (the potential administrator); and, as last resort, the OPGT (or potentially the deceased's surviving spouse), but where the validity of the deceased's will is challenged, the appointment of an ETDL is preferred, except if the estate is of modest value, very straightforward and uncomplicated.

Decision-Makers of *Prima Facie* Equal Standing or Rank:

Judicial guidance in Ontario is limited for when a dispute arises between two or more people who are equally entitled in rank, statutorily or presumptively, to assume the duty of disposal and associated custody of the body of a deceased person for disposal, such as among co-trustees jointly appointed without qualification by the deceased's will. Alternatively, the dispute may exist between those with equal entitlement to be appointed administrator of the estate (or the

potential, or *prima facie*, administrator), such as the parents of a deceased child or the adult children of a deceased parent.

If judicial intervention is requested, the Court is very likely to heavily weigh both the need to resolve the dispute promptly and the practicalities of disposal without unreasonable delay[70]. The Court may also consider other practicalities, such as the deceased's place of residence, the length of time of that residency, available disposal options, convenience to the family members and, to the extent reasonably ascertainable, the nature and familial matrix of the competing claimants' relationship with the deceased, but most likely with guarded attention to the "*arcane*" contentions by the competing parties.[71]

Interestingly and unlike in Ontario, British Columbia, for example, has statutorily defined a prescribed hierarchy and, if a dispute arises between those with *prima facie*, equal entitlement to decision-making authority, there is a mechanism for vesting the right to control the disposition of the deceased to a single decision-maker.[72] Under this mechanism, if the right to control the disposition of human remains devolves to people on the same level in the statutory hierarchy, the order of priority is determined in accordance with an agreement between or among them, if any, failing which authority vests with the eldest of the persons or descends in order of age. This mechanism, while advantageous for its operative simplicity, may create the risk of arbitrary and unfair decision-making. For example, in the case of a dispute between the parents of a deceased child, the elder of them would be statutorily deemed the decision-maker for their child's disposition.

Qualifications to the Power of the Estate Trustee:

An estate trustee's decision-making authority for disposal of the deceased and incidental custodial right to the remains for that purpose is subject to, or fettered by, both statutory and common law qualifications:

(a) **Deceased's Express Wishes or Directions (Religious and Cultural Issues)**:

A deceased's express wishes or preference regarding the place or manner of his or her disposal do not limit an estate trustee's authority, but may materially influence his or her decision-making.

There is no property in a body - any direction by the deceased relating to the disposition of his or her human remains (by will, pre-need cemetery or funeral planning contract, precatory memorandum[73] or otherwise), including for burial or cremation, delivery of the body to any person other than the duly appointed estate trustee, or specification regarding the place, manner of or any special arrangements for disposal, is neither dispositive nor enforceable, even if expressed due to firmly-entrenched religious or culturally-driven reasons.[74] Spiritual, traditional or axiomatic beliefs and customs do not bind an estate trustee, provided the trustee complies with his or her legal duties and, if a dispute arises, an assessment of the merits of competing emotions, religious beliefs or cultural values will commonly be avoided by the judiciary, as being irrelevant – the place and manner of disposal is a question only of legal obligation[75].

However, final wishes expressed by a deceased, if any, should be considered and may be followed by an estate trustee, but they do not bind, should not cause unreasonable expense and cannot unfairly prejudice beneficiaries or creditors of the estate.[76] To the extent reasonably possible, "*the wishes of* [the deceased] *should be respected and honoured in death*."[77] Practically, adhering to the express wishes of the testator is very likely to bolster the trustee's decision-making and strengthen its defensibility, if challenged.[78]

Comparatively other provincial jurisdictions statutorily mandate that a deceased's express wishes or direction for disposition be followed, except in exceptional circumstances. For example, in B.C. a "*written preference*" by the deceased binds his or her estate trustee in control of disposition, including by a will or "*preneed cemetery or funeral services contract*", provided that compliance does not offend the applicable tissue donation legislation and "*would not be unreasonable or impracticable or cause hardship*".[79]

(b) **Disposal-Related Duties of the Estate Trustee**:

An estate trustee's decision-making authority for disposal must also comply with his or her obligations established by common law.

Whether appointed by will or judicially, an estate trustee's fundamental obligation is to manage and dispose of the deceased's human remains in a decent, respectful, dignified, appropriate and timely manner – burial, cremation and reasonable disposition of cremated remains are judicially sanctioned as an acceptable discharge of this duty.[80]

Any interment of a body, scattering of cremated remains at a cemetery and cremation must be carried out in a "*decent and orderly manner*", with "*quiet and good order*" maintained throughout.[81] A dead human body may also not be cremated without a certificate issued by the coroner authorizing the cremation.[82] Embalming a dead human body is not mandatory, but may be recommended and be completed only by a licensed operator.[83]

An estate trustee's legal obligation to dutifully, respectfully and decently dispose of the deceased is also sanctioned by the *Criminal Code*, which makes it an indictable offence, punishable by imprisonment, not only to neglect a lawful duty to properly care for a dead body, but to improperly or indecently interfere with, or offer any indignity to, human remains, buried or not.[84]

Beyond this fundamental duty, the estate trustee's other responsibilities related to disposal of the deceased are:

- to act with due regard and subject to the reasonable limits of the assets in the testamentary estate and the deceased's financial circumstances generally, consistent with and befitting of the deceased's "*station in life*"[85]; and
- if requested reasonably to do so, to provide to the deceased's family members (next of kin) information practically necessary to inform them about the place and manner of disposal of the deceased's human remains and final arrangements as would be "*appropriate in the*

circumstances", provided doing so would not unreasonably expose the trustee to fear, violence, attack or obstructive tactics[86],

subject to which, the trustee is obliged to dispose of the deceased's human remains in his or her discretion, but without acting capriciously.[87] Breach of duty by an estate trustee may expose the trustee to claims for damages, including for infliction of mental distress.[88] An estate trustee may also be challenged, or be exposed to liability to creditors and beneficiaries, if excessive, extravagant or potentially unreasonable expenses are incurred for final arrangements, particularly if those expenses are grossly disproportionate to, or may substantially deplete, the value of the estate.[89]

If an estate trustee, or family member of the deceased, experiences a dispute with, or involving, a licensed operator, but engages only the complaint process codified by the FBCSA and administered by the BAO, damages to the aggrieved party are not an available remedy.[90]

If the trustee dies, becomes incapable or inactive before fulfilling the duty of disposal, his or her own estate trustee may assume the duty and exercise the same powers.[91]

(c) **Special Purpose/Transformation - the "*Work and Skill*" Qualification**:

A trustee's ancillary, rightful possession of a dead human body for disposal may also be qualified by a narrow exception to the '*no property in a body*' common law rule - if a third party has expended effort, work or applied skill to the body, or its parts, while in that person's lawful possession, such that the body, or parts, acquire special usefulness, purpose or may be transformed for a specific objective such as, for example, preservation for medical or scientific examination, the benefit of medical science or education generally, lawful exhibition, or in a manner that may create financial value in the body or its parts for the third party, or the body, or its parts, have otherwise "*acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes*…." – if so, a right to possession of the body, or its parts, in priority to the estate trustee may arise.[92]

Notably, cryogenically or medically preserved human reproductive materials, including sperm, ovum and embryos, have been held elsewhere as capable of being "*property*". However, in Ontario it remains unclear whether a non-trustee could advance a tenable possessory claim to, for example, DNA and other genetic parts and materials preserved medically as of death or within a dead human body, even "*without the acquisition of different attributes, if they have a use of significance beyond their mere existence*".[93] Such possessory rights, if any, are yet to be judicially scrutinized in Ontario, at least not comprehensively. With respect to human reproductive material, including sperm, posthumously using or removing an *in vitro* embryo "*for any purpose*", or any human reproductive material "*for the purpose of creating an embryo*", is statutorily prohibited, absent the donor's informed, written consent while alive.[94] Presumably if statutory consent by the deceased for the removal of his or her reproductive material "*for the purpose of creating an embryo*" were not established, a viable possessory claim by a non-trustee would seem unlikely, given any other use would be questionable.[95] For posthumous conception with lawful, statutory consent, the deceased's spouse may also apply to the Superior Court for a declaration that the deceased is a parent of the child conceived after his or her death through assisted reproduction.[96] Subject to this statutory restriction regarding human reproductive material, the ability of a non-trustee to successfully advance a qualifying, possessory claim to genetic or reproductive material within, or medically preserved from, a dead body may exist, but is yet to be judicially determined.

(d) ***Causa Mortis* Whole Body and Tissue (Organ) Donation**:

The trustee's incidental, custodial right for disposal is also qualified by any lawful donation of the deceased's tissue or whole body. The deceased *inter vivos* or, alternatively, the deceased's spouse or next of kin immediately before, or after, the death, may consent to and direct for the donation and use of the deceased's whole body, or parts, for the assistance of another or medical research, training or education, which binds the estate trustee.

A trustee must enquire if the deceased may have registered for organ or tissue donation for either transplant or research[97] through the Trillium Gift of Life Network (the "Network"), which regulates the removal of tissue from a dead body for transplantation into the body of a living

person or for other therapeutic, medical or scientific purposes.[98] Alternatively, a deceased person may have consented to his or her whole body being donated to the custody of an educational or scientific institute for the purpose of medical education or research: (a) by registering the donation directly with a designated, educational facility (by completing prescribed forms offered directly by the educational facility)[99]; (b) in his or her a last will and testament, or other testamentary declaration; (c) verbally; or (d) otherwise, by a written consent.

Specifically, any person who is at least sixteen years of age (or, if younger, there was "*no reason to believe*" otherwise at the time[100]) may consent, by "*a writing*"[101] or orally "*in the presence of at least two witnesses during the person's last illness*" to donate his or her whole body, or any part, including tissue[102], for use after death for "*therapeutic purposes, medical education or scientific research.*"[103] This consent, effective upon death, is "*binding and is full authority*" for "*the use of the body or the removal and use of the specified part or parts for the purpose specified*", unless the person acting on the consent "*has reason to believe that it was subsequently withdrawn*."[104]

For tissue donation, when a person dies, particularly in a public hospital[105], the Network will usually be notified by the hospital and will access the registered donor database maintained by the Ministry of Health and Long-Term Care ("MHLTC") and, even if a deceased person had registered for donation, the common practice of the Network is to reaffirm, or verify, this consent with the deceased's family.[106] If consent is affirmed, medical tests are completed to determine what organs and tissues are suitable for transplant and, if any, they are matched with the transplant wait list and surgery takes place in an operating room at the hospital. The entire donation process, from the time the family affirms donation to recovery, typically takes about twenty-four to forty-eight hours.[107]

If a person did not, or could not, during life give consent, or "*in the opinion of a physician is incapable of giving consent by reason of injury or disease and the person's death is imminent*"[108], consent to the *post-mortem* use of that person's body, or any part, for "*therapeutic purposes, medical education or scientific research*" may be given in the following, descending priority in writing, orally (with at least two witnesses) or by recording, by:

- a "*spouse*"[109];
- a child;
- a parent;
- a sibling;
- a next-of-kin;
- a person "*lawfully in possession of the body*", including a duly-appointed estate trustee[110],

unless the third party, consenting person "*has reason to believe that the person who died or whose death is imminent would have objected.*"[111] Such consent, if given by the third party in priority, confers "*binding*" and "*full authority*" for: (a) "*the use of the body or for the removal and use of the specified part or parts for the purpose specified*", unless the person acting on the consent "*has actual knowledge of an objection thereto by the person in respect of whom the consent was given or by a person of the same or closer relationship to the person in respect of whom the consent was given than the person who gave the consent*"[112]; and (b) the collection, use and disclosure of necessary personal information.[113]

If a deceased person's tissue is donated to a living person, generally the remaining body cannot be donated to an educational facility.[114] If the specific use cannot be achieved "*for any reason*", the donated remains must be disposed of as if no consent to donation had been given.[115] Before death, a coroner may also direct for tissue to be transplanted after death where a person's death is imminent and there is reason to believe a death investigation or inquest may be necessary, if consent to donation is also obtained.[116] The Office of the Chief Coroner, the Regional Supervising Coroner, or a designated coroner, may also deliver an unclaimed or abandoned body to "*a teacher of anatomy or surgery in a school*" for "*the purpose of anatomical dissection*".[117]

Generally, time is of the essence, particularly for whole body donation – a trustee must be mindful that an educational facility may decline the donation if:

- more than forty-eight hours have elapsed since death;
- an autopsy was conducted;

- embalming occurred;
- amputation occurred, or major, surgical operations have been performed; and/or
- the deceased had certain infectious or contagious diseases or was emaciated.[118]

For whole body donation, transportation expense is usually payable by the deceased's estate or consenting third party. However, the educational facility for a donated body must dispose[119] of the body at the expense of the facility "*after it has served the purpose for which it was received*."[120]

Both the Crown and those employed by both medical and educational facilities are immune from civil liability for damages when tissues and whole bodies are donated through the Network.[121]

(e) **Death Investigation (Coroner's Authority)**:

The duty to dispose of a dead human body is also qualified by a coroner's authority, including to conduct a death investigation[122].

No person may interfere with, or alter, a human dead body or its condition "*in any way*" until the coroner approves, but every person has a duty to immediately notify the coroner or a police officer if the person "*has reason to believe*" that the deceased died because of, for example: violence, misadventure, negligence, misconduct, by unfair means, during or following pregnancy, suddenly and unexpectedly, untreated disease or sickness, any cause other than disease or "*under such circumstances as may require an investigation*."[123]

Furthermore, certain deaths must be reported to the coroner and be investigated to determine if an inquest is necessary, including a person who dies:

(a) in a "*children's residence*", a supported or intensive group living residence, a psychiatric facility or a private or public hospital to which the person was transferred[124];
(b) in a long-term care facility[125];

(c) while a patient at a psychiatric facility or committed to a correctional facility, place of temporary (youth) detention or subject to secure or open (youth custody), even if the death of that person does not occur on the premises or while the person is not in the actual custody of the facility, institution or place[126];

(d) while detained in a detention facility or lock-up, temporary (youth) detention, place of secure custody or correctional institution[127], while detained by a peace officer[128], while restrained in a psychiatric facility or admitted to a secure treatment program, or because of any workplace accident or at a construction project, mining plant or mine[129]; and/or

(e) because of medical assistance in dying.

Accordingly, a trustee's rightful possession of the deceased's body for disposal is qualified if, for example, a coroner is informed, or has reason to believe, that a person died in a circumstance described above, in which case the coroner is likely to issue a warrant to take possession of the body to conduct an investigation.[130] A coroner may also: (i) examine or take possession of any dead body, or both; and (ii) enter and inspect any place related to the dead body.[131]A coroner's broad investigative powers also include, if there are reasonable and probable grounds, inspecting places and seizing records or other things believed to be related to the deceased[132] and may, at any time during an investigation, conduct or require *post-mortem* or any other examination as may be appropriate in the circumstances.[133] Even if a body has been interred, the Office of the Chief Coroner may direct for it to be disinterred for an investigation or inquest.[134]

(f) **Interment and Scattering Rights**:

An estate trustee's authority for disposal, at least with respect to a licensed cemetery, is also subject to interment and scattering rights holders.

- **Interment[135] (Burial) in a Cemetery**:

"*Interment rights*" may be purchased by any person from a licensed cemetery operator[136], which include "*the right to require or direct the interment of human remains in a lot*" (being "*an area*

of land in a cemetery containing, or set aside to contain, interred human remains and includes a tomb, crypt or compartment in a mausoleum and a niche or compartment in a columbarium and any other similar facility or receptacle"[137]. Correspondingly, an "*interment rights holder*" is "*the person who holds interment rights with respect to a lot whether the person be the purchaser of the rights, the person named in the certificate of interment or such other person to whom the interment rights have been assigned.*"[138] Interment rights for a lot may also be sold or assigned to a third party, before exercised, subject to the cemetery's by-laws.[139]

If interment rights for a lot in a licensed cemetery were purchased by a third party (*i.e.*, the interment rights are not held by the deceased or the estate trustee), the estate trustee cannot dispose of the deceased's human body in that specific lot without the consent of the interment rights holder.[140] Similarly, an estate trustee cannot unilaterally disinter a human body from that specific lot without the consent of the interment rights holder.[141]

- **Scattering (Cremated Remains in a Cemetery)**:

A "*scattering ground*" is "*the land within a cemetery that is set aside to be used for the scattering of cremated human remains*"[142]. Only a person licensed as a cemetery operator may "*maintain or set aside land to be used for the purpose of scattering cremated human remains*" and only if the land is within a licensed cemetery.[143] A cemetery may also establish a "*private scattering ground*" for related or affiliated remains.[144] No one is permitted to charge a fee for "*the use of land for scattering cremated human remains unless the person is a licensed cemetery operator and the scattering takes place on land within a cemetery*".[145] Accordingly, "*scattering rights*" is "*the right to require or direct the scattering of cremated human remains on the scattering ground of a cemetery*".[146] The "*scattering rights holder*" is, therefore, "*the person who holds the scattering rights with respect to a scattering ground whether the person be the purchaser of the rights, the person named in the certificate of scattering or such other person to whom the scattering rights have been assigned*". As with interment rights, scattering rights may also be sold to a third party, unless prohibited by the cemetery's by-laws.[147]

If scattering rights for a scattering ground in a licensed cemetery were purchased by a third party (*i.e.*, the scattering rights are not held by the deceased or the estate trustee), the estate trustee cannot scatter the deceased's cremated remains on those grounds without the consent of the third party scattering rights holder.[148] By corollary, an estate trustee cannot unilaterally remove cremated, scattered remains in a cemetery without the consent of the scattering rights holder.[149]

Both interment and scattering rights must be exercised within twenty years of the date of purchase, or they may be abandoned.[150]

(g) **Disinterment and Exhumation**:

A trustee's power and authority to disinter a deceased person is statutorily limited. Pursuant to the FBCSA, human remains may be disinterred if:

- directed by an order of the Court for the "*purpose of a proceeding*"[151];
- directed by the Ontario government (*i.e.*, the Crown) "*in the interest of justice*"[152];
- directed by a coroner, if a warrant for possession is issued, for a death investigation;[153]
- directed by the "*Chief Coroner*", if necessary for an investigation or inquest[154];
- directed by the "*registrar*"[155], if dealing with "*burial sites*"[156] or "*irregular burial sites*"[157], "*burial grounds*" and "*aboriginal peoples burial grounds*"[158];
- ordered by the registrar to close a cemetery[159]; and/or
- directed by a "*medical officer of health*", if authorized by the *Health Protection and Promotion Act*[160], who may attend at, supervise or direct any disinterment or removal of scattered remains.[161]

Except for these circumstances, disinterring human remains and removing scattered, cremated remains is prohibited, unless:

(a) the prior consent of the "*interment rights holder*" or "*scattering rights holder*" is obtained, respectively[162]; and

(b) except for cremated human remains, prior notice is given to the "*medical officer of health*"[163],

unless:

(i) the whereabouts of the rights holder is unknown;

(ii) the holder is not "*readily ascertainable*"; or

(iii) the holder is unable to consent,

in which case the registrar may consent on behalf of the holder, subject to the steps prescribed by the FBCSA.[164]

Human remains may only be buried in a cemetery, but a dead human body cannot be removed from a cemetery, even if lawfully disinterred, without certification by a medical officer of health or the licensed cemetery operator.[165]

(h) **Criminal Responsibility or Wrongdoing Related to the Deceased's Death**:

In Ontario, it is not judicially resolved, at least not clearly, whether a person who is, or may be, criminally responsible for, or otherwise engaged in criminal wrongdoing in relation to, the death of a deceased person, is entitled to exercise the right to control for the disposal of the deceased's human remains, particularly if appointed by the deceased's will.

Admittedly it may be unlikely, but nonetheless possible, for the issue of criminal responsibility for the death of a person to be resolved before the deceased's remains are buried or cremated. For example, the deceased's remains may not be discovered before the completion of a death investigation or, alternatively, the criminal process of being charged and convicted of an offence relating to the death of the deceased. Alternatively, the deceased's cremated remains may be held *in specie*, creating the opportunity for criminal responsibility to be determined before disposition.

The issue has been considered directly in other jurisdictions, in which it has been held that a person who is guilty of a "*wrongful homicide*" of a deceased person "*forfeits the right to*

administration" and that "*a person may be passed over in relation to a grant of administration because of his or her bad character or other unfitness to act*"[166].

In Ontario, presumably the common law "*forfeiture rule*" [167] may apply or, alternatively, if the person has been appointed by the deceased's will, or otherwise, application could be made for removal.[168]

Places for the Lawful Disposal of Human Remains:

(a) **Interment and Burial of Human Remains**[169]:

Dead human bodies and cremated remains must be interred[170] in a cemetery established under the FBCSA and operated by a licensed cemetery operator.[171] Cemetery operators[172] do not sell the land, but rather "*interment rights*"[173] to be interred in a grave, lot or a plot within a licensed cemetery. If a change is necessary, subject to the cemetery's by-laws, an interment rights holder may resell the rights to a third party or, alternatively, to the cemetery from which the rights were initially acquired.[174]

Cemetery grounds must be maintained to ensure the safety of the public and to preserve the dignity of the cemetery[175]. A cemetery must allow for reasonable access by the public at any time, unless restricted by the cemetery's by-laws.[176] Cemetery operators must ensure the cemetery has an entrance accessible to the public directly from a public thoroughfare or another publicly accessible area.[177] Everyone is prohibited from causing or committing a nuisance in a cemetery or willfully or unlawfully disturbing those assembled to inter human remains in a cemetery.[178]

(b) **Cremated Remains**:

A dead human body may only be cremated at an established crematorium by a licensed crematorium operator, unless the deceased had a "*pacemaker or radioactive implant*"[179] or no "*coroner's certificate*"[180] has been obtained by the operator.[181] All cremations must be

completed in a "*decent and orderly manner*", ensuring that "*quiet and good order are maintained*".[182]

While ashes may be unclaimed (in which case the licensed operator possessing the remains may be required to retain the remains for a significant period before lawfully interring them in a cemetery, potentially at its own expense[183]), commonly they are, subject to the authority of the estate trustee, collected, divided *in specie* or disposed of by:

- interment in a columbarium or niche in a cemetery;
- burial in a cemetery; or
- scattering.

If "*scattering rights*" are purchased from a licensed cemetery, the remains must be scattered on a designated "*scattering ground*" within the cemetery.[184] A cemetery operator must ensure scattering grounds are "*reasonably accessible*" to the public[185] and cannot require either an interment or scattering rights holder to provide or install a marker[186], except for religious reasons or if required by the cemetery's by-laws.[187] A rights holder may install a marker if permitted by, and installed in accordance with, the cemetery's by-laws.[188]

Cremated remains may be disposed of lawfully by:

- buying rights to inter or scatter the cremated remains within a licensed cemetery;
- buying rights to inter the cremated remains in a niche within an above-ground columbarium, mausoleum or private structure within a licensed cemetery;
- scattering the cremated remains on private property (*i.e.*, privately – without contracting with a licensed operator and not within a licensed cemetery) with the consent of the land owner[189];
- entering a contract for licensed supplies or services[190] with a licensed operator of a cemetery, crematorium, funeral establishment (or funeral services provider)[191] or transfer service[192] to scatter the cremated remains[193], including on private property;

- without prior approval, scattering the cremated remains on land owned by the provincial Crown[194], including land covered by water, if the land is unoccupied (such as a provincial park, conservation area or reserve, or the Great Lakes), subject to any posted restrictions or designated areas and with an expectation that scattering be undertaken in an environmentally-responsible manner;[195]
- scattering the cremated remains on municipally-owned lands, subject to any by-law prohibiting scattering in certain areas, such as municipal parks; and
- transporting the cremated remains out of Ontario[196].

Unclaimed (Abandoned) Bodies:

Disturbingly dead human bodies are increasingly unclaimed across Ontario[197], potentially doubling during the past ten years. The elevated trend is likely attributable to more urbanization, increasing costs for final arrangements, greater geographical displacement of family members (and next of kin) and shifts in societal trends and familial relationships generally. Practically, the deceased may simply have had no next of kin or, if they did, none may be willing to enter a contract with an operator to pay for the cost of final arrangements, or even make the necessary enquiries and apply for social assistance benefits that may be available to pay for disposition, often creating difficult circumstances for the hospital, police or the attending funeral establishment in possession of the dead body – the only choice may be to seek to have the body declared as unclaimed or abandoned.

Generally, the Office of the Chief Coroner ("OCC")[198] or, alternatively, the Ontario Forensic Pathology Service ("OFPS")[199], both of which conduct death investigations in Ontario, must be contacted if a dead human body is potentially abandoned or unclaimed by a relative or friend within twenty-four hours after death[200], if the body has not been or will not be used for organ or tissue donation[201], in which case an "*inspector*" is likely to assume control of the body [*i.e.*, the Regional Supervising Coroner ("RSC"), or a designated, local coroner][202]. If a death investigation must be conducted by the OCC for an unclaimed dead body, final disposition of the deceased may be delayed for a significant period, possibly a year.[203]

The OCC will not assume financial responsibility for retaining, storing or transferring an unclaimed body; rather, the professional or facility in possession must do so initially, usually the hospital at which the deceased died or possibly an attending funeral establishment. The OCC may also require that an unclaimed body be stored or retained in a public or private morgue[204] until final arrangements are resolved, pending which the morgue operator must ensure the body is secure against "*unlawful interference*".[205]

For example, if death occurs in a hospital and the body is potentially unclaimed, the hospital must notify the OCC, which will initially direct the hospital to store the unclaimed body and to promptly "*take reasonable measures*"[206] to attempt to locate next of kin for the deceased or, in the alternative, a potential claimant for the body.[207] The Ministry of Community Safety and Correctional Services ("MCSCS") requires that "*due diligence*" be undertaken by the professional or institution in possession of the body before the RSC will declare a body unclaimed and deliver disposition instructions to the responsible, local municipality[208].

To assist professionals and institutions with identifying next of kin and potential claimants, the MCSCS offers, among other things, a "*Checklist for Claimant Search*"[209]. The OCC may also direct the hospital (or other facility) possessing the potentially unclaimed body to complete and submit to the RSC: (a) a "*Next of Kin and Claimant Search Form*"; (b) a "*Decision Tree*" for the unclaimed body, effectively outlining the OCC's expectation of the hospital (often with the involvement of the local police service or a funeral establishment) for diligently undertaking reasonable efforts to locate next of kin or an appropriate claimant alternative; and (c) certain additional records or information, if available, particularly to attempt to identify the deceased's next of kin, if any[210], to satisfy the RSC such reasonable efforts were discharged by the hospital (or other facility in possession of the unclaimed body) and, if so, the RSC may provide disposition instructions to the local municipality. Often a body is identified, but if not, it is more likely to be declared unclaimed.

Similarly, if the death occurs in the community, the local police service will initially notify the local, investigating coroner (who will notify the RSC), following which the police service will likely be directed by the RSC to promptly take reasonable measures to locate next of kin or a

potential claimant, even if a coroner's investigation may be initiated.[211] For a death in the community, the OCC is likely to issue a "*Coroner's Direction to Transfer and Store*" the unclaimed dead body to a private or public morgue "*for a period not exceeding 14 days*".[212]

If next of kin or an alternative claimant is located by these efforts, that person may claim the body from the OCC and undertake the disposition.[213] If no next of kin or potential claimant is located, or is located but declines to claim the body, the hospital, for example, will initially notify both the local police service and the RSC, following which the RSC will continue to manage the unclaimed body, including directing for storage in a morgue, if further investigation may reasonably be necessary.[214]

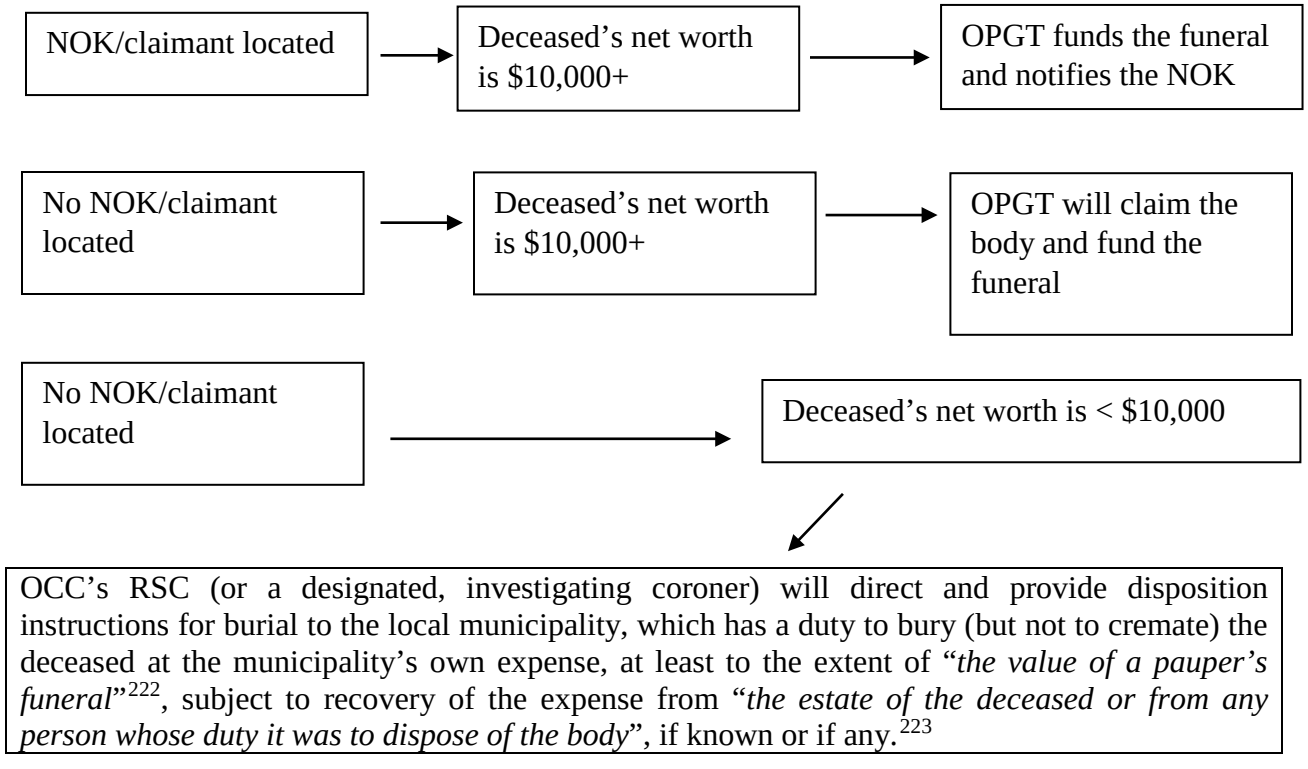
If a body remains unclaimed for a period of fourteen days, and "*despite reasonable efforts to locate a potential claimant*" and "*after all known potential claimants have been reached and given reasonable time to make a decision*", the OCC will usually proceed with disposition of the body unless there are reasonable grounds to extend this period of time.[215] The RSC will deliver a "*Form 6 – Report and Warrant to Dispose of an Unclaimed Body*" to the local municipality, providing known information about the deceased.[216] The RSC may also deliver the unclaimed body to "*a teacher of anatomy or surgery in a school, for the purpose of anatomical dissection*".[217]

When directed to dispose of an unclaimed body, which must be buried unless the OCC directs otherwise[218], the local municipality will generally arrange final disposition with a local funeral establishment, based on the budget policy set by the local municipality, subject to financial contribution through the OPGT from the deceased's estate, if any. Generally, the local municipality will arrange for an inexpensive grave and casket and apply the balance of the allotted budget to the service for the deceased, if any.[219]

If no next of kin or claimant is located initially, the identity of the deceased is known and there is reason to believe the deceased may have held assets on death, such as real property, the OCC may also refer the unclaimed body to the OPGT, Estates Office, for further investigation. The OPGT may also attempt to identify next of kin or potential claimants through its own, more

extensive resources, while also attempting to ascertain if the deceased had a net worth on death of at least ten-thousand dollars[220]. In fact, since the increase to both the income and asset exemptions for both Ontario Works and the *Ontario Disability Support Program*, effective September of 2017[221], the OCC (or the RSC) now more commonly, if not routinely, refer an unclaimed body to the OPGT, Estates Office, for further investigation of next of kin, the deceased's assets and to potentially assume responsibility for disposal of the deceased's unclaimed body.

In summary, the common scenarios for an unclaimed body are:



A crematorium service, funeral establishment or other bereavement service provider in possession of unclaimed, cremated remains, is required to retain the remains and may be required to inter those remains at a cemetery, potentially at its own expense, if they remain unclaimed for one year from the date of cremation and the operator has been unable, despite reasonable efforts, to locate the buyer of the cremation service, an estate trustee or next of kin[224].

Payment for Disposition:

(a) ***Prima Facie* Responsibility for Payment**:

An estate trustee's duty to dispose of the deceased's human remains incorporates a duty to pay for the disposition - *prima facie* the estate is responsible for the amount reasonably paid.

Engaging a "*funeral establishment*"[225] or "*transfer service*"[226] is not legally required – subject to the consent of the estate trustee, if any, an unlicensed family member, for example, may arrange funeral services if that person receives no payment or benefit for doing so, provided the death is registered with the local municipality to obtain a burial permit, which is necessary for both burial and cremation.[227]

However, if "*cemetery services*"[228], "*crematorium services*"[229], "*funeral services*"[230], transfer services (collectively, "*licensed services*"[231]) or "*licensed supplies*"[232] are arranged with a licensed operator, an estate trustee's duty to dispose of the deceased's human remains extends to paying only reasonable expense for the disposition, having regard to the deceased's "*station in life*" and circumstances on death, including for the purchase of markers, gravestones and the cost of inscription[233], which must be accurate and dignified.[234] The expense may not be extravagant – effectively, the standard is reasonableness, having regard to all of the circumstances, including consideration of creditors, if any.

Generally, reasonable funeral expenses[235] may be prioritized against other expenses of, or claims against, the estate of the deceased person, as a first charge[236] - an estate trustee is entitled to indemnity from the assets of the estate for such expenses.[237] If an estate trustee is not acting, or fails or neglects to arrange for the disposal of the deceased, and those arrangements must be made by another person, that person is generally entitled to be reimbursed out of the estate.[238]

If the deceased was not an undischarged bankrupt at the time of death, but his or her estate is insolvent, subject to the rights of secured creditors, if any, the proceeds of the bankrupt estate should pay the reasonable funeral expenses in priority to creditors and before the costs of

administration of the bankrupt estate. However, if the deceased died as an undischarged bankrupt, the estate trustee may not be authorized to pay, or be reimbursed, for the funeral and testamentary expenses using estate assets, or at least those expenses may not be payable in priority to creditors.[239] In that case, if there are insufficient assets to pay funeral expenses, particularly if the body is consequently unclaimed or abandoned, the local municipality in which the deceased resided may be responsible for disposing of the deceased using social assistance benefits to which the deceased was entitled, if available, or potentially at its own expense, subject to a right of recovery against the deceased's estate.[240]

(b) **Bereavement Contracts with Licensed Operators**:

The FBCSA does not promulgate bereavement sector self-regulation, but rather codifies strict and comprehensive oversight of operators within the sector, particularly for consumer protection. Specifically designed to offer enhanced protection to potentially vulnerable buyers, the FBCSA incorporates *extensive* protection for consumers in the bereavement sector entering contracts with licensed operators for licensed supplies and services, including for interment and scattering rights.[241]

For example, the FBCSA prohibits every person from contacting, by any means, any "*vulnerable person*"; specifically, a person in a hospital, long-term care home, hospice or such other institution as may be prescribed for the purposes of soliciting the making of, or negotiating, a contract for the sale or provision of a licensed supply or service.[242]

If a contract with an operator is entered, it may be cancelled by the purchaser, in writing, at any time within thirty days of when the contract was made, in which case the operator must fully refund the purchaser, even if the licensed supply or service was previously delivered or performed[243], except if requested by the purchaser to conduct a funeral, burial or cremation within this period.[244] An operator is also prohibited from performing services or delivering supplies during this "*cooling off*" period, unless requested by the purchaser to conduct a burial or cremation and, if the contract is cancelled by the purchaser within this period, an operator cannot charge an administrative or cancellation fee.[245]

Following this initial period, a purchaser may also cancel the contract and is entitled to refund by the operator for any supplies and services contracted for, but not yet delivered or performed by the operator at the time of cancelation, less a cancellation fee of ten *per cent* of the contract price, to a maximum of $350.[246] An operator is not required to refund the purchaser for licensed supplies or services requested, received and used by the purchaser as of when the notice of cancellation by the purchaser is made, either during or after the initial "*cooling off*" period.

Operators must by law also provide specific and extensive disclosure to consumers before a contract is entered, including ownership information and a detailed list of current prices for all supplies and services offered by the operator or of interest to the purchaser.[247] Every contract for bereavement services or supplies entered with a cemetery, crematorium, funeral establishment or transfer service operator must also comply with the specific requirements prescribed not only by the FBCSA[248] but also, for example, by the *Accessibility for Ontarians with Disabilities Act, 2005*[249] and, absent such compliance, an operator cannot enforce the contract, even if the licensed supplies and services provided for under the contract have been delivered or performed.[250]

An estate trustee should also consider if the deceased pre-paid for funeral expenses and, if so, the trustee should: (a) review the contract to verify compliance with the requirements of the FBCSA, failing which it is unenforceable by the operator; and (b) ensure the operator has complied with its duties for pre-paid funeral contracts.[251] Pre-paid contracts are guaranteed – the operator must provide the same service or supplies, without additional charge, even if the price has subsequently increased.[252]

Beyond disciplinary sanction, the potential punishment for operators failing to comply with these protective safeguards is severe: a fine of not more than $50,000 or imprisonment for a term not exceeding "*two years less a day*", or both. If a corporation fails to comply, the fine could be $250,000.[253]

Furthermore, at common law, a contract for funeral services is also a "*peace of mind*" contract, a breach of which, such as unreasonable delay by the operator in providing the funeral service, could result at common law in damages payable by the operator for, for example, emotional or mental suffering by family members.[254]

(c) **Selling Interment and Scattering Rights**:

Holders are entitled to sell their unused interment or scattering rights. A cemetery operator may be required to either repurchase those rights from the holder or, alternatively, facilitate the resale of those rights by the holder on the open market. A cemetery's by-laws must specify if the resale of interment or scattering rights on the open market is prohibited and, if so, the holder may be entitled to cancel the contract with the cemetery operator. If cancelled, the cemetery may be required to repurchase the rights from the holder at the market value identified by the cemetery's current price list, less the amount deposited by the cemetery into its care and maintenance fund or account when the contract was entered initially. However, a cemetery is not required to repurchase interment rights for an unused grave or lot located in a plot, if one or more graves within the plot were previously used.

On the other hand, if the cemetery's by-laws permit the resale of the rights by the holder publicly, the rights cannot be sold for more than the market value listed on the cemetery's current price list. The cemetery operator must be notified in advance of and be involved with the transfer by the holder[255] - the operator may charge an administrative fee but is not required to deposit further into its care and maintenance fund resulting from the resale transaction. [256]

(d) **Additional Sources of Financial Assistance for Funeral Expenses**:

(i) **CPP Death Benefit**:

If the deceased qualified, application should be made for the Canada Pension Plan ("CPP") death benefit to defray reasonable funeral expenses:

- a one-time, lump-sum payment to the estate on behalf of a deceased CPP contributor;
- the application[257] must be made with sixty days of death, usually by the estate trustee appointed by: (i) the will; or (ii) the Court (to administer the estate);
- if no estate exists, or the estate trustee does not apply, application and payment may be made by, in order of priority:
    - the person or institution that has paid for or that is responsible for paying for the funeral expenses of the deceased, such as a local municipality that is required, or elects, to pay for the disposition;
    - the surviving spouse or common-law partner of the deceased; or
    - the next-of-kin of the deceased[258];
- the amount of the benefit depends on both the duration and amount of the deceased's contributions to the CPP[259] – Service Canada provides a table to calculate the payment[260]; and
- Service Canada determines the benefit by calculating the amount that the deceased's CPP retirement pension would have been if the deceased had been age sixty-five at the time of death - the death benefit is equal to six months' worth of this calculated retirement pension to a maximum of $2,500.[261]

(ii) **Ontario Works**:

If the deceased received financial assistance through Ontario Works ("OW"), the Ontario Disability Support Program ("ODSP") or died as a qualifying, low-income person, firstly, OW health benefits may be available to assist with funeral expenses and, secondly, the local municipality may even pay for the funeral (usually burial only) expenses, unless they are prepaid or the deceased's estate has a net value of ten-thousand dollars, or more:

- OW may approve and pay for expenses for a funeral and burial, not only for a recipient or "*benefit unit member*" of OW or ODSP, but for non-member Ontario residents, if eligible[262];
- eligibility is based on financial circumstances of the deceased and/or his or her spouse, if any, on death (*i.e.*, a '*needs and means assessment*');

- the health benefit may include: (a) for burial expense, transferring the body, the purchase of a burial lot, a marker, as required by a cemetery, and potentially "*perpetual care*" cost charged by a cemetery; and (b) for cremation expense, transferring the body, a standard urn and scattering the remains in a cemetery or burial of the remains in a pre-owned lot[263];
- the guideline (recommended) maximum amount payable is $2,250 against the cost of funeral and burial or cremation, but a greater amount may be approved by the "*administrator*" - the person appointed by the "*delivery agent*" (*i.e.*, the local municipality) to "*oversee the administration of* [the OWA] *and the provision of assistance in the delivery agent's geographic area*"[264], subject to the local municipality's own policy maximums for discretionary benefits for funeral arrangements[265],

subject to both the Ontario government's and the "*delivery agent*" municipality's right to seek recovery of the expense from, for example, the deceased's estate or potentially by assignment of other social benefit programs received by the deceased immediately before death, including CPP[266] and Old Age Security ("OAS") pension.[267]

Particularly if an estate for the deceased does not exist, is insolvent, or no estate trustee is acting, alternative sources of assistance for disposition should be considered, including:

(iii) **Local Municipality**:

As discussed above, a local, responsible municipality may also be required to pay for the disposition of:

- an unclaimed or abandoned body[268], particularly when the deceased cannot be identified or, alternatively, if identified, the deceased's estate is non-existent or insolvent and no next of kin or alternative claimant can be located or, if located, is unwilling to claim the body or at least pay for funeral expenses; and
- a patient who died in a hospital and who is an "*indigent person*", or the dependent of an "*indigent person*",[269]

subject to the municipality's right to seek recovery of the expense against, for example, a deceased's estate or possibly social benefit programs benefitting the deceased immediately before death, including the CPP death benefit, if payable.

Generally, a deceased person will be disposed of by burial, if arranged by the local municipality. However, if a municipality pays for funeral expenses, a crematorium operator must cremate a person's remains if given a "*written direction*" from a "*delivery agent*", unless the crematorium restricts its operation to cremation of "*members of a defined religious organization*".[270]

(iv) **OPGT – Estates Administration**:

The OPGT, Estates Administration may also arrange and pay for a funeral and burial if the OPGT administers the deceased's estate requiring, among other things, that the estate has a minimum value of ten-thousand dollars "*after payment of the funeral and all debts owing by the estate*".[271]

(v) **Surviving Spouse**:

A surviving spouse, even if separated from the deceased at the time of death and entitled to no support, may be responsible at common law for the deceased's "*funeral expenses*" if no estate exists or insufficient assets are available to pay the expense[272], but if a third party pays, or a funeral service provider is unpaid, recovery must initially be sought against the estate[273].

(vi) **The Last Post Fund (Veterans)**:

This potential source of assistance is a national, non-profit organization, funded mostly by Veterans Affairs Canada, offering funeral, burial and grave marking benefits for eligible Canadian and Allied Veterans "*due to insufficient funds at time of death*."[274]

Alternative and Emerging Disposal Methods:

Burial and cremation remain the predominant, judicially-approved manner of disposal in Ontario – at approximately the same rate.[275] However, increasing cultural, spiritual and religious diversity, technological innovation, environmentally and ecologically-driven concerns and funeral-related expense continue to challenge the sustainability of both traditional means[276], creating the opportunity for alternatives to emerge.

These alternatives must: (a) comply with the FBCSA as a lawful manner of disposal; and (b) be consistent with an estate trustee's duty, particularly to dispose of human remains in a "*decent*", "*dignified*" and "*appropriate*" manner, which is not comprehensively defined by Ontario law.

These alternative methods of non-conventional disposal are both permitted by the FBCSA and recognized by the BAO:

- *natural* or *green* burial in licensed cemeteries, generally within designated areas[277]; and
- "*alkaline hydrolysis*" [occasionally referred to as "*Resomation*" (a proprietary tradename), bio-cremation or flameless/ water cremation], a process whereby the body is reduced to sterile water and bone ash by a high-pressure, more chemical-friendly process relative to traditional cremation[278], which is offered currently by only five crematorium operators in Ontario[279].

Other alternatives continue to emerge, reportedly being preferable to traditional burial and cremation. These developing alternatives are not yet active or authorized by the BAO in Ontario, but may potentially be permitted by the FBCSA for licensed crematorium operators[280]:

- "*Promession*", a proprietary tradename, a five-step process involving cryogenic freezing, vibration and freeze drying, rendering the body to powder with ostensibly minimal toxicity and resource consumption[281]; and
- "*Cryomation*", also a proprietary tradename, involving freezing the body by liquid nitrogen, fragmenting and removing foreign matter to render granular, non-toxic remains.[282]

Bereavement Sector Reform – Flexibility or Certainty?

Unlike in Ontario, in which disputes regarding the disposal of human remains are resolved primarily by common law, other provinces, including British Columbia, Alberta and Saskatchewan, have codified a hierarchical order of priority establishing the right to control the "*disposition*" of the "*human remains*" of a deceased person[283], including the right to, specifically, control the deceased's cremated remains (ashes).[284]

For example, in B.C., if the person highest in priority is "*unavailable or unwilling to give instructions*", that right passes to the person next in priority.[285] As noted above, if the right to control the disposition of human remains devolves to a class of "*equal rank*", the order of decision-making authority is determined by agreement between them, if any or, alternatively, "*begins with the eldest of the persons or descends in order of age*".[286]

The legislation in B.C. also codifies a mechanism for a person to seek an order by the Court granting that person the '*sole right*' to control the disposition, in which case the Court is statutorily directed to consider, among other things and contrary to the approach in Ontario: "*the feelings of those related to, or associated with, the deceased*…"; the "*rules, practice and beliefs respecting disposition of human remains and cremated remains followed or held by people of the religious faith of the deceased*"; "*any reasonable directions given by the deceased*…"; and any "*family hostility or a capricious change of mind respecting the disposition of the human remains or cremated remains*" and, if that person successfully obtains the order, he or she is deemed "*to be at the top of the order of priority*".[287]

On the one hand, Ontario's current, common law-focused approach to resolving disputes over human remains arguably engenders flexibility, at least in part, as a primary advantage compared to a rigidly set statutory regime. The Superior Court is empowered to adopt a pragmatic approach to resolving disputes about the right of disposal, duly considering the specific facts of the case. Indeed, it may be difficult to conceive of a statutory, rigidly-defined approach, at least without risking the flexibility preserved by a common law approach. Embracing a comprehensive, statutorily-defined approach may also expose estate trustees to potentially greater civil liability,

such as claims for breach of statutory duty, trespass and negligence-based damages for "*wrongful disposition*".[288]

On the other hand, inherent flexibility, as the case law reveals, may also create a degree of uncertainty and unpredictability, or unintentionally facilitate the opportunity for desperate, grieving family members to litigiously escalate their rancor by usurping very limited judicial resources. Ontario's current approach might also be questioned, for example, for not fully appreciating or accounting for: evolving and expanding religious, spiritual and cultural diversity, practices, beliefs and customs; an enshrined commitment to environmental and ecological preservation and protection; generally increasing economic costs, or even the testamentary preference of the deceased, if known.

However, if a statutory hierarchy model were to be considered, careful thought must be afforded to whether the order of priority must reflect the existing common law or, alternatively, be focused more generally on the deceased and his or her relations with others. More acute attention may also be warranted for varying and developing cultural and spiritual factors. Moreover, if legislative reform is a possibility, it may also be worthwhile to contemplate directing the judiciary, when exercising discretion in determining disputes about the person entitled to make decisions about disposal, to consider specific factors, as other provinces have promulgated.

In any event, if any reform to the law for the disposal of a dead body is contemplated, due consideration must be given to:

(a) continuing to emphasize the importance of disposing of human remains in a dignified, decent, respectful and timely manner;
(b) recognizing and respecting choices made by a deceased with respect to the disposal of his or her own body or cremated remains;
(c) more effectively facilitating the resolution of disputes, while minimizing the emergence of protracted, contentious or unnecessary litigation or delay; and

(d) being clear, concise, straightforward, accessible and transparent, not only for surviving family members, but those operating within the bereavement sector and to benefit those who regulate it.

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*This article is a summary for information and guidance only. It is not exhaustive and should not be relied on as legal advice, which should only be obtained from a qualified lawyer based on specific information. For more information – www.**wardlegal.ca** or **jason@wardlegal.ca**.*

End Notes and Additional Reference and Information:

[1] 2002, SO 2002, c. 33 ("FBCSA"). Effective July 1, 2012, the FBCSA both modernized and consolidated the *Cemeteries Act (Revised)*, R.S.O. 1990, c. C. 4 ("*Cemeteries Act*") and the *Board of Funeral Services Act*, R.S.O. 1990, c. F. 36 [formerly the *Funeral Directors and Establishment Act*, R.S.O. 1990, c. F. 36 ("FDEA")] and imposed new and expanded definitions and scope of regulation for the bereavement sector. The FBCSA "*applies*

to all transactions relating to licensed supplies and services even if the purchaser in the transaction or the person engaging in the transaction with the purchaser is located outside of Ontario when the transaction takes place" [FBCSA, ss. 1.1].

[2] An "*individual licensed to provide or direct the provision of funeral services or to hold oneself out as available to do so*" [FBCSA, (*General*) O. Reg. 30/11, ss. 1(1)].

[3] An "*individual who, in respect of contracts made before the death of the intended recipient of supplies and services, is licensed to act under subsection 6 (1) on behalf of a person licensed as a Funeral Establishment Operator – Class 1 or Funeral Establishment Operator – Class 2 or who is licensed to hold oneself out as available to do so*" [FBCSA, (*General*) O. Reg. 30/11, ss. 1(1)].

[4] An "*operator*" is "*a person who is licensed to operate a cemetery, crematorium, funeral establishment, casket retailing business, marker retailing business, transfer service or any other business for which a license may be required by regulation and includes a cemetery owner who is deemed to be a cemetery operator under subsection 5 (2)*" [FBCSA, ss. 1(1)].

[5] FBCSA, ss. 1(1): "*..cemetery services, crematorium services, funeral services and transfer services and includes interment rights and scattering rights and any other services that are sold or provided by a person licensed under* [the FBCSA] *in the normal course of a business regulated under* [the FBCSA]".

[6] FBCSA, ss. 1(1): "*..caskets and markers and any other supplies that are sold by a person licensed under* [the FBCSA] *in the normal course of a business regulated under* [the FBCSA]".

[7] "*Human remains*" means "*a dead human body or the remains of a cremated body*" [FBCSA, ss. 1(1)].

[8] "*Inter*" means the burial of human remains and includes the placing of human remains in a lot [FBCSA, ss. 1(1)] and "*interment*" means the "*burial of a corpse in a grave or tomb, typically with funeral rites*" [English Oxford Living Dictionaries, www.en.oxforddictionaries.com/definition/interment].

[9] A "*crematorium*" is "*a building that is fitted with appliances for the purpose of cremating human remains and that has been approved as a crematorium or established as a crematorium in accordance with the requirements of this Act or a predecessor of it and includes everything necessarily incidental and ancillary to that purpose*", at which "*crematorium services*" are provided, which are "*services provided in respect of the cremation of dead human bodies and includes such services as may be prescribed*" [FBCSA, ss. 1(1)].

[10] Per the FBCSA, sub-section 1.1(2), the same provisions that apply to cremation, crematoriums and related services apply, "*with necessary modifications, to establishments that provide alternative processes or methods of disposing of human remains and to those processes or methods*".

[11] www.thebao.ca/legislation. For more information about the structure and operation of the FBCSA in the bereavement sector: "*Resources for the Bereavement Section – Plain Language Guide for the Funeral, Burial and Cremation Services Act, 2002*", Ministry of Government and Consumer Services - www.sse.gov.on.ca/mcs/en/Pages/fbcsa9.aspx; "*Rules for the bereavement sector and burial sites*", Ministry of Government and Consumer Services - www.ontario.ca/page/rules-bereavement-sector-and-burial-sites.

[12] FBCSA, Part III (*Prohibitions and General Duties Re: Operation of Businesses*) [s. 4 – 13]; Part XI (*Special Provisions Re: Cemeteries, Crematoriums and Burial Sites*) [s. 83 – 105] and (*General*) O. Reg. 30/11, Part I (*Operation of Business*) - Division D (*Standards of Operation*) [s. 43 – 53] and Part III (*Cemeteries, Burial Sites and Crematoriums*) - Divisions A, B, C and D [s. 146 – 191]. A "*burial site*" is land, other than a cemetery, containing human remains [FBCSA, ss. 1(1)].

[13] FBCSA, Part IV (*Licensing*) [s. 14 – 26].

[14] FBCSA, (*General*) O. Reg. 30/11 – Division B (*Additional Prohibited Activities*) [s. 2 – 3].

[15] FBCSA, Part VIII (*Code of Ethics and Discipline*) [s. 62 to 65] and FBCSA, O. Reg. 306/16 (*Code of Ethics*).

[16] FBCSA, Part IX (*Complaints, Inspections and Investigations*) [s. 66 – 71].

[17] The FBCSA, while it contains *comprehensive*, consumer-centric protection provisions, does not limit or restrict the application of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A ("*Consumer Protection Act*") to the bereavement sector [Faith Waldron, Senior Policy Advisor, Consumer Policy and Liaison Branch, Ministry of Government and Consumer Services/Consumer Protection Ontario]. For more information about the *Consumer Protection Act* – www.ontario.ca/page/your-rights-under-consumer-protection-act. An FBCSA "*Consumer Information Guide*" is available from the BAO at thebao.ca.

[18] FBCSA, Part V (*Consumer Protection*) [s. 27 – 50] and FBCSA, (*General*) O. Reg. 30/11, Part II (*Consumer Protection*) – Divisions A, B and C [s. 112 – 144].

[19] FBCSA, Part III (*Prohibitions and General Duties Re: Operation of Businesses*) [s. 4 – 13] and FBCSA, (*General*) O. Reg. 30/11, Part 1 (*Operation of Business*) - Division B (*Additional Prohibited Activities*) [s. 2 – 3].

[20] FBCSA, Part VI (*Trust Accounts*) [s. 51 – 60], s. 59 (*Passing of Accounts*) and FBCSA, (*General*) O. Reg. 30/11, Division F (*Trust Accounts and Trust Funds*) and Division G (*Care and Maintenance Funds and Accounts*).

[21] FBCSA, Part VII (*Compensation Funds*) [s. 61 – 65] and FBCSA, (*General*) O. Reg. 30/11 (*General*), Part IV (*Compensation Fund*) [s. 192 – 211].

[22] The BAO was established on January 16, 2016, pursuant to the *Safety and Consumer Statutes Administration Act, 1996*, SO 1996, c 19 and, by administering provisions of the FBCSA, it "*regulates and supports licensed funeral establishments, cemetery operators, crematorium operators, transfer service operators, funeral directors, funeral preplanners, transfer service sales representatives, cemetery sales representatives, and crematorium sales representatives across Ontario*" [www.thebao.ca]. The BAO is a "*delegated administrative authority*" corporation, pursuant to sub-section 4(1)(b) of the pending *Delegated Administrative Authorities Act, 2012*, S.O. 2012, c. 8, Sched. 11, responsible for administering provisions of the FBCSA and its regulations [FBCSA, ss. 1(1)]. Amongst other regulation and enforcement of the FBCSA, the BAO is responsible for: (i) licensing cemetery, crematorium, funeral establishment and transfer service operators, sales representatives and funeral directors; (ii) enforcing licensees' compliance with the FBCSA through inspections and investigations of licensees; and (iii) responding to questions or complaints from the public related to the bereavement sector. Ontario's Ministry of Government and Consumer Services retains "*residual authority to act*" and provides oversight for the BAO and is responsible for legislation, regulations and administering certain provisions of the FBCSA [FBCSA, ss. 112(4.1)]. For more information about the BAO and its regulatory role and administrative authority on behalf of the Ministry of Government and Consumer Services – www.ontario.ca/faq/what-do-administrative-authorities-do; www.ontario.ca/page/rules-bereavement-sector-and-burial-sites; www.sse.gov.on.ca/mcs/en/Pages/fbcsa9.aspx; "*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 – www.thebao.ca/for-consumers/consumer-information-guide/.

[23] www.theboa.ca/for-consumers/overview/. With respect to "*consumer protection*", the BAO defines the FBCSA as "*consumer protection legislation respecting funerals, burials, cremations and related services within the province of Ontario*", aimed to "*recognize that bereavement related purchases are often made during delicate and emotional times*" and to ensure that "*consumers are clearly informed of their options and have necessary information on hand when making bereavement related purchase decisions*" [www.thebao.ca/legislation/]. The BAO is also authorized to make regulations for the FBCSA [FBCSA, ss. 112(2)].

[24] Notably the FBCSA prohibits an operator, including a funeral establishment, from providing any licensed supplies or services within thirty days after the contract is made with the purchaser, unless the operator is requested by the purchaser under a contract for the provision of licensed supplies or services, within that thirty-day period after the contract was made, to provide any of those supplies or services, for example, because they are required "*for the disposition of human remains*" or the "*co-ordination and provision of rites or ceremonies in relation to human remains*" within that initial, thirty-day period [FBCSA, ss. 43(1); (*General*) O. Reg. 30/11, ss. 139(1)].

[25] A "*will*" is a "*testament*", "*codicil*", "*an appointment by will or by writing in the nature of a will in exercise of a power*" and "*any other testamentary disposition*" [*Succession Law Reform Act*, R.S.O. 1990, c. S. 26 ("SLRA"), ss. 1(1)] and includes "*a testament and all other testamentary instruments of which probate may be granted*" [*Estates Act*, R.S.O. 1990, c. E. 21, ss. 1(1) ("*Estates Act*")] and "*any testamentary instrument of which probate or administration may be granted*" [*Rules of Civil Procedure*, R.S.O. 1990, Reg 194 ("*Rules of Civil Procedure*"), ss. 74.01]. For the public generally, excluding minors and those in military service, a will is *prima facie* valid if it is executed properly, in compliance with the requirements of the SLRA; specifically: (a) it must be in writing [s. 3]; (b) it must be signed by the testator at its end, or by another person at the direction of, or in the presence of, the testator [ss. 4(1)(b)]; (c) the testator's signature must be witnessed by two or more people (both of whom witnessed the testator sign) [ss. 4(1)(b)]; and (d) the two or more witnesses must have signed the will in the testator's presence [ss. 4(1)(c)]. A deceased may have made a "*holograph will*", if the will is wholly by his or her own handwriting and is signed, even with no witnesses and/or if undated [SLRA, s. 6]. A holograph will is not invalidated only because it does not appoint an estate trustee: *Laframboise* v. *Laframboise*, 2011 CanLII 7673 (ONSC) ("*Laframboise*"). For the signature of the testator, a will or holograph will is valid if the signature of the testator (or the person signing for the testator) "*is placed at, after, following, under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will*" [SLRA, ss. 7(1)]. Anything underneath or that follows

the testator's signature, or that was inserted after the will was signed, is invalid [SLRA, ss. 7(3)(a) and (b)]. A holograph will, to be valid, must also reflect that the testator had the necessary intention that his or her would be a non-variable, final disposition on death, not merely some other expression of his or her wishes, which may be transitory or subject to change – rather, the will must reflect "*a deliberate or fixed and final expression of intention as to the disposal of property upon death*": *Bennett* v. *Toronto General Trust Corp*., [1958] S.C.R. 392 ("*Bennett*"), para. 5; *Nizio*l v. *Allen*, 2011 CanLII 7457 (ONSC) ("*Niziol*"), para. 11. A will is not invalidated only because: the testator's signature does not follow, or is not immediately after, the end of the will; a blank space intervenes between the concluding words of the will and the signature; the signature: (i) is placed among the words of a testimonium clause or of a clause of attestation; (ii) follows or is after or under a clause of attestation either with or without a blank space intervening; or (iii) follows or is after, under or beside the name of a subscribing witness; the signature is on a side, page or other portion of the paper or papers containing the will on which no clause, paragraph or disposing part of the will is written above the signature; or there appears to be sufficient space on or at the bottom of the preceding side, page or other portion of the same paper on which the will is written to contain the signature [SLRA, ss. 7(2)]. If a witness to the will is a beneficiary or appointee named in the will, the spouse of that person, or a person claiming through that person, the bequest or appointment of that person by the will may be void, but the will is not necessarily invalidated [SLRA, ss. 12(1)]. If a beneficiary or an '*executor*' is an attesting witness to the will, they are deemed competent witnesses to prove the execution of the will or its validity or invalidity [SLRA, ss. 12(1), s. 14]. The authority of an estate trustee appointed by a will should not be relied on if there is notice to, or knowledge by, the estate trustee appointed by the will, or any other interested party, that the validity of the will has been challenged, particularly by the filing of a "*Notice of Objection*" at the Superior Court of Justice, pursuant to sub-Rule 75.03(1) of the *Rules of Civil Procedure*.

[26] *Silver Estate*, 1999 CarswellOnt 4217, (1999) O.J. No. 5026, 31 E.T.R. (2d) 256, 93 A.C.W.S. (3d) 935 ("*Silver*"); *Re Hollwey* v. *Adams* (1926), 58 O.L.R. 507 (Ont. H.C.) ("*Hollwey*")].

[27] Sub-Rule 74.01 of the *Rules of Civil Procedure* defines "*estate trustee*" as being an "*executor*" or an "*administrator*". "*Personal representative*", if referred to, also means an executor or an administrator [SLRA, ss. 1(1)].

[28] *Catto* v. *McKay*, 2016 CanLII 3025 (ONSC), 2016 CarswellOnt 8846, 20 E.T.R. (4th) 324 (ONSC), para. 44, additional reasons 2016 CarswellOnt 12956 (ONSC) ("*Catto*"), per Smith, J., at paragraph 43: "…*because Donna is entitled to be the administrator of the Estate, I find that she also had the right to decide on the location and manner of the burial of Mark Catto's ashes*"; *Saleh* v. *Reichert*, 1993 CanLII 9394 (ONSC), (1993) CarswellOnt 567, (1993) 50 ETR 143, 104 DLR (4th) 384 (Ont. Gen. Div.) ("*Saleh*") [dispute among the deceased's family members regarding cremation or burial, based on "*the fundamental tenets of the Muslim faith*", per Bell, J., at paragraph 8: "*It is not disputed that, upon the death of a person, a duty arises to bury or otherwise dispose of the remains in a decent and dignified fashion*"; *Carter* v. *Thompson*, Court File Number CV70-1809-ES (Unreported) ("*Carter*"), per Bielby, J.: "*..the law is well established that the executors or estate trustees are the one entitled to deal with the remains and have possession of same*"; *Lajhner* v. *Banoub*, 2009 CarswellOnt 1745, 49 E.T.R. (3d) 87 (ONSC) ("*Lajhner*"), per Gunsolus, J., at paragraph 22: "*There is no legal right in a corpse. Rather than rights, there are only obligations. This is an obligation that the law places on the estate administrator*"; *Abeziz* v. *Harris Estate* (June 17, 1992), Doc. Re 1171/92, 1992 CarswellOnt. 3803, 3 W.D.C.P (2nd) 499, [1992] O.J. 1271 (Ont. Gen. Div.) ("*Abeziz*") [parent of the deceased seeking authority to determine final arrangements], per Farley, J., at paragraph 28: "…*I understand that there is no legal right in a corpse (absent possibly some interim element under the Anatomy Act, R.S.O. 1990, c.A.21 for medical research). Rather than rights there are only obligations. This is an obligation the law places on the executor if there is one……[The estate trustee]…does have the legal obligation to attend to this using estate funds*"; *Hunter* v. *Hunter* (19230) 65 OLR 586, [1930] 4 D.L.R. 255 (Ont. H.C.) ("*Hunter*"), p. 265; *Decleva (Re)*, 2008 CanLII 15896 (ONSC), 2008 CarswellOnt 2106, 42 C.B.R. (5th) 80, 40 E.T.R. (3d) 144 ("*Decleva*"), para. 13 [the duty of disposal is not imposed on other, such as bankruptcy, trustees]; *Schara Tzedeck* v. *Royal Trust Co*., [1953] 1 S.C.R. 31, [1952] 4 D.L.R. 529 (SCC), affirming (1952), 5 W.W.R. (N.S.) 279 (BCCA), affirming (1951), 1 W.W.R. (N.S.) 760 (BCSC) ("*Schara*"), para. 12; *Mouaga* v. *Mouaga*, 2003 CarswellOnt 2128, [2008] O.J. No. 2030, 50 E.T.R. (2d) 253 ("*Mouaga*"), para. 6; *Heafey* v. *McCrae*, 1999 CarswellOnt 5263, 5 E.T.R. (3d) 121, para. 10; affirmed 2000 CarswellOnt 4415, 5 E.T.R. (3d) 125 (Ont. C.A.) ("*Heafey*"); *Sopinka (Litigation Guardian of)* v. *Sopinka*, 2001 CanLII 27996 (ONSC), 2001 CarswellOnt 3234, (2001), 55 O.R. (3d) 529, 42 E.T.R. (2d) 105 ("*Sopinka*"), para. 31; *Johnston* v. *Alberta (Director of Vital Statistics)*, 2008 CanLII 188

(ABCA), 2008 CarswellAlta 644 (Alta. C.A.), affirming 2007 CanLII 597 (ABQB), 421 AR 336, leave to appeal refused, 2008 CanLII 59059 (SCC), 2008 CarswellAlta 1754, 2008 CarswellAlta 1755 (SCC.) ("*Johnston*") [refusal to quash the issuance of a disinterment permit by the Alberta government to the deceased's spouse, challenged through judicial review by the deceased's mother; Court has discretion to determine the right of control of the estate trustee for cremated remains, regardless of the priority prescribed by statute]; *Jaworenko Estate (Re)*, 2013 CanLII 517 (ABQB) ("*Jaworenko*"), para. 40. [estate trustee entitled to determine the disposition of the deceased's cremated remains, despite the objection of the deceased's surviving spouse]; *Bedont Estate, Re*, 2004 CarswellOnt 2107 (Ont. S.C.J.), additional reasons at 2004 CarswellOnt 1930 (Ont. S.C.J.) ("*Bedont*") [no interference with trustee's decision to bury the deceased in foreign country – trustee is responsible for burial and has the right to determine "*the place and manner of such event*"]; *Waldman* v. *Melville (City)*, 1990 CanLII 7808 (SKQB), (1990), 5 E.T.R. (3d) 121 ("*Waldman*"), para. 16, citing with approval *Pettigrew* v. *Pettigrew*, (1904) 207 Pa. 313, 64 L.R.A. 179 (Supreme Court of Pennsylvania) ("*Pettigrew*") [wife held to have no right or control over the body of her deceased husband after burial; the responsibility for disposition of the remains belonged exclusively to his next of kin], citing *Wynkoop* v. *Wynkoop*, 42 Pa. 293, in which the Pennsylvania Supreme Court held, on appeal and at paragraph 21: "*When a man dies, public policy and regard for the public health, as well as the universal sense of propriety, require that his body should be decently cared for and disposed of. The duty devolves upon some one, and must carry with it the right to perform……But inasmuch as there is a legally recognized right of custody, control and disposition, the essential attribute of ownership, I apprehend that it would be more accurate to say that the law recognizes property in a corpse, but property subject to a trust and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise*"; *R.* v. *Fox* (1841) 2 QB 246, 114 ER 95 ("*Fox*"); *R.* v. *Scott* (1842) 2 QB 248, 114 ER 97 ("*Scott*"); Cappon, Donna C., Hawkins, Robyn M and Therieault, Carmen S., *Widdlefield on Executors and Trustees*, (2018) 6th Ed. – 1.1 – The Corpse, WestlawNext, Thomson Reuters Canada ("*Widdlefield*"); *Theobald on Wills*, 13th ed. (1971), p. 111.

[29] *Waldman*, *supra*, note 28, para. 2; *Popp Estate, Re*., 2001 CanLII 183 (BCSC), 2001 CarswellBC 221, 37 E.T.R. (2d) 295 (BCSC) ("*Popp*") [on the deceased's sister's application to disinter the remains, the husband estate trustee was held to be entitled to control disposition of his spouse's cremated remains, "*provided he did not act capriciously*"]; *Widdlefield*, *supra*, note 28.

[30] "*Probating*" a deceased's will may otherwise be necessary in order to verify the validity of the will and authorize the appointed estate trustee to represent the deceased's estate, such as: (a) for dealing with third parties who may require the will be probated before accepting the lawful validity and authority of the will and the power of the estate trustee, such as for transfers of real property, or dealing with financial institutions requested to release or transfer funds or debtors owing money seeking verification of the proper party for repayment; (b) proceedings in which the estate trustee represents the estate as a party, in which case the Court may require the will be probated to satisfy an evidentiary issue, pursuant to section 49 of the *Evidence Act*, R.S.O. 1999, c E. 23 ("*Evidence Act*"); and/or (c) if a foreign estate trustee intends to establish his or her rights in Ontario, in which case ancillary letters probate may be necessary [*Carmichael Estate, Re*, 2000 CanLII 22320 (ONSC) ("*Re Carmichael*") [per Haley, J.'s extensive review of the historical development of the requirement for probate judicially].

[31] *Lajhner*, *supra*, note 28, para. 22; *Abeziz*, *supra*, note 28, para. 28; *Miner* v. *Canadian Pacific Railway*, 1911 CarswellAlta 23, 3 Alta L.R. 408, (1910), 15 W.L.R. 161 (Alta. S.C.) ("*Miner*"), p. 167; *Williams* v. *Williams*, (1882) 20 Ch. D. 659, 51 L.J. Ch. 385, 46 L.T. 275, 46 J.P. 726, 15 Cox 39 (Eng. Ch. Div.) ("*Williams*"), per Kay, J., at page 665: "*It is quite clearly the law of this country that there be no property in the dead body of a human being….after the death of a man, his executors have a right to the custody and possession of his body (although they have no property whatever in it) until it is properly buried*"; *Hunter*, *supra*, note 28, per McEvoy, J., at page 265: "*It has been repeatedly held that there can be no property in a dead body, but, where there has been a duty to bury, it has been held that there is, a right of possession of the body for that purpose*"; *Halsbury's Laws of England*, Vol. 3, "*Burial and Cremation*", p. 405: "*The law in general recognises no property in a dead body*"; *Yearworth, et al*. v. *North Bristol NHS Trust*, [2009] EWCA Civ. 37, [2010] QB 1, [2009] WLR (D) 34, (2009) 107 BMLR 47, [2009] LS Law Medical 126, [2009] 2 All ER 986, [2009] 3 WLR 118 (CA) ("*Yearworth*"); *R.* v. *Sharpe*, 169 ER 959 (1856-7) ("*Sharpe*") [son convicted for disinterring his mother without consent of the cemetery]; *Foster* v. *Dodd*, (1867) LR 3 QB 67, p. 77 ("*Foster*"), per Byles, J.: "*A dead body by law belongs to no one, and is, therefore, under the protection of the public*". For a comprehensive review of the historical development of the common law '*no property in a body*' tenet: Whaley, Kimberly and Stigas, Dina

(Whaley Estate Litigation), "*The Body, Ashes & Exhumation – Who Has The Last Word*?", April 6, 2009, The Six-Minute Estates Lawyer, LSUC.

[32] *Meier* v. *Bell* (Unreported, Supreme Court of Victoria, March 3, 1997) ("*Meier*"), per Ashley, J., at page 6: "*Although in practice the immediate family of a deceased person often make funeral arrangements, it is, strictly, for the executor to decide where burial is to be effected*".

[33] *Grandison* v. *Nembhard* (1989) 4 BLMR 140 (Eng. H.C.) ("*Grandison*") [no interference in the exercise of the estate trustee's discretion unless exercised in a manner that is "*wholly unreasonable*"]; *Sullivan* v. *Public Trustee* (NT) (Unreported, Supreme Court of the Northern Territory, Gallop, A.J., 24 July, 2002) ("*Sullivan*").

[34] *Re Bellotti* v. *Public Trustee*, Unreported, Supreme Court of Western Australia, November 11, 1993 ("*Bellotti*") [only in exceptional circumstances should a court interfere with the manner in which the person entitled to dispose of a deceased person's body exercised that discretion], per Franklyn, J., at page 13: "*What is a proper and decent burial in any particular case must depend on all of the relevant circumstances. It seems to me that it is a matter to be determined at the discretion of the person whose obligation it is to attend to and provide for that burial. In my view, it would be inappropriate for a Court save in the most exceptional circumstances to direct such a person as to how he should exercise that discretion*".

[35] "*The physical change caused by cremation has enabled people to bring disputes before the courts that would be inconceivable if the deceased was still in bodily form.……The physical form of ashes allows them to be carried, moved and generally treated with an ease that is not possible for bodies….the physical transformation caused by cremation lessens their corporeal quality, or perhaps even extinguishes that quality. It is, therefore, not surprising that ashes are moved about and argued over in ways that do not occur with bodies*" [Groves, M, "*The disposal of human ashes*" (2005) 12 Journal of Law and Medicine 267, pp. 270-272].

[36] Rodriguez-Dod, Eloisa, "*Ashes to Ashes: Comparative Law Regarding Survivors' Disputes Concerning Cremation and Cremated Remains*", (2008) Florida International University College of Law, p. 320. In the United States, dividing cremated remains among family member claimants appears to be a common remedy for resolving the dispute: *In re Estate of K.A.*, 807 N.E.2d 748, 749 (Ind. Ct. App. 2004), p. 751 ("*K.A.*")[cremated remains of child divided among the parents]; *In re Estate of Puckett*, PB 2006-000799, slip op. at 4 (Ariz. Super. Ct. Oct. 23, 2006) ("*Puckett Estate*") [Minnesota Twins' outfielder Kirby Puckett's cremated remains divided among his children]; *Stewart* v. *Schwartz Bros.-Jeffer Mem'l Chapel, Inc.*, 606 N.Y.S.2d 965, 969 (N.Y. Sup. Ct. 1993) ("*Stewart*"): "*Displaying the wisdom of King Solomon, who when confronted with two women both claiming to be the mother of a child decided that he would "Divide the living child in two, and give half to the one, and half to the other" (1 Kings 3:16), the parties agreed….to cremate [the deceased] and split the ashes*".

[37] R.S.O. 1990, c. E. 21 ("*Estates Act*").

[38] Pursuant to the *Rules of Civil Procedure*: (a) an "*estate trustee without a will*" is defined as an "*administrator*" [sub-Rule 74.01], while "*administration*" of an estate "*includes all letters of administration of the effects of deceased persons, whether with or without a will annexed, and whether granted for general, special or limited purposes*" [*Estates Act*, s. 1], including for the appointment of an "*administrator*" [*Estates Act*, s. 29]; and (b) application may be made to be appointed, subject to the requirements of sub-Rule 74.05.

[39] *Rules of Civil Procedure*, ss. 74.05(1).

[40] *Buswa* v. *Canzoneri*, 2010 CanLII 7137 (ONSC), 2010 CarswellOnt 988, 65 E.T.R. (3d) 312 ("*Buswa*") [intestate deceased's daughter (his closest next of kin – related by blood in the first degree) granted appointment as estate trustee during litigation only for the purposes of disposing of the deceased's remains in priority to the deceased's siblings (related by blood in the second degree), pursuant to sub-section 29(1)(b) of the *Estates Act*, as the deceased had no spouse including, at paragraph 24, decision-making authority for the manner of disposal (cremation) and arrangements for final disposition in a dignified manner]. "*Next of kin*" means: "*In the law of descent and distribution, this term denotes the person's nearest of kindred to be decedent, that is, those who are most nearly related by blood*" [*Buswa*, *supra*, para. 19] and "*degree of kindred*" means: "*The relationship between a deceased person and her relatives to determine who are most nearly related by blood. For example, parents and children of a decedent are related to the decedent in the first degree. Grandparents, grandchildren, brothers and sisters are related to the decedent in the second degree*" [*Buswa*, *supra*, para. 20].

[41] *Estates Act*, s. 29; *Lajhner*, *supra*, note 28, per Gunsolus, J., at para. 18: "*Such a priority scheme would fetter or be a constraint upon the court's role and would detract from the court's parens patriae jurisdiction*"; *Catto*, *supra*, note 28, para. 35; *Mohammed* v. *Heera*, [2008] O.J. No. 4176 (ONSC) ("*Mohammed*"), per Warkentin, J., at paragraph 28: "*I agree with counsel for the Applicants that a plain reading of s 29(1) does not provide spouses or those living in a conjugal relationship with the deceased at the time of death priority to the appointment over*

next of kin". Comparatively, in British Columbia, the right of a person to control the disposition of human or cremated remains statutorily vests, and devolves, pursuant to a hierarchy, prioritizing "*the personal representative named in the will of the deceased*" [*Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, ss. 5(1)].

[42] *Estates Act*, s. 5; *Catto*, *supra*, note 28, per Smith, J., at paragraph 40: "*…the usual practice is to appoint the married spouse as administrator of the Estate*."; *Mohammed*, *supra*, note 41, per Warkentin, J., at paragraph 30: "*….it may be the usual practice of the Court to appoint the spouse or person living in a conjugal relationship over the next of kin particularly when the person is married to the deceased. In those circumstances the spouse is entitled to a preferential share of the estate and one third of the estate where there are two or more children of the deceased*"; Schnurr, B, *Estate Litigation* (Vol. 2, 2nd, Thomson Carswell, c. 18.6, p. 23).

[43] SLRA, *Intestate Succession*, s. 44 to 49.

[44] *Catto*, *supra*, note 28, para. 42.

[45] *Lajhner*, *supra*, note 28, per Gunsolus, J., at para. 18: "*Sub-section 29(3) clearly indicates that the court has the ultimate discretion to appoint the administrator when a person dies intestate*."

[46] *Estates Act*, ss. 29(3).

[47] *Estates Act*, ss. 29(4).

[48] *Saleh*, *supra*, note 28; *Mouaga*, *supra*, note 28, para. 6; CED (2009) *Burial and Cremation* 1.8(a) (Ontario), 1.8(a) 52-53; *Widdlefied*, *supra*, note 28.

[49] *Mouaga*, *supra*, note 28, para. 6; *W. (L.A.)* v. *Children's Aid Society of Rainy River (District)*, 2005 CarswellOnt 1428, [2005] 3 C.N.L.R. 113, [2005] W.D.F.L. 2673, [2005] W.D.F.L. 2680, [2005] O.J. No. 1446, 139 A.C.W.S. (3d) 309, 254 D.L.R. (4th) 179 (ONSC) ("*CAS Rainy River*"); *Saunders* v. *Saskatoon Funeral Home Company Limited*, 2016 CanLII 217 (SKQB) ("*Saunders*"), per Meschishnick, J., at paragraph 15: "*No doubt that upon death there is an immediate need to have someone authorized to direct the disposal of the human remains*"; *Catto*, *supra*, note 28, para. 40; *Mohammed*, *supra*, note 41, para. 30; *Bellotti*, *supra*, note 34, per Franklyn, J., at page 16: "*In my opinion, it is in the public interest that bodies are not left unburied for long periods*"; *Meier*, *supra*, note 32, per Ashley, J.: "*I consider it to be entirely understandable and appropriate that a court should approach a matter such as the present by seeking to identify a person with the best claim in law to the responsibility of making burial arrangements. Such identification might not always be straightforward, but it is likely to be very much easier than attempting to resolve what I have called the 'merits' [of competing claims to place of burial]. The matter before me illustrates the complex factual issues that could arise for determination if a decision was required to be made upon the merits – issues the subject of hot debate and much emotion*"; *Doherty* v. *Doherty*, [2007] 2 Qd R 259 (QLSC) [right of disposal for cremated remains held by the potential administrator] ("*Doherty*").

[50] *Saunders*, *supra*, note 49, para. 33; *Lewisham Hospital NHS Trust* v. *Hamuth*, [2006] All ER (D) 145 ("*Lewisham*") [hospital, where the deceased had died, ordered to arrange the funeral as the dispute regarding the right to determine the manner of disposal of the deceased was not resolved within a reasonable time].

[51] Any person who appears to have a financial interest in the deceased's estate may, before a certificate of appointment of estate trustee (with a will) has been issued, challenge the validity of the will by filing a prescribed notice of objection (Form 75.1) – *Rules of Civil Procedure*, sub-Rule 75.03.

[52] Section 28 of the *Estates Act*: "*Administration pending action. 28. Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Superior Court of Justice has jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the administrator so appointed has all the rights and powers of a general administrator, other than the right of distributing the residue of the property, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper*." If the appointment of an Estate Trustee During Litigation is ordered, the appointee must file with the Superior Court an application, which must include: (a) the order of appointment; (b) security required by the *Estates Act*, if any, unless dispensed with by the order; (c) any other material that may be directed; and (d) the prescribed form – *Rules of Civil Procedure*, sub-Rule 74.10(1).

[53] Sub-Rules 75.06(1) and (3)(f) of the *Rules of Civil Procedure* provide that any person "*who appears to have a financial interest in an estate may apply for directions…..as to the procedure for bringing any matter before the court*", for which the Court may direct, among other things, "*that an estate trustee be appointed during litigation, and file such security as the court directs*".

[54] *Mayer* v. *Rubin*, 2017 CanLII 3498 (ONSC) ("*Mayer*") [ETDL appointed in a contested passing of accounts], per Myers, J., at paragraph 28: "*The inherent jurisdiction of the court most readily deals with issues concerning the court's own processes. It is used to fill gaps where the legislature has not provided an answer such as when is it appropriate to appoint an officer of the court to preserve and protect the assets of an estate which may be at risk during litigation*" and, at paragraph 31, "*….In my view, the power to appoint an estate trustee during litigation is to ensure that the playing field is kept level*"; *Catto*, *supra*, note 28, per Smith, J, at paragraph 30: "*Rule 74.10(1) also allows the Court to appoint an Estate trustee during litigation.…*" [dispute between deceased's spouse and mother for appointment as administrator and request for exhumation of cremated remains]; *Dempster* v. *Dempster*, 2008 CanLII 59588 (ONSC) ("*Dempster*"), para. 24 [ETDL appointed to achieve a level playing field]; *McColl* v. *McColl*, 2013 CarswellOnt 13589 (ONSC) ("*McColl*") [ETDL appointed in an application for dependent's relief, pursuant to Part V of the SLRA], per Greer, J., at paragraph 25: "*In addition, the Court has the power under subrule 75.06(3)(f) of the Rules of Civil Procedure R.R.O. 1990, Reg. 194 to appoint an estate trustee during litigation, and file such security as the court directs*"; *Groner Estate, Re*, 1994 CarswellOnt 2478 (Ont. Gen. Div.) ("*Groner Estate*"); *Marilyn Dietrich, et al*. v. *Matthew Playfair, et al*., June 24, 2013, Toronto Court File Number 2012-272 (Unreported, Greer, J) ("*Playfair*") [alleged misconduct by appointed estate trustees], per Greer, J.: "*I have the jurisdiction under R75.06(3)(f) to appoint an ETDL…The Trust Company will bring its expertise in administering the estate during litigation as a neutral party who will ready the documentation needed and protect the assets….*"; *Henia Gefen* v. *Arie Gaertner, et al*., January 27, 2017, Toronto Court File Number CV-13-486451 (Unreported; Newbould, J.) ("*Henia*") [ETDL appointed to protect the estate from the trustees' animosity]; *Kalman* v. *Pick, et al*., 2013 CanLII 304 (ONSC) and *Kalman* v. *Pick*, 2014 CanLII 2362 (ONSC), 2014 CarswellOnt 5584 (collectively, "*Kalman*") [ETDL appointed in the context of a dependent's relief claim and a contentious passing of accounts], per McEwen, J., at sub-paragraph 5(ii): "*I am aware that a court should not lightly interfere with the Testator's choice of Estate Trustee or Trustees but the simple fact of this case is that, as noted, a level of dysfunction has arisen that requires the appointment of the ETDL*" and "*…the appointment of an ETDL will likely result in savings to the parties in that the administration of the Estate can be done in an orderly fashion, without acrimony and suspicion*"; *Buswa*, *supra*, note 40 [ETDL appointment to next of kin, pursuant to sub-section 29(1)(b) of the *Estates Act*, including decision-making for final arrangements]; *Potrzebowski* v. *Potrzebowski*, 2016 CanLII 6981 (ONSC), 2016 CarswellOnt 17918, (2016) 273 A.C.W.S. (3d) 223 ("*Potrzebowski*") [ETDL appointed in the context of a dispute between family members regarding authority to act as estate trustee]; *Langston* v. *Landen*, 2006 CanLII 15755 (ONSC), 2006 CarswellOnt 2932, 24 E.T.R. (3d) 110, appealed on other grounds: 2008 CanLII 321 (ONCA) ("*Langston*") [ETDL appointed in the context of the resignation, removal and replacement of estate trustees], per Greer, J., at paragraph 20: "*The Court, however, does not necessarily have to replace these Trustees at the moment. It may appoint an Estate Trustee during Litigation pursuant to s.28 of the Estates Act, R.S.O. 1990, c. E.21. Such a Trustee is subject to the immediate control and direction of the Court, and takes over the administration of the deceased's property and is entitled to reasonable remuneration as fixed by the Court*"; *Consolidated Practice Direction Concerning Estates List in the Toronto Region* (July 1, 2014), Part V – *Scheduling Matters on the Estates List*, sub-part B. *Passing of Accounts Applications*, para. 21 and sub-para. 46(d): "*Draft orders giving directions should address, where applicable, the following matters*:….*d. whether an estate trustee should be appointed during litigation and the amount of security, if any, such an estate trustee should file*" [www.ontariocourts.ca/scj/practice/practice-directions/toronto/estates/#B_Passing_of_Accounts_Applications]. However, in *Forbes* v. *Gauthier Estate*, 2008 CanLII 41574 (ONSC), 2008 CarswellOnt 4912, 168 A.C.W.S. (3d) 1119, 43 E.T.R. (3d) 143 ("*Forbes*"), involving a claim made by the deceased's sibling against the estate for a constructive or resulting trust, Power, J. held the jurisdiction of the Court to appoint an ETDL is limited to only when the validity of a will is challenged, pursuant to section 28 of the *Estates Act*, whereas sub-Rule 75.06(3)(f) does not confer such authority for appointment until a passing of accounts is at issue before the Court.

[55] *Mayer*, *supra*, note 54, para. 31; *McColl*, *supra*, note 54, para. 26.

[56] Hull and Hull, *Probate Practice*, 4th ed., p. 263; *Langston*, *supra*, note 54, para. 20; *Re Bazos*, 1964 CanLII 258 (ONCA), [1964] 2 O.R. 236 ("*Re Bazos*"); *Salisbury* v. *Dell*, [1993] O.J. No. 920 (Ont. Gen. Div.) ("*Salisbury*"); *Commander Leasing Corp. Ltd*. v. *Aiyede*, 1983 CanLII 1649 (ONCA), 4 D.L.R. (4th) 107 ("*Commander*").

[57] *Estates Act*, s. 28 – the right to distribution of property of the estate, particularly if the dispute is resolved, may be permissible with Court approval and the consent of those with a financial interest in the estate. Further

reference – Wagner, Charles, "*Distribution of estate by an Estate Trustee During Litigation*", April 14, 2014 - www.wagnersidlofsky.com/distribution-of-estate-by-an-estate-trustee-during-litigation.

58 *Langston*, *supra*, note 54, para. 22; *Re Bazos*, *supra*, note 56, p. 238.

59 *Mayer*, *supra*, note 54, paras. 34, 35 and 36.

60 *Buswa*, *supra*, note 40, para. 24, in which Stinson, J., pursuant to sub-section 29(1)(b) of the *Estates Act*, appointed the deceased's next of kin as ETDL for the deceased's estate, being the only order sought by the next of kin, and "*authorized and empowered*" the EDTL to "*dispose of* [the deceased's] *remains in a dignified manner*".

61 *Crown Administration of Estates Act*, R.S.O. 1990, c. C. 47, ss. 1(1) and 2(2) ("*Crown Administration of Estates Act*"); *Public Guardian and Trustee Act*, R.S.O. 1990, c. P. 51, ss. 7(1) ("*Public Guardian and Trustee Act*").

62 *Crown Administration of Estates Act*, ss. 2(2): "*For greater certainty, subsection (1) does not affect the obligation of the Public Guardian and Trustee to apply for letters of administration or letters probate*".

63 The OPGT is appointed as estate trustee for approximately 225 estates per year and administers approximately 1,400 estates at any given time [www.attorneygeneral.jus.gov.on.ca/english/family/pgt/estatesadmin.html].

64 According to the OPGT's own policy, it will administer an estate if: (a) the deceased was an Ontario resident or owned real estate in Ontario; (b) the deceased did not make a will or the deceased did make a will, but the estate trustee has died or become incapable; (c) there are no known next of kin living in Ontario or the next of kin are minors or mentally incapable adults; and (d) the estate is valued at a minimum of $10,000.00 after payment of the funeral and all debts owing by the estate [Ministry of the Attorney General, The Office of the Public Guardian and Trustee Estates Administration, "*Estates Administration: The Role of the Public Guardian and Trustee*", ISBN 0-7794-5752-8, 2014 - www.attorneygeneral.jus.gov.on.ca/english/family/pgt/estatesadmin.html.

65 *Public Guardian and Trustee Act*, ss. 7(1.1); *Potrzebowski*, *supra*, note 54, para. 3.

66 *Potrzebowski*, *supra*, note 54.

67 *Crown Administration of Estates Act*, ss. 2(1).

68 *Public Guardian and Trustee Act*, ss. 7(1): "*The Public Guardian and Trustee may be granted letters probate or letters of administration and, subject to subsection (1.1), may be appointed as a trustee under any Act or as trustee of any will or settlement or other instrument creating a trust or duty in the same manner as if he or she were a private trustee*".

69 *Anderson* v. *Walden*, 1959 CanLII 152 (ONCA) ("*Anderson*"), paras. 18 and 21 (per Schroeder, J.A.).

70 *Calma* v. *Sesar* (1992) 2 NTLR 37; (1992) 106 FLR 446 (NTA H.C.) ("*Calma*") [dispute among parents about place of burial of adult son; both equally entitled to apply for "*letters of administration*" and treated on an equal footing; solution could not be based on competing religious beliefs and values; practical issue was burial without unreasonable delay], per Martin, J., at paragraph 13: "*The conscience of the community would regard fights over the disposal of human remains such as this as unseemly. It requires that the Court resolve the argument in a practical way paying due regard to the need to have a dead body disposed of without unreasonable delay, but with all proper respect and decency*"; *Smith* v. *Tamworth City Council* (1997) 41 NSWLR 680 ("*Smith*"), per Young, J.: "*Where two or more persons have an equally ranking privilege, the practicalities of burial without unreasonable delay will decide the issue*"; *Burrows* v. *Cramley*, [2002] WASC 47, Pullin, J. ("*Burrows*"); *Keller* v. *Keller*, [2007] VSC 118 ("*Keller*") [deceased's daughter closer to her mother and preferred over the deceased's son], per Hargrave, J., at page 671: "*I have come to the view that I should exercise my discretion in favour of the child in whom the deceased reposed her principal trust and confidence concerning the significant issues which she faced in her later years*".

71 *A.B.* v. *C.D.*, [2007] NSWSC 1474 ("*AB*") [dispute between parents over the place of burial of their deceased child], per Harrison, J., at paragraph 59: "*…arguments in support of* [the parents'] *respective contentions inevitably invited a consideration of significantly more arcane matters such as love, sentiment, grief, responsibility and even anger. It would in my opinion have been curious if these matters had not become prominent in the present proceedings, and wrong to exclude consideration of them when they did. It seems to me to be presently beyond doubt that each of the child's mother and father feels the need to pursue her or his respective claims for relief for reasons not necessarily entirely associated with the ultimate outcome. This is also completely understandable. However, such factors are usually evenly balanced and not productive of satisfying or comfortable persuasion. This case is no exception*".

72 *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, ss. 5(3).

[73] Also referred to as a "*memorandum of wishes*", a document made by a testator that may or may not be specifically identified or referenced by his or her will, but is an expression of wishes made by the testator or settlor regarding the manner in which his or her trustee(s) exercise their discretionary powers conferred by a will [uslegal.com].

[74] *Hunter, supra*, note 28, p. 265; *Schara, supra*, note 28; *CAS Rainy River, supra*, note 49; *Williams, supra*, note 31, p. 665 [Court refused to enforce the deceased's direction for cremation in a codicil]: "*It follows that a man cannot by will dispose of his dead body. If there be no property in a dead body it is impossible that by will or any other instrument the body can be disposed of*"; *Saleh, supra*, note 28, paras. 7 and 27 [unsuccessful challenge by the deceased's father to the trustee's decision to cremate, based on Islam doctrine], per Bell, J, at paragraph 25: "*….religious law had no bearing on the case……there are only legal obligations*"; *Lajhner, supra*, note 28, per Gunsolus, J., at paragraph 20: "*Even in circumstances where a deceased expresses the wish to be cremated that is not dispositive of the issues, as an expressed wish of a person directing the disposition of his or her body cannot be enforced in law. Rather, the duty to dispose of the remains falls upon the administrator of the deceased's estate…..*" and, at paragraph 29: "*The court is cognizant of the religious beliefs that motivate the Applicants and the Respondent Ms. Banoub in relation to this matter. The law is clear, however, that such religious laws or beliefs are not a factor that the court may take into consideration. Ultimately, it is up to the estate administrator or trustee to assume the obligation to dispose of the deceased's remains in an acceptable and dignified fashion*"; *Abeziz, supra*, note 28 [unsuccessful challenge by the deceased's mother to cremation directed by the estate trustee, based on Orthodox Jewish doctrine], para. 23.; *Buchanan* v. *Milton*, [1999] 2 FLR, 855 (Hale J.) (Eng. H.C.) ("*Buchanan*") [Court acknowledged the deeply-held cultural beliefs of the deceased's birth family, but determined it was inappropriate to base a decision about disposal on the cultural or spiritual beliefs of the parties]; *Meier, supra*, note 32, per Ashely, J.: "*…There cannot be departure from principle in order to accommodate particular factual disputation, whether it be founded on matters religious, cultural or some other description*". Notably, other jurisdictions have statutorily conferred the right to a deceased person to direct for his or her own disposition of remains – for example: (i) *Cremation, Interment and Funeral Services Act*, SBC 2004, c 35, s. 6: "*A written preference by a deceased person respecting the disposition of his or her remains or cremated remains is binding on the person who under section 5 [control of disposition of human remains or cremated remains], has the right to control the disposition of those remains if (a) the preference is stated in a will or preneed cemetery or funeral services contract, (b) compliance with the preference is consistent with the Human Tissue Gift Act, and (c) compliance with the preference would not be unreasonable or impracticable or cause hardship*"; and (ii) *Civil Code of Quebec*, CQLR c CCQ-1991, s. 42: "*A person of full age may determine the nature of his funeral and the disposal of his body; a minor may also do so with the written consent of the person having parental authority or his tutor. In the absence of wishes expressed by the deceased, the wishes of the heirs or successors prevail. In both cases, the heirs or successors are bound to act; the expenses are charged to the succession*".

[75] Disputes often arise based on religion, custom or tradition. For example, the Jewish faith considers cremation an act of desecration and humiliation of the dead; *Abeziz, supra*, note 28 [nothing inherently undignified about cremation, a judicially-accepted manner of disposal in Ontario]; Rabbi Yitzchok Breitowitz, "*The Desecration of Graves in Eretz Y Israel: The Struggle to Honor the Dead and Preserve Our Historical Legacy*", Jewish Law Articles – www.jlaw.com/Articles/heritage.html. Similarly, cremation may offend fundamental tenets of the Islamic faith – *Saleh, supra*, note 28. Inter-faith conflict may also arise, such as differences between the manner of Protestant and Catholic burial: *Hunter, supra*, note 28; *Keller, supra*, note 70, per Hargrave, J., at page 669: "*The authorities establish that the court ought not, in an application such as this, embark on a lengthy adversarial hearing to resolve the various claims and counterclaims. This would delay the decision for an unacceptable period while the body remained undisposed of*".

[76] *Abeziz, supra*, note 28, per Farley, J., at paragraph 23: "*…While it is true that [a] testator cannot force his executor to comply with his or her wishes there is nothing to prevent a valid executor from carrying out a testator's lawful wishes concerning the disposal of the testator's body"*; *Widdlefield, supra*, note 28.

[77] *Heafey, supra*, note 28, para. 15.

[78] An estate trustee should review the drafting lawyer's file and notes to discern if the deceased expressed any preferences for final arrangements, which may not be expressed in, or fully expressed by, the will or a precatory memorandum, and to determine if the deceased had arranged any funeral-related pre-planning, such as purchasing a lot or pre-paying any funeral-related expenses.

[79] *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, s. 6.

[80] *Buswa*, *supra*, note 40, para. 24; *Abeziz*, *supra*, note 28, per Farley, J., at paragraph 28: "*…The fundamental obligation is that the body be appropriately dealt with – that is disposed of in a dignified fashion. Burial and cremation come to mind as being specifically sanctioned in Ontario*."; *Saleh*, *supra*, note 28, per Bell, J., at paragraph 25: "*..the fundamental duty or obligation is that the remains be disposed of in a decent and dignified fashion. Further, as burial and cremation are both specifically sanctioned in Ontario, disposal by either means would meet the requirement for disposal in a decent and dignified fashion…*"; *Lajhner*, *supra*, note 28, paras. 21 and 22; *Bastien* v. *Ottawa Hospital (General Campus)*, 2001 CanLII 28016 (ONSC), 2001 CarswellOnt 3561, 56 O.R. (3d) 397 ("*Bastien*") [despite a lack case law on the meaning and scope of the obligation, the standard of care for burial is in a decent and dignified manner]; *Saunders*, *supra*, note 49, para. 16.

[81] FBCSA, ss. 5(3)(a) and 7(1).

[82] FBCSA, (*General*) O. Reg. 30/11, ss. 31(2)(a).

[83] FBCSA, (*General*) O. Reg. 30/11, ss. 4(1). Embalming dead human bodies means "*to preserve and disinfect all or part of a dead human body by any means other than by refrigeration, but does not include religious rites relating to the washing of a body*" [FBCSA, ss. 1(1)]. Practically, it is the process of replacing blood and bodily fluids with a chemical solution to temporarily preserve the body. In Ontario, embalming is not required by law, but in some circumstances may be recommended by an operator, particularly if there may be delay between death and the visitation, burial or cremation ["*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 – www.thebao.ca/for-consumers/consumer-information-guide/, p. 8]. However, embalming (or making "*any alteration to the body*" or applying "*any chemical to the body, internally or externally*") of a human dead body is prohibited if a person "*has reason to believe that a dead body will be shipped or taken to a place outside Ontario*" until a certificate is issued by the coroner [*Coroners Act*, R.S.O. 1990, c. C. 37, ss. 13(3) ("*Coroners Act*")].

84 *Criminal Code*, RSC 1985, c C-46, s. 182 ("*Criminal Code*"): "*Dead Body - Every one who* (a) *neglects, without lawful excuse, to perform any duty that is imposed on him by law or that he undertakes with reference to the burial of a dead human body or human remains, or* (b) *improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years*"; *R.* v. *Murray*, 2007 CarswellNB 268, 2007 NBQB 214, 829 A.P.R. 177, 322 N.B.R. (2d) 177 (N.B.Q.B.) [funeral director convicted of "*offering an indignity*" to human remains for improperly storing a body pending disposition].

[85] *Decleva*, *supra*, note 28, para. 13; *Schara*, *supra*, note 28, paras. 12 and 14; *Mouaga*, *supra*, note 28, para. 3; *Saunders*, *supra*, note 49, para. 16: "*…and if the disposition is to be done in a dignified manner, it must be done in a timely fashion*".

[86] *Sopinka*, *supra*, note 28 [estate trustee breached the duty to inform, but no damages were awarded to the deceased's former spouse for intentional infliction of "*mental suffering*", or otherwise], per Quinn, J, at paragraphs 35 and 36: "*Although I was not provided with any authority on point, I am prepared to hold there is a duty on an estate trustee, upon request, to provide particulars to the next of kin of the deceased regarding his or her burial. I would define next of kin generally to include the mother, father, children, brothers, sisters, spouse and common law spouse of the deceased. Where next of kin happen to be minors, I think that the duty is owed to them through their custodial parent or guardian…The specific request must be reasonable and the nature of the particulars provided must be appropriate in the circumstances*".

[87] *Popp*, *supra*, note 29, para. 23; *Widdlefield*, *supra*, note 28.

[88] For example, in *Sopinka*, *supra*, note 28 [deceased's former spouse's action against the estate trustee alleging, *inter alia*, breach of the duty to inform of final arrangements was dismissed for lack of supporting evidence], Quinn, J. held at paragraph 41: "*Although the statement of claim seeks damages for the intentional infliction of "mental suffering", I take this to be the tort more commonly known as the intentional infliction of "nervous shock". This tort has three elements: (1) an overt act by the defendant; (2) intention to produce harm; and (3) resultant nervous shock sustained by the Plaintiff and consequent injury. The gist of the authorities is that the overt act must be flagrant and extreme. Intention is proved by the express statement of such or by facts permitting intention to be imputed. Once intention is established, motive is irrelevant. Finally, the overt act must produce a visible and provable injury or illness*".

[89] Trudelle, Paul, Hull and Hull [LLP], "*Dealing with the Body, and Other Estate Issues That Arise Immediately Upon Death*", October, 2008, p. 4 ("*Dealing with the Body*").

[90] FBCSA, Part IX (*Complaints, Inspections and Investigations*) [s. 66 – 71]; "*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 – www.thebao.ca/for-consumers/consumer-information-guide/, p. 12.

[91] *Sopinka, supra*, note 28; *Trustee Act*, R.S.O. 1990, c. T. 23, s. 3 ("*Trustee Act*").

[92] *Abeziz, supra*, note 28, para. 28; *Miner*, *supra*, note 31 [damages claimed by a mother for, *inter alia*, transferring her deceased son's remains to an incorrect location], in which Beck, J., at paragraph 19, recognized potential qualifications to '*no property in a dead body*', effectively balancing the duty to dispose of the body and conditions that may exist: "*…the law recognizes property in a corpse, a property, of course, which is subject, on the one hand, to the obligations, e.g. of proper care and prima facie of decent burial appropriate to its condition and the condition of the individual in his lifetime….and to the restraints upon its voluntary or involuntary disposal and use provided by law (e.g. the existence of the conditions authorizing its use for anatomical purposes) or arising out of the fact that the thing in question is a corpse…and, on the other hand, the nature and extent of the right or obligation of the person for the time being claiming property (e.g. an executor, a husband, wife, next of kin, medical institute, etc.)"* and, specifically, at paragraph 18, for example: potentially historically-significant remains of interest to society (i.e., mummification) and "*skeletons or anatomical preparations of bodies or parts of bodies; and I shall take the liberty of adding – outside the range of the ecclesiastical law of the Church of England – bodies or parts of bodies preserved and venerated as the relics of saints*", the basis of which would not apply in Canada; *Doodeward* v. *Spence*, [1908] 6 CLR 40 (H.C.) ("*Doodeward*"), cited by Beck, J. in *Miner, supra* [the purchaser of a preserved two-headed, still-born fetus, which the purchaser exhibited publicly, was held liable for indecently displaying human remains, but conversely was also granted possession of, or property in, the fetus], in which Griffith, C.J. held for the majority (with Higgins, J. dissenting on the basis that there can be no property in a human body, dead or alive): "*If, then, there can, under some circumstances, be a continued rightful possession of a human body unburied, I think, as I have already said, that the law will protect that rightful possession by appropriate remedies. I do not know of any definition of property which is not wide enough to include such a right of permanent possession. By whatever name the right is called, I think it exists, and that, so far as it constitutes property, a human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under such right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of a work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances*"; *Dobson and Dobson* v. *North Tyneside Health Authority and Newcastle Health Authority*, [1997] 1 WLR 596, [1996] EWCA Civ. 1301, (1997) 33 BMLR 146, [1997] 1 FLR 598, [1996] 4 All ER 474 (CA) ("*Dobson*") [damages claimed by family members after discovering not all body parts had been returned for burial following the post-mortem, being retained for medical research] at page 479, at which the Court of Appeal held that the neuropathologist who had removed the brain during an autopsy and preserved it did not create an actionable proprietary claim, such as "*stuffing or embalming a corpse or preserving an anatomical or pathological specimen for a scientific collection or with preserving a human freak such as a double-headed foetus that has some value for exhibition purposes"*; *AB, et al*. v. *Leeds Teaching Hospital NHS Trust, Cardiff and Vale NHS Trust*, [2004] EWHC 644, (2004) 77 BMLR 145, [2004] 2 FLR 365, [2005] 2 WLR 358, [2005] QB 50 (QB) ("*Leeds*") [damages claimed against hospitals and medical practitioners for removal of organs from deceased children without parental, informed consent]; *Yearworth*, *supra*, note 31 [damages claimed against the defendant hospital with custody of sperm samples given by the claimants during fertility treatment, which were destroyed by equipment failure]; *R.* v. *Kelly and Lindsay*, [1999] QB 621, [1999] 2 WLR 384, [1998] 3 All ER 741 ("*Kelly*") [criminal conviction of artists upheld for theft for depicting anatomical specimens, or human body parts used for training purposes, held by the Royal College of Surgeons], in which Rose, L.J., at pages 630 to 631, citing *Doodewood*, *supra*, with approval, held that, as an exception to the longstanding common law rule of '*no property in a corpse*', parts of body are capable by law of becoming the subject of property, particularly if those parts have been preserved for medical or scientific examination, or for the benefit of medical science, or such parts have otherwise "*acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes*…." – a right to retain possession may arise.

[93] *Kelly, supra*, note 92, p. 750: "*…the common law does not stand still. It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property for the purposes of*

section 4, even without the acquisition of different attributes, if they have a use of significance beyond their mere existence. This may be so if, for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit in a trial. It is to be noted in Dobson, there was no legal or other requirement for the brain, which was then the subject of the litigation, to be preserved"; *C.C.* v. *A.W.*, [2005] A.J. No. 428, 2005 CanLII 290 (ABQB) ("*C.C.*") [genetic materials; specifically, fertilized embryos, were ordered returned to the female partner as her property]; *J.C.M* v. *A.N.A.*, 2012 CanLII 584 (BCSC) ("*J.C.M.*"); *Lam* v. *University of British Columbia*, 2013 CanLII 2094 (BCSC), 2013 CanLII 2142 (BCSC) and 2015 CanLII 2 (BCCA) ("*Lam*") [frozen sperm held to be property (for the purpose of warehouse legislation)]; *K.L.W.* v. *Genesis Fertility Centre*, 2016 CanLII 1621 (BCSC) ("*K.L.W.*") [human sperm or ovum stored for reproductive purposes are property]; *Kate Jane Bazley* v. *Wesley Monash* IVF Pty. Ltd., [2010] QSC 118 (Queensland SCTD) ("*Bazley*"); *Jocelyn Edwards: Re the Estate of the late Mark Edwards*, [2011] NSWSC 478 ("*Edwards*"); *Hecht* v. *Superior Court*, 16 Cal. App. 4th 836 (1993), 59 Cal. Reptr. 2d 222 (Cal. CT. App 1996) ("*Hecht*") [deceased had a proprietary interest in his own frozen sperm sufficient to direct for its disposition]; *Yearworth*, *supra*, note 31 [damages awarded against a hospital arising from destruction of frozen sperm]; Weber, Bryce, *et al*., "*Postmortem Sperm Retrieval: The Canadian Perspective*" (2009) Journal of Andrology, Vol. 30, Issue 4, pp. 407-409; Shapiro and Sonnenblick, "*The Widow and the Sperm: The Law of Post-Mortem Insemination*" (1986) 1. J. Law & Health 229, 243-244; Whaley, Likwornik, "*Genetics and the Estate Claim: Life After Death?*", OBA Institute, February, 2008.

94 *Assisted Human Reproduction Act*, SC 2004, c. 2 ("*Assisted Human Reproduction Act*"), s. 8: "*Use of reproductive material without consent.* 8 (1) *No person shall make use of human reproductive material for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its use for that purpose. Posthumous use without consent.* (2) *No person shall remove human reproductive material from a donor's body after the donor's death for the purpose of creating an embryo unless the donor of the material has given written consent, in accordance with the regulations, to its removal for that purpose. Use of in vitro embryo without consent* - (3) *No person shall make use of an in vitro embryo for any purpose unless the donor has given written consent, in accordance with the regulations, to its use for that purpose*"; Snow, Dave, Baylis, Francoise and Downie, Jocelyn, "*Why the Government of Canada Won't Regulate Assisted Human Reproduction: A Modern Mystery*" (McGill Journal of Law and Health), 2015 CanLIIDocs 116.

95 The statutory requirements to establish consent by the deceased donor for the posthumous removal of his or her reproductive material "*for the purpose of creating an embryo*" are prescribed by the *Assisted Human Reproduction (Section 8 Consent) Regulations*, SOR/2007-137, Part 2 – *Consent Given Under Subsection 8(2) of the Act* [s. 6 – 9].

96 *Children's Law Reform Act*, R.S.O. 1990, c. C. 12, ss. 12(1) ("CLRA").

97 "*Transplant*" means "*the removal of tissue from a human body, whether living or dead, and its implantation in a living human body, and in its other forms it has corresponding meanings*" [TGLNA, *infra*, s. 1]. Organs or tissue not suitable for transplantation can be used for organ and tissue research (if consented to by the donor upon or after registration in the Network) - this research is specific to the field of organ and tissue donation, and is not the same as whole body donation - www.giftoflife.on.ca/en/faq.htm.

98 The TGLN is a "*not-for-profit agency of the Government of Ontario*", established by the *Trillium Gift of Life Network Act*, R.S.O. 1990, c. H. 20 ("TGLNA"), pursuant to the *Human Tissue Gift Amendment Act (Trillium Gift of Life Network)*, 2000, S.O. 2000 c. 39 – Bill 142, "*dedicated to the planning, promotion, coordination and support of organ and tissue donation and transplantation. Its mission is to save and enhance lives through the gift of organ and tissue donation in Ontario*." - www.giftoflife.on.ca/en/faq.htm.

99 *Anatomy Act*, R.S.O. 1990, Chapter A. 21, s. 1 ("*Anatomy Act*"), defines a "*school*" as "*an institution designated as a school by the regulations*", and sub-section 14(a) authorizes making regulations "*designating schools for the purposes of this Act*", which are identified by O. Reg. 21 (*General*). Ten education institutions in Ontario are designated currently and many operate body donor programs, with prescribed consent and other forms. For example, Queen's University, School of Medicine, Department of Biomedical and Molecular Sciences, "*Human Body Donor Program*" - https://dbms.queensu.ca/home/human_body_donor_program; University of Guelph, Human Health & Nutritional Sciences, "*Human Anatomy Body Donation Program*" - https://www.uoguelph.ca/hhns/human-anatomy-body-donation-program; University of Toronto, Surgery, "*Willed Body Program*" - https://surgery.utoronto.ca/willed-body-program; Branswell, Helen, The Canadian

Press, Toronto Star, Nov. 24, 2008, "*How to donate your body to science*" - https://www.thestar.com/life/health_wellness/2008/11/24/how_to_donate_your_body_to_science.html.

[100] TGLNA, ss. 4(2).

[101] In 2008, TGLN ended the use of paper donor cards, by adopting an online registry stored by The Ministry of Health and Long-Term Care ("MHLTC") for consent to donate organs and tissue. Any person who is sixteen years of age or older, with a valid Ontario health card, may register their consent for organ and tissue donation at www.BeADonor.ca or in person at any Service Ontario centre. Service Ontario also delivers an "*Organ and Tissue Donor Registration*" form when, for example, a driver's license or health care is renewed or replaced, which may be mailed or delivered in person to any Service Ontario location for registration as a donor. By registering as an organ and tissue donor, a person can consent to the use of his or her organs and tissues for transplant only, or transplant and organ and tissue research. The donor is also given the opportunity to consent to any needed organs and tissues, or exempt organs and tissue from a specified list – these decisions are affirmed by the codes on the back of the person's photo health card. Organ donation is rare in Ontario – only two-to-three *per cent* of hospital deaths occur in a manner allowing for organ donation; specifically, when the deceased passes in a hospital and on a ventilator. Tissue donation (particularly eyes, bone, skin and heart valves) offers greater opportunity – a deceased person may donate tissue after passing in a hospital (but without being on a ventilator) or at home [www.giftoflife.on.ca/en/faq.htm].

[102] "*Tissue*" is defined as "*a part of a living or dead human body and includes an organ but, unless otherwise prescribed by the Lieutenant Governor in Council, does not include bone marrow, spermatozoa, an ovum, an embryo, a foetus, blood or blood constituents*" [TGLNA, s. 1]. Section 2 reads: "*A transplant from one living human body to another living human body may be done in accordance with this Act, but not otherwise*", permitting tissue donation from a deceased human body by other means. According to the Network, organs and tissue that can be donated include the heart, kidneys, liver, lungs, pancreas, small intestines, eyes, bone, skin, and heart valves [www.giftoflife.on.ca/en/faq.htm].

[103] TGLNA, ss. 4(1).

[104] TGLNA, ss. 4(3).

[105] "*Hospital*" is defined as a "*hospital approved as a public hospital*" under the *Public Hospitals Act*, R.S.O. 1990, c. P. 40 ("*Public Hospitals Act*"). Unless the Network determines otherwise, every "*designated facility*" must notify the Network as soon as possible when a patient at the facility has died, or a physician is "*of the opinion that the death of a patient at the facility is imminent by reason of injury or disease*" [TGLNA, ss. 8(1) and (2)]. The Network "*shall*" determine, in consultation with the facility, whether the facility is required to contact the patient, or the patient's substitute, regarding consent for tissue donation [TGLNA, ss. 8(3)]. A "*designated facility*" may be a hospital, health facility or other entity "*engaged in activities related to tissue donations or transplants*" or "*designated as a member of a prescribed class of facilities*" [TGLNA, s. 1 and ss. 8(2)]. Class designations and members of a class are defined by O. Reg. 179/05 (General).

[106] To reaffirm an individual's consent to donate, the Network considers the appropriate legal authority to be, in descending order of priority: "1. *the patient's spouse or same-sex partner*; 2. *a child of the patient*; 3. *a parent of the patient*; 4. *a brother or sister of the patient*; 5. *any other relative of the patient*; *and* 6. *any person who is lawfully in possession of the body (e.g., an executor of the will, or administrator of the estate)*." In there is no next of kin for the deceased, donation can proceed when registered consent has been recorded with the MHCTC's database [www.giftoflife.on.ca/en/faq.htm].

[107] www.giftoflife.on.ca/en/faq.htm.

[108] TGLNA, ss. 5(2).

[109] Consent may be obtained by the next in priority if the that person is "*not readily available*" [TGLNA, ss. 5(2]. Sub-section 5(1) defines "*spouse*" as a person: (a) to whom the person is married; or (b) with whom the person is living or, immediately before the person's death, was living in a conjugal relationship outside marriage, if the two persons: (i) have cohabited for at least one year; (ii) are together the parents of a child; or (iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*, R.S.O. 1990, c. F. 3 ("*Family Law Act*"), notably a definition of "*spouse*" different from the definition at sub-section 1(1) and section 29 of the *Family Law Act*.

[110] Except for the following: (a) the Chief coroner, or coroner in possession of the body, for purposes of the *Coroners Act*; (b) the Ontario Public Guardian and Trustee in possession for burial of the body, pursuant to the *Crown Administration of Estates Act*; (c) a licensed operator under the FBCSA, particularly an embalmer or

funeral director in possession "*for the purpose of its burial, cremation or other disposition*"; and (d) a crematorium in possession for purposes of cremating the body [TGLNA, ss. 5(5)].

[111] TGLNA, ss. 5(3).

[112] TGLNA, ss. 5(4).

[113] TGLNA, ss. (4.1).

[114] www.mcscs.jus.gov.on.ca/english/DeathInvestigations/WholeBodyDonation/DI_body_donation.html.

[115] TGLNA, s. 8.

[116] TGLNA, s. 6 - Coroner's direction: "*Where, in the opinion of a physician, the death of a person is imminent by reason of injury or disease and the physician has reason to believe that section 10 of the Coroners Act may apply when death does occur and a consent under this Part has been obtained for a post mortem transplant of tissue from the body, a coroner having jurisdiction, despite the fact that death has not yet occurred, may give such directions as the coroner thinks proper respecting the removal of such tissue after the death of the person, and every such direction has the same force and effect as if it had been made after death under section 11 of the Coroners Act*".

[117] *Anatomy Act*, ss. 4(1).

[118] Ministry of Community Safety & Correctional Services, "*Whole Body Donation*" - www.mcscs.jus.gov.on.ca/english/DeathInvestigations/WholeBodyDonation/DI_body_donation.html.

[119] Per section 1 of the *Anatomy Act*, the body may be disposed of by any disposition permitted by the FBCSA.

[120] *Anatomy Act*, s. 7. A donor's remains are commonly and respectfully cremated and interred in a plot owned by the medical or educational facility, or may be returned to the deceased's family, upon request. The designated facilities commonly arrange an annual service of gratitude, to which the deceased's family and friends are invited, to honour and extend gratitude to donors and for their donative generosity ["*Whole Body Donation*", Ministry of Community Safety and Correctional Services, November 29, 2017 – www.mcscs.just.gov.on.ca].

[121] TGLNA, ss. 9(1) and (2) read: "*No action or other proceeding for damages or otherwise shall be instituted against any of the following individuals for any act done or performed in good faith in the performance or intended performance of any duty or function or in the exercise or intended exercise of any power or authority under this Act or for any neglect, default or omission in the performance or execution in good faith of any duty, function, power or authority under this Act: 1. A member of the board of directors of the Network. 2. A member of the medical or other staff of a designated facility. 3. Any other person employed in a designated facility*"; and "*Despite sections 5 and 23 of the Proceedings Against the Crown Act, no action or other proceeding for damages or otherwise shall be instituted against the Crown, the Minister or an officer, employee or agent of the Crown for any act done or performed in good faith in the performance or intended performance of any duty or function or in the exercise or intended exercise of any power or authority under this Act or for any neglect, default or omission in the performance or execution in good faith of any duty, function, power or authority under this Act*".

[122] In Ontario, coroners are medical doctors with specialized training in the principles of death investigation, who investigate approximately 15,000 deaths per year, pursuant to section 10 of the *Coroners Act* - www.mcscs.jus.gov.on.ca.

[123] *Coroner's Act*, s. 10 and 11.

[124] *Coroner's Act*, ss. 10(2).

[125] *Coroner's Act*, ss. 10(2.1).

[126] *Coroner's Act*, ss. 10(3).

[127] *Coroner's Act*, ss. 10(4), (4.1), (4.2) and (4.3).

[128] *Coroner's Act*, ss. 10.1(1).

[129] *Coroner's Act*, ss. 10(4.6), (4.7), (4.8) and (4.9).

[130] *Coroner's Act*, ss. 15(1).

[131] *Coroner's Act*, ss. 16(1).

[132] *Coroner's Act*, ss. 16(2).

[133] *Coroner's Act*, ss. 28(1) and (2).

[134] *Coroner's Act*, s. 24.

[135] "*Inter*" means "*the burial of human remains and includes the placing of human remains in a lot*" [FBCSA, ss. 1(1)].

[136] Pursuant to the FBCSA, ss. 4(2): "*No person shall sell or offer to sell interment rights, scattering rights or cemetery services to the public, or hold themself out as available to sell such rights or services to the public,*

unless, (a) *the person holds a prescribed license and is acting on behalf of a cemetery operator*; *or* (b) *the person is licensed as a cemetery operator*." Prior to a consumer purchasing interment rights, a cemetery operator must provide, *inter alia*, the cemetery's: current price list, by-laws and an explanation of any restrictions on the rights being purchased (such as, for example, restrictions on memorialization options, monuments, etc.). The purchase contract must specify the number of interments (bodies or cremated remains) or scatterings to which the purchase is contractually entitled with each interment or scattering right. A portion of the contract price paid for interment and scattering rights must be deposited to a care and maintenance fund. Income earned from this fund is used to maintain the cemetery. The care and maintenance contribution depends on the type and cost of the interment rights purchased ["*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 – www.thebao.ca/for-consumers/consumer-information-guide/, p. 7].

[137] FBCSA, ss. 1(1). A "*plot*" means "*two or more lots in respect of which the rights to inter have been sold as a unit*" [FBCSA, ss. 1(1)] and a "*mausoleum*" is "*a structure, other than a columbarium, used as a place for the interment of human remains in tombs, crypts or compartments*", whereas a "*columbarium*" is "*a structure designed for the purpose of interring cremated human remains in niches or compartments*" [FBCSA, ss. 1(1)]. A "*private structure*" is a mausoleum or columbarium "*situated on a cemetery set aside for the interment of human remains of only those persons who are related or affiliated in a manner specified in the contract at the time the interment rights are sold*" [FBCSA, ss. 1(1)].

[138] FBCSA, ss. 1(1).

[139] FBCSA, ss. 47(1). A cemetery operator is permitted to make by-laws [defined as the "*rules under which the cemetery or crematorium is operated*", per FBCSA, ss. 1(1)] "*governing the operation of the cemetery and, in particular, governing rights, entitlements and restrictions with respect to interment and scattering rights*" [FBCSA, (*General*) O. Reg. 30/11, ss. 150(1)]. If sale to a third party is permitted, the cemetery must be notified before interment rights may be sold, or purchased from, a third party and the transfer must be completed through the licensed cemetery operator, for which the cemetery operator will verify that the seller is the *bona fide* interment rights holder and update the public register and issue a new interment rights certificate, while charging an administrative fee for this service. If the cemetery's by-laws prohibit a rights holder from selling the interment rights to a third party, the rights holder may cancel the contract of purchase, in which case the cemetery is required to refund an amount equal to the market price, excluding any amount that was paid into the cemetery's care and maintenance fund or account prior to that time. Cemeteries are not required to repurchase interment rights for an unused grave or lot that is located in a plot, where one or more of the graves or lots have already been utilized [FBCSA, s. 47; Consumer Protection Ontario, "*Funeral, burial, cremation or scattering: your rights*" – www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights].

[140] FBCSA, (*General*) O. Reg. 30/11, ss. 161(1): "*No cemetery operator shall inter human remains in a lot, other than the remains of the interment rights holder, without the written consent of the interment rights holder*". Furthermore, an interment rights holder has the right to: (a) inter any human remains in the lot to which the interment rights relate in accordance with the cemetery by-laws; (b) erect a marker on the lot, or other receptacle for human remains, to which the interment rights relate if doing so does not contravene the cemetery by-laws; (c) have reasonable access to the lot to which the interment rights relate at any time, except as prohibited by the cemetery by-laws; and (d) when the interment rights have been paid in full, receive a certificate of interment rights from the operator [FBCSA, ss. 48(1)] An interment rights holder and the relatives of any person whose remains are interred in a cemetery also have the right to decorate the lot in which the remains are interred if the decoration does not contravene the cemetery by-laws [FBCSA, ss. 48(2)].

[141] FBCSA, (*General*) O. Reg. 30/11, ss. 162(3)(a) and (6); *Heafey*, *supra*, note 28, per O'Neill, J., at paragraph 12: "*It is clear from these sections of the act, that the rights of the interment rights holder with respect to the disinterment of human remains supersede those of the executor at common law*" and, at paragraph 13: "*While this court has jurisdiction to order disinterment pursuant to subsection 2(a), there is, in my view, no provision in the act allowing the court to dispense with the consent of the interment rights holder…..*".

[142] FBCSA, ss. 1(1).

[143] FBCSA, ss. 4(5).

[144] A "*private scattering grounds*" is defined as "*land within a cemetery that is set aside to be used for the scattering of cremated human remains of only those persons who are related or affiliated in a manner specified in the contract at the time the scattering rights are sold*" [FBCSA, ss. 1(1)].

[145] FBCSA, ss. 5(6).

[146] FBCSA, ss. 1(1).

[147] FBCSA, s. 47; Consumer Protection Ontario, "*Funeral, burial, cremation or scattering*: *your rights*" – www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights.

[148] FBCSA, (*General*) O. Reg. 30/11, ss. 161(2): "*No cemetery operator shall scatter cremated human remains in a scattering ground, other than the remains of the scattering rights holder, without the written consent of the scattering rights holder*". Furthermore, a scattering rights holder has the right to: (a) scatter any cremated human remains on the scattering ground to which the scattering rights relate in accordance with the cemetery by-laws; (b) erect a marker on the scattering ground to which the scattering rights relate if doing so does not contravene the cemetery by-laws; (c) have reasonable access to the scattering ground to which the scattering rights relate at any time, except as prohibited by the cemetery by-laws; and (d) when the scattering rights have been paid in full, receive a certificate of scattering rights from the operator [FBCSA, ss. 48(3)]. A scattering rights holder and the relatives of any person whose cremated remains are scattered in a cemetery also have the right to decorate the scattering ground on which the remains are scattered if the decoration does not contravene the cemetery by-laws [FBCSA, ss. 48(4)].

[149] FBCSA, (*General*) O. Reg. 30/11, ss. 162(4).

[150] FBCSA, ss. 49(1).

[151] A Court is likely to be "*extremely cautious in making these types of orders and should only do so in the face of clear, cogent and compelling reasons*" [*Mason* v. *Mason*, 2017 NBBR 132, 2017 NBQB 132, 2017 CarswellNB 350, 2017 CarswellNB 351 (NBQB) ("*Mason*"), para. 16]; *Heafey*, *supra*, note 28; *Catto*, *supra*, note 28 [deceased's mother's request to exhume cremated remains and reinter the ashes denied, as married spouse had been appointed estate trustee and objected to exhumation]; *Johnston*, *supra*, note 28 [refusal to quash the issuance of a disinterment permit by the Alberta government to the deceased's spouse (estate trustee), challenged through judicial review by the deceased's mother; deceased's body disinterred in Alberta and reinterred in Saskatchewan].

[152] *R*. v. *Polimac*, (2006) 149 C.R.R. (2d) 161 ("*Polimac*") [Crown granted order to disinter the deceased from a lot owned by the deceased's common law partner (the interment rights holder), who was subsequently charged with her murder]; FBCSA, ss. 102.1(2) reads: "*Powers of Attorney General or Solicitor General (2) If the Attorney General, the Solicitor General or a lawful delegate of either of them considers it in the interest of justice for the purpose of an inquiry as to the cause of death or for the purpose of a criminal investigation or proceeding that human remains should be disinterred or removed, the Attorney General, the Solicitor General or the delegate, as the case may be, may exercise the powers of direction mentioned in subsection (1)*", but such direction may be given without the consent of the interment rights holder [FBCSA, (*General*) O. Reg. 30/11, ss. 162(5)].

[153] FBCSA, ss. 102.1(1), (2) and (3).

[154] *Coroner's Act*, s. 24.

[155] A "*registrar*" is a person(s) appointed by the Ministry of Consumer and Government Services or other "*Executive Council*" to which administration of the FBCSA is assigned [FBCSA, ss. 1(1) and 3(1)].

[156] "*Burial site*" means "*land containing human remains that is not a cemetery*" [FBCSA, ss. 1(1)]. Pursuant to sections 94 and 95 of the FBCSA: "*No person shall disturb or order the disturbance of a burial site or artifacts associated with the human remains except*, (a) *on instruction by the coroner*; (b) *pursuant to a site disposition agreement*; or (c) *if the disturbance is carried out in accordance with the regulations*" and, if a burial site is unmarked, any "*person discovering or having knowledge of a burial site shall immediately notify the police or coroner*".

[157] FBCSA, (*General*) O. Reg. 30/11, ss. 162(1), 178 and 179.

[158] FBCSA, (*General*) O. Reg. 30/11, ss. 162(1) and 184.

[159] FBCSA, (*General*) O. Reg. 30/11, ss. 162(1) and FBCSA, ss. 88(7) and 173(1).

[160] R.S.O. 1990, c. H. 7, pursuant to FBCSA, (*General*) O. Reg. 30/11, ss. 162(17).

[161] FBCSA, (*General*) O. Reg. 30/11, ss. 162(16) and (17). Comparably, in British Columbia, for example, exhumation, disinterment and removal of human remains may be arranged by the person statutorily entitled, by defined hierarchy, to control the human remains, subject to approval by the "*director*" and the "*medical health officer*", if the deceased "*was known to have had an infectious or contagious disease or other disease dangerous to public health*" [*Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35: Part 4 – *Exhumation, Disinterment and Removal of Human Remains*, ss. 16(1)].

[162] FBCSA, (*General*) O. Reg. 30/11, ss. 162(2), (3) and (4).

[163] FBCSA, (*General*) O. Reg. 30/11, ss. 162(3), provided that these requirements do not apply to a disinterment or removal that is: (a) directed under sub-section 102.1 FBCSA (specifically, directed by Court order, the Attorney General (Crown) or a coroner); or (b) ordered by the registrar for the purpose of a cemetery closure, pursuant to sub-section 88(7) of the FBCSA [FBCSA, (*General*) O. Reg. 30/11, ss. 162(5) and 173(1)].

[164] FBCSA, (*General*) O. Reg. 30/11, ss. 162(6).

[165] FBCSA, (*General*) O. Reg. 30/11, ss. 162(18).

[166] *A.B.* v. *C.D.*, [2007] NSWSC 1474 (Aust. H.C.) ("*AB*"), para. 39, citing *Re Crippen*, [1911], p. 108 ("*Crippen*"); *Re G*; *M* v. *L*, [1946], p. 183 ("*M v. L*"); *Re Arden*, [1898], p. 147 ("*Arden*"); *Joseph* v. *Dunn* (2007) 35 WAR 95, pp. 99-100 ("*Joseph*"); *Re JSB (A Child)*, [2010] 2 NZLR 236 ("*JSB*"), per Heath, J., at page 253: "*…an understandable community sentiment that those who have been complicit in causing serious injury to their children through violent behaviour ought to be regarded as having forfeited the right to make decisions about the child's remains, on death*"; *Re Pedersen* (Unreported, Supreme Court of New South Wales, 17 June 1977) ("*Re Pedersen*") [person unlawfully killed the deceased; disentitled to executorship].

[167] *R.* v. *Millard*, 2017 CanLII 4548 (ONSC) ("*Millard*"), per Code, J., at paragraph 15: "*I appreciate that counsel for the Estate Trustee of Wayne Millard's estate may have advised Millard and his mother that the approximately $1 million in proceeds of the hangar sale that was being held by the Estate Trustee, was not available to Millard due to the "forfeiture rule" and the outstanding allegation that Millard had murdered his father*"; *Cleaver* v. *The Mutual Reserve Fund Life Assurance*, [1892] 1 QB 147 ("*Cleaver*") [potential beneficiary under a life insurance policy], per Fry, LJ, at page 156: "*It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces rights directly resulting to the person asserting them from a crime of that person*"; *Hilton* v. *Allen* (1940) 60 CLR 691 ("*Hilton*"), per Dixon, Evatt and McTiernan, JJ.: "*the principle that by committing a crime no person could obtain a lawful benefit to himself*"; *The Estate of Hall*, [1914] P1 ("*Hall*") [the application of the "*forfeiture rule*" is not limited to circumstances where the killing was a murder, nor to circumstances relating to the operation of the rule]; Hardingham, I. J., Neave, M.A., Ford, H.A.J., "*Wills and Intestacy in Australia and New Zealand*" [Sydney: Law Book Co., 1983]: "*Finally, the exclusionary principle is not limited to cases where the person killed is the testator or the intestate. For instances, in a wider context, it can apply where a person entitled to an interest in property in remainder, whether under a Will or settlement, causes a premature vesting in possession of that interest by killing the holder of the prior interest. Thus, if the grandchild of an intestate, for example, kills her or his (that is the grandchild's) father before the intestate's death, it is submitted that the grandchild will not be entitled to share, by representation, in that part of the estate which would have passed to the father had he or she not pre-deceased the intestate*"; *Troja* v. *Troja* (1994) 33 NSWLR 269 (NSWCA) ("*Troja*"). In New South Wales, for example, the *Forfeiture Act 1995* provides potential relief for those guilty of unlawful killing, and other persons, from forfeiture of benefits caused by the automatic application at common law of the "*forfeiture rule*", such as for certain individuals found not guilty on the grounds of mental illness, for example. This legislation confers broad discretion to the Supreme Court of NSW to modify, where justice requires, the operation of the "*forfeiture rule*", which would otherwise apply at common law, including mechanisms to apply for "*forfeiture modification order*s" within twelve months of the death of the deceased person or, alternatively, for a late application. The Supreme Court may also modify the effect of the "*forfeiture rule*" where justice requires (such as, where the person who committed the unlawful killing had been subjected to severe domestic violence by the victim over a long period of time). In a recent decision by the High Court in the United Kingdom, the Court was requested to exercise discretion to grant relief from the "*forfeiture rule*" to a husband who had suffocated the testator, his spouse, pursuant to the *Forfeiture Act 1982* ("FA 1982") [*MacMillan Cancer Support* v. *Hayes and Long*, [2017] EWHC 3110 (Ch) (14 June 2017) ("*MacMillan*")]. The U.K. legislation recognizes the "*forfeiture rule*" as, among other things, "*the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing*". In the U.K., the "*forfeiture rule*" generally applies to perpetrators who have committed manslaughter, aided and abetted unlawful killing and aided and abetted suicide. Section 2 of the FA 1982 empowers the Court to modify the effect of the rule on the person who unlawfully killed, thereby enabling that person to benefit with respect to an estate that materialized because of, or in relation to, the criminally wrongful act. Generally, the Court in the U.K. will exercise discretion, where appropriate, particularly in cases of domestic violence and diminished responsibility.

[168] A co-trustee, or any person with a financial interest in an estate, may apply to have an estate trustee passed over or removed, pursuant to sub-section 37(3) of the *Trustee Act*. Sub-rule 14.05(3)(c) of the *Rules of Civil Procedure* further authorizes an application for the "*removal or replacement of one or more executors,*

administrators or trustees, or the fixing of their compensation"; *Johnston* v. *Lanka Estate*, 2010 CanLII 4124 (ONSC) ("*Lanka*") [summarizing principles for removal of a trustee].

169 "*Inter*" means "*the burial of human remains and includes the placing of human remains in a lot*" [FBCSA, ss. 1(1)]. "*Human remains*" means a "*dead human body or the remains of a cremated human body*" [FBCSA, ss. 1(1)].

170 Generally, for burial in Ontario, and subject to the cemetery's by-laws, the deceased is placed in a grave with or without a casket [FBCSA, ss. 1(1) – a casket is "*a container intended to hold a dead human body for funeral, cremation or interment purposes and that is not a vault, burial container or a grave liner*"]. A rigid container may be required to transport the body. A casket is required when placing the body in a crypt. The body or cremated remains must be buried in a licensed cemetery. For burial in a grave, a vault or outer liner to further protect the body in the casket may be purchased. This container is placed in the ground and is commonly fabricated from concrete or fiberglass. Generally, it is not mandatory to use a vault or outer liner, unless directed by the medical officer of health. For burial in a crypt (entombment), the casket is placed in a sealed crypt in a mausoleum. A mausoleum is commonly an above-ground structure made of concrete, stone or marble, containing several crypts. Not all cemeteries have mausoleums ["*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 – www.thebao.ca/for-consumers/consumer-information-guide/, p. 8].

171 FBCSA, ss. 4(1), (2) and (3). A "*cemetery*" is: (a) land that has been established as a cemetery under the FBCSA, other legislation (or a predecessor that related to cemeteries); or (b) land that was recognized by the appointed registrar as a cemetery under a predecessor of the FBCSA that related to cemeteries, and includes: (i) land that, in the "*prescribed circumstances*", has been otherwise set aside for the interment of human remains; and (ii) a mausoleum or columbarium intended for the interment of human remains [FBCSA, ss. 1(1)].

172 Cemetery operators may establish and approve by-laws governing the operation of the cemetery, including governing rights, entitlements and restrictions regarding interment and scattering rights, provided the cemetery is operated in accordance with those by-laws, which must comply with the FBCSA and be filed with, and approved by, the "*registrar*", which may approve, refuse or revoke any by-law [FBCSA, s. 150].

173 A person may purchase "*interment rights*" from a licensed cemetery operator, which include "*the right to require or direct the interment of human remains in a lot*" (being "*an area of land in a cemetery containing, or set aside to contain, interred human remains and includes a tomb, crypt or compartment in a mausoleum and a niche or compartment in a columbarium and any other similar facility or receptacle*") [FBCSA, ss. 1(1)]. Correspondingly, an "*interment rights holder*" is "*the person who holds interment rights with respect to a lot whether the person be the purchaser of the rights, the person named in the certificate of interment or such other person to whom the interment rights have been assigned*" [FBCSA, ss. 1(1)]. Interment rights may be sold or assigned to a third party, before exercised, subject to the cemetery's by-laws [FBCSA, ss. 47(1)].

174 FBCSA, Part V (*Consumer Protection*), *Interment and Scattering Rights* [s. 47 – 50]. The rights holder may resell interment or scattering rights to a third party if the cemetery by-laws permit. If resold, the rights holder must inform the cemetery operator, which must transfer the rights to the new holder. A rights holder is prohibited from reselling rights for a price greater than the price on that cemetery's current price list. If the cemetery's by-laws do not permit the holder to resell the rights to a third party, the cemetery operator must buy them from the rights holder at the price on the cemetery's current price list, less any payments that were made to the cemetery's care and maintenance fund. A cemetery operator may charge an administration fee when a holder resells the rights. The cemetery is not required to buy back rights for a grave in a plot (which is a group of graves initially purchased as a unit) if one of those graves has been used by the rights holder ["*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 – www.thebao.ca/for-consumers/consumer-information-guide/, p. 7].

175 FBCSA, ss. 5(1)(b).

176 FBCSA, ss. 5(3)(c).

177 FBCSA, (*General*) O. Reg. 30/11, ss. 30(2).

178 FBCSA, s. 102.

179 FBCSA, (*General*) O. Reg. 30/11, ss.125(1)(a).

180 FBCSA, (General) O. Reg. 30/11, ss. 125(1)(b).

181 FBCSA, ss. 6(3). Absent the signed consent of the "*purchaser of the cremation services*", a body may not be cremated: (a) with another body; or (b) with animal remains, and the cremated remains may not be co-mingled [FBCSA, (*General*) O. Reg. 30/11, ss. 186(2)].

[182] FBCSA, ss. 7(1).

[183] FBCSA, (*General*) O. Reg. 30/11, section 53, reads: "*Unclaimed cremated human remains 53. (1) An operator having possession of unclaimed cremated human remains that were not in the possession of the operator for the purposes of interring or scattering shall retain them until they are claimed or interred in a cemetery, whichever is earlier. (2) If cremated human remains are not claimed within one year from the date of cremation and if the operator has made reasonable efforts to contact the purchaser of the cremation service or the personal representative or family member of the deceased, as applicable, the operator may have the remains interred in a cemetery, including in a common lot in a cemetery. (3) If cremated human remains are claimed before they are interred under subsection (2), the operator shall refund any refundable deposit charged for the interment*".

[184] FBSCA, ss. 1(1) defines: (a) a "*scattering ground*" as "*the land within a cemetery that is set aside to be used for the scattering of cremated human remains*"; (b) "*scattering rights*" as "*the right to require or direct the scattering of cremated human remains on the scattering ground of a cemetery*"; and (c) a "*scattering rights holder*" as "*the person who holds the scattering rights with respect to a scattering ground whether the person be the purchaser of the rights, the person named in the certificate of scattering or such other person to whom the scattering rights have been assigned*". Pursuant to sub-section 4(2): "*No person shall sell or offer to sell interment rights, scattering rights or cemetery services to the public, or hold themself out as available to sell such rights or services to the public, unless,* (a) *the person holds a prescribed license and is acting on behalf of a cemetery operator*; *or* (b) *the person is licensed as a cemetery operator*." Only a person licensed as a cemetery operator may "*maintain or set aside land to be used for the purpose of scattering cremated human remains*" and only if the land is within a licensed cemetery [FBCSA, ss. 4(5)]. No one is permitted to charge a fee for "*the use of land for scattering cremated human remains unless the person is a licensed cemetery operator and the scattering takes place on land within a cemetery*" [FBCSA, ss. 5(6)]. Similar to interment rights, scattering rights may also be sold to a third party, unless prohibited by the cemetery's by-laws [FBCSA, s. 47; Consumer Protection Ontario, "*Funeral, burial, cremation or scattering*: *your rights*" – www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights].

[185] FBCSA, s. 156.

[186] A "*marker*" is "*any monument, tombstone, plaque, headstone, cornerstone or other structure or ornament affixed to or intended to be affixed to a burial lot, mausoleum crypt, columbarium niche or other structure or place intended for the deposit of human remains*" [FBCSA, ss. 1(1)].

[187] FBCSA, s. 158. However, a cemetery by-law may be made to require a rights holder to provide a marker if, for example: (a) it is required for religious reasons or is a cornerstone; (b) the cemetery's by-laws require markers; or (c) the by-law had been approved and was in force when the rights were purchased [FBCSA, ss. 158(2)].

[188] FBCSA, ss. 158(4).

[189] Provided that the private land owner does not: (a) "*maintain or set aside*" the private land "*to be used for the purpose of scattering cremated human remains*"; and/or (b) charge a "*fee for scattering*" or for the use of the private land for scattering the human remains [FBCSA, ss. 4(5) and (6) – "*No person shall charge a fee for the use of land for scattering cremated remains unless the person is a licensed cemetery operator and the scattering takes place on land within a cemetery*"]. If the land owner allows, or intends to allow, multiple scatterings on a specific piece of the land, the owner may be required to establish the land as a cemetery, with a licensed cemetery operator [Consumer Protection Ontario, "*Arrange a funeral, burial, cremation or scattering – Handling cremated remains*", December 5, 2017 – www.ontario.ca./page/arrange-funeral-burial-cremation-or-scattering].

[190] The requirements for a "*contract for the provision of licensed supplies or services*" with a licensed operator are defined by sub-section 121(1) of the FBCSA and the corresponding (*General*) O. Reg. 30/11.

[191] A "*funeral establishment*" means "*premises established for the purpose of temporarily placing dead human bodies, and in prescribed circumstances cremated human remains, so that persons may attend and pay their respects*" [FBCSA, ss. 1(1)]. "*Funeral services*" means "*the care and preparation of dead human bodies, the co-ordination and provision of rites and ceremonies with respect to dead human bodies and the provision of such other services as may be prescribed, but does not include cemetery or crematorium services*" [FBCSA, ss. 1(1)].

[192] A "*service to the public with respect to the disposition of dead human bodies, including the transportation of dead human bodies and the filling out of necessary documentation with respect to the disposition of dead human bodies*" [FBCSA, ss. 1(1)].

[193] If a licensed operator is, by contract, to scatter cremated human remains, sub-section 28(1) of the FBCSA imposes requirements on the scattering operator: "*Scattering cremated human remains. 28.* (1) *An operator that*

scatters cremated human remains for consideration shall fulfil the following requirements: 1. If cremated human remains are to be stored before they are scattered, the operator shall store them, or arrange for them to be stored by another person, in a respectful and dignified manner free from exposure to the elements. 2. The operator shall ensure that cremated human remains are not co-mingled with other cremated remains when in storage or when being scattered, unless the operator's contract with the purchaser authorizes it. 3. Whenever cremated human remains are received by the operator, the operator shall prepare a record setting out, i. the name of the deceased person whose cremated remains were received, ii. the date the operator received the cremated remains, iii. the name and address of the person who authorized the scattering of the cremated remains, and iv. the date, manner and place of scattering of the cremated remains. 4. If the purchaser, personal representative or a family member of a deceased person requests disclosure of the record prepared under paragraph 3 with respect to the deceased person, the operator shall disclose the record free of charge to the person making the request. 5. The operator shall ensure that cremated human remains are scattered only in areas to which no prohibition against the scattering of cremated human remains applies and shall comply with all rights and obligations of the scattering rights holder if the scattering is to take place in a cemetery. 6. The operator shall maintain a record setting out the following current information: i. The locations where the operator is storing cremated human remains if the operator is doing it directly. ii. The name of each person storing cremated human remains under an arrangement with the operator under paragraph 1, the address of the storage facility and the address of the person storing the cremated human remains, if it is different from the address of the storage facility. iii. For each storage facility listed under subparagraph i or ii, the position and telephone number of an individual at the storage facility who may be contacted for information about the stored cremated human remains. (2) Subsection (1) does not apply to a cemetery operator in respect of cremated human remains that the operator receives for scattering in the cemetery and who scatters the remains in the cemetery".

[194] Permitting scattering on both private and Crown land (including land covered by water) was initially announced on June 25, 2009, by Harinder Takhar, (then) Minister of Government Services: "*Government consent is not needed in those areas* [Crown land] *but those wishing to scatter ashes on private land should get the owner's approval, he said*" [Oshawa This Week, "*Ashes rules spread out of Pickering*", July 3, 2009 - www.durhamregion.com/news-story/3466776-ashes-rules-spread-out-of-pickering/]. Such permission is intended to recognize and support religious diversity, faith-based rituals and customs and the plurality of ceremonial and burial beliefs in Ontario communities. For example, scattering ashes is a sacred ritual for Sikhs, Hindus and other faiths [Armstrong, Laura, Toronto Star, "*Provincial park in Oakville first to advertise as a scattering garden for cremated loved ones.*", May 15, 2015 - www.thestar.com/news/gta/2015/05/15/provincial-park-in-oakville-first-to-advertise-as-a-scattering-garden-for-cremated-loved-ones.html]; "*It is important for many families of various cultures to scatter the ashes of a loved one as part of the ceremonial practices of their faith,*" said Mississauga East-Cooksville MPP Dipika Damerla. "*The Ministry of Natural Resources recognizes that the practice of scattering cremated remains is an important part of the religious beliefs of many families*" and "*According to the Ministry of Natural Resources, scattering ashes is allowed in all Ontario provincial parks both on land and in waters because the government recognizes that the practice is an important part of the religious beliefs of many families*" [Khalil, Nouman, Brampton Guardian, "*New park sign guides how to scatter cremated ashes in responsible way*", July 09, 2015 - www.bramptonguardian.com/news-story/6005086-new-park-sign-guides-how-to-scatter-cremated-ashes-in-responsible-way/].

[195] A "*Crown Land Use Policy Atlas*" is available at: www.ontario.ca/page/crown-land-use-policy-atlas.

[196] Consumer Protection Ontario, "*Arrange a funeral, burial, cremation or scattering. What you need to know before you arrange a funeral, burial, cremation or scattering service*" - www.ontario.ca/page/arrange-funeral-burial-cremation-or-scattering#section-5. A deceased person's body may be moved beyond Ontario if a requisite certificate has been obtained from a coroner, usually by an operator. If a deceased person is to be transported to another country, embalming and a sealed casket or container may be required by the receiving country or the transportation company. If human remains are to be transported outside of Ontario, the transporting party must comply with the applicable law in the receiving jurisdiction [www.catsa.gc.ca/cremated-remains-0; "*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017, p. 8 – www.thebao.ca/for-consumers/consumer-information-guide/, p. 8].

[197] Young, Leslie and Russell, Andrew, "*Dying Alone: Hundreds of bodies are going unclaimed in Ontario and Quebec*", Global News, February 22, 2017 – https://globalnews.ca/news/3262664/dying-alone-more-peoples-remains-going-unclaimed-in-ontario-and-quebec/.

[198] The Office of the Chief Coroner for Ontario, Ministry of Community Safety and Correctional Services "*serves the living through high quality death investigations and inquests to ensure that no death will be overlooked, concealed or ignored*" [www.mcscs.jus.gov.on.ca/english/DeathInvestigations/office_coroner/coroner.html]. In Ontario, coroners are medical doctors with specialized training in the principles of death investigation, who investigate approximately 15,000 deaths per year in accordance with section 10 of the *Coroners Act* [www.mcscs.jus.gov.on.ca/english/DeathInvestigations/AboutDeathInvestigationsinOntario/DI_intro.html].

[199] The OFPS provides forensic pathology services in accordance with the *Coroners Act*, including medicolegal autopsy services for public death investigations under the legal authority of a coroner – it performs approximately 6,000 autopsies per year [www.mcscs.jus.gov.on.ca/english/DeathInvestigations/AboutDeathInvestigationsinOntario/DI_intro.html].

[200] No person is, by law, required to claim a dead human body, except a local municipality acting on a direction of The Office of the Chief Coroner, the Regional Supervising Coroner, or a designated, local coroner, pursuant to section 11 of the *Anatomy Act* [Office of the Chief Coroner, *Investigating Coroners Best Practice Guideline No. 3 – Management of Unclaimed Body*, Memorandum No. 10-04, Issued: March 11, 2010, p. 5 ("OCC *Guidelines*")].

[201] Pursuant to the *Trillium Gift of Life Network Act*, R.S.O. 1990, c. H. 20.

[202] The *Anatomy Act*: (a) at section 1, defines both a "*general inspector*" and "*local inspector*"; and (b) at sub-section 3(1), reads: "*Subject to the Coroners Act, the person having possession of the body of a deceased person that, (a) is unclaimed by a relative or friend within twenty-four hours after the death*; *and* (b) *has not been or will not be used for a purpose authorized under the Human Tissue Gift Act, shall notify the local inspector and shall furnish the local inspector with such information respecting the deceased person as is within the knowledge of the notifier and as the local inspector may require*." Sub-section 3(2) deems the "*local inspector*" to assume control of the unclaimed body on such notice and, if so, the body may still be claimed by "*a relative for disposition or by any other person who gives an undertaking to dispose of the body*", per sub-section 3(3). If "*doubt exists*" whether a relative or friend, who has given an undertaking to dispose of the body, is entitled to claim a body, the claimant may apply for a prescribed order by the Ontario Court of Justice [*Anatomy Act*, s. 6; O. Reg. 263/99, s. 1].

[203] A "*death investigation*" may be undertaken if, pursuant to section 10 of the *Coroners Act*, any person has reason to believe the deceased died as a result of, or under, those prescribed conditions or circumstances.

[204] *Anatomy Act*, ss. 12(1) and (2). A "*private morgue*" is a "*place where bodies are customarily retained before their disposition, other than a public morgue*" [*Anatomy Act*, s. 1], defined as a "*place under the control and management of a municipal corporation where bodies are retained before their disposition*" [*Anatomy Act*, s. 1].

[205] *Anatomy Act*, ss. 12(1) and (2). If an unclaimed body is, by the initial direction of the Regional Supervising Coroner, stored in a public or private morgue for a period of fourteen days or more, the morgue must contact the Regional Supervising Coroner for further direction [OCC *Guidelines*, p. 2].

[206] OCC *Guidelines*, p. 2.

[207] Pursuant to the hospital's authority under the *Public Hospitals Act.* The MCSCS defines a "*claimant*" as "*a person or organization that is prepared to assume responsibility for disposition i.e. friend, colleague, neighbour, charitable organization, religious institution*" and may be "*anyone who wants to claim the body for burial or cremation*", provided that a claimant is not necessarily responsible for financially incurring the expense of the funeral, burial or cremation - claimants need not be blood relatives, either [www.mcscs.just.gov.on.ca/English/DeathInvestigation/UnclaimedBodies/unclaimedbodies.html].The MCSCS also defines a "*potential claimant*" as "*a person who could lawfully claim the body but has not given an undertaking as per Section 3(3)*" [OCC *Guidelines*, p. 2].

[208] *Anatomy Act*, s. 11: "*Duty of municipality to bury 11. Subject to this Act, any unclaimed body found within the limits of a regional municipality or of a local municipality that is not situated within a regional municipality shall, at the request of the local inspector or, where there is no local inspector appointed under subsection 2 (2), of a coroner, be disposed of at the expense of the corporation, but the corporation may recover the expense thereof from the estate of the deceased or from any person whose duty it was to dispose of the body*"; www.mcscs.jus.gov.on.ca/English/DeathInvestigations/UnclaimedBodies/unclaimedbodies.html.

[209] www.mcscs.just.gov.on.ca/sites/default/files/content/mcscs/docsec095460.pdf. The "*Checklist*" will be provided to the Regional Supervising Coroner "*in case where, despite best efforts, no claimant could be located*" and to "*assist the Regional Supervising Coroner with the necessary information when considering municipal disposition*" [www.mcscs.jus.gov.on.ca/English/DeathInvestigations/UnclaimedBodies/unclaimedbodies.html].

[210] For example, records and information from: social workers, family or attending physicians, medical clinics, the municipality in which the deceased resides, or has resided (through the "*Social Services department*"), pharmacies, foreign consulates, religious affiliations and other "*hospitals, facilities or agencies which may have provided services to the deceased*", such as veterans' and aboriginal/First Nations' affairs, the Children's Aid Society, police or EMS, social services (Ontario Works, ODSP, etc.), The Office of the Public Guardian and Trustee and community organizations, including for mental health or shelter services [OCC *Guidelines*, p. 5; www.mcscs.jus.gov.on.ca/English/DeathInvestigations/UnclaimedBodies/unclaimedbodies.html].

[211] Upon being notified of an unclaimed body, the Regional Supervising Coroner or designated, local coroner will assess whether a coroner's death investigation will be initiated based on the manner of death being within the criteria established by section 10 of the *Coroners Act*, noting that a body merely being unclaimed does not, without more, meet the test in section 10 for a death investigation [OCC *Guidelines*, p. 2].

[212] *Anatomy Act*, ss. 12(1).

[213] *Anatomy Act*, ss. 3(3). The OCC defines an "*undertaking*" as "*a solemn and binding promise to perform an act within a specified time frame. A declaration of interest or a statement of intent, without subsequent action to claim the body, is not an undertaking*" [OCC *Guidelines*, p. 1].

[214] The Regional Supervising Coroner will manage the disposition of the unclaimed body, including: (a) reporting to the OCC; (b) directing for the transfer or storage of the unclaimed body; and (c) delegating responsibility in the case, or specific requirements, to the local, investigating coroner [OCC *Guidelines*, p. 3].

[215] OCC *Guidelines*, p. 4.

[216] The OCC's internal guidelines for unclaimed bodies stipulate that the time period for the process, from being initially notified by the local police or hospital, for example, that no known potential claimant has been located to the time when the Regional Supervising Coroner directs the local municipality to dispose of the body, is "*expected to take 1-2 business days; and, the municipality is expected to act within 1-2 business days of receipt of the Form 6 – Report and Warrant to Dispose of an Unclaimed Body*" [OCC *Guidelines*, p. 4].

[217] *Anatomy Act*, ss. 4(1). The school must dispose of the body at its own expense after it has served the purpose for which it was received, but must notify the OCC, or its designate, before the disposal [*Anatomy Act*, ss. 7]. The "*schools*" approved to receive an unclaimed body for anatomical dissection are prescribed by the *Anatomy Act*, (*General*) O. Reg. 21.

[218] OCC *Guidelines*, p. 4.

[219] In the City of Kawartha Lakes, Ontario ("CKL"), for example, the average expense paid by the municipality for disposing of an identified, unclaimed body (burial only) is $2,500, generally comprising the purchase of a lot, casket, burial service and a brief gravesite service by the attending funeral establishment, which expense the CKL will attempt to recover if the deceased's identity is known and subject to discovery of any assets held by the deceased. If the deceased's identity is unknown, the municipality may be unable to recover any expense, including by applying for the CPP death benefit utilizing the death certificate for the deceased.

[220] While the OPGT may not be required to claim a body and/or manage arrangements for the disposition of the unclaimed body, if the OCC contacts or refers the body to the OPGT, which does not claim the body, the OCC will designate the body as unclaimed, notwithstanding "*any role the OPGT may have in the disposition of the estate of the deceased*" [OCC *Guidelines*, p. 6].

[221] The increased income and asset exemptions for both Ontario Works and the *Ontario Disability Support Program* are summarized at https://www.mcss.gov.on.ca/en/mcss/programs/social/ow/improvingOW2017.aspx, such as the increased asset limits for cash and other assets for individuals from $2,500 to $10,000.

[222] *Decleva*, *supra*, note 28, para. 19.

[223] *Anatomy Act*, s. 11. Per Scott W. Nettie, Registrar in Bankruptcy, in *Decleva*, *supra*, note 28, at paragraphs 13 and 14: "*This seems all the more correct when one considers the provisions of the Anatomy Act, R.S.O. 1990, c. A.21, and in particular s. 11 thereof. That section provides that a municipal corporation has the obligation to bury any unclaimed body within its limits, and may only look to recover the expense thereof from the estate of the deceased or any person whose duty it was to dispose of the remains. The reference to estate must be taken, in my view, to mean testamentary estate, as that would be the usual and expected context when dealing with corporeal remains.…Thus, in Ontario, if there are insufficient assets to bury an undischarged bankrupt, and no person, consequently, steps forward to claim the remains, and become burdened with burial costs, the city will provide a pauper's funeral*".

[224] FBCSA, (*General*) O. Reg. 30/11, ss. 53. (1) reads: "*An operator having possession of unclaimed cremated human remains that were not in the possession of the operator for the purposes of interring or scattering shall*

retain them until they are claimed or interred in a cemetery, whichever is earlier. (2) *If cremated human remains are not claimed within one year from the date of cremation and if the operator has made reasonable efforts to contact the purchaser of the cremation service or the personal representative or family member of the deceased, as applicable, the operator may have the remains interred in a cemetery, including in a common lot in a cemetery*. (3) *If cremated human remains are claimed before they are interred under subsection* (2), *the operator shall refund any refundable deposit charged for the interment*".

225 "*Funeral establishment*" is defined as a "*premises established for the purpose of temporarily placing dead human bodies, and in prescribed circumstances cremated human remains, so that persons may attend and pay their respects*" [FBCSA, ss. 1(1)].

226 "*Transfer service*" means "*a service to the public with respect to the disposition of dead human bodies, including the transportation of dead human bodies and the filling out of the necessary documentation with respect to the disposition of dead human bodies*" [FBCSA, ss. 1(1)].

227 FBCSA, (*General*) O. Reg. 30/11, ss. 7(2). A family member of the deceased may carry out the funeral and transfer services (except for arterial embalming), if those services are provided at no charge and/or benefit. Any burial or cremation must involve a cemetery or crematorium, respectively ["*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 - https://thebao.ca/for-consumers/consumer-information-guide/, p. 7]. To register a death, the municipal clerk must be provided: (a) a medical certificate of death (completed by the attending doctor or a coroner, identifying the cause of death); and (b) a statement of death (completed by a funeral director or family member, including personal information about the deceased, if known (e.g., family history, age at death, place of death). This may be used for medical and health research or statistics and to apply for the CPP death benefit, for example ["*What to do when someone dies*", Ontario Ministry of Consumer and Government Services, February 8, 2018 - www.ontario.ca/page/what-do-when-someone-dies#section-4].

228 "*Cemetery services*" are "*services provided by a cemetery operator in respect of the interment of human remains or the scattering of cremated human remains at a cemetery and includes such services as may be prescribed*" [FBCSA, ss. 1(1)].

229 "*Crematorium services*" are "*services provided in respect of the cremation of dead human bodies and includes such services as may be prescribed*" [FBCSA, ss. 1(1)].

230 "*Funeral services*" are "*the care and preparation of dead human bodies, the co-ordination and provision of rites and ceremonies with respect to dead human bodies and the provision of such other services as may be prescribed, but does not include cemetery or crematorium services*" [FBCSA, ss. 1(1)], which are "*services provided in respect of the cremation of dead human bodies and includes such services as may be prescribed*" [FBCSA, ss. 1(1)].

231 "*Licensed services*" is defined as "*cemetery services, crematorium services, funeral services and transfer services and includes interment rights and scattering rights and any other services that are sold or provided by a person licensed under* [the FBCSA] *in the normal course of a business regulated under* [the FBCSA] [FBCSA, ss. 1(1)].

232 "*Licensed supplies*" means "*caskets and markers and any other supplies that are sold by a person licensed under* [the FBCSA] *in the normal course of business regulated under the* [FBCSA]" [FBCSA, ss. 1(1)].

233 *Schara*, *supra*, note 28; *Chernichan* v. *Chernichan Estate*, 2001 ABQB 913, 2001 Carswell Alta 1730 (Alta. Q.B.) ("*Chernichan*"); *Hancock* v. *Podmore* (1830), 1 Barn. & Adol. 260 ("*Hancock*"); *Edwards* v. *Edwards* (1834) 2 Cr. & M 612 ("*Edwards*"); *Miller, Re* (1963), 43 W.W.R. 83 (BCSC) ("*Miller*"); *Shields Estate, Re* (1994), 6 E.T.R. (2d) 25 (PEITD) ("*Shields*"); *Oldfield, Re*, [1949] 1 W.W.R. 540 (Man. Q.B.) ("*Oldfield*").

234 *Sopinka*, *supra*, note 28.

235 Funeral expenses should be appropriate to the estate of the deceased: *Hancock*, *supra*, note 230; *Edwards*, *supra*, note 230.

236 *Estates Administration Act*, R.S.O. 1990, c. E. 22, s. 5: "*Subject to section 32 of the Succession Law Reform Act, the real and personal property of a deceased person comprised in a residuary devise or bequest, except so far as a contrary intention appears from the person's will or any codicil thereto, is applicable ratably, according to their respective values, to the payment of his or her debts, funeral and testamentary expenses and the cost and expenses of administration*"; *Catto*, *supra*, note 28, paras. 51, 52 and 59; *McDougall & Brown Ltd.* v. *Breckon*, [1943] O.W.N. 705 (Ont. Co. Ct.) ("*McDougall*"); *Decleva*, *supra*, note 28, para. 13; *Anderson*, *supra*, note 69, para. 20, per Schroeder, J.A.: "*In the case at bar, if instead of being insolvent the deceased wife had left an estate sufficient to provide for payment of her funeral expenses, I would be disposed to take the view that the*

foundation for the application of the old Common Law rule did not exist and that the husband should not be held liable"; *Gibbons, Re* (1899), 31 O.R. 252 (Ont. H.C.) ("*Gibbons*"); *Pearce* v. *Diensthuber* (1977), 81 D.L.R. (3d) 286 (Ont. C.A.) ("*Pearce*"), per Weatherston, J.A.: "*From the earliest times it has been held that it is the power and duty of a rightful executor or administrator to bury the deceased in a manner suitable to the estate which he or she leaves behind, and the cost of so doing is a first charge against the estate*".

[237] *R.* v. *Wade* (1818) 5 Price 621, 146 ER 713 ("*Wade*"); *Sharp* v. *Lush* (1879) 10 Ch. D 468, at 472 ("*Sharpe*").

[238] *Pearce*, *supra*, note 234.

[239] *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, ss. 136(1); *Decleva*, *supra*, note 28, per Reg. S.W., at paragraph 19: "*Thus, in Ontario, if there are insufficient assets to bury an undischarged bankrupt, and no person, consequently, steps forward to claim the remains, and become burdened with burial costs, the city will provide a pauper's funeral*".

[240] *Decleva*, *supra*, note 28.

[241] For more detailed information regarding these extensive consumer protections incorporated into the FBCSA: Webb, Graham, "*An Overview of the Funeral, Burial and Cremation Services Act*", Advocacy Centre for the Elderly, 2013 – www.acelaw.ca/appimage/file/Funeral,_Burial_&_Cremation_Services_Act-2013.pdf; BAO, "*Consumer Information Guide, Funeral, Burial, Cremation & Transfer Services*", March, 2017 – www.theboa.ca.

[242] FBCSA, ss. 29(2).

[243] FBCSA, s. 42 reads: "*30-day cooling-off period - 42 (1) If a purchaser enters into a contract for the provision of licensed supplies and services and all of the requirements in subsection 40 (1) are met, the purchaser is entitled to cancel the contract at any time within 30 days after the day on which the last of the requirements described in subsection 40 (1) is met. Notice - (2) A purchaser may cancel a contract under subsection (1) by giving the operator written notice of the cancellation. Refund - (3) An operator who receives a notice of cancellation under subsection (2) shall, within 30 days after receiving the notice, refund to the purchaser all money received under the contract together with the amounts that are prescribed. Where contract performed - (4) Subject to section 43, subsections (1), (2) and (3) apply even though the licensed supplies and services provided for under the contract have been delivered or performed. Repossession or return of supplies - (5) Subsections 41 (4) and (5) apply with necessary modifications to a purchaser who cancels a contract under this section*"; "*Consumer Protection*", Bereavement Authority of Ontario, 2018 – https://thebao.ca/for-professionals/cemeteries-crematoriums/consumerprotection/.

[244] If the purchaser requests the operator, pursuant to a contract for the provision of licensed supplies or services and within that thirty-day period after the contract was made, to provide any of the specified supplies or services because they are required "*for the disposition of human remains*" or the "*co-ordination and provision of rites or ceremonies in relation to human remains*" [FBCSA, ss. 43(1); (*General*) O. Reg. 30/11, ss. 139(1)].

[245] FBCSA, ss. 43(1); "*Consumer Protection*", Bereavement Authority of Ontario, 2018 – https://thebao.ca/for-professionals/cemeteries-crematoriums/consumerprotection/.

[246] FBCSA, ss. 44(1) reads: "*Further cancellation rights - 44 (1) The purchaser under a contract for the provision of licensed supplies or services, other than interment rights and scattering rights, may cancel the contract at any time if a right to cancel under section 42 or 43 no longer applies and if the operator has not fully performed the contract*".

[247] FBCSA, Part V (*Consumer Protection*) [s. 27 – 50]; FBCSA, (*General*) O. Reg. 30/11, Part II (*Consumer Protection*), Division C (*Miscellaneous Consumer Protection Matters*) [s. 134 – 144]; "*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 - https://thebao.ca/for-consumers/consumer-information-guide/, p. 8; "*Consumer Rights Under the FBCSA*", Bereavement Authority of Ontario, 2018 – https://thebao.ca/for-consumers/647-2/; "*Consumer Protection*", Bereavement Authority of Ontario, 2018 – https://thebao.ca/for-professionals/cemeteries-crematoriums/consumerprotection/.

[248] FBCSA, ss. 40(1) "*Contract requirements*"; FBCSA, (*General*) O. Reg. 30/11, Division B (*Contract Requirements*) [s. 120 – 144]. For example, among other requirements, the contract with the operator must be in writing and be signed by both parties. It must be written in plain language and legibly printed in ten-point font or larger type. Any written materials must be provided in accessible formats, such as large print or audio, at no additional cost when needed to accommodate a person with disabilities. In addition, the contract must include: the name of the person who is paying for the contract (the purchaser); the name of the person for whom the supplies or services are to be provided (the recipient/the deceased); the name of the licensed operator; a

description of the supplies or services being considered and details of when and how they are to be provided by the operator; the price of each supply or service, taxes and the total price; all payment, cancellation and refund policies, including the right to cancel the contract and, for interment rights, a detailed location and description of the grave, crypt or niche and, for scattering rights, the location and description of where the scattering may occur. For both rights, the purchaser must also be provided by the operator a copy of the cemetery's or crematorium's by-laws and a certificate of interment rights or scattering rights following payment in full by the purchaser. The specific disclosure required by the operator to the purchaser "*before a contract for the sale of licensed supplies or services is entered into*" is prescribed by section 112 of the FBCSA, (*General*) O. Reg. 30/11. The certificate must include the name of the person who can legally authorize an interment or scattering. When an operator provides to the purchaser a detailed and current price list of the licensed supplies and services offered [FBCSA, ss. 33(1) and (2) – "*Every operator shall maintain a price list of the licensed supplies and services that are provided by the operator…*", which must also be made "*available to the public*"; (*General*) O. Reg. 30/11, Division E (*Price Lists and Pricing*), s. 54 and 55], it must include any package prices, minimum prices and the range of prices for interment and scattering rights, among other things. The contract must include a statement if the operator (or a representative) is receiving a commission for recommending certain supplies or services. [FBCSA, (*General*) O. Reg. 30/11, Division B (*Contract Requirements*) [s. 120 – 133]; Division E (*Price Lists and Pricing*) [s. 54 – 75]; "*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 - https://thebao.ca/for-consumers/consumer-information-guide/, p. 8].

249 S.O. 2005, c. 11.

250 FBCSA, ss. 41(1) reads: "*Cancellation, unenforceable contract - 41 (1) A purchaser under a contract that is not enforceable by the operator under subsection 40 (1) may cancel the contract at any time after it is made by giving the operator written notice of cancellation. Refund - (2) An operator who receives a notice of cancellation under subsection (1) shall, within 30 days of receiving the notice, refund to the purchaser all money received under the contract together with the amounts that are prescribed. Where contract performed - (3) Subject to the regulations, subsections (1) and (2) apply even though the licensed supplies and services provided for under the contract have been delivered or performed. Repossession or return of supplies - (4) If licensed supplies were delivered under a contract that is cancelled under this section, the purchaser shall, subject to the regulations, (a) permit the supplies to be repossessed by the operator who delivered them; (b) return the supplies to the operator; or (c) deal with them in such manner as may be prescribed. Reasonable care - (5) If a purchaser cancels a contract under this section, the purchaser shall take reasonable care of the licensed supplies delivered to the purchaser under the contract for the prescribed period*." With respect to payment options, a purchaser may preplan final arrangements without prepaying. Generally, providers will maintain a record of the plans without cost.

251 If a purchaser elects to prepay, a contract must be entered with the operator. There are two ways to prepay for final arrangements: firstly, the purchaser may pay the operator and the payment must be held "*in trust*" by a bank, trust company or independent trustee (whereby the prepaid money will earn income until the final arrangements are needed, which accumulated income will be used to offset any increase in the cost for the final arrangements) or, secondly, the purchaser may buy insurance from an insurance company, which may include an operator. The operator must give the purchaser a contract specifying the total amount of money paid by the purchaser and the terms of payment for any balance owed by the purchaser - if a purchaser prepays with a licensed funeral home, funeral establishment or transfer service, the funds are protected by a prescribed compensation fund, available to "*compensate a person who suffers a financial loss due to a failure on the part of a licensee to comply with this Act or the regulations or with the terms of an agreement made under this Act*" [FBCSA, Part VII, ss. 51(1) and (2)]. If money is deposited in trust for prepaid services or supplies, the operator is required by law to only have it in very safe investments (and the purchaser is entitled to request the operator once each year where and how the money is invested and how much money the purchaser holds in the trust account). If a purchaser buys an insurance policy to fund a contract and pays the insurance company directly, the money is protected under the *Insurance Act*, R.S.O. 1990, c. I.8 ("*Insurance Act*"). If the purchaser elects to buy an insurance policy, generally the purchaser will be required to enter both: (a) an insurance contract with an insurance company; and (b) a prepaid contract with the operator. The insurance contract must specify manner of cancellation, fees payable and refund rights, among other things. For prepaid supplies or services, if prices increase, the income generated by the prepayment will be applied to offset any increase in costs. At the time of death, funeral establishments, cemetery and crematorium operators must provide a statement showing either: (a)

how much money an insurance policy will pay for the costs of final arrangements; or (b) how much money is held in trust (including income earned) and the cost of the supplies or services requested by the purchaser at the time they are delivered. For prepaid contracts made on or after July 1, 2012, a purchaser's estate trustee will not be required to pay more for the services or supplies the deceased purchaser requested, except for any balance that may still be owing under the contract. However, any services or supplies that are requested, but not included in the prepaid contract, will require payment. For prepaid contracts made before July 1, 2012, the purchaser's estate trustee may be required to pay more money due to increased prices, subject to the terms of the specific contract. As of July 1, 2012, all prepaid contracts must be guaranteed — the provider cannot request more money, even if the cost of delivering the supplies and services increases. If prices decrease, the cost of the supplies or services must be based on the most current price list. If that cost is lower than the amount pre-paid by the purchaser (together with the interest earned since the contract was made), entitlement to the excess depends on the date the contract was made and the laws in effect on that date. Excess funds (including accumulated interest) must be paid to the deceased person's estate or the person specified in the contract to receive the refund if: (a) the contract was signed on or after April 1, 1992 for cemetery or crematorium services; or (b) the contract was signed on or after June 1, 1990 for funeral or transfer services. Contracts made before these dates do not require any refund by the operator. A prepaid contract may be cancelled or modified by the purchaser or estate trustee at any time before the services or supplies are provided. Notice of cancellation or change must be given to the operator, in writing. The refund to which the purchaser is entitled in the event of cancellation or change to the contract depends on the amount paid, any cancellation fees and whether any supplies and services have been previously provided. As of July 1, 2012, if the purchaser cancels within thirty days of entering the contract, a full refund is required. After thirty days, the operator may keep a cancellation fee of ten *per cent* of the amount in trust, up to a maximum of $350. If the purchaser buys, but cancels, an insurance contract, the cancellation fee or refund, if any, will depend on the terms of the insurance contract – both the *Insurance Act* and *Consumer Protection Act* may apply, including by prescribing a "*cooling-off*" period to cancel the insurance contract within a specified period of time [FBCSA, O. Reg. 30/11, Division B, *Contract Requirements*, s. 120 to 128; Consumer Protection Ontario, "*Pre-plan and pre-pay final arrangements. Know your rights before you preplan and prepay for final arrangements, like a funeral, burial, cremation or scattering*" - www.ontario.ca/page/pre-plan-and-pre-pay-final-arrangements.

[252] FBCSA, s. 38; "*Pre-plan and pre-pay final arrangements*", Consumer Protection Ontario, July 21, 2016 - www.ontario.ca/page/pre-plan-and-pre-pay-final-arrangements. However, if a licensed supply or service is no longer available, either: (a) the operator may make a reasonable substitution, but at no extra charge, where substitutions must be similar in value, style, design and construction to what is included in the pre-paid contract; or (b) the estate trustee may cancel that part of the contract by providing written authorization or may enter into a new contract with the operator ["*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 - https://thebao.ca/for-consumers/consumer-information-guide/, p. 9].

[253] FBCSA, ss. 79(1), (2) and (3).

[254] *Tsekhman* v. *Spero*, 2017 CanLII 1718 (ONSC) ("*Tsekhman*"), para. 30, citing with approval *McLoughlin* v. *Arbor Memorial Services Inc.*, [2004] O.J. No. 5003 ("*McLoughlin*").

[255] The cemetery must, for example, verify the identity of the interment or scattering rights holder, update the "*Public Register*" and issue a replacement rights certificate to the new purchaser.

[256] FBCSA, Part V (*Consumer Protection*) [s. 27 – 50]; FBCSA, (*General*) O. Reg. 30/11, Part II (*Consumer Protection*), Division C (*Miscellaneous Consumer Protection Matters*) [s. 134 – 144]; "*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017 - https://thebao.ca/for-consumers/consumer-information-guide/, p. 8; "*Consumer Rights Under the FBCSA*", Bereavement Authority of Ontario, 2018 – http://.thebao.ca/for-consumers/647-2/; "*Consumer Protection*", Bereavement Authority of Ontario, 2018 – https://thebao.ca/for-professionals/cemeteries-crematoriums/consumer-protection/; "*Funeral, burial, cremation or scattering: your rights*", Consumer Protection Ontario, December 5, 2017 – www.ontario.ca/page/funeral-burial-cremation-or-scattering-your-rights.

[257] The applicant must submit to a Service Canada Centre the "*Application for Canada Pension Plan Death Benefit (ISP1200)*" at https://catalogue.servicecanada.gc.ca/content/EForms/en/Detail.html?Form=ISP1200, with certified true copies of "*required documentation*". Payment is made approximately six to twelve weeks from the date of submission.

[258] www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-death-benefit.html. To be eligible, the deceased must have made contributions to the Canada Pension Plan ("CPP") in the lesser of: (a) one-third of the calendar years in their CPP contributory period, but no less than three calendar years; or (b) ten calendar years.

[259] The average death benefit amount paid: (a) as of January, 2016, was $2,296.85; and (b) as of October, 2017, was $2,299.03 and the maximum payment amount was $2,500. For more detailed information on CPP death payments, refer to the Information Card (Rate Card) at www.canada.ca/en/employment-social-development/programs/pensions/pension.html.

[260] www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-benefit/amount.html.

[261] Within ninety days of being notified in writing of the decision by Service Canada, an applicant may, in writing, request a reconsideration by Service Canada of a deceased's eligibility for the death benefit or the amount paid. If the reconsideration decision is disputed, the applicant may appeal the decision to the Social Security Tribunal of Canada [www1.canada.ca/en/sst/index.html].

[262] *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sched. A ("OWA"), s. 8 and ss. 74(4), O. Reg. 134/98, s. 55 and 59 and Directive 7.2: Health Benefits (*Funerals and Burials* and *Recovery of Funeral, Burial and Cremation Costs*) ("OWA, Directive 7.2") – www.mcss.gov.on.ca/en/mcss/programs/social/directives/ow/7_2_OW_Directives.aspx. The responsible municipality (or "*delivery agent*"), as territorially and geographically identified by section 2 of the OWA and O. Reg. 136/98 (*Designation of Geographic Areas and Delivery Agents*), Schedule 1, is where the recipient or benefit unit member ordinarily resided and received assistance. A "*transient or homeless person*" is deemed to reside in the municipality in which the person received assistance. The municipality in which the transient person died may be responsible for the "*costs of preparing the body and any transportation costs*", where the family requests burial in another municipality. The municipality receiving the body is responsible for the funeral and burial and cremation costs.

[263] OWA, Directive 7.2, *supra*, note 259.

[264] OWA, *supra*, note 259, s. 2 and 43, subject to cost-sharing of the amount exceeding the (recommended) guideline amount, per OWA Directive 11.3: Cost Sharing.

[265] In the CKL, for example, the municipality will usually pay (for an OW, ODSP or qualifying, low-income deceased) for the purchase of a cemetery lot, grave opening and closing and a service for the deceased (in consultation with the family and the funeral establishment), subject to the OWA and the municipality's own policy for discretionary funeral benefits – the average cost of a funeral paid for by the CKL for an OW, ODSP or qualifying, low-income deceased is $4,500. However, other municipalities have their own policies, which may provide for more or less paid on average for funeral expense.

[266] If the deceased's identity is known, his or her body is claimed and the funeral expense is both arranged by and paid for by the responsible "*delivery agent*" municipality, funded through OW, the municipality (being an "*institution that has paid for or that is responsible for paying for the funeral expenses of the deceased*" [www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-death-benefit.html], may withhold the death certificate for the deceased until Service Canada determines if the deceased is eligible for the CPP death benefit, in which case the municipality may assign or claim the benefit for itself to defray the funeral expense.

[267] OWA, Directive 7.2 - both the Province of Ontario and the municipality (delivery agent) may seek recovery of the disposal expenses from "*any person or organization liable for the payment of these expenses*", which are "*payable out of the deceased's person's estate in priority to any other charge on the estate.*" In addition to seeking recovery from "*the person responsible for administering the estate (i.e., the executor if one is appointed under a will or a court appointed administrator)*", the delivery agent may also seek recovery by assignment of benefits from CPP or Old Age Security ("OAS") benefits for which the deceased is eligible.

[268] *Davey* v. *Cornwallis* (1930), 39 Man. R. 259 (Man. C.A.) ("*Davey*") [coroner recovered funeral expenses for an unclaimed body from the local municipality].

[269] The *Public Hospitals Act*, section 25 reads: "*In the event of the death in a hospital of a patient who is an indigent person, or the dependent of an indigent person, the municipality in which the patient was a resident at the time of the patient's admission shall pay to the hospital any expenses of his or her burial that it incurs*", subject to, by section 27, the municipality's right to recovery "*from the patient, or, in the event of the patient's decease, from his or her estate or personal representatives, or, in the case of a dependent, from any person liable in law with respect to the dependent, the amount of the payment so made, and the same may be recovered as a debt in any court of competent jurisdiction*".

[270] FBCSA, (*General*) O. Reg. 30/11, ss. 188(1) and (2). A "*delivery agent*", for a geographic area, is the delivery agent designated by the Ministry of Community and Social Services to administer the OWA and provides assistance in that area [OWA, s. 2].

[271] The *Crown Administration of Estates Act* confers the right to the OPGT to apply to administer certain estates.

[272] *Anderson*, *supra*, para. 21; *Chernichan*, *supra*, note 230; *Pierce*, *supra*, note 233; *Routta* v. *Routta*, [1955] 1 D.L.R. 627 (N.B. Co. Ct.) ("*Routta*"); *Hunter*, *supra*, note 28.

[273] *Pearce*, *supra*, note 233; *Taymaz* v. *Enache, Pescar and Marius Enache (Estate of)* (September 28, 2017), Doc. SC-16-00140902-0000; SC-16-00140902-00D1 (ONSC) ("*Taymaz*"); *Catto*, *supra*, note 28, para. 59.

[274] The Last Post Fund ("LPF") is supported financially by Veterans Affairs Canada and private donations. The LPF aims to "*ensure that no Veteran is denied a dignified funeral and burial, as well as a military gravestone, due to insufficient funds at time of death*" by delivering the *Veterans Affairs Canada Funeral and Burial Program*, which provides funeral, burial and grave marking benefits for eligible Canadian and Allied Veterans. The LPF has also created the *Unmarked Grave Program*, intended to provide military markers for unmarked Veterans' graves. The LPF national office is located at Montreal and it also operates from centres located in Halifax and Toronto [www.lastpostfund.ca].

[275] The best information available from the BAO is based on license renewals, whereby licensed operators declare the total number of services undertaken in the preceding year, categorized by: (a) cremations; (b) body (casket) burial; and (c) burial of cremated remains or scatterings at cemeteries. This BOA statistical data does not account, for example, for: (i) cremated remains retained by family members/claimants (*i.e.*, not buried or scattered at cemeteries); (ii) cremated remains buried or scattered not within cemeteries; and (iii) remains cremated outside Ontario, but buried within Ontario. The BOA's most recent data indicates that, in 2016, 58,001 non-interment cremations were undertaken and, with respect to cemeteries: (a) there were 33,416 body burials; and (b) 27,803 cremation interments (a total of 61,219) – comparatively: 49% by cremation only and 51% by burial of a body or cremated remains at cemeteries.

[276] Burial, for example, results in significant formaldehyde-based embalming fluid, steel, concrete and hardwood deposited in cemeteries annually. Alternatively, cremations require high energy and resource consumption and emit toxicity, such as carbon monoxide, fine soot, sulfur dioxide, heavy metals and mercury from dental fillings ["*Burying dead bodies takes a surprising toll on the environment*", Julia Calderone, Tech Insider, Nov. 4, 2015 - www.businessinsider.com/burying-dead-bodies-environment-funeral-conservation-2015-10/#the-embalming-process-is-toxic-1; *"Could the Funeral of the Future Help Heal the Environment*?", Erin Blakemore, Smithsonian.com, Feb. 1, 2016 - www.smithsonianmag.com/science-nature/could-funeral-future-help-heal-environment-180957953/].

[277] A "*natural burial*" is the act of returning a body as naturally as possible to the earth. The body is neither embalmed nor cremated, but rather interned by non-conventional, "*low impact*" (simple, biodegradable) casket or shroud in a protected green space, aiming to reduce energy, resource consumption and toxicity, ordinarily without a fabricated, individual marker, but rather communal memorials or natural markers. Interred remains are located by GIS, GPS or trackable microchip. Only three natural burial services in Ontario are recognized by the Natural Burial Association in Cobourg, Pickering and Brampton [naturalburialassoc.ca; greenburialcanada.ca].

[278] For both cremation or alkaline hydrolysis, the deceased's body or skeletal remains are reduced to an ash or granular substance. Commonly the remains are placed in a small receptacle or urn, together with a metal identification tag. The consumer may provide the urn or purchase it from the operator, subject to the crematorium and cemetery by-laws for the type and size of container allowed. An operator is permitted to store remains for up to one year and may charge a deposit for this service. If the remains are claimed within one year, the deposit will be refunded in full. After one year, the operator may use the deposit to inter the remains in the common grounds of a cemetery ["*Consumer Information Guide – Funeral, Burial, Cremation & Transfer Services*", Bereavement Authority of Ontario, March, 2017, p. 8 - https://thebao.ca/for-consumers/consumer-information-guide/]. Specifically, alkaline hydrolysis ultimately yields: (a) sterile liquid (subject to provincial

and, in particular, municipal requirements for disposal); and (b) bone ash, which is intended to avoid potentially harmful airborne particle emissions, mercury release from dental amalgam and high energy consumption (carbon emission) caused by conventional flame cremation. [McClurg, Lesley (July 24, 2017) "*Want to Cut Your Carbon Footprint? Get Liquefied When You're Dead*"; Cohen, Jeremy (November 17, 2015) "*Bio Cremation: A Greener Way To Die?*"*;* resomation.com; en.wikipedia.org/wiki/Alkaline_hydrolysis_(body_disposal); beyond.life/blog/everything-need-know-resomation/].

[279] One of the five crematoria operators in Ontario currently offering this alternative disposal method is under suspension by the BOA pending a hearing [https://theboa.ca/immediate-license-suspension-hiltons-aquagreen-dispositions-inc/]. The process may also be referred to as "*resomation*", being merely a brand name or trademark developed by Resomation Ltd., a business originating in Scotland.

[280] These alternative methods, if permitted, would have to be conducted in a "*crematorium*", which is "*a building that is fitted with appliances for the purpose of cremating human remains and that has been approved as a crematorium or established as a crematorium in accordance with the requirements of this Act or a predecessor of it and includes everything necessarily incidental and ancillary to that purpose*", at which "*crematorium services*" are provided, which are "*services provided in respect of the cremation of dead human bodies and includes such services as may be prescribed*" [FBCSA, ss. 1(1)]. Sub-section 1.1(2) of the FBCSA also stipulates that the same provisions applying to cremation and related services apply to "*alternative processes and methods of disposing of human remains*" and the licenced establishments offering those alternatives.

[281] "*Promession*" (also a trade name only), another process not expressly contemplated by the FBCSA, but which could potentially comply, involves freeze-drying the body with liquid nitrogen, using high-amplitude vibrations to shatter it, creating a dry powder, which is sifted through a metal separator that removes mercury and metal parts. [en.wikipedia.org/wiki/Promession; "*The green final frontier: eco-burial*", The Globe and Mail, Mar. 3, 2010 - theglobeandmail.com/report-on-business/small.../sb.../article4309322/; promessa.se].

[282] The body is frozen by liquid nitrogen, fragmented and foreign matter is removed, yielding sterile, granular, non-toxic powdered remains, a process which reportedly reduces, or minimizes, carbon dioxide, mercury and other conventional effluents, while creating granular remains capable of being disposed with minimal space and toxicity impact [irtl.co.uk].

[283] Saskatchewan – *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s. 91; Alberta – *General Regulation (Funeral Services Act)* Alta Reg. 226/1998, s. 36 and *General Regulation*, Alta Reg. 249/1998, "*Who may control disposition*", s. 11; British Columbia – *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, "*Control of disposition of human remains or cremated remains*", ss. 5(1) – (3), which also, at section 1, defines "*spouse*" to include *de facto* spouses and common law spouses. In a 1991 report on a review of the law governing the administration of estates of deceased persons, the Ontario Law Reform Commission recommended that, as a general rule, the duty of disposal should fall upon the estate trustee appointed by the deceased [Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, *Report* (1991) 37, Rec. 22(1)]. Interestingly, the Commission also recommended [at 37-8, Rec. 22(2)] that, if no estate trustee has been named in the will or appointed by the Court, or if the estate trustee is unavailable or unwilling to act, the family members should have the duty to dispose of the body of the deceased in accordance with the following order of priority: the surviving spouse with whom the deceased was living at the time of death; an adult child of the deceased; the parents of the deceased; an adult brother or sister of the deceased. These recommendations have not been enacted in Ontario.

[284] *General Regulation*, Alta Reg 226/1998, ss. 36(2); *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, ss. 5(1). For example, in Alberta, a crematorium operator is prohibited from delivering cremated remains in more than a single container or to more than one person without the written authorization of the person the operator believes on reasonable grounds has authority to control the disposition of the cremated remains [*Crematory Regulation*, Alta Reg 248/1998, ss. 5.2(2)]. In Saskatchewan, the deceased's ashes must not be disposed of by the crematorium in any manner other than as directed by the person who has the right, under the statutory order of priority, to control the disposition of the deceased's human remains: *Funeral and Cremation Services Regulations*, c F-23.3, Reg. 1, ss. 29(1)(b); *Funeral and Cremation Services Act*, RSS 1999, c F-23.3, s. 91.

[285] *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, "*Control of disposition of human remains or cremated remains*", ss. 5(2).

[286] *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, "*Control of disposition of human remains or cremated remains*", ss. 5(3).

[287] *Cremation, Interment and Funeral Services Act*, SBC 2004, c. 35, "*Control of disposition of human remains or cremated remains*", ss. 5(4), (5).

[288] *Edmonds* v. *Armstrong Funeral Home Ltd*., [1931] 1 D.L.R. 676 (A.C.A.) [action for trespass and damages for wrongful disposition of the deceased]; Larsen, Michael, "*Can an Executor be Held Liable for Not Following the Burial Wishes of a Deceased Person?*", September 21, 2017 – www.cwilson.com.

[289] Fortuitously the same day as the 2018 *Qingming Festival*, also known as "*Ancestors Day*" or "*Tomb-Sweeping Day*", a Chinese national holiday believed to have originated in A.D. 732 during the reign of Tang emperor Xuanzong, to honour and respect the dead, particularly those who died during significant events in China's history, often by attending and cleaning their burial sites and tombs and offering foodstuffs, tea and joss paper.

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TAB 15

THE SIX-MINUTE Estates Lawyer 2018

Canadian Tax Law Update – Tax Issues You Need to Know About in 2018

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May 3, 2018

cpd Continuing Professional Development

Canadian Tax Law Update –

Tax Issues You Need to Know About in 2018

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CANADIAN TAX LAW UPDATE –

TAX ISSUES YOU NEED TO KNOW ABOUT IN 2018

Introduction

Lawyers who practice estates and trusts law are aware that 2018 is a watershed year in tax and estate planning – particularly with respect to the tax treatment of dividend distributions from and capital gains on the shares of private corporations and of passive (investment) income earned by private corporations – in light of proposed amendments (announced in July 2017 and accompanied by draft legislative proposals, which were revised in December 2017 and again in the 2018 Federal Budget (in February 2018)) to the *Income Tax Act* (Canada)[1] (the "ITA"). Those draft legislative proposals emanated from 2017 Federal Budget comments by, as well as 2018 Federal Budget measures from, the Department of Finance (Canada) ("Finance") – certain of which proposed ITA amendments are intended to be effective starting in 2018 and others of which are intended to be effective beginning after 2018.

Consequently, it is essential to have a clear understanding of the operation of those proposals (called the "tax on split income" (TOSI) proposals) to expand the ITA provisions intended to limit "income sprinkling", as well as to be aware of some problematic consequences that could arise from them – and to consider possible tax planning strategies which could mitigate the potentially adverse impact of the TOSI proposals – now that the intended enactment of the TOSI proposals has been confirmed by Finance. In addition, in July 2017 a "new regime" for the taxation of "passive (investment) income" earned by private corporations was announced by Finance and, although not accompanied by draft legislative proposals at that time, Finance had indicated that amendments to certain ITA provisions impacting private corporations which earn passive (investment) income would be forthcoming – and a December 2017 announcement by Finance indicated that draft legislative proposals regarding passive (investment) income earned by private corporations would be contained in the 2018 Federal Budget)[2] ; thankfully, however, the measures proposed in the 2018 Federal Budget bore little resemblance to the "passive (investment) income proposals" announced in July 2017[3].

A brief discussion of some other proposed developments impacting tax and estate planning – including a couple of July 2017 proposals which Finance subsequently announced (in October 2017) will not be proceeding, as well as proposed measures in

the 2018 Federal Budget regarding new annual reporting requirements for trusts – is also included in this paper.

Federal Budget 2017 – Announcement of Review of Tax Planning Strategies involving Private Corporations

The federal government announced in the 2017 Federal Budget that Finance was in the process of reviewing tax planning strategies used by private corporations and their shareholders to obtain "unfair tax advantages" – and that it would be providing in the following months a paper identifying issues and proposed policy responses. Three areas of concern to the federal government (i.e. Finance) were specifically identified, being described in the "Tax Planning using Private Corporations" section of the 2017 Federal Budget as follows[4]:

i. "Sprinkling income using private corporations, which can reduce income taxes by causing income that would otherwise be realized by an individual facing a high personal income tax rate to instead be realized (e.g. via dividends or capital gains) by family members who are subject to lower personal tax rates (or who may not be taxable at all)."

ii. "Holding a passive investment portfolio inside a private corporation, which may be financially advantageous for owners of private corporations compared to otherwise similar investors. This is mainly due to the fact that corporate income tax rates, which are generally much lower than personal rates, facilitate accumulation of earnings that can be invested in a passive [investment] portfolio."

iii. "Converting a private corporation's regular income into capital gains, which can reduce income taxes by taking advantage of the lower tax rates on capital gains. Income is normally paid out of a private corporation in the form of salary or dividends to the principals, who are taxed at the recipient's personal income tax rate (subject to a tax credit for dividends reflecting the corporate tax presumed to have been paid). In contrast, only one-half of capital gains are included in income, resulting in a significantly lower tax rate on income that is converted from dividends to capital gains."

There were no further pronouncements made by Finance until the summer of 2017 regarding its review of tax planning strategies using private corporations – and then on July 18, 2017 the Minister of Finance announced the most significant policy change and proposed revisions to the Canadian tax treatment of private corporations since the early

1970's (which had, after a thorough public consultation process, resulted in the 1972 tax reform amendments to the ITA).

July 2017 Consultation Paper and Draft Legislative Proposals – Tax Planning Using Private Corporations

On July 18, 2017 Finance released a consultation paper[5] on the above-described issues, together with a number of proposed legislative amendments intended to address its policy concerns which had been briefly mentioned in the 2017 Federal Budget – which proposed legislative amendments, if implemented, would have significant effects on many privately-held Canadian businesses, including family businesses and incorporated professionals, and would effectively reverse many years of well-accepted tax planning for business owners (which had for many years been encouraged by several levels of government in Canada) – relating to "income sprinkling" (more correctly known as "income splitting"), and to the conversion of corporate income into capital gains (known as "surplus stripping"), and to restricting access to the lifetime capital gains exemption (known as the "LCGE") by minors and trusts, together with the release of a discussion paper on the taxation of passive (investment) income earned by private corporations (entitled "Holding Passive Investments Inside a Private Corporation", for which draft legislative proposals were not provided at that time).

It is important to note that the draft legislative proposals released on July 18, 2017 (the "Proposals") were very complex and far-reaching – and that the Minister of Finance's letter and the Executive Summary accompanying them, which announced a relatively brief 75-day consultation period (only up to October 2, 2017) evoked extensive criticism of

- the initial rhetoric used therein (including the assertion that owners of private corporations, such as business owners, professionals and entrepreneurs, were using their status to utilize the existing Canadian tax system inappropriately by obtaining "'unfair' and 'unintended' tax advantages" not available to other individuals such as employees, by exploiting so-called "loopholes" in the system), and
- the lack of a meaningful tax policy review of the potential economic implications of the Proposals and of an appropriate consultation process with stakeholders (i.e. business owners and their professional advisors), and
- the fact that the potential impact, both immediate and long-term, of the Proposals on the Canadian economy had not been assessed by Finance prior to the release of the Proposals.

It is understood that more than 21,000 submissions regarding the Proposals were made to Finance up to its imposed submissions deadline of October 2, 2017 from

numerous business and professional organizations in Canada – many of which (such as the submission from STEP Canada and the STEP Canada Tax Technical Committee) addressed significant tax policy concerns as well as describing numerous problematic, and potentially unanticipated, technical issues and deficiencies in the Proposals.

1. Tax on Split Income – Proposed expansion of the existing ITA rules

In the course of establishing or reorganizing a privately-held business, business owners (such as entrepreneurs) often include other family members in the ownership of the business (e.g. of an operating company). When the after-tax income of the business is subsequently distributed among those corporate shareholders as dividends, family members who have little or no other income will generally pay tax on this dividend income at a relatively low rate. The ITA presently includes provisions regarding "tax on split income" or "TOSI" (which is commonly referred to as the "kiddie tax" provisions) in section 120.4 ITA, which effectively deny the benefit of such low rates of tax to minors who receive "split income" (as defined in subsection 120.4(1) ITA).

The July 18, 2017 draft legislation proposed an extremely wide-ranging expansion of the ITA provisions regarding the "tax on split income" in section 120.4 ITA (i.e. the "kiddie tax" provisions). In order to understand the extent of the proposed amendments contained in the draft legislative proposals (i.e. the Proposals), it would likely be helpful to summarize the existing "tax on split income" rules – which were enacted in 2000 in response to tax planning structures allowed by the courts in *Neuman v. The Queen*[6] (which involved "dividend sprinkling" shares held by a spouse who was not involved in the business of the owner-manager) and also in *Ferrel v. The* Queen[7] (involving the payment of a management fee by a corporation to a trust whose beneficiaries were family members, who were in low income brackets, of the owner-manager of a business).

The existing section 120.4 ITA provision applies only to minors (individuals who have not attained the age of 18 in the particular year) – and the individual to whom that provision is applicable is called a "specified individual" (defined as an individual under age 17 before the particular year began, not a non-resident of Canada and having a parent resident in Canada at any time in the year). The existing "kiddie tax" rules tax in the hands of the "specified individual" at the top marginal rate of tax (and without any deductions or credits, other than the dividend tax credit and the foreign tax credit) any amount of "split income" received by the "specified individual". "Split income" includes the following types of income:

- dividends on unlisted shares (i.e. private corporation shares), and
- income from a partnership or trust where the partnership or trust provides services or property to

- a business carried on by a person related to the "specified individual", which business pays a fee or other amount to the partnership or trust for the services or property provided to it, or
- a corporation where a person related to the "specified individual" is a "specified shareholder" of the corporation (i.e. holding at least 10 percent of the issued shares of the corporation) and the corporation pays a fee or other amount to the partnership or trust for the services or property provided to it.

The existing section 120.4 ITA provision contains limited exclusions from certain income being classified as "split income", which is called an "excluded amount" – such that dividends received by a minor on inherited shares of a private corporation would be an "excluded amount" (and consequently would not be "split income" subject to the "kiddie tax") if the shares are

- private corporation shares inherited upon the death of a parent, or
- private corporation shares inherited from anyone other than a parent, where the minor individual recipient is in full-time attendance at a post-secondary educational institution.

In addition, there are anti-avoidance rules contained in existing subsections 120.4(4) and (5) ITA to prevent any attempted conversion into a capital gain of what would be dividend income taxed in the hands of a minor individual – and which would treat the entire capital gain realized as an "ineligible" dividend (taxed at a higher rate of tax than an "eligible" dividend) – and which apply where a "specified individual" (i.e. a resident Canadian minor individual) would otherwise have a taxable capital gain from the disposition of private corporation shares that are transferred directly or indirectly in any manner whatever to a person with whom the "specified individual" does not deal at arm's length (e.g. an immediate family member such as a parent, brother or sister).

2. Tax on Split Income – Impact of the July 18, 2017 draft legislative proposals

The draft legislative proposals released on July 18, 2017 (i.e. the Proposals) regarding "tax on split income" (TOSI) would significantly expand the scope of the existing TOSI rules in the ITA by having them apply to adult individuals as well as to minor individuals, including in situations where after-tax corporate income is distributed to adult shareholders – effective for amounts of "split income" that would be received beginning in the 2018 taxation year (i.e. from January 1, 2018 onwards) – unless the payment is considered to be "reasonable in the circumstances".

According to the Proposals, "reasonableness" would be based on factors such as

- ❖ the extent to which the “specified individual”/recipient is engaged in the business (i.e. the functions relating to the business performed by the individual);
- ❖ the assets contributed, directly or indirectly, to the business by the “specified individual”/recipient;
- ❖ the risks assumed by the “specified individual”/recipient in connection with the business; and
- ❖ the total of any amounts previously paid to the “specified individual”/recipient from the business.

It should be added that where the adult “specified individual” is under age 24, a stricter and more onerous “reasonableness test” would apply:

- ❖ he or she must be actively engaged on a regular, continuous and substantial basis in the activities of the business in order to be considered to have performed any functions in the business (i.e. part-time service will not qualify); and
- ❖ the value of the property contributed or risks assumed is multiplied by the prescribed interest rate (which is currently 2 percent, but which could potentially change each calendar quarter).

Moreover, according to the proposed amendments to section 120.4 ITA as contained in the Proposals the categories of income which would constitute “split income” were to be expanded to include all of the following types of income:

- ❖ dividends on unlisted shares (i.e. private corporation shares);
- ❖ income from a partnership or trust where the partnership or trust provides services or property to
  - o a business carried on by a person related to the “specified individual”, which business pays a fee or other amount to the partnership or trust for the services or property provided to it, or
  - o a corporation where a person related to the “specified individual” is a “specified shareholder” (i.e. holding at least 10 percent of the issued shares of a corporation) of the corporation and the corporation pays a fee or other amount to the partnership or trust for the services or property provided to it;
- ❖ interest or other income on debt obligations;
- ❖ capital gains or other income from the disposition of property (if income from that property would otherwise be “split income”); and
- ❖ income earned on income which is itself “split income” (sometimes referred to as “secondary income” or “second generation income”).

Furthermore, according to the proposed amendments to subsection 120.4 ITA contained in the Proposals, the proposed expanded definition of “specified individual”

potentially subject to the TOSI rules contained a requirement for a certain level of connectedness to the business which is the source of the income to be an adult "specified individual" (which is not included in the case of a minor "specified individual") – such that an adult who is resident in Canada would be a "specified individual" if:

- his or her income for the year includes income from property [i.e. investment income], a taxable capital gain or other income from the disposition of property, a shareholder benefit pursuant to subsection 15(1) ITA or a more broad-based benefit pursuant to section 246 ITA – which can reasonably be considered to be derived, directly or indirectly, from a business, and
- the business is carried on, during the particular year or a previous year, by
    - another individual resident in Canada who is related to him or her (and "related person" is expanded such that an uncle or aunt is related to his or her nephew or niece), or
    - a corporation of which the other individual is a "specified shareholder" or a "connected individual" (and "connected individual" is defined to include a corporation which is factually controlled by the other individual or a related group of which the other individual is a member, as well as where the other individual owns shares of or property which derives, directly or indirectly, all or part of its value from the shares of a corporation which carries on a services business (where the services provided by the corporation are primarily provided by the other individual).

Consequently, although in the case of a "specified individual" who is a minor the TOSI rules would operate essentially the same as under the existing TOSI provisions (i.e. the "kiddie tax" provisions), for a "specified individual" who is an adult the Proposals provided that a "reasonableness test" would apply in order to determine whether a portion of otherwise "split income" would be a "split portion"[8] – since for an adult "specified individual" only the "split portion" of "split income" would be subject to the proposed amended TOSI provisions. The "reasonableness test" questions whether the particular amount exceeds what would have been paid or payable to the "specified individual" by an entity operating at arm's length with him or her having regard to functionality, contribution, risk and prior payment(s) to him or her.

Moreover, the Proposals provided that where property is inherited, a "deeming rule" would apply to provide continuity of functions performed, assets contributed, risks assumed and amounts paid (i.e. from the deceased person to the person who inherited the property).

In summary, according to the July 18, 2017 Proposals:

- For a minor "specified individual", any amount received by him or her which constitutes "split income" would have been caught by the proposed amended TOSI rules and taxed at the top marginal rate of tax. Consequently, dividends on any private corporation shares (whether the shares are held directly or by a discretionary trust but the dividends are allocated to a minor beneficiary) would be included in the minor's income and taxed at the top marginal rate pursuant to the proposed amended TOSI provisions – since there is no requirement that the minor individual's parent control or be a "specified shareholder" (have a minimum 10 percent share ownership) of the private corporation; but
- For an adult "specified individual", not all "split income" would be included in his or her income under the proposed amended TOSI provisions and taxed at the top marginal rate of tax – since it is only the "split portion" of "split income" which would be included in his or her income under the proposed amended TOSI provisions contained in the Proposals (i.e. after applying the proposed "reasonableness test", in order to determine what portion of the otherwise "split income" amount would be in excess of the amount which would be considered "reasonable in the circumstances", such that any such excess amount would be treated as a "split portion" and taxed under the proposed amended TOSI provisions).

3. Surplus stripping – Proposed measures aimed at "surplus stripping"

Since only one-half of a capital gain is taxable in Canada under existing section 38 ITA, individuals could potentially realize a significant tax advantage if some of the value of a corporation could be extracted as a capital gain as opposed to as a dividend. The extracting of corporate surplus as a capital gain instead of as a dividend is commonly referred to as "surplus stripping" – and there are provisions in the ITA which are specifically aimed at preventing surplus stripping transactions, most notably section 84.1 ITA.

Section 84.1 ITA is an anti-avoidance rule that curtails the ability to extract corporate surplus as a capital gain – by only recognizing an individual's "hard" cost base in the transferred shares and not any "soft" cost base (which represents capital gains in respect of which no income tax was paid, such as capital gains subject to claiming of the lifetime capital gains exemption under subsection 110.6 ITA (the "LCGE")). Consequently, existing section 84.1 ITA effectively prevents an individual from avoiding income tax that would ordinarily arise on a taxable dividend by removing corporate surplus through a non-arm's length transfer of shares to a non-arm's length corporation.

The July 18, 2017 consultation paper and related legislative proposals (i.e. the Proposals) focused specifically on section 84.1 ITA – and identified a specific transaction that could allegedly facilitate the avoidance of section 84.1 ITA, and proposed a

suggested legislative amendment solution. The proposed legislative amendments to section 84.1 ITA addressed such avoidance transactions by expanding the scope of what the ITA would treat as "soft" cost base – by decreasing the "hard" cost base associated with all capital gains realized previously from dispositions by the individual with non-arm's length persons such as non-arm's length corporations (from 1985 onward) and consequently taxing the individual as a deemed dividend on amounts that were previously taxed as a capital gain on a prior disposition (thereby expanding the scope of "soft" cost base to include any cost base arising from capital gains realized on previous dispositions of the shares by the individual or non-arm's length individuals, regardless of whether the gains were subject to tax or were sheltered under the LCGE). When combined with the addition of proposed new section 246.1 ITA (which would have converted an amount payable into a taxable dividend), unfortunately these proposed legislative amendments would have created immediate and automatic double taxation with no relieving provisions since the total tax payable on the realization of value would have included

- tax on the capital gain realized on the prior disposition(s) by a non-arm's length person; and
- tax on the deemed dividend resulting from the application of proposed amended section 84.1 ITA or proposed new section 246.1 ITA.

In addition, these proposed legislative amendments would have effectively eliminated a well-accepted form of post-mortem tax planning commonly known as the "pipeline" – which has been used frequently to mitigate the potential for double taxation when an individual dies owning shares of a private corporation. Furthermore, it was evident that the enactment of these proposed legislative amendments would have had a significant adverse impact on the ability of business owners to transfer a business to family members.

According to the Proposals, Finance stated that these proposed legislative amendments were to have been effective as of July 18, 2017.

4. The Lifetime Capital Gains Exemption – Proposed measures to restrict access to the LCGE

When an individual realizes a capital gain on the disposition of qualified small business corporation shares[9] ("QSBC shares"), or of qualified farm or fishing property[10], it may be possible to exempt some or all of the capital gain from taxation using the individual's lifetime capital gains exemption (the "LCGE") – provided that the required conditions described in subsection 110.6(2.1) ITA in the case of the shares of a Canadian-controlled private corporation[11] which constitutes a "small business corporation"[12] could be satisfied (or the subsection 110.6(2) ITA required conditions in the case of farm or fishing property). If the QSBC shares are owned by a trust, the existing ITA provisions

enable the trust to allocate the resulting capital gain among the individual beneficiaries of the trust (including minors)[13] – such that each individual beneficiary could utilize all or part of his or her LCGE to shelter (at least a portion of) the total capital gain realized on a disposition by the trust of the QSBC shares.

The proposed legislative amendments contained in the July 18, 2017 proposals (i.e. the Proposals) would have restricted the benefits of the above-described tax planning strategy, since

- minors (i.e. an individual who has not attained age 17 before the beginning of the particular year) would no longer have been able to claim the LCGE, and
- the LCGE could not have been claimed in respect of any portion of the capital gain that accrued
  - during the time when the shareholder of the QSBC shares was a minor (before the year in which the individual attained age 18), or
  - during the time when the QSBC shares were held by a trust (except for an "eligible LCGE trust", as defined in the draft legislative proposals as being an alter ego trust, a testamentary spousal trust or an *inter vivos* joint partner trust), and
- the LCGE would not be available to the extent that the income from the capital gain would be considered to be "split income" under the proposed expanded TOSI provisions (as described above in this paper).

The July 18, 2017 proposed legislative amendments did, however, include some transitional rules that would have allowed a trust to create a deemed disposition of QSBC shares at fair market value before the end of 2018 – in order to "crystallize" any capital gain that had accrued in the trust before it would have become subject to the new restrictions to accessing the LCGE.

According to the Proposals, Finance stated that these proposed legislative amendments were to have been effective for the 2018 taxation year (i.e. beginning as of January 1, 2018, applicable to dispositions occurring after 2017).

5. Passive Income of Private Corporations – Proposed approaches aimed at the earning of "passive income" through a Private Corporation

Under the ITA provisions in existence at the date of release of the Consultation Paper (July 18, 2017), active business income earned through a Canadian-controlled private corporation (a "CCPC") in Ontario is subject to income tax at a combined federal-provincial rate of

- 15% on active business income in a taxation year up to the corporation's "business limit"[14] of $500,000, and
- 26.5% on active business income in a taxation year of the corporation in excess of the $500,000 business limit amount.

On the other hand, the maximum combined federal-provincial marginal rate of tax on income (such as business income) earned personally is 53.53% in Ontario. Consequently, a corporation that earns the same amount of active business income as an individual in the top tax bracket (or even in a somewhat lower tax bracket) earns would ultimately have more after-tax dollars to invest – since the lower corporate tax rates would facilitate the accumulation of earnings that could be invested by the corporation in a passive investment portfolio.

The consultation paper released on July 18, 2017 by the Department of Finance asserted that

- the above-described differential in the taxation of active business income earned by a private corporation and business income earned by an individual – and the consequential facilitation of the accumulation of earnings that could be invested by a private corporation in a passive investment portfolio – would result in a substantial and "unfair" tax advantage to owners of private corporations (who invest after-tax corporate income in passive investments) over the long-term, and
- low corporate income tax rates in the Canadian income tax system are intended to facilitate reinvestment in the business for growth of the business, rather than to enable the earning of passive income (i.e. investment income) by the business corporation.

Consequently, Finance suggested that amendments to the ITA are required in order to establish a greater degree of "fairness" as between the tax treatment of passive (investment) income earned through a private corporation and the tax treatment of passive (investment) income earned personally by an individual. Although no specific legislative amendments were proposed on July 18, 2017 to address this concern of Finance, the consultation paper contains a description of a couple of alternative approaches intended to achieve more "neutral" tax results regarding the taxation of passive (investment) income, including

- replacing the refundable tax mechanism on passive (investment) income earned by a private corporation with a non-refundable tax in situations where corporate earnings used to fund the acquisition by the corporation of passive investments were subject to tax at low corporate tax rates (e.g. on active business income within the $500,000 "business limit" of the corporation), such that there would not be a

refund of the refundable tax upon the payment of a dividend by the corporation to its shareholder(s); and

- characterizing corporate dividends paid from passive (investment) income of the corporation as either "eligible dividends"[15] or "non-eligible dividends", based upon the source of the corporate earnings used to fund the acquisition by the corporation of the passive investments (such as small business income, general business income, or capital contributions by shareholder(s)), such that corporate dividends sourced from passive investments funded from active business income taxed at the lower (small business income) tax rate would be treated as "non-eligible dividends"; and

- not allowing the non-taxable portion of a private corporation's capital gain(s) to be added to the corporation's capital dividend account[16] and subsequently distributed to shareholder(s) of the corporation on a tax-free basis (as a capital dividend) in situations where the investment by the corporation, in the capital property(ies) whose disposition triggered the realization of the capital gain(s), was funded with corporate earnings which had been subject to a low corporate tax rate (i.e. on active business income within the $500,000 "business limit" of the corporation).

In order to effectively implement the passive income proposals contained in the discussion paper on "Holding Passive Investments Inside a Private Corporation" included in the consultation paper, it would have been necessary to identify and classify the type of earnings that a private corporation used to fund the acquisition of each passive investment made by the corporation. The discussion paper provided two potential alternative approaches:

- the "Apportionment Method" – The first potential approach would have apportioned passive (investment) income among one of three "pools" (being small business income, general business income or capital contributions by shareholders), with corresponding tax results as dividends are paid out of each "pool" by the corporation; and

- the "Elective Method" – The second potential approach would have assumed that the passive income of a CCPC is earned using funds that had been taxed at the low small business rate (i.e. on active business income within the $500,000 "business limit" of the corporation) unless the corporation elected otherwise.

It is important to note that many business owners and members of the tax planning community in Canada responded to the Department of Finance, during the 75-day consultation period following the release of the discussion paper contained in the

consultation paper, and responded that business owners, entrepreneurs and professionals generally do not incorporate or retain income in their corporations in order to obtain the "deferral advantage" that is the target of these alternative potential approaches to the taxation of "passive income" earned by corporations – since, in many situations, there is little "deferral advantage" due to under-integration in the Canadian income tax system and since the accumulation of passive investments within a corporation is frequently necessary to

- finance business growth; and/or
- enable a business to continue to meet its financial obligations in the event of an economic downturn; and/or
- provide the owner(s) of a business with a source of savings for sick leave, parental leave and/or retirement.

October 2017 Announcements re updates to July 2017 Proposals – Tax Planning Using Private Corporations

As mentioned earlier in my paper, during the 75-day period for public comment and consultation on the above-described July 18, 2017 proposals re the taxation of private corporations and their shareholders (i.e. the Proposals), Finance received more than 21,000 submissions in response to the Proposals – and encountered widespread criticism of the Proposals from business owners, various organizations, professionals and members of the tax planning community in Canada. Following the conclusion of the consultation period on October 2, 2017, and particularly during the week of October 16, 2017 (known as "Small Business Week" in Canada), the federal government announced several updates to the proposed changes of July 18, 2017 (the "October 2017 Updates"). On October 24, 2017, the federal government released its Fall Economic Statement 2017[17] which reaffirmed those announcements contained in the various media releases from the previous week regarding the updates to the July 18, 2017 proposed changes to the taxation of private corporations and their shareholders.

In the October 2017 Updates and in the Fall Economic Statement 2017 the federal government announced that

- It would not be moving forward with the proposed measures that would have restricted access to the LCGE [as described earlier in my paper] (i.e. to effectively limit the access to the LCGE by minors and to limit the multiplication of claims of the LCGE within a family group including family trusts)
    - and that the proposed extension of the TOSI provisions to taxable capital gains from the disposition of property would not apply to property that can qualify for the LCGE (i.e. qualified small business corporation shares and qualified farm or fishing property); and

- ❖ It would not be moving forward with the proposed measures regarding "surplus stripping" [as described earlier in my paper] (i.e. to restrict individuals from extracting corporate surplus as a capital gain, as opposed to dividend income, which is subject to taxation at a higher tax rate)
    - since Finance had been made aware from the considerable feedback it received during the public consultation process that the enactment of these particular proposed draft amendments to the ITA would have had a significant adverse impact on post-mortem planning (i.e. "pipeline" planning) as well as on the ability to transfer a business to family members, but
    - Finance did express its intention to work with stakeholders over the following year in order to develop a revised set of amendments that would not hinder the intergenerational transfer of a business; and

- ❖ It would be moving forward with the proposed measures regarding "income sprinkling" (more correctly known as "income splitting") with family members [as described earlier in my paper] (i.e. distributing after-tax corporate income to family members, whether through a family trust or otherwise, who are in lower tax brackets), but that it would simplify somewhat the complex proposals released on July 18, 2017, and that
    - the "simplified" expanded TOSI provisions would be effective for 2018 and subsequent taxation years (i.e. beginning January 1, 2018), and
    - revised draft legislative amendments would be released later in the fall of 2017; and

- ❖ It would continue to develop the proposals regarding the taxation of passive (investment) income of private corporations [as described earlier in my paper] (i.e. to tax such passive income in a manner to achieve "tax neutrality" with the taxation of passive (investment) income earned personally by individuals), and that
    - the details of the proposed changes would be released in the 2018 Federal Budget [to be forthcoming in late winter], and
    - there would be an annual threshold of $50,000 of passive (investment) income earned by a private corporation each year (presumably to be taxed under existing rules), in order to provide business owners with some flexibility to hold savings for various purposes (presumably such as business growth, to meet financial obligations during an economic downturn or to fund sick leave or paternal leave or retirement); however, passive (investment) income in excess of $50,000 each year would be subject to a "new" tax regime, and

- these changes would be applied on a "go-forward basis", such that current investments (at the effective date of the legislative amendments when enacted) of a private corporation and the income earned on those current investments would not be impacted.

The federal government also (unexpectedly) announced during the week of October 16, 2017 that the federal "small business tax rate" payable by Canadian-controlled private corporations (CCPCs) on their first $500,000 of active business income in a taxation year would be reduced from 10.5% to 10.0% effective January 1, 2018, and then would be further reduced to 9.0% effective January 1, 2019. When combined with the subsequent announcement (on November 14, 2017) by the Ontario government that the Ontario "small business rate" payable by CCPCs on their first $500,000 of active business income in a taxation year would be reduced to 3.5% effective January 1, 2018, the combined federal-provincial corporate tax rates on such "small [active] business income" earned by CCPCs in Ontario would be 13.5% in 2018 and 12.5% in 2019.

Although business owners, professionals and members of the tax community in Canada were somewhat encouraged by the October 2017 announcements from Finance (particularly regarding the indication that Finance would not be going forward with those July 18, 2017 proposals regarding restricting access to the LCGE and regarding surplus stripping, as well as the indication that the "small business tax rate" would be reduced), their consternation remained regarding the impending release of the revised proposed ("simplified") expanded TOSI legislative amendments and draft legislative proposals regarding the taxation of passive (investment) income earned by private corporations.

December 2017 Revised Draft Legislative Proposals – Tax Planning Using Private Corporations

1. Tax on Split Income – Proposed expansion of the existing ITA rules – Revised Draft Legislative Proposals

On December 13, 2017 Finance finally released revised draft legislative proposals regarding the "tax on split income" ("TOSI") provisions (the "Revised TOSI Proposals")[18], which narrowed somewhat the proposed scope of the July 18, 2017 proposals regarding the TOSI provisions but which would still significantly expand the scope of the existing TOSI provisions in the ITA – by effectively providing that TOSI would apply where a "specified individual" receives (directly or indirectly) an amount of "split income" from a "related business" (i.e. the business of a "related individual") and the amount received is not an "excluded amount" (as defined in the Revised TOSI Proposals).

The revised proposed measures will expand the existing TOSI provisions in the ITA in the following manner:

- "specified individual" will include adults as well as minors – so that the TOSI provisions would potentially apply to adult individuals as well as to minor individuals, including in situations where after-tax corporate income is distributed to adult shareholders of a private corporation, to be effective for amounts of "split income" that would be received beginning in the 2018 taxation year (i.e. from January 1, 2018 onwards) unless the amount received is considered to be an "excluded amount" or is considered to be "reasonable in the circumstances":

- "split income" will now include income on indebtedness and taxable capital gains;

- whether an amount of otherwise "split income" received by a "specified individual" would be an "excluded amount" will involve a determination which includes certain "bright-line tests" (e.g. whether a business is an "excluded business"; whether shares held in respect of which dividends are received are "excluded shares"); and

- if an amount of otherwise "split income" received by a "specified individual" is determined not to be an "excluded amount" based on those "bright-line tests" then a "reasonableness test" would then be applied (i.e. whether the amount received would be "reasonable in the circumstances").

According to the December 13, 2017 announcement by Finance, the Revised TOSI Proposals are to be effective for the 2018 taxation year (i.e. beginning as of January 1, 2018) – although it should be noted that the legislative amendments regarding the Revised TOSI Proposals have not yet been enacted (as of the date of writing my paper) but they have recently been introduced for consideration by Parliament.

It is evident that the Revised TOSI proposals are intended to clarify whether a family member is significantly involved in a (related) business, and thereby might potentially be excluded from having dividend income or capital gains derived from that business taxed at the top marginal tax rate (as TOSI). In general, a business would be a "related business" if an individual who is related to the "specified individual" either is actively engaged in the business or owns a significant portion of the equity in the corporation which carries on the business.

In light of the recent introduction (and likely subsequent enactment) of the revised ITA provisions impacting "income sprinkling" strategies (more correctly known as "income splitting" strategies), the recommended steps for completing a "TOSI analysis" would be as follows:

- ❖ Is the individual, who has received a dividend on private corporation shares or interest on indebtedness of a private corporation or realized a taxable capital gain on the disposition of private corporation shares, a "specified individual"?

- ❖ If so, has the "specified individual" received an amount which would be "split income"?

- ❖ If so, what portion (if any) of that amount would be an "excluded amount"?

    - o excluded based on application of either of the "bright-line tests", or (as a "last resort")
    - o excluded based on application of the "reasonableness test".

As in the July 18, 2017 proposed amendments to the TOSI provisions, in the December 13, 2017 revised proposed legislative amendments (the Revised TOSI Proposals), the definition of a "specified individual" has been expanded to include[19]

- ❖ any individual who is resident in Canada, regardless of his or her age; and
- ❖ for an individual who is under 18 years old, if he or she has a parent resident in Canada at any time in the year.

Consequently, the proposed revised provisions re "income sprinkling" could apply to adults and minors, but would not apply to non-resident individuals.

Moreover, as in the July 18, 2017 proposed amendments to the TOSI provisions, in the December 13, 2017 proposed legislative amendments (i.e. the Revised TOSI Proposals) the categories of income which would constitute "split income"[20] are to be expanded to include all of the following types of income:

- ❖ dividends on unlisted shares (i.e. private corporation shares);
- ❖ income from a partnership or trust where the partnership or trust provides services or property to
    - o a business carried on by a person related to the "specified individual" which business pays a fee or other amount to the partnership or trust for the services or property provided to it, or
    - o a corporation where a person related to the "specified individual" is a "specified shareholder" (i.e. holding at least 10 percent of the issued shares of a corporation) of the corporation and the corporation pays a fee or other amount to the partnership or trust for the services or property provided to it;
- ❖ interest or other income on debt obligations;

- ❖ capital gains or other income from the disposition of property (if income from that property would otherwise be "split income").

It should be noted, however, that in the December 13, 2017 Revised TOSI Proposals "split income" would not include income earned on reinvested "split income" (commonly referred to as "second generation income") which was previously subject to the TOSI provisions – a change from the July 18, 2017 proposed amendments to the TOSI provisions.

In the December 13, 2017 proposed legislative amendments (i.e. the Revised TOSI Proposals), the definition of an "excluded amount"[21] provides a number of general exclusions for certain amounts which would otherwise be "split income" subject to the TOSI provisions, such as

- ❖ if the individual recipient is under age 25, income from property received as a result of the death of a parent

- ❖ if the individual recipient is under age 25, income from property received as a result of the death of any person if the individual is a full-time post-secondary student or if he or she is entitled to the disability tax credit

- ❖ income from property received as a result of a breakdown of a marriage or common-law partnership

- ❖ taxable capital gain that arises because of a deemed disposition of property on the death of an individual

- ❖ taxable capital gain on the disposition of qualified small business corporation shares or of qualified farm or fishing property

    - o applies to taxable capital gains on capital gains realized by a trust and allocated to beneficiaries.

As mentioned, there are also "bright-line tests" included in the definition of "excluded amount" in the December 13, 2017 revised draft legislative amendments with respect to the Revised TOSI Proposals – in particular, the "excluded business" and the "excluded shares" specific exclusions for amounts which would otherwise be "split income" for purposes of the TOSI provisions, as well as the "contributions to business by spouse over age 65" specific exclusion for amounts which would otherwise be "split income" for purposes of the TOSI provisions:

- ❖ "excluded business" – A "specified individual" over age 17 would not be subject to TOSI on amounts (which would otherwise be "split income") received in the year from an "excluded business" – which is defined to be a business in which the individual is actively engaged on a regular, continuous and substantial basis in the taxation year in which an amount is received or in any 5 previous taxation years (in order to demonstrate an ongoing meaningful contribution to the business). The 5 previous taxation years do not have to be consecutive years. There is also a "deeming rule" that if an individual works at least an average of 20 hours/week during the part of the year that the business operates, he or she will be deemed to be engaged in the business on a regular, continuous and substantial basis.

- ❖ "excluded shares" – A "specified individual" over age 24 would not be subject to TOSI on amounts (which would otherwise be "split income") received in the year on "excluded shares" owned by the individual. This exclusion from TOSI would apply to income received on a share (including from the disposition of the share) if all of the following conditions are met:

    - o the individual has attained the age of 25 years in or before the particular year;
    - o the individual owns at least 10 percent of the outstanding shares of a corporation in terms of votes and value; and
    - o the corporation
        - ▪ earns less than 90 percent of its income from the provision of services, and
        - ▪ is not a professional corporation (i.e. a corporation that carries on the professional practice of an accountant, dentist, lawyer, medical doctor, veterinarian or chiropractor), and
        - ▪ does not earn all or substantially of its income from a related business in respect of the specified individual

- ❖ "contributions to business by spouse over age 65" – Income from a "related business" would be an "excluded amount" for a "specified individual" and not be subject to TOSI if the individual's spouse has
    - o made meaningful contributions to the business, and
    - o has attained the age of 65 (in or before the year the amount is received)
    - o NOTE – In respect of a deceased individual, his or her surviving spouse would continue to benefit from the contributions made by the deceased individual.

If the proposed new exclusions from the proposed expanded TOSI rules released on December 13, 2017 do not apply, then a "specified individual" who has attained the

age of 25 years in or before the year would be subject to TOSI on amounts derived directly or indirectly from a "related business", but only to the extent that the amounts exceed a "reasonable return" [22]. A "reasonable return" is defined as an amount that is reasonable having regard to the contributions of the adult "specified individual" to the related business relative to other family members who have contributed to the business – including labour contributions, capital contributions, risks assumed and other relevant factors including previous amounts received by that "specified individual" from the business. Consequently, it is likely that if an amount received by a "specified individual" is disproportionate relative to the contributions to, and the amounts received from, the business by him or her and other family members, the portion of the amount which is considered to be in excess of a "reasonable return" would be subject to the revised proposed TOSI provisions.

For adult individuals between age 18 and age 24, the determination of "reasonableness" would be based on capital contributed by the individual and

- there is a "safe harbor capital return test" applicable, which would limit the return on capital acquired from a non-arm's length source to an amount equal to the prescribed rate of interest (established quarterly by the Canada Revenue Agency), and
- the "reasonable return on arm's length capital test" would limit the return on capital acquired from an arm's length source to an amount that is "reasonable in the circumstances".

2. Tax on Split Income – Impact of the December 13, 2017 revised draft legislative proposals

The December 13, 2017 revised draft proposed ITA amendments regarding "income sprinkling" somewhat simplify the draft proposals released on July 18, 2017 to expand the TOSI provisions; however, there will continue to be significant complexity involved in attempting to apply the revised draft proposed ITA amendments to typical business structures (which could create considerable uncertainty for business owners) – and without any "grandfathering" having been made available for existing arrangements. Moreover,

- The "excluded business" bright-line test for qualifying as an "excluded amount" from "split income" would not apply to corporations which earn 90 percent or more of their income from providing services – and it is important to note that a substantial proportion of the economy in Canada is created by service businesses (which would not be able to rely on that test to attempt to achieve an exclusion from "split income" which would be subject to the proposed expanded TOSI provisions).

- ❖ It is not clear whether the excluded shares" bright-line test for qualifying as an "excluded amount" from "split income" would apply to businesses carried on through a group of corporations (particularly for the shares of a parent corporation whose income is derived from the income of a subsidiary company).

- ❖ The proposed expanded TOSI provisions would not apply to salaries paid by a private corporation to family members of the owner-manager of a business – and the recent introduction (and likely impending enactment) of the revised draft ITA amendments regarding the TOSI provisions may well result in an increased emphasis on the payment of salaries (which should be "reasonable in the circumstances") rather than dividends to family members.

Federal Budget 2018 Measures – Tax Planning Using Private Corporations

1. Tax on Split Income – Proposed expansion of the existing ITA rules – Proceeding to enact the Revised TOSI Proposals

On February 27, 2018, Finance confirmed in the 2018 Federal Budget that the federal government will proceed with the proposed introduction and subsequent enactment of the revised draft proposed ITA amendments regarding "income sprinkling" announced on December 13, 2017 (i.e. the Revised TOSI Proposals)[23] [as described above in my paper] – to be effective starting on January 1, 2018 (i.e. beginning in the 2018 year).

2. Passive Income of Private Corporations – Proposed revisions to existing ITA rules applicable to Private Corporations earning "passive income"

In the 2018 Federal Budget, Finance introduced proposed revisions to the existing ITA provisions regarding the taxation of private corporations earning passive (investment) income (the "Revised Passive Income Proposals") [24] – to provide

- ❖ if a private corporation which is a Canadian-controlled private corporation (CCPC) [as described above in my paper] and its associated corporations earn more than $50,000 of passive investment income – called "adjusted aggregate investment income", which includes portfolio dividends received by the corporation and capital gains realized by the corporation on the disposition of non-active assets but does not include capital gains realized by the corporation on the disposition of "active assets"— in a year, then the amount of the CCPC's active business income eligible for the "small business tax rate" [as described above in my paper] would be reduced on a "straight-line" basis (a $5 reduction for every $1 of passive investment

income earned in excess of $50,000 in a year) – such that the CCPC's $500,000 "business limit" would be completely eliminated at $150,000 of passive investment income, and

- for restrictions on the ability of a private corporation to obtain a refund of the balance in its refundable dividend tax on hand ("RDTOH") account[25] – (i.e. a refund of a portion of the tax paid by the corporation when it earned income) where the corporation pays dividends to its individual shareholder(s) from income earned on its passive investments that were funded from the corporation's income which was taxed at the (low) "small business rate" [as also described above in my paper],

to be effective for taxation years beginning after 2018.

Federal Budget 2018 Measures – Enhanced Reporting Requirements for Trusts

1. Reporting Requirements for Trusts – Proposed additional annual reporting requirements

After having indicated in the 2017 Federal Budget that it would examine methods to enhance trust reporting requirements in order to improve the collection of information pertaining to the beneficial ownership of trust property, on February 27, 2018 Finance proposed in the 2018 Federal Budget to require that for certain trusts additional information be provided on an annual basis[26], including the identity of

- the settlor, all trustees and all beneficiaries, as well as
- each person who has the ability (through the terms of the trust deed or a related agreement) to exert control over trustee decisions regarding the apportionment of trust income or capital (such as a protector)

and which new requirements would be applicable to

- "express trusts" which are Canadian resident trusts (i.e. trusts created with the express intent of the settlor of the trust), and
- Non-resident trusts which are presently required to file a T3 trust return in Canada,

with respect to trust returns required to be filed for the 2021 and subsequent taxation years.

However, the 2018 Federal Budget provides that the proposed enhanced annual reporting requirements would not apply to

- mutual fund trusts and segregated funds,

- ❖ trusts governed by registered plans (e.g. RRSPs and RRIFs),
- ❖ graduated rate estates,
- ❖ qualified disability trusts,
- ❖ trusts that qualify as non-profit organizations or registered charities, and
- ❖ trusts that have been in existence for less than 3 months or that generally hold less than $50,000 in assets throughout the taxation year.

New penalties for a failure to file a T3 trust return (including a beneficial ownership schedule where required), equal to $25 for each day, to a maximum penalty of $2,500, were also proposed by Finance in the 2018 Federal Budget.

Summary

As described above in this paper, it is evident that the 2017 draft proposals regarding revisions to the taxation of private corporations and their shareholders in Canada – in particular, the December 13, 2017 revised draft legislative amendments regarding "income sprinkling" as confirmed in the 2018 Federal Budget delivered on February 27, 2018 (commonly referred to as the Revised TOSI Proposals), and the February 27, 2018 proposed measures regarding private corporations earning passive (investment) income – could cause significant changes to tax and estate planning for business owners, professionals and entrepreneurs. As a result, it is essential that estates and trusts lawyers keep in mind the potential impact of those proposed revised ITA provisions which will most likely soon be enacted (and are currently included in Bill C-74 which has been introduced in Parliament), as well as any ongoing refinements to them, in structuring and implementing tax and estate plans for clients.

ENDNOTES

NOTE: The information and opinions contained in this paper are provided as of the date of the presentation (May 3, 2018) and are subject to change without notice. The author does not make any representation or warranty, express or implied, in and takes no responsibility for, any errors or omissions which may be contained in this paper and does not accept any liability whatsoever for any loss arising from any use or reliance on the information and opinions contained herein.

1. R.S.C. 1985, c.1 (5th Supp.), as amended from time to time.
2. The 2018 Federal Budget was delivered on February 27, 2018.
3. Federal Budget 2018, Department of Finance (Canada), February 27, 2018.
4. Federal Budget 2017, Department of Finance (Canada), March 22, 2017.
5. "Tax Planning Using Private Corporations" consultation paper and draft legislative proposals to amend the ITA, Department of Finance, July 18, 2017.
6. *Neuman v. The Queen*, 98 DTC 6297 (SCC).
7. *Ferrel v. The Queen*, 97 DTC 1565 (TCC), decision affirmed 99DTC 5111 (FCA).
8. According to proposed subsection 120.4(1) ITA of the *Income Tax Act* (Canada) as amended from time to time (the "ITA"), particularly the proposed definition of "split income".
9. Within the meaning of that term as defined in subsection 110.6(1) of the ITA.
10. Within the meaning of that term as also defined in subsection 110.6(1) of the ITA.
11. As defined in subsection 125(7) of the ITA.
12. As defined in subsection 248(1) of the ITA.
13. Pursuant to subsections 104(21.2) to 104(21.22) of the ITA.
14. As defined in subsection 125(2) of the ITA.
15. As defined in subsection 89(1) of the ITA.
16. Within the meaning of that term as defined in subsection 89(1) of the ITA.
17. Fall Economic Statement 2017 entitled "Progress for the Middle Class", Department of Finance (Canada), October 24, 2017.
18. [Proposed] Amendments to the Income Tax Act and Regulations on Income Sprinkling, Department of Finance (Canada), December 13, 2017.
19. Ibid, in subsection 120.4(1) ITA.
20. Ibid, in subsection 120.4(1) ITA.
21. Ibid, in subsection 120.4(1) ITA.
22. Ibid, in subsection 120.4(1) ITA.
23. Federal Budget 2018, Department of Finance (Canada), February 27, 2018.
24. Ibid.
25. As defined in subsection 129(3) of the ITA.

26. Federal Budget 2018, Department of Finance (Canada), February 27, 2018.

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TAB 16

THE SIX-MINUTE Estates Lawyer 2018

Deathbed Retainers

Alexandra Mayeski
Mayeski Mathers LLP

May 3, 2018

cpd Continuing Professional Development

DEATHBED RETAINERS

The Six Minute Estates Lawyer 2018

Alexandra V. Mayeski[1]

It has been recognized that the making of a Will is an important activity and one that, not uncommonly, is engaged in by a person who is approaching the end of his or her life, whether it be by reason of illness or advanced age.[2] Serious illness in a testator, especially where the testator is elderly and the illness is capable of affecting his or her mental state "is one of the most extreme of suspicious circumstances. Few other circumstances demand of the solicitor greater care and caution."[3]

Some of us have experienced the situation where we get a call from an existing or prospective client (or one of their family members) requesting that you meet with the client at their bedside because they do not have long to live and do not have a Will in place that properly sets out their wishes. Do you take on the retainer?

This immediately puts the lawyer in a risky situation that raise issues of what their professional and legal duties are. This paper examines the case law in the area and provides some practical tips on how to deal with such situations in an effort to protect you as the lawyer as well as your client.

Hall v. Bennett Estate

The case of *Hall v. Bennett Estate*[4] is a leading and important case for estates practitioners that deals with the deathbed Will scenario. In this case, the lawyer, Mark Frederick, received a call from a social worker requesting that he attend at the hospital to see a terminally ill patient, Bennett, who wished to make a Will. On the way to the hospital, Frederick purchased a Will form at a local store in case a Will would have to be prepared expeditiously.

Frederick met with Bennett for 65 minutes, but Bennett kept drifting in and out of consciousness. When awake he was lucid and communicative. Bennett advised Frederick that

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[1] Partner at Mayeski Mathers LLP in Prince Edward County, ON.
[2] *Hall v. Bennett* (2003), 64 O.R. (3d) 191 (C.A.) at para. 21.
[3] *Ibid.,* at para. 25 citing with approval M.M. Litman & G.B. Robertson on "Solicitor's Liability for Failure to Substantiate Testamentary Capacity" (1984), 62 Can. Bar. Rev. 457 at pg. 474.
[4] *Supra*, Note 2 ("*Bennett Estate*").

he did not wish his daughter and grandchildren to receive his estate and gave instructions with respect to certain bequests. However, despite several attempts to ascertain what Bennett wanted to happen to the residue of his estate, Frederick could not get any answers. He therefore did not have a complete sense of what Bennett wanted to happen to his estate and determined that Bennett lacked the requisite testamentary capacity to make a Will. Frederick terminated the interview and Bennett died later that day.

One of the potential beneficiaries brought an action against Frederick for negligence in failing to prepare the Will. The trial judge held that Bennett had the capacity to make a Will and that in failing to prepare the Will in accordance with Bennett's instructions, Frederick had breached his duty of care to the prospective beneficiary. Frederick appealed.

The Court of Appeal recognized that numerous cases have dealt with the question of testamentary capacity and that the testator must have "a sound disposing mind" to make a valid will. In particular, and as extricated from the case law, the testator:

- must understand the nature and effect of a Will,
- must recollect the nature and extent of his or her property,
- must understand the extent of what he or she is giving under the Will,
- must remember the persons that he or she might be expected to benefit under his or her Will, and
- where applicable, must understand the nature of the claims that may be made by persons he or she is excluding from the Will.[5]

The Court of Appeal found that a lawyer's first obligation is to inquire into the testamentary capacity of the testator before undertaking to do a Will. In the circumstances of this case, the Court found that the evidence in support of Frederick's opinion that he did not have sufficient instructions to prepare a Will and that Bennett lacked testamentary capacity was "overwhelming" and "that his duty was to *decline* the retainer".[6] It was therefore concluded that Frederick fulfilled any

[5] *Ibid*. at para. 14. A lower standard of capacity applies when executing a Will. If the testator enjoys testamentary capacity on the date the instructions are given and, having lost that capacity, remains capable at execution of understanding that he or she gave instructions earlier, that he or she is being asked to sign a Will and that the Will tendered for execution has been prepared based on these earlier instructions, it will be upheld. See *Yeas v. Yeas* (2017), 34 E.T.R. (4th) 116 (Ont. S.C.J.) at para. 314 adopting the proposition in *Parker v. Felgate* (1883), L.R. 8 P.D. 171 (Eng.P.D.A.).

[6] *Ibid.* at para. 58 [emphasis in original].

obligation that he owed to Bennett and, in the absence of any retainer to prepare a Will, he owed no duty to the prospective beneficiary.

The Court of Appeal also stressed the importance, for guidance in future cases, that it was at least questionable whether a lawyer, regardless of his or her opinion on the testator's capacity, could be found to be under a *legal* obligation to accept a retainer to prepare a Will.[7] By way of example, if a lawyer believes a testator is able to make a Will, but nonetheless declines the retainer, the exigent circumstances would undoubtedly give rise to a serious question of professional conduct and, depending on the circumstances, could form the basis of disciplinary proceedings.[8] However, while the *Rules of Professional Conduct* may inform a Court's decision on the question of a lawyer's duty and standard of care, they do not, in and of themselves, create legal duties that found a basis for civil liability.[9] Accordingly, a Court should address the issue of whether in all the circumstances the lawyer was under a legal obligation to accept a retainer.[10]

Rules of Professional Conduct

In light of the Court of Appeal's emphasis on a lawyer's professional conduct in urgent circumstances such as deathbed retainers, it is important to review what is required under our *Rules of Professional Conduct*. Rule 3.1-2 provides that a lawyer must perform any legal services undertaken on a client's behalf to the standard of a competent lawyer.[11] The definition of a "competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client, including:

- Investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action.[12]

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[7] At para. 61.
[8] In this regard, the Court of Appeal noted the Commentary in Rule 3.01 of the *Rules of Civil Procedure* [now Rule 4.1-1] discussed in more detail below.
[9] At para. 62.
[10] *Ibid.*
[11] Pursuant to Rule 3.2-1, a lawyer also has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil. Rule 3.2-1 should be read in conjunction with the Rules relating to competence under Section 3.1 (see Commentary to Rule 3.2-1, para. 1).
[12] Rule 3.1-1 (b).

- Performing all functions conscientiously, diligently, and in a timely and cost-effective manner.[13] This means that a lawyer should make every effort to provide timely service to the client. If a lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed, so that the client can make an informed choice about their options, such as whether to retain new counsel.[14]

- Recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served.[15]

Accordingly, in the context of a deathbed retainer, the lawyer should ensure that he or she is competent in the area of estate planning before accepting such retainer. The Commentary to Rule 3.1-2 speaks to how a lawyer must recognize his or her limitations before accepting a retainer:

> A lawyer should not undertake a matter without honestly feeling competent to handle it, or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is distinct from the standard of care that a tribunal would invoke for purposes of determining negligence.
>
> A lawyer must recognize a task for which the lawyer lacks competence and the disservice that would be done to the client by undertaking that task. If consulted about such a task, the lawyer should
>
> (a) decline to act;
>
> (b) obtain the client's instructions to retain, consult or collaborate with a licensee who is competent for that task; or
>
> (c) obtain the client's consent for the lawyer to become competent without undue delay, risk or expense to the client.[16]

However, the lawyer must recognize an added professional obligation when declining a retainer. The Commentary to Rule 4.1-1 provides, in part, that:

> **Right to Decline Representation** - A lawyer may decline a particular representation (except when assigned as counsel by a tribunal), but that discretion should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation… A lawyer

[13] Rule 3.1-1 (e).
[14] Commentary to Rule 3.1-1 at para. 12.
[15] Rule 3.1-1 (h).
[16] Commentary to Rule 3.1-2, paras. 5-6.

> declining representation should assist in obtaining the services of another licensee qualified in the particular field and able to act...[17]

It has been noted that this may be interpreted to hold a lawyer in a small town with few available lawyers to a higher standard than a lawyer in a large urban area.[18]

The ability to provide timely and prompt service is also key in what are often circumstances that require immediate attention. The Court in *McCullough v. Riffert* spoke about the continuum of urgency depending on the facts of any given case:

> 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 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.
>
> In my view, there is a continuum between a client who presents without any particular concerns regarding health or age and a client who is clearly on his or her death bed. The level of urgency to prepare a will quickly will increase as factors mount. There may be situations where a lawyer should prepare a brief will at the first interview with a very elderly or a terminally ill client. Best practices may indicate that course of action to be prudent in such situations. There always exists the possibility that a client could die from the illness or an accident after the first meeting with the lawyer. To fail to prepare a will quickly may fall below the standard of care for a reasonably competent solicitor depending on all the facts in this continuum…[19]

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[17] Commentary to Rule 4.1-1 at para. 4. This Rule was specifically referenced by the ONCA in the *Bennett Estate* case in the context of possible professional misconduct arising in circumstances where the testator is competent, but the lawyer declines the retainer to draft a Will.

[18] Claudia A. Sgro and Margaret R. O'Sullivan, "Between a Rock and a Hard Place: The Dilemma of the Deathbed Will" LSUC: The Six-Minute Estates Lawyer 2012, April 24, 2012. https://www.osullivanlaw.com/Events-and-Conferences/Between-a-Rock-and-a-Hard-Place-The-Dilemma-of-the-Deathbed-Will.pdf ("**Sgro/O'Sullivan Paper**").

[19] (2010), 59 E.T.R. (3d) 235 (Ont. S.C.J.), at paras. 61-62. In this case, the client died 10 days after giving instructions to a lawyer to prepare a Will. The client wanted his niece to receive his entire estate. The Will was not signed before the client's death resulting in an intestacy and the client's three (3) estranged children receiving the estate. The niece commenced a claim against the lawyer in negligence as a disappointed beneficiary for failing to attend to the preparation and execution of the Will before the client died. The niece's evidence was that she used the expression that her uncle had "seen death" when she made him the appointment with the lawyer. The lawyer did not recall the conversation, but testified that she was sure she would remember if something like that was said. The lawyer's notes indicated that there was no particular hurry in preparing the Will and that the testator just wanted it done before he left on a trip. Court held that the lawyer met the reasonable standard of care and dismissed the niece's claim in negligence.

Calderaro v. Meyer[20]

The case of *Calderaro v. Meyer* is a cautionary tale since the *Bennett Estate* case where the validity of a Will made in a hospital was in question. In that case, the testator's physical and mental health was deteriorating as a result of suffering a seizure and being diagnosed with HIV. Prior to being hospitalized, the testator filled out a "Will Questionnaire" and instructed his ex-common-law spouse, Carmela, to forward it to a solicitor and have a Will prepared. The Questionnaire indicated that the testator wanted his wife Sylvia (who at the time was living Brazil) to be the sole estate trustee. While away on a holiday, Carmela faxed the Questionnaire to a lawyer and instructed him to prepare a Will accordingly. The lawyer had never met either the testator or Carmela before. When Carmela returned from her holiday, she contacted the lawyer and requested that he attend at the hospital to have the Will executed. By that time, the testator could not speak, although his eyes were open and physically could not sign a Will. The lawyer read each clause in the Will to the testator and instructed him to hold his mother's hand and squeeze it to confirm that testator understood and agreed to the terms as read to him. A neighbour signed the Will on behalf of the testator. The Will gave a certain property to Carmela and the residue to his wife. The Will appointed Carmela and the testator's wife as co-estate trustees. The testator died just over a month later.

Carmela brought the matter before the Court and sought, among other things, a declaration that the Will was valid. At trial, neither the neighbour nor the mother were called as witnesses. The evidence of the lawyer was that the testator was "catatonic" and "in a waking coma". He testified that he relied on Section 4(1)(a) of the *Succession Law Reform Act* that provides that a Will is not valid unless it is signed by the testator or by some other person in his presence and by his direction.[21]

The Court ultimately held that the Will was not duly executed since the testator could not communicate his instructions. The only evidence of any direction given to the neighbour to sign the Will was given by the lawyer. With respect to the issue of whether the testator had knowledge of and gave approval of the contents of the Will, the Court determined that there was insufficient evidence to establish that the testator communicated his approval of the provisions of

[20] (2011), 75 E.T.R. (3d) 231 (Ont. S.C.J.).
[21] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, Section 4(1)(a).

the Will. The Court noted that the Will appointed Carmela as an executor which was contrary to what was set out in the Will Questionnaire. There was no evidence that the testator instructed that change, approved that change or had any knowledge that it was incorporated into his Will.

On the issue of testamentary capacity, the Court found that the medical evidence negated any finding that when the Will was executed the testator had a "sound disposing mind". In this regard, the Court specifically referred to the obligations of a lawyer in determining whether a testator has a "sound disposing mind" at paragraphs 63-65 of the decision:

> [63] Further, as set out in the *Bennett Estate* case, the attending solicitor has an obligation to take steps to determine whether the testator has a "sound disposing mind" where there is any doubt. That obligation requires the solicitor, amongst other things, to:
>
> *(a) To obtain a medical status examination of the testator.*
>
> [64] As previously reviewed, although Kaplan had expressed concerns that a medical report regarding Clark's competency be obtained, there is no evidence that such a report was sought or requested. Further, Kaplan failed to speak with Clark's doctors, and failed to review Clark's medical records in lieu of obtaining a medical report.
>
> *(b) To interview the testator if there any question of testamentary capacity.*
>
> [65] Kaplan did not interview Clark in any sufficient depth prior to or on April 21, 2008. Prior to April 21, 2009, Kaplan had never met Clark or communicated with him. His only contact with Clark was the 45 minutes required to execute the will. There is no evidence that Kaplan interviewed Clark, to inquire whether Clark understood the nature and effect of the proposed will, whether Clark recollected the nature and extent of his property, whether Clark understood the extent of what he would give under the will, and whether Clark remembered the persons he might be expected to benefit under the will.

In this case, the evidence did not establish that the testator had the requisite testamentary capacity to make the Will and, accordingly, it was found to be invalid.

Practical Tips

Below are some practical tips and considerations when deciding whether you will accept a retainer that requires you to attend the bedside of a client who is near death.[22]

[22] See also: **Sgro/O'Sullivan Paper**; John E.S. Poyser, "Estate Planning for Clients with Diminished Capacity: Deathbed Wills", (2010) 29 E.T.P.J. 244 ("**Poyser Paper**") which provides suggestions as to best practices, minimum practice, as well as precedent documents that may assist in certain circumstances. Hull and Hull's blog

(a) Before Being Retained

When the initial call is made, the lawyer should get as much information as they can about what the potential client requires for their estate plan. Is it a basic Will that is required, or do complex trusts need to be drafted? Do you have the requisite expertise and competence to deliver the legal services required? How dire is the situation and how quickly will the Will need to be prepared? Given your other commitments, are you able to prepare the Will promptly (or immediately in some circumstances)? The lawyer should also get as much information about the nature of the potential client's health. Is the testator suffering from diminished capacity? Are there any physical limitations? Will he or she be able to physically sign a Will?

If the lawyer decides that he or she will meet with the testator, it should be made clear that the lawyer is not retained and has not agreed to act until the lawyer has met the testator.[23] If, however, based on the information gathered, the lawyer decides to refuse the retainer, this should be done quickly especially if time is of the essence. Consideration should be given to our *Rules of Professional Conduct* as noted above. That is, this decision should be exercised prudently, particularly if the probable result would be to make it difficult for a person to obtain legal advice or representation. If it is Friday afternoon of a long weekend in a small town, will the lawyer be able to assist in obtaining the services of another lawyer to act? Admittedly, the situation is challenging whether the lawyer decides to meet with the testator or decides to refuse the retainer.

(b) Meeting with the Testator

The key issue in context of deathbed retainers is whether the potential client has the requisite testamentary capacity to make a Will. As noted in *Calderaro v. Meyer*, the lawyer has an obligation to obtain a medical report regarding capacity or speak with the testator's doctors or review medical records in lieu of such report. It has also been suggested that the lawyer reach out to he doctor (with the testator's consent), explain the test for capacity and request that he or she confirm their opinion in writing as soon as possible, even on an interim basis by email.[24]

"The tricky business of deathbed estate planning" (by Ian Hull) https://hullandhull.com/2017/05/the-tricky-business-of-deathbed-estate-planning/ ("**Hull and Hull Blog**") sets out some very helpful steps for lawyers to take in these circumstances.

[23] Poyser Paper at pg. 281.

[24] Sgro/O'Sullivan Paper at pg. 7-12. Hull and Hull Blog.

It is imperative that the lawyer meet with the testator alone to ensure that he or she is not being unduly influenced by others.[25] In the words of John E.S. Poyser, "[r]educed capacity and vulnerability are an irresistible combination for shark-like family members."[26] As such, the lawyer must make the necessary inquiries to ensure the testator is acting on their own desire to make a Will.

It is extremely important that the lawyer document, document, document. If there is a challenge to the Will later on or a claim against the lawyer for negligence, these notes will be key evidence as to what took place. If there is any possible doubt about the testator's capacity or any other reason to suspect that the Will may be challenged, Courts have instructed lawyers to prepare a memorandum, or note, of the lawyer's observations and conclusions to be retained in the file.[27]

The lawyer's notes should be as fulsome and copious as possible citing questions asked and answered and observations relating to issues of capacity and undue influence. Videotaping the interview has also been suggested.[28]

If the situation warrants, the lawyer might consider having a short basic form of Will ready for the meeting.[29] A simple Will can also be handwritten by the lawyer and then signed before two witnesses and following all the other necessary formalities.[30]

To Prepare the Will or Not Prepare the Will: That is the Question[31]

There are a number of considerations lawyers must take into account when deciding to take on or refuse the retainer to prepare a Will in situations where the testator is close to death. Prior to the *Bennett Estate* case, the case law favoured the lawyer drafting a Will even if capacity was in doubt. For instance, in *Scott v. Cousins* Justice Cullity stated the following:

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[25] *Ibid.*
[26] Poyser Paper at pg. 282.
[27] *Scott v. Cousins* (2001), 37 E.T.R. (2d) 113 (Ont. S.C.J.) at para. 70.
[28] Hull and Hull Blog. See also Greg Murphy, "Documenting the Death Bed Will" Law Society of Saskatchewan, Wills, Estates and Trusts: End-of-Life Decision Making, October 3, 2014 http://library.lawsociety.sk.ca/inmagicgenie/documentfolder/WETEDM6.PDF who suggests becoming a "documentary film-maker" when recording the meeting with the testator and investigating the testator's circumstances.
[29] Sgro/O'Sullivan Paper at pg. 7-15.
[30] Poyser Paper at pg. 283.
[31] See also the discussion in the Sgro/O'Sullivan Paper under the heading "The Least Worst Alternative?".

> Some authorities go further and state that the solicitor should not allow a will to be executed unless, after diligent questioning, testing or probing he or she is satisfied that the testator has testamentary capacity. This, I think, may be of a counsel of perfection and impose too heavy a responsibility. In my experience, careful solicitors who are in doubt on the question of capacity, will not play God – or even judge – and will supervise the execution of the will while taking, and retaining, comprehensive notes of their observations on the question.[32]

However, more recently, and as set out in the *Bennett Estate* case, it is open to the lawyer to refuse to draft a Will where the testator lacks testamentary capacity. What is required is a thorough inquiry with respect to testamentary capacity before the lawyer undertakes to make a Will. However, the issue of liability is not whether the testator is or is not capable of making a Will, but rather, whether a reasonable and prudent lawyer, in the drafting lawyer's position, could draw such conclusion.[33]

Whether the lawyer accepts or declines the retainer when they get the call about a deathbed retainer, the situation is one that requires great care.

[32] At para. 70.
[33] *Bennette Estate* at para. 12.

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TAB 17

THE SIX-MINUTE Estates Lawyer 2018

Pros and Cons of Using a Qualifying Spousal Trust, Alter Ego Trust and Joint Spousal Trust

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cpd Continuing Professional Development

Pros and Cons of Using a Qualifying Spousal Trust, Alter Ego Trust and Joint Spousal Trust

by Kathleen Robichaud[1]

Introduction

Alter Ego Trusts, Joint Spousal Trusts and Qualifying Spousal Trusts are trusts that are afforded special treatment under the *Income Tax Act*, mainly by allowing property to be transferred to the trust on a roll over basis. Alter Ego Trusts and Joint Spousal Trusts are *inter vivos* trusts. Qualifying Spousal Trusts are testamentary trusts that are set up in a Will. They are useful planning tools that can be used on their own, but, likely are going to be used in conjunction with other estate planning tools like: Wills; beneficiary designations; family trusts; and joint ownership with right of survivorship. The key elements of each type of trust in order for them to qualify for special income tax treatment and the pros and cons of these types of trusts are discussed below.

Background

What is an Alter Ego Trust?

Alter Ego Trust means a trust to which paragraph 104(4)(a) would apply if that paragraph were read without reference to subparagraph 104(4)(a)(iii) and clauses 104(4)(a)(iv)(B) and (C) of the *Income Tax Act* [2]

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[1]This paper was prepared by Kathleen Robichaud of the Law Office of Kathleen Robichaud to outline the pros and cons of using Qualified Spousal Trusts; Joint Spousal and Common Law Partner Trusts; and, Alter Ego Trusts as part of an estate plan for your client or clients. These can be useful planning tools, but, are also very case specific. It is important to use thoughtful judgment; careful drafting and to consult with income tax specialists when working with and advising clients on the use of these planning tools.

[2]*Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) (*Income Tax Act*) s. 248(1)

To put it more simply, an Alter Ego Trust within the meaning of the *Income Tax Act* is:

- one where the settlor and the beneficiary of the income and capital of the trust during the lifetime of the settlor are one and the same;
- the settlor must be over 65 years of age;
- the settlor and the trust must be resident in Canada;
- the trust must be an *inter vivos* trust created after 1999;
- the settlor must be entitled to receive all of the income that arises during the settlor's lifetime, and no person other than the settlor can receive or otherwise obtain the use of the income or capital of the trust while the settlor is alive
- the trust has not elected to not be considered an Alter Ego Trust in its return for its first tax year.[3]

What is a Joint Spousal Trust?

Joint Spousal or Common-law Partner Trust means a trust to which paragraph 104(4)(a) would apply if that paragraph were read without reference to subparagraph 104(4)(a)(iii) and clause 104(4)(a)(iv)(A) of the *Income Tax Act*[4]

To put it more simply, a Joint Spousal or Common-Law Partner Trust within the meaning of the *Income Tax Act* is:

- one where the settlor and the settlor's spouse or common-law partner are the beneficiaries until the death of the last of them to die;
- the settlor must be over 65 years of age;
- the settlor and the trust must be resident in Canada;
- the trust must be an *inter vivos* trust created after 1999;

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[3]See https://www.canada.ca/en/revenue-agency/services/tax/trust-administrators/types-trusts.html#ltr

[4]*Income Tax Act*, *supra*, note 2, s. 248(1).

- the settlor and/or the settlor's spouse or common-law partner must be the only people entitled to receive or obtain the use of all of the income that arises until the death of the last of them to die, and no person other than the settlor and/or the settlor's spouse or common-law partner can receive or otherwise obtain the use of the income or capital of the trust until the death of the last of them to die.[5]

For the remainder of this paper, a Joint Spousal or Common-Law Partner Trust will be referred to as a Joint Spousal Trust.[6]

What is a Qualified Spousal Trust?

A Qualified Spousal or Common-Law Partner Trust is one created in the taxpayer's Will and which entitles the spouse or common-law partner to receive all of the income of the trust arising before the spouse or common-law partner's death.

It is similar to a Joint Spousal Trust in that:

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[5]See https://www.canada.ca/en/revenue-agency/services/tax/trust-administrators/types-trusts.html#ltr

[6]For purposes of this paper, where the term spouse is used, whether reference is made to common-law partner or not, it is intended to have mean both married and common-law partners.

> **common-law partner**, with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and
>
> (a) has so cohabited throughout the 12-month period that ends at that time, or
>
> (b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii),
>
> and, for the purpose of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were living separate and apart at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship; (conjoint de fait)

Income Tax Act, *supra*, note 2, s. 248(1)

- the deceased testator's spouse or common-law partner is the beneficiary during his or her lifetime;
- the deceased must have been resident in Canada immediately before death;
- but, does not require that the settlor be over 65 years of age when the trust is created;
- the deceased's spouse or common-law spouse must be the only person entitled to receive or obtain the use of all of the income that arises during his or her lifetime, and no person other than the deceased's spouse or common-law spouse can receive or otherwise obtain the use of the income or capital of the trust during his or her lifetime;
- it also requires that property vest indefeasibly in the trust within 36 months of the testator's death (or longer if application is made and granted);
- the trust must be resident in Canada immediately after the time the property vested indefeasibly in the trust.[7]

"Tainted" Spousal Trust

A trust created by a taxpayer in the taxpayer's will that does not meet the requirements for a Qualifying Spousal or Common-Law Partner Trust in subsection 70(6) is often referred to as a "tainted" Spousal Trust. Spousal trusts can become tainted if certain debts or obligations are required to be paid out of the spousal trust[8] and can become untainted pursuant to a method provided for at subsection 70(7). When considering the pros and cons of the various types of trusts, it is important to understand the property holdings of the spouses; the obligations the testator client or clients can reasonably be expected to have in the event of the testator's death and how that might affect the trust.[9]

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[7] *Income Tax Act*, *supra* note 2, paragraph 70(6)(b). See also, subsection 284(8).

[8] *Income Tax Act*, *supra* note 2, subsection 108(4) lists the types of debt payments that will not prevent a trust from qualifying as a spouse trust and include tax on income of the trust and estate or succession duties payable as a consequence of the testator's death on any property of the trust.

[9] For some useful information on Qualifying Spousal Trusts and how they can become tainted and untainted, see Canada Revenue Agency, Interpretation Bulletin IT-3054: Testamentary Spouse Trusts which is no longer being updated, but, continues to provide a good overview of the conditions which still

Throughout the remainder of this paper, Qualifying Spousal or Common-Law Partner Trusts will be referred to as Qualifying Spousal Trusts.

Pros and Cons for all types of trusts

Control Over Assets

Con: Residency requirements may limit the choice of trustees. May be an issue for testators whose trusted business advisors and/or children are not Canadian residents.

Con: A settlor or settlors must give up control over their assets if they are appointing others as trustees and can be at risk of mismanagement and/or theft by one or more trustees;

Income Tax Issues

Con: For all three types of trusts, taxes eventually have to be paid.

Con: Placing property into any one of the three types of trusts can result in a potential for a mismatch between tax burden imposed on trust beneficiaries and beneficiaries who inherit under the Will[10]

Pro: The exemption from the requirement to pay income tax on the gain received as a result of the disposition of the principal residence can be maintained even when the principal residence is

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must be met for a trust to qualify as a spouse trust described in subsection 70(6) of the *Income Tax Act* and also of how such a trust can become tainted.

[10]For an explanation of how changes made to the *Income Tax Act* that came into effect on January 1, 2016 can result in a potential mismatch between taxes paid and benefits received by the various beneficiaries of the trust and of the relevant estates, see "Special Advisory: New Trust Taxation Rules: Important Considerations" by O'Sullivan Estate Lawyers, February 1, 2016 at pages 6 to 8 in particular. https://www.osullivanlaw.com/Advisory-Letters/Special-Advisory-New-Trust-Taxation-Rules-Important-Considerations-February-2016.pdf. Also see *infra* note 16.

transferred to any one of the three types of trusts providing the trust is properly drafted and the requirement of the property being inhabited by a "specified beneficiary" is met. A specified beneficiary generally means the settlor, the spouse of the settlor or child of the settlor.[11]

Pro: The 21 year deemed disposition rule, subject to limited exceptions, does not apply to any of the three types of trusts. As such these three types of trusts do not have to treat all capital property held in the trust as though it has been disposed of and in turn pay income tax on the associated capital gains of the disposition that other types of trusts are required to pay.[12]

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[11]For an explanation of how income tax rules in effect as of January 1, 2016 affect the requirements of trusts holding property with respect to which a taxpayer might wish to use the principal residence, see: "Bulletin: Recent Tax Changes Affecting Trusts Holding a Residence - Time to Review Your Estate Plan", by Darren Lund; Corina S. Weigl; and Katie Ionson, January 12, 2017. https://www.fasken.com/en/knowledgehub/2017/01/privateclientservicesestateplanning-20170112; and for further information on changes affecting the rules for claiming the principal residence exemption, see: "Proposed changes for claiming the principal residence exemption" CRA, modified 11-22-2016. https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/federal-government-budgets/budget-2016-growing-middle-class/proposed-changes-claiming-principal-residence-exemption.html.

[12]For an overview of the deemed disposition rules see: T3 Trust Guide at: https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/t4013/t3-trust-guide-2016.html#ddd

Deemed disposition day

This is the day we consider the trust to have disposed of its capital property, land inventory, and Canadian and foreign resource properties.

Generally, it is one of the following:

- for a spousal or common-law partner trust, the day the beneficiary spouse or common-law partner died
- for a joint spousal or common-law partner trust, the day the settlor or the beneficiary spouse or common-law partner died, whichever is later
- for an alter ego trust, the day the settlor died, unless the trust filed an election not to be considered an alter ego trust (see the definition of alter ego trust). If the trust has filed an election, the deemed disposition date will be 21 years after the day the trust was created
- for a trust to which property was transferred by an individual (other than a trust) where the transfer did not result in a change in beneficial ownership of that property and no person (other than the individual) has any absolute or contingent right as a beneficiary under the trust, the day on which the individual dies

Con: All three types of trusts can be disqualified from status as a spousal trust in turn triggering significant negative income tax consequences at an unanticipated interval from things like loans to children; paying for insurance premiums and a failure by a settlor and/or spouse to receive all of the income of the trust during his or her lifetime.[13]

Planning for Incapacity

Pro: All three types of trusts can be useful tools in planning for incapacity, provided that: the trust is set up so as to provide a process for appointing replacement trustees; or provides alternate trustees in the event that the first choice or choices are unable to act; and, sets out a method for determining incapacity that is clear and reasonable;

Pro: All three types of trusts can protect an incapable settlor and/or beneficiary from themselves; from unscrupulous outsiders; and friends or family members;

Careful Planning

Pro: All three types of trusts push the parties to get their affairs in order and to look carefully at and identify what they own; how it is held; what it is worth; and ideally, the tax consequences of

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- for other trusts, 21 years after the day the trust was created
- Subsequent deemed dispositions will occur every 21 years, on the anniversary of the day established above....

[13]For a helpful explanation of some of the ways that trusts can become disqualified because of loans by the trust to certain parties and also how the payment of insurance premiums by the trust may violate the "use of capital" requirement, see "Spousal Trusts" Tax and Accounting Bulletin by CCH a Wolters Kluwer business at http://www.cch.ca/newsletters/TaxAccounting/November2009/index.htm. Also see CRA Technical Interpretations 2014-0529361E5 (November 16, 2015) and 2012-0435681C6 (May 8, 2012). regarding the view of CRA regarding the payment of life insurance premiums from the trust and how it may disqualify a trust from the rollover. Finally, regarding the waiving of the entitlement to income and how it can disqualify a trust from the rollover, see: CRA document no. 2005-0141181C6, October 7, 2005, which cites Greenberg Estate v. The Queen, [1997] 3 CTC 2859 (TCC)) and see: "Spouse's Discretion to Accumulate Income in Trust" CRA Technical Interpretation 2003-0014515, June 2, 2003.

disposing of an asset along with the potential tax benefits that might be available to them as taxpayers. As such, it is likely that no assets are missed in the probate planning process as they might be when using a Will where, for example, all of the residue of my estate is left to the testator's spouse. It is also likely that all tax planning opportunities are considered and tax savings are maximized.

Pro: A trust is likely to result in a much more customized and thoughtful plan for how to deal with assets such as: businesses; cottage property; investment property; and, other types of investments than might result from the preparation of a Will and/or Power of Attorney for Property. In that way, setting up a trust is likely to allowing better management of assets in the event of the death or incapacity of the settlor or last of the spouses to die.

Con: Effective set up of a trust and effective tax planning requires assistance from competent professional advisors for most people. Assistance from professional advisors can be expensive.

All three types of trusts must be validly created. They must be real trusts.[14]

Pros and Cons of Qualified Spousal Trusts

Protecting Assets for Future Beneficiaries while Looking after Surviving Spouse

Pro: The remainder of the trust property can be left to heirs of the testator's choosing without the risk that the surviving spouse, had it been left to him or her directly, might leave it to heirs that the testator would not have chosen. This can be especially important in the case of second

[14]For an example of a decision where the Tax Court of Canada looked at the requirements for establishing a trust had been validly made and the consequences of a finding that a trust was effectively a sham, see: Antle v. Canada, 2009 TCC 465 (CanLII), affirmed by the Federal Court of Appeal at Antle v. Canada, 2010 FCA 280 (CanLII) leave to appeal to the Supreme Court of Canada denied Paul Antle v. Her Majesty the Queen, 2012 CanLII 4144 (CSC). For a useful overview of how to create a valid trust, see "Alter Ego and Joint Partner Trusts: Non-Tax Issues", by Timothy C. Matthews, QC, TEP; Society of Trust and Estate Practitioners (Canada); 9th National Conference at pages 8 to 12.

marriages where a testator has children from a first marriage who the testator wishes to leave his or her assets to while ensuring the second spouse is provided for during his or her lifetime.

Pro: A trust can be an effective way of protecting your spouse's and children's eventual inheritance while ensuring your assets are distributed the way you intended. For example: a trust can provide for the remainder of the trust once the last spouse dies to be left to children thereby protecting their inheritance from a potential future spouse of your surviving spouse. It can also protect your assets from creditors of the settlor; from a spouse's creditors and from creditors of the children of the settlor or settlors of the trust. For a surviving spouse with an illness such as dementia, a trust can be a way of ensuring he or she is provided for the remainder of his or her lifetime where he or she might otherwise have been unable to manage the assets for his or her own use and benefit.

Pro: A surviving spouse who is left the testator's assets in a Will and not through a trust arrangement could later make a Will disinheriting the desired beneficiaries of the first spouse to die. Assets held in the trust are protected from that risk.

Con: A conflict of interest can exist between capital and income beneficiaries. For example, children (if they are remainder beneficiaries of the trust) have an interest in the capital of the trust and are more likely to prefer that trustees select assets that increase the capital of the trust. The surviving spouse on the other hand would be more likely to benefit from income producing assets that might diminish the capital of the trust more quickly. It is possible and even likely that a testator might want to choose children of the testator who may not be the children of the surviving spouse as trustees for the spousal trust. This could increase the potential for conflict regarding the management of the trust between the surviving spouse and the trustees.

Control Over Assets

Pro: The testator can maintain control over his or her assets including the use and benefit of the testator's assets until his or her death.

Con: A disadvantage of creating a spousal trust is that in order to avoid the risk of the trust being tainted, a testator may need to arrange his or her affairs differently then he or she might have wanted. For example, to avoid tainting the trust or to ensure that a tainted trust can become untainted, it is important that: the testator have property of sufficient value available that can be reasonably easily liquidated; ensure that and adequate discretion is given to the estate trustee to determine which properties to liquidate and which debts to pay with that property; give adequate discretion to liquidate the property; choose an estate trustee who is sufficiently knowledgeable to make those judgement calls and carry out that work or clearly directed to obtain the advice of professional advisors who can assist with the administration of the estate. That can mean a few things, like selling hard to sell property in advance of the testator's passing or keeping property that is easy to sell for longer than a testator otherwise might have. It can also mean that the spouse of the testator and/or children of the testator who might otherwise have been the preferred choice of administrators may not be the best choice for Estate Trustee and in fact a professional trustee may be the better or best choice. If so, fees for the services of the professional trustee will be required to be paid. A testator can reasonably expect that the there will be fees and possibly higher fees than might otherwise be required for the hiring of professional advisors in order to properly administer an estate where the goal is to maintain a Qualifying Spousal Trust. Where a client has sufficient property of value and of varying types, all of the above becomes less of an issue. Where there is not a lot of property of value, the fees become more of an issue.

Con: To help address the problem of tainting the spousal trust, a testator might need to purchase a life insurance policy that is of sufficient value to cover anticipated debt payments for debts of a type that do not fall under subsection 108(4). This can increase the overall cost of the trust arrangement.

Con: Spouses often will hold assets in joint tenancy including their home; cottage; and bank accounts. Spouse also often make beneficiary designations to name each other as the beneficiary of investments held by each other such as: RRSPs; TFSAs; and of life insurance polies. Title to the assets that are to go into the spousal trust on death must be held by the spouse who will be transferring them to the spousal trust in the Will. As such, the goal of transferring assets to the trust can place some limits on the ability of the spouses to hold assets jointly. Assets held jointly may need to be transferred to one spouse only or changed to a tenancy in common ownership. Spouse in turn would lose the corresponding benefits that joint ownership can have. There can also be a cost to transferring title to certain assets, such as real property. Spouses might have to reconsider their beneficiary designations and change them from each other to their respective estates as part of the set up for the Qualifying Spousal Trust.

Estate Administration Tax Savings down the road

Pro: The remainder beneficiaries will have the property transferred to them through the trust and as such would not have to pay estate administration tax on the death of the surviving spouse in order to receive their inheritance.

Confidentiality benefit of Joint Spousal Trust not available

Con: Because this type of trust is created in the Will, it is likely the benefit of confidentiality will be lost as it can be reasonably expected that the Will creating the trust will have to be probated.

Income Tax Issues

Pro: To the extent that the trust is a Qualifying Spousal Trust, the property within the trust will pass to the surviving spouse on a tax deferred basis, reducing the income tax burden to the surviving spouse during his or her lifetime.

Con: Current tax rules do not allow for a rollover of proceeds of a RRIF into a spousal trust.

Con: As of January 1, 2016, while spousal trusts may still qualify for graduated rates, they can only do so for a maximum of 36 months. If a spousal trust does qualify itself as a graduated rate estate, it may be at the expense of a trust for a disabled child since only one testamentary trust can qualify for graduated rates.[15]

Con: As of January 1, 2016, changes to the *Income Tax Act* required that in the year the surviving spouse dies, the income, including all income from the deemed disposition of capital property held in the spousal trust, must be included in the income tax return of the deceased spouse.[16] If the beneficiaries of the spousal trust and of the deceased spouse (whether by Will or on intestacy are different and unless there was careful planning to address this possibility) there may be a mismatch between the assets used to pay income tax and the assets gifted to the beneficiaries. Take for example, Betty who has two children from her first marriage. Betty owned a small RRSP outside of the trust which she wished to leave to her two children. Betty was the beneficiary of a Qualifying Spousal Trust that had been set up in her second husband, Charlie's Will. The trust property consisted mainly of 3 large rental buildings which increased significantly in value since Charlie died. The remainder of the trust was left to Charlie's children. Charlie's children to would receive their inheritance potentially tax free because the capital gain on the increase in the value of the buildings would be payable by Betty's estate. Betty's children might receive nothing since all of the RRSP might have had to be used up to pay income taxes.[17]

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[15]For an overview of the impact of Graduated Rate Estates rules, see "Bad news for testamentary spousal trusts, Major changes to the estate taxation rule book are on the way"; by MaryAnne Loney, The Lawyers Weekly, Vol. 34, No. 42 (March 20, 2015); and see *Income Tax Act, supra* note 2, subsection 122(1).

[16]*Income Tax Act, supra* note 2, subsection 104(13.4).

[17]For an overview of some of the ways that the potential 'mismatch' can occur, see "Changes coming to taxation of estates, trusts"; by Karen Slezak and Alexandra Spinner, The Lawyers Weekly, Vol 35, No. 29 (December 4, 2015). See also *supra* note 10.

Pros and Cons of Alter Ego Trusts and Joint Spousal Trusts

Reduced Cost and Delay in the event of the first Death

Pro: Property held in an Alter Ego Trust as well as in a Joint Spousal Trust passes outside of the estate and is instead distributed upon the death of settlor according to the terms of the trust. As such:

- there is no Estate Administration Tax payable;
- the assets in the trust can be transferred without the need for the delay and expense of the Probate process;
- the assets are already held by the trustees and so there is continuity of management of the assets;
- for settlors with assets in more than one jurisdiction – to the extent that each of the jurisdictions recognize the concept of a trust and that the trust you have established meets the requirements of a properly constituted trust (i.e. Quebec has special requirements for trusts that are different from Ontario) – multiple Wills and/or multiple probate proceedings can be avoided with potentially significant time and cost savings;
- the choice of trustees may be less limited than the choice of Estate Trustees would be since trustees will not have to qualify to be Estate Trustees in a foreign jurisdiction in order to deal with the assets of the Alter Ego Trust and/or Joint Spousal Trust;

Pro: Because assets are transferred during the lifetime of the settlor to the trustees, the trustees do not need to expend time and effort transferring title of the assets first to themselves as trustees and then to beneficiaries. This can reduce time and expense to the process of transferring assets to beneficiaries upon the death of the settlor.

Con: If a trustee needs to be replaced and that trustee holds title to certain assets in trust, there may be a need to change title from that trustee to a replacement trustee.

Pro: A trust protects against estate litigation to the extent that no assets or few assets fall into the estate of the settlor.

Pro: Trust assets can continue to be used and are not frozen upon the death of the settlor. As such, beneficiaries can have immediate access to assets and not face the financial hardship that might be faced by the spouse of a testator whose assets are frozen. Trustees can also quickly determine and pay debts and expenses.

Confidentiality

Pro: Generally transfers of property to Alter Ego Trust and/or a Joint Spousal Trusts can be done and are done on a confidential basis as between the settlor and his or her legal and financial advisors and as such there is greater privacy afforded to the client. This is because there is no requirement to file the trust document in court in order to administer the trust assets in the event of the death of the settlor like there would be if using a Will to transfer assets on death. Note, however, that if there is challenge to the establishment of the trust; the management of the trust or the ability of the trust or its beneficiary or beneficiaries to access certain income tax benefits, the privacy protection afforded by the trust can become no different than that of a Will that must go to probate.

Incapacity Planning

Pro: The transfer of property into an Alter Ego Trust and/or a Joint Spousal Trust allows the disposition of property to be dealt with during the settlor's lifetime.

Pro: Because assets that are placed in an Alter Ego Trust and/or a Joint Spousal Trust are transferred during the lifetime of the settlor, provided that the trust provisions are set up to allow for replacement trustees or name a trustee other than the settlor at the outset and/or address the issue of capacity of the settlor (who may also be a trustee), even if the settlor becomes incapable,

the settlor's assets can continue to be used for the benefit of the settlor without the need for a Power of Attorney for Property. Note that in some cases, Powers of Attorney for Property are set up, an assessment of capacity of the grantor and for the grantor to have been found to be incapable with respect to property by the capacity assessor. The test for capacity in that circumstance is a stringent one. As a result, the grantor's assets can either be tied up while capacity is assessed or exposed to misuse by the grantor his or herself while the grantor's capacity is in a state of decline, but, has not yet reached the level of decline that would result in a finding that he or she is incapable with respect to property. The likelihood of involvement of the Office of the Public Guardian and Trustee in the affairs of the settlor and/or of the courts to name a guardian for property of the settlor is reduced thereby maintaining privacy of the settlor.

Pro: For individuals with assets in multiple jurisdictions, in addition to the benefit of not having to name Estate Trustees in multiple jurisdictions to transfer property, especially in the case of real property, there is also the benefit of not having to make Powers of Attorney for Property in each jurisdiction where assets are held and to ensure that the Power of Attorney in each jurisdiction can continue in the event of the grantor's incapacity. This can also reduce expense that goes along with having Powers of Attorney for Property prepared in multiple jurisdictions and ensuring that those Powers of Attorney will remain valid in the event of the incapacity of the grantor. This benefit applies to jurisdictions that recognize the concept of a trust. As such, especially where deciding to use a trust as a substitute for a Power of Attorney for Property it is important to ensure that the trust is or will be considered to have been properly constituted in the foreign jurisdiction.

Income Tax Issues and other costs

Pro: Income of an Alter Ego Trust is taxed in the hands of the settlor at graduated rates unless an election is made for income to be taxed in the trust.

Pro: Income of a Joint Spousal Trust is taxed in the hands of the settlor and his or her spouse at his, her or their graduated rates unless an election is made for income to be taxed in the trust.

Pro: The transfer of property to an Alter Ego Trust and to a Joint Spousal Trust can occur on a tax-free basis.[18]

Pro: Where Joint Spousal Trusts and Alter Ego Trusts are used for estate planning purposes, it is generally desirable that the attribution rule at subsection 75(2) of the *Income Tax Act* applies to attribute income, gains and losses associated with the trust property to the settlor and/or his or her spouse. It is important, however, to be aware that this can also be a Con of the establishment of these types of *inter vivos* trusts that will require careful tax planning to address.[19]

Con: Income and capital gains that is taxed within the trust in the case of Alter Ego Trusts and Joint Spousal Trusts is taxed at the highest marginal tax rate for individuals.

Con: An improperly constituted trust is exposed to being treated as though it did not exist which could result in a variety of problems for the person who attempted or pretended to settle the trust.[20]

Con: There are ongoing administrative tasks and costs associated with maintaining an Alter Ego Trust including keeping track of trust property; filing Trust Returns; and managing the trust assets. While assets needed to be managed before they were transferred to the trust, assets held in trust are more likely to require more people of a greater level of knowledge and expertise to

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[18]Recall that for the rollover rules to apply to the transfer of capital property, both the transferor and the transferee must be resident in Canada.

[19]For a helpful review of the how the attribution rules work and how elections and other tax planning strategies can be used to make the most of available exemptions, see: "Estate Planning", *infra* note 21at pages 8 to 13.

[20]For where to find information on how to properly constitute a trust, see: *supra* note 14.

manage the affairs of the settlor in turn more time, work and cost. A weighing of the costs savings against the overall set up and maintenance cost is important.

Con: A trust is not entitled to any of the basic personal exemptions. As such capital gains exemptions, for example, may be lost. The loss of the ability to use basic personal exemptions can result in a greater income tax burden than would otherwise have been paid by the settlor had the assets not been placed into the trust. Careful planning can be used to help address this issue.[21]

Con: Land Transfer Tax may be payable when the beneficial owner of the trust is changed and when certain other transfers involving real property being transferred to or that is held by trusts.[22]

Con: Trust property from an Alter Ego Trust cannot be transferred to a testamentary trust on a rollover basis since the property is not considered to be property of a trust created under the terms of a taxpayer's Will.[23]

Con: Where some property is transferred by way of a Will; some by way of beneficiary designations; some by right of survivorship in the case of joint ownership; and some is transferred through the trust, there can be a mismatch between those who pay income tax and

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[21]For examples of circumstances where transfer of property to a trust on a rollover basis may not be desirable, see "Alter-Ego and Joint Spousal or Common-Law Partner Trusts in Estate Planning" by Kim G.C. Moody, CA, TEP, http://www.step.ca/pdf/articles/Alter-ego_trust_moody.pdf at pages 6 to 7 in particular. ["Estate Planning"]

[22]For transfers that will trigger a requirement to pay land transfer tax on the value of the property conveyed see Tax Bulletin LTT 1-2005: Conveyances involving Trusts at: https://www.fin.gov.on.ca/en/bulletins/ltt/1_2005.html

[23]*Income Tax Act, supra* note 2, subsection 248(9.1).

those who receive the assets or the beneficial interest in the assets.[24] Insurance and/or other tax planning strategies can be used to avoid this.

Con: There are circumstances where charitable giving can be less advantageous when done through gifts to charity made from the Alter Ego trust when the settlor dies or in the case of a Joint Spousal Trust, when the last of the spouses dies.[25]

Pro: Placing property acquired at a lower adjusted cost based than already owned identical property to an Alter Ego or Joint Spousal Trust can permit avoidance of cost averaging rules that might otherwise apply, thereby providing an added income tax benefit and related cost savings.[26]

Pro: Transferring property into an Alter Ego or Joint Spousal Trust can allow for a taxpayer who is already being taxed at the top marginal tax rates, provided he or she elects to have property taxed in the trust, to benefit from provincial rate shopping.[27] Note, however, that a strategy designed for the purpose of or in part for the purpose of provincial rate shopping should be used with some caution in light of possible anti-avoidance rules applying to defeat the benefit of the strategy as well as other issues that can arise by having to select and use trustees in a province where the settlor or settlors of the trust do not reside.

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[24]For more information and some articles that provide examples on the "mismatch" reference above, see *supra* notes 10 and 16.

[25]For a review of considerations as to how the use of trusts affects potential income tax benefits from making charitable donations, see "Estate Planning", *supra* note 21 at pages to 16 to 18.

[26]For an explanation of the way in which such a strategy might be useful to a taxpayer/client, see "Estate Planning", *supra* note 21 at pages 24 to 25.

[27]For an explanation of the way in which a trust would be set up to allow for provincial rate shopping, see "Estate Planning", *supra* note 21 at pages 22 to 23. Note that provincial income tax rates shown in that article are based on rates in 2000 and 2001. It will be important that you or your client's accountant review current provincial rates at the time the trust is being established and consider whether rate changes are anticipated before deciding on which province a trust should be resident in.

Protection from Creditors

An Alter Ego Trust and/or a Joint Spousal Trust, to the extent that: there is no automatic entitlement to receive income; and, no entitlement to receive any of the capital of the trust, the trust can provide effective creditor protection to the settlor and/or the spouse of the settlor.[28]

In summary, an Alter Ego Trust and/or a Joint Spousal Trust is likely to be of most benefit when the client has one or more of the following circumstances or goals:

- the client wishes to protect his or her property from being accessed and controlled by his or her spouse;
- the client has capital property that can be transferred on a rollover basis and that is not going to lose the benefit of any available elections that can be accessed only by individuals and not by trusts;
- the client has enough of that type of property to make the cost of setting up the trust worthwhile; the client has property in more than one jurisdiction where at least one of those other jurisdictions recognizes the concept of a trust;
- the client has children from a first marriage he or she wishes to benefit;
- the client wants privacy with respect to the manner in which his or her assets are to be dealt with in the event of his or her death;
- the client is concerned about protecting his or her assets in the future from potential creditors.

[28]For a useful overview of how trusts can be used for creditor protection and the corresponding limits of their use for that purpose, see "Alter Ego and Joint Partner Trusts: Non-Tax Issues", by Timothy C. Matthews, QC, TEP; Society of Trust and Estate Practitioners (Canada); 9th National Conference at pages 13 to 15.

Conclusion

Alter Ego Trusts, Joint Spousal Trusts and Qualifying Spousal Trusts are best prepared with thoughtful knowledge of the overall goals of your client or clients; the family and personal circumstances of the client or clients as well as a clear understanding of the client's asset holdings. It will be more likely than not that the client or clients will have a high net worth. It will be more likely than not that some consultation with the tax advisor for your client or clients will be necessary. This paper reviews some of the pros and cons of each of these vehicles. As can be seen, these can be useful tools, but, can also be part of a complex overall plan that requires some skill to pull together properly.

Law Society of Ontario | Barreau de l'Ontario

TAB 18

THE SIX-MINUTE Estates Lawyer 2018

Wills and Estates Danger Areas (And How to Avoid Them)

Daniel Pinnington, President & Chief Executive Officer,
Lawyers' Professional Indemnity Company (LAWPRO®)

May 3, 2018

cpd Continuing Professional Development

Wills and Estates Claims

Malpractice Fact Sheet

lawpro.ca

Quick stats

Average **202 claims** per year

Average cost: **$6.8 million** per year

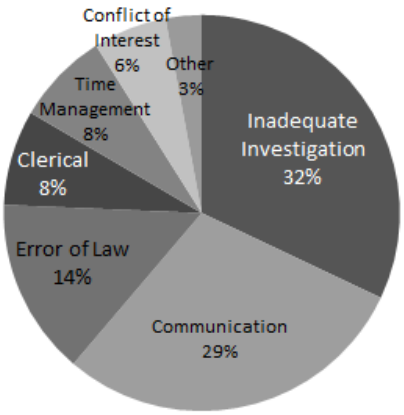
Average cost per claim: $33,400

#4 claims area by count

#4 claims area by cost

Average of 4 years before claim reported

Common errors



The number of claims per year in this area has doubled over the last decade, with inadequate investigation claims surpassing communications issues as the biggest source of these claims.

These errors typically occur at the client intake. Too many lawyers are not truly listening to the client's instructions and not probing and questioning the client to uncover facts that may cause problems later. It's important to read between the lines instead of simply filling in the elements of a will template or precedent.

Wills and estates is an extraordinarily complex area. Lawyers who practice in this area must maintain a working familiarity with a wide range of statutes and must apply complex provisions of the *Income Tax Act*. Law-related errors are more than twice as likely to occur in the wills and estates area as compared to other areas of practice.

Ensuring you understand the client's needs, knowing the relevant law and avoiding shortcuts can help prevent claims. Detailed documentation of your conversations with, and instructions from, the client can support a lawyer's defence should a claim be made.

See the reverse page for the most common wills and estates errors and more steps that can be taken to reduce exposure to a malpractice claim.

Speakers and resource materials

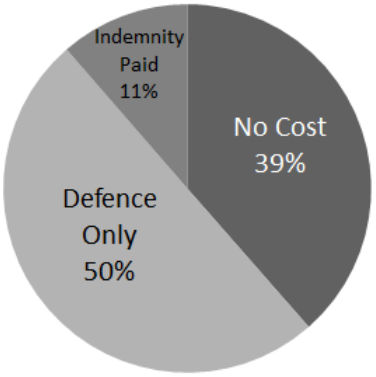
We can provide knowledgeable speakers who can address claims prevention topics. Email practicePRO@lawpro.ca

Visit practicePRO.ca for resources including LAWPRO Magazine articles, checklists, precedents, practice aids and more.

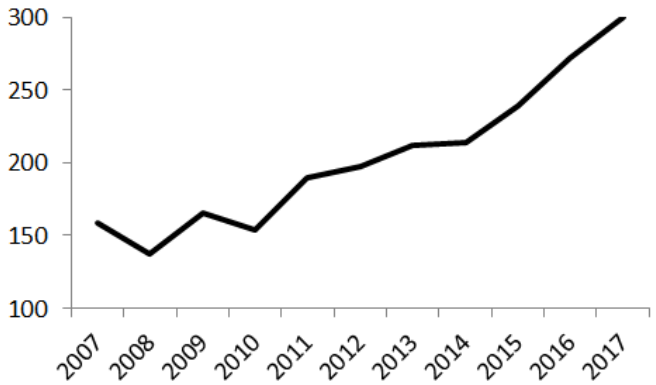
Hot topics in wills and estates law claims

- Proper investigation requires that you ask yourself the question: "what does my client really want?"
- Ask your client what their assets are (and insist on an answer).
- Law-related errors are twice as likely to occur in this area of practice than in others. Make sure you know statute and case law.

Resolution of claims



Count of wills and estates claims



All claim figures from 2007-2017. All cost figures are incurred costs (March 2018)

Risk management tips

Ask more probing questions when meeting with a client to prepare a will

Too many lawyers are not asking the questions that could uncover facts that could cause problems later, or making clear to the client what information they need to provide. Was there a prior will? Are all the beneficiaries identified correctly? What about gift-overs? Were all assets identified and how are they registered? Was there a previous marriage? Ask, ask, ask. And then do a reporting letter to confirm everything that was discussed.

Take time to compare the drafted will with your notes

It sounds like obvious advice, but we see claims where the will did not adequately reflect the client's instructions, or overlooked some important contingencies. Many of these errors could have been spotted by simply reviewing the notes from the meeting with the client. It can help to have another lawyer proofread the will, or set it aside for a few days and re-read it with fresh eyes. When you review it, consider the will from the position of the beneficiaries or disappointed would-be beneficiaries. Ask yourself if you were going to challenge this will, on what basis would you do so?

Confirm as best you can the capacity of the testator and watch for undue influence

With greater numbers of elderly clients, lawyers need to be vigilant about these issues. Meet with the client separately from those benefiting from a will change, and have written proof that the client understands what they are asking and the advice you've given. And while it is difficult to be completely certain of capacity, be sure to document the steps you've taken to satisfy yourself that the client's capacity has been verified.

Don't act for family members or friends

We see claims where lawyers didn't make proper enquiries or take proper documentation because they assumed they had good knowledge of their family or friends' personal circumstances. It's best not to act for them, but if you must, treat them as if they were strangers. And remember if a claim arises it will likely not be from the friend or family member, but from a disappointed beneficiary with no personal relationship with you.

Most common malpractice errors

Inadequate investigation of fact or inadequate discovery (32%)

- Failure to ask the testator what their assets are
- Failure to ask about the existence of a prior will
- Not digging into more detail about the status of past marital relationships, other children or stepchildren, or whether a spouse is a married spouse or common law spouse

Lawyer/client communication errors (29%)

- Failure to compare the draft will with the instructions notes to ensure consistency
- Failing to ensure that the client understands what you are telling him and that you understand what he is telling you, particularly if there is a language barrier
- In estate litigation: failing to communicate and document settlement options

Failure to know or properly apply the law (14%)

- Not being aware of key provisions of the *Income Tax Act* (and not obtaining the appropriate tax advice)
- Drafting a complex will involving sophisticated estate planning when you do not have the necessary expertise
- Failing to properly execute documents

Time management and procrastination (8%)

- Missing the six-month deadline for making an election and issuing the necessary application under Section 6 of the *Family Law Act*
- Delay in preparing a will
- Delay in converting assets into cash in an estate administration

Ask critical questions to head off will challenges

We all know it's impossible to write an effective will for a client without investigating the details of the client's circumstances and estate.

While this conclusion may seem trite, in recent years LAWPRO has seen an average of 60 claims per year alleging that the lawyer did not investigate key details. This specific error has roughly doubled in the last decade. These claims generally arise after a bequest fails because an asset or a beneficiary has been misdescribed, or when a would-be beneficiary asserts a right that the lawyer didn't contemplate when drafting the will.

Asking critical questions before drafting both ensures that the will accurately reflects the testator's intentions, and − provided the answers to the questions are documented − minimizes the lawyer's risk of a challenge that leads to a claim. What information gaps are most likely to lead to claims?

Spousal and dependent relationships

It's not enough for a lawyer to ask a testator for the spelling of a spouse's name. The lawyer must ask about the client's entire history of marriages and cohabitations to ensure that there are not multiple individuals who could be interpreted as "spouses." It's necessary to know whether the testator has ever made a mutual or mirror will with anyone, whether a property the testator wants to include in the will is jointly owned with anyone (spouse or not), and whether any property meets the definition of matrimonial home under the family law.

The same care must extend to questions about children: are they minors, or adults? Are any of these children stepchildren, adopted, or estranged? Are there adult dependents − for example, a child with a disability? Are there any other individuals – a nephew, a partner's child – who are financially dependent on the testator? When there are children with a former spouse, there may be support obligations under a separation agreement or court order that need to be reflected in the will.

Often, arrangements are made to fund support through life insurance or other investments; but for this to occur, the investment must have an appropriate beneficiary designated – something the lawyer should take steps to confirm.

Ownership and value of assets

When a will mentions specific assets, it is up to the lawyer to confirm that they are capable of being passed through the will. In some instances, a testator has attempted to bequeath assets that turned out to be jointly owned with another person, or owned by a corporation rather than personally. To avoid this, the lawyer can perform searches to confirm ownership. Confirmation of ownership details is also prudent when it comes to corporate shares.

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In other cases, the value of assets is important; for example, where the testator is attempting to divide an estate in specific proportions. Ensuring that the testator's intentions are honoured may require the formal valuation of assets, and it's up to the lawyer to recommend this (and if the testator declines, to make a note in the file). It's also important to ask about mortgages, liens, or other debts that may reduce the value of assets.

Critical clerical errors

Often, the questions we fail to ask are the ones for which we think we already know the answers. The resulting oversights include getting a beneficiary's name wrong, or misdescribing a bequest. For example, a gift to "St. Pat's" may lead to a tug-of-war between St. Patrick's Cathedral, St. Patrick's community school and St. Patrick's animal refuge − all of which may operate in the deceased's hometown! Where a charity is named a beneficiary, the lawyer must take steps to record the charity's correct legal name (perhaps including an address for good measure). Similarly, an ambiguous description of assets can lead to a challenge: where a testator who spends summers in a mobile home on the grounds of a mobile home park of which he is part owner leaves his brother "my share in the trailer park," does the gift include the testator's mobile home?

Influence and capacity

Perhaps the hardest questions for a lawyer to ask relate to testator capacity and potential undue influence. Getting to the bottom of either problem requires a lawyer to listen to and act on gut instincts.

Uncovering undue influence may be best approached indirectly: for example, by asking the reasons for instructions to deviate from a prior will. When listening to the explanation, pay attention to who seems to be left out of the story. That individual is the person most likely to challenge the new will. If the testator protests this kind of probing, the lawyer should explain that it's essential to document reasons for "glaring omissions" at the time the will is drafted.

When capacity is in question, the situation is even more delicate: suggesting that the client submit to an assessment means inviting the possibility that the lawyer will not be able to draft the will that has brought the client into the office in the first place. Ignoring doubts about testator capacity, however, is not the answer. The *Rules of Professional Conduct* require a lawyer to take appropriate steps when dealing with a client under a disability. A sincere attempt to grapple with questions of capacity and to document observations that support capacity is more useful, in the long run, than a file that is silent on the issue. If the testator's cognitive abilities are in decline, the family already know it, and a challenge is likely.

Nora Rock is Corporate Writer and Policy Analyst at LAWPRO.

Document intentions behind *inter vivos* transfers

There is a wide range of reasons behind individuals' decisions to transfer ownership of property. Unfortunately, legal presumptions about transfers don't always align well with the transferor's intentions, which can lead to unexpected results. Transfers that are intended to be gifts may be treated as trusts in favour of the transferor; or transfers made for expediency (for example, to allow a relative to manage one's assets) may be treated as gifts if there is evidence to rebut the presumption of resulting trust.

If you are retained to handle a transfer without meaningful consideration from an older adult to a person who might be expected to be a beneficiary under that person's will (adult child, niece/nephew, etc.), ask the parties about the reason for the transfer. Determine whether the transferor intends the transferee to hold the property in trust for him/her, and document the parties' intentions and other potentially relevant details − for example, whether the transferee has power of attorney for the transferor, and whether there are other likely future beneficiaries who may expect to share in the transferor's property. Keep notes about the reason for the transfer in your files, and send the client a reporting letter that summarizes your understanding of the purpose of the transaction.

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Landmines for lawyers when drafting wills

When it comes to mistakes and claims, the Achilles heel for lawyers in the wills and estates area is drafting wills: Making will-drafting errors – either because of poor communication, inadequate discovery or errors in law – is the single most common issue in claims reported in this area of law. In many cases, the mistake which led to the claim could have been prevented.

Communication

Communication – or lack thereof – remains the number one reason for claims reported in the wills and estates area. Most communication errors arise from a failure to follow a client's instructions, a failure to obtain consent, or a failure to inform the client.

In the area of will-drafting, commonly reported errors which originate from communication or lack thereof can include:

- failure to compare the lawyer's will instruction notes with the will;
- failure to confirm the assets and debts of the testator, and;
- failure to confirm the marital status of the testator.

Many of these errors can be easily avoided: For example, have someone else review the will to avoid a problem arising out of a failure to follow client instructions. Use checklists or reporting letters that confirm drafting instructions to avoid an error arising from a failure to inquire about assets or the marital status of the testator.

A good way to avoid communication errors in will-drafting: Document the will drafting instructions, review and confirm the instructions with the testator when the will is drafted, and do a final review of the instructions when the will drafting is completed.

Inadequate investigation

Inadequate investigation is a broad category; typical errors include those arising from a failure to properly inquire about the testamentary capacity of the testator and the failure to properly inquire as to the personal circumstances of the testator.

It is your responsibility, as the lawyer preparing the will, to ensure that the testator has the requisite testamentary capacity. The solicitor should ask the testator open-ended questions to determine testamentary capacity. As well, inquiries should be made about any medical conditions to assess if there is any mental or physical impairment.

If you are concerned about capacity, consider obtaining an expert opinion from an assessor or, at a minimum, speak to the family doctor and obtain a medical report. Along with preparing the will, prepare a memo on your observations of the physical and mental state of the testator.

As part of your initial will interview, obtain a list of assets and liabilities of the testator. You should also, where possible, verify ownership and registration of assets as well as any

designated beneficiary of those assets. Special attention should be paid to life insurance, pension plans, RRSP and RRIFs.

Finally, the solicitor should inquire and confirm marital status of the testator and any obligations to dependents. If possible, the lawyer should obtain and review a copy of any separation agreement or marriage contract which may give rise to those obligations.

Know the law

Legal errors arising from lack of knowledge of the law are more prevalent in the wills and estates field than in many other areas of the law. Errors range from the mundane (e.g., failure to properly execute a will) to the more complex (e.g., errors in estate planning).

Some of the most expensive claims for LAWPRO in the wills and estates field arise from errors in estate planning. These errors often occur because the lawyer preparing the estate plan does not understand or have the expertise to properly execute it.

Complex estate planning requires a thorough understanding of corporate and tax law. If you don't have the expertise in these areas, please refer the matter to a lawyer who does. If an accountant asks you to draft certain documents and you don't understand the implications of the documents being prepared, send the matter elsewhere. Asserting that you were merely a scribe is no defence to a negligence claim.

When undertaking any type of estate planning it is imperative that the lawyer confirm how assets are held. Do not rely on the testator to properly describe corporate assets or the title to a piece of land. For example, the lawyer has an obligation where practicable to confirm that real property forms part of the testator's estate and is not registered in the name of a corporation. Similarly, the solicitor should confirm ownership registration of shares and other assets (see *Willhelm v. Hickson* (1999),183 D.L.R. (4th) 45 (Sask. C.A.).

Finally, in light of the decision in *Pecore v. Pecore* (2005), 19 E.T.T. (3d) 162, (Ont.C.A.), [2007] 1 S.C.R. 795, it is crucial that you discuss the implication of joint ownership.

Standard of care

Developments in the current law of solicitor's negligence can be traced to the decision of the House of Lords in *White v. Jones,* [1995] 2 A.C. 207. In *White v. Jones,* the court created a remedy for the benefit of disappointed beneficiaries. The new remedy was necessary because there is no privity of contract between a beneficiary and the lawyer drafting the will who makes an error depriving the beneficiary of his or her inheritance.

In W*hite v. Jones* the court created a duty of care owed by the solicitor to the disappointed beneficiary to fill a "lacuna in the law." The rationale for the duty of care is that it is reasonably foreseeable to the solicitor that the beneficiaries will suffer a loss if the will is not prepared properly or in a timely manner. The solicitor's liability arises from the solicitor's assumption of responsibility to implement the testator's wishes by preparing the will properly and the absence

of a basis, for the disappointed beneficiary who has suffered the loss, to frame a cause of action unless the court provides a remedy.

Common mistakes in will drafting which can give rise to disappointed beneficiary claims include:

i) unreasonable delay in preparation of a will;
ii) preparation of a will for a testator lacking competence; and
iii) clerical errors in drafting a will.

Unreasonable delay

Unreasonable delay in preparing a will is a question of fact. (*Rosenberg Estate v. Black*, 2001 O.J. No. 5051).

The age and health of the testator are of prime importance. In urgent cases the lawyer should consider preparing a holographic will while the lawyer attends to drafting a more formal will.

LAWPRO was recently called upon to assist an insured in a claim where the disappointed beneficiary alleged that the insured was negligent in not preparing a will in a timely manner.

Justice Mulligan in his decision in *McCullough v. Riffert*, 2010 ONSC 3891, reviewed the standard of care for a solicitor drafting a will. Justice Mulligan referred to Brian Schnurr's text, *Estate Litigation*, 2nd ed. (Carwswell; 1994- (looseleaf)) where Mr. Schnurr, when addressing how long is too long, states:

> "If the 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."

In these circumstances, Mr. Schnurr suggests that a temporary or holograph will should be prepared immediately while the solicitor attends to the drafting and revision of the formal will. In the case at bar, the judge found that the lawyer met the reasonable standard of care in will preparation. Even though the testator died 10 days after consulting with the lawyer, the judge concluded that the facts did not support a finding that the lawyer should have known that the preparation of the will was necessary immediately, because there was no clear evidence that the testator was in poor health or that his death was imminent.

Incompetent testator

The flipside to the failure to prepare a will are the claims which are reported when the lawyer allegedly prepares a will or a power of attorney for an individual who lacks capacity.

This allegation usually arises in the context of a will challenge. The challenger will allege that the testator lacked mental capacity or was unduly influenced when the will was prepared. The lawyer will usually be added as a party to the proceedings by the challenger who is seeking damages for his lost legacy or costs.

A LAWPRO matter is one of the leading cases in this area. In *Hall v. Estate of Bruce Bennett*, 2003 Can LII 7157 (ON C.A.), the Court of Appeal found that the solicitor properly declined to prepare a will where the testator lacked capacity. The evidence in this case was that the testator did not remember the full extent of his estate and was not alert enough to sign. In coming to this decision, the Court of Appeal found that there was no retainer to prepare a will and, as such, there was no duty owed to the disappointed beneficiary.

However, in cases where a solicitor has improperly refused to prepare a will where there is a retainer, damages have been awarded. In situations involving a potential issue of capacity and a near-death situation, the problem for the lawyer is that he or she is in an impossible situation. If a will is prepared and the testator is found to lack testamentary capacity, the lawyer may be liable for costs to set aside the will. On the other hand, if the lawyer doesn't prepare a will for the testator, there may be liability to disappointed beneficiaries for not completing the retainer.

In these circumstances, where possible, a medical opinion or a capacity assessment should be obtained. Regardless of whether a will is prepared or not in these circumstances, it is imperative to document all advice given to the testator. As well, copious notes should be taken on all aspects of the will preparation, including extensive notes on issues relating to capacity.

In determining capacity, you should ask sufficient relevant questions to satisfy yourself that the testator meets the capacity tests in the legislation. Numerous checklists with lists of relevant questions are available.

Usually where there is a will challenge on the basis of lack of capacity, there is often also an allegation of undue influence.

It is important when drafting a will to ensure that the testator is instructing you and not being directed by an interested party. Be aware of red flags that may suggest undue influence. Examples include a refusal by a "friend" or relative to allow the testator to meet with the lawyer privately or a testator who brings in notes setting forth the terms of the will.

Another red flag would be a radical change in the beneficiaries from a previous will. In these cases, the lawyer should ask the testator the reason for the change and confirm and document the change requested. If you are not satisfied with the answers given for the change, probe further.

Finally, once the will has been drafted, highlight in your reporting letter the changes in the will and the explanation given by the testator for the changes.

Clerical errors

Clerical errors are a continual source of claims at LAWPRO. Common errors include spelling errors in the names of charitable organizations, typographical errors in bequests, errors in the number of parts in the division of a residue and missing dispositive provisions in the document.

Most of these errors can be avoided by reading the will or having someone else proofread the will.

Another “avoidance tip” is to check the math: The division of the residue should total 100 per cent.

Errors in names of charities can result in a charity not receiving its bequest. The solicitor owes a duty to the intended beneficiaries and can be found negligent for misnaming the charity.

When drafting a will with a charitable beneficiary, the lawyer can take steps by reviewing the Canada Donor’s Guide or the Canada Revenue Agency website to confirm the existence of the charity and the proper spelling of its name. It is best practice to include both the name and address of the charity because if there is an error, the court has a better chance of identifying the intended beneficiary.

Recently LAWPRO was successful in a rectification application with respect to a typographical error.

In *Earle Nugent, Estate Trustee under the will of Viola Binkley v Susan Lang et al.*, 2009 CanLII 26604 (ON S.C.), the solicitor had made a typographic error in the preparation of a new will. As a result, the new will left the sum of $25,000 to each of three beneficiaries rather than the intended $2,500. The court granted the request for rectification. The beneficiaries sought leave to appeal but it was denied on the basis that there was no good reason to doubt the correctness of the decision. Although this precedent has been extremely helpful in resolving other similar claims, it was an expensive process which could have been avoided by simply proofreading the will.

Failure to include clauses in the will for disposition of assets and the residue often result in an intestacy. If the matter cannot be rectified or resolved, a claim for negligence will be advanced against the drafting solicitor. Even if it is resolved, a claim for costs will be advanced by the various parties against the lawyer, which can be difficult and costly to resolve.

If the testator has life insurance, RRSP or pension plans where there is a separate designation of a beneficiary, this needs to be discussed and considered when drafting the will. Finally, it is imperative that you inquire and confirm a testator’s marital status. Common-law spouses are often referred to as husband or a wife by a testator. If the testator is separated or divorced, the lawyer should review any agreement to determine any support obligations and discuss the implications of the appropriate family law provisions.

Conflict of interest

Another source of claims in the estates field is conflicts of interest. Often conflicts arise where a lawyer accepting a retainer from both husband and wife or common-law partners to prepare mirror or mutual wills.

If you obtain instructions from spouses or common-law partners to prepare wills, treat the matter as one of a joint retainer. The commentary in the Rules of Professional Conduct under Rule 2.04 states:

> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992*, S.O. 1992, c.30 to prepare one or more wills for them based on their shared understanding of what is to be in each will, should treat the matter as a joint retainer and comply with subrule (6).
>
> Further, …if only one of them were to communicate new instructions…
>
> a) the subsequent communication would be treated as a request for a new retainer and not part of the joint retainer…
> b) in accordance with rule 2.03 the lawyer would be obligated to hold the communication in strict confidence…;
> c) the lawyer would have a duty to decline the new retainer, unless:
> i) the spouses had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close relationship…;
> ii) the other spouse or partner had died; or
> iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.
>
> After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

Although the sub-rule does not require it, if there is a power imbalance between the two spouses consider recommending that the "weaker" client obtain independent legal advice to ensure that the client's consent is informed and not coerced.

Notwithstanding that the rules do allow a lawyer, in certain circumstances, to act on a subsequent retainer, this is an area fraught with danger and a practice that should be avoided. For example, although it appears to be permitted under the Rules, a problem can arise when one of the partners dies and the surviving partner returns to the lawyer seeking to change his or her will.

An example of the type of situation which can arise was discussed in the case of *Hall v. McLaughlin Estate,* 2006 CanLII 23932 (On. S.C.), 2006 O.J. No. 2848.

In the *Hall* case, the couple had made mutual wills. This was a second marriage for both spouses and both spouses had grown children from previous relationships.

The initial wills were mirror wills which provided that on the death of the first spouse the estate would go to the other. On the death of the last spouse, the estate was to be split equally with one half going to the husband's children and the other half going to the wife's children.

The wife died first and her estate went to the husband. Contrary to the agreement, the husband changed his will and left the entire estate to his children only. The court imposed a constructive trust on the net value of the husband's estate for the wife's children. The court did so because it found there was a binding agreement that the survivor of them would divide his or her estate into two halves between the two families.

There is no mention in the judgment whether or not the same lawyer prepared the 1992 will and the husband's subsequent will. If it was the same lawyer and the estate had been depleted, it is likely that a claim would have been advanced by the disappointed beneficiaries.

Avoiding negligence claims

1. Promptly report to LAWPRO

Preventing claims is in both your best interests and those of all lawyers insured under the LAWPRO program. Claim prevention helps to reduce the cost of the program and ultimately the cost to the profession for the primary insurance program.

To trigger LAWPRO's involvement, the matter must be reported by the lawyer or the named insured in a timely fashion. Failure to report could result in a denial of coverage if LAWPRO is prejudiced by the late report.

Many claims are reported late because the lawyer does not realize that there is a potential claim. This is particularly true in the wills and estates field. The following events should trigger a report by the insured lawyer to LAWPRO:

1. a request for the will file after the testator's death;
2. a request that the lawyer be examined or provide an affidavit in a will dispute.

If the lawyer reports the matter to LAWPRO as soon as a request is made for his or her file, or the lawyer is asked to provide an affidavit, his or her interests can be best protected. LAWPRO will, in many cases, provide counsel to respond to a request to review a file or to examine the lawyer on a claim prevention basis.

We have in our portfolio numerous claims in which an insured has provided an inaccurate statement or affidavit, and in a subsequent lawsuit this becomes the basis for a negligence claim against the lawyer.

If you are asked for your file after the testator has died, or are asked by a lawyer for a beneficiary or executor to provide a statement, it is possible that a will challenge is being contemplated and the potential exists that you may be sued. As well, in the event of a challenge to the will, the appointment of the executor may also be in doubt and the lawyer may be releasing a file to a party who is not entitled to receive it. The best practice in these circumstances is not to give the file to any party without a court order.

2. Document your file

Once you have reported the claim or potential claim to LAWPRO , defence counsel will request a copy of your file. The contents of the file will often determine the strategy defence counsel will

employ to respond to a claim/potential claim. Well-documented files will often provide a viable defence to the claim. The reverse is true with respect to poorly documented files.

3. Use retainer agreements
Consider using retainer agreements in your practice. Through the use of retainer agreements, you specify the terms and conditions of your employment. If there are conflicts of interest, or any issue of privilege, this can be canvassed in the retainer agreement.

4. Write reporting letters
Where possible, confirm will instructions in writing, document telephone calls and e-mails, and prepare comprehensive reporting letters. Reporting letters are extremely important and can be easily created through the use of templates. In some cases, a reporting letter confirming instructions for a new will and the reason for the drafting instructions may provide a defence to a claim from a disappointed beneficiary.

5. Use checklists
Using a checklist will help prevent many of the clerical errors that are reported. Checklists also help ensure that you've asked about all relevant issues including marital status, family history and testamentary capacity.

6. Develop office routines
All personnel involved in will preparation should be aware of the proper steps to be taken for the execution of wills.

Proofreading wills, comparing the lawyer's notes to the drafted document and checking the math for any fractional legacy should be part of the routine before a will is sent to the testator for review. Consider using a tickler system to follow up and ensure that wills are executed in a timely manner.

Conclusion

In summary, reducing the risk of malpractice claims in the wills and estate field is possible through the use of good practices and procedures. The tools to implement these practices are readily available to the profession. While you cannot totally eliminate the risk of a malpractice claim, you can improve the odds of avoiding a claim by integrating risk management strategies into your practice.

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