Seminar on the Basics of Estates Litigation

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Grounds to Set Aside a Will

Generally accepted grounds for setting aside a will are:

1. Lack of Testamentary Capacity. A person must be of sound mind, memory and understanding to be able to make a valid will. When a will is contested on the ground of mental incapacity, the propounder of the will must prove on a balance of probabilities that the testator understood what she or he was doing.

The testator must be able to:

i. comprehend and recollect what property she or he possessed;
ii. the people that ordinarily might be expected to benefit;
iii. the extent of what is being given to each beneficiary; and
iv. the nature of the claims of others who are being excluded.

Interestingly enough, a person may still be able to make a good will after having been declared incapable of managing his or her affairs. To successfully challenge a will on the grounds of lack of testamentary capacity, substantial and persuasive medical evidence must be obtained. Evidentiary requirements would also include contacting witnesses as to fact, such as neighbours and friends, to substantiate the medical evidence of lack of capacity.

In many cases, the services of an expert witness will be engaged to give a "retrospective opinion" on capacity after death. The expert witness will review the medical data compiled from various sources and consider the observations of witnesses. The expert witness will also consider relevant medical records and lawyer's notes from the date of the instructions for and execution of the will.

2. Presence of Undue Influence. The burden for proving undue influence is carried by those who **attack** the will on a balance of probabilities. Those attacking the will must show that the mind of the testator was overcome by influence exerted by another person so that there was no voluntary approval of the contents of the will. Coercion in essence must be proved. Where one person has the ability to dominate the will of another through manipulation, coercion or abuse of power, undue influence may be found.

3. Presence of Suspicious Circumstances and Lack of Knowledge and Approval. Where there are suspicious circumstances, those who propound a will have the burden of proving:

i. requisite capacity; and
ii. that on a balance of probabilities, the testator knew and approved of the contents of the will.

Suspicious circumstances may be raised by:

i. circumstances surrounding the preparation of the will;
ii. circumstances tending to call into question the capacity of the testator; or
iii. circumstances tending to show that the free will of the testator was overcome by acts of coercion or fraud.

I recently settled a case where the majority of an estate was left by the deceased to her only 3 children. My client was one of the children named Frank Cohen.

Frank and his sister received a third of the residue outright. Subject to the discretion of the Estate Trustee, for the third child, Jerry Cohen, the 1/3rd residue was to remain invested and he would receive a net income of $12,000 a year during his lifetime.

30 days following the death of Jerry's wife, the balance of his portion of the residue would be paid to him. The deceased explained in her will that Jerry had no children and she did not want his wife or her family to receive anything from the estate.

Jerry challenged the validity of the will and raised the following as suspicious circumstances:

i. the lawyer who prepared the will was a good friend of his brother, Frank;
ii. the will was signed in Frank's home;
iii. Frank's family and his sister were present when the will was signed;
iv. Shortly before the execution of her will, the deceased received treatment for major depression; and
v. the deceased suffered from Addison's disease and the symptoms included short term memory lapses and mood swings.

4. Due Execution. The *Succession Law Reform* Act sets out the legal requirements and formalities regarding testamentary documents.

By way of overview only:

i. a will must be in writing;
ii. a will must be signed by the testator at the end after it has been completed;
iii. a testator must sign the will or acknowledge a signature in the presence of 2 or more witnesses present at the same time; and
iv. the witnesses must also sign the will in the presence of the testator.

There is a distinction between a regular will and a "holograph will". A holograph will:

i. Is wholly in the testator's handwriting;
ii. Is signed; and

iii. Does not require the presence or signature of a witness.

The onus of proof regarding due execution is upon the **propounder** of the will.

5. Fraud & Forgery. The burden for proving fraud is carried by those who attack the will. Obtaining the evidence of the 2 witnesses to the Will often dispels allegations of fraud. However, the **propounder** of the will must prove on a balance of probabilities that the signature on the Will is the signature of the testator. Some allegations warrant engaging a handwriting expert. Before making an allegation of fraud or forgery, the challenger must ensure that there is substantive evidence to support the allegations. The failure to substantiate these claims could lead to unfavourable cost consequences.

Case Summary

A recent case of the Ontario Superior Court of Justice, *Johnson v Huchkewich* sets out how some of these issues are considered by the Court.

Facts

- Family of four: father, mother and two daughters.
- Father and mother instructed a lawyer to draft joint wills.
- The joint wills contained the provision that when the first of them died, everything would go to the other.
- When the survivor died, everything would go to only one of their daughters.
- The father died and all of his assets were inherited by his wife.
- The mother died.
- In accordance with the mother's will, her estate was left to only 1 child to the exclusion of the other.
- The excluded child challenged her mother's will claiming incapacity and undue influence.

Held

- The Court held that will was valid.
- The entitled child remains entitled and the excluded child received nothing.

Reasoning

Undue Influence

- The excluded daughter argued that her sister exerted undue influence over her parents.
- She argued, in the alternative, that her father exerted undue influence over her mother.
- There was little evidence to suggest that her sister exerted any undue influence.
- The Court considered that at the time of drafting and execution of the will, only the parents were present.

- Additionally, the parents went to the lawyer's office alone and were not driven by the entitled sister.
- While the entitled sister did help out with household chores and visited her parents often, there were not adequate facts to support an allegation of undue influence.
- The court stated that undue influence is not mere influence or persuasion.
- There must be some level of coercion or fraud.
- There was no potential for domination of either testator here.

Capacity

- The testator had suffered a stroke and had been suffering from various forms of dementia before she made her will.
- The court stated that

> *"isolated memory and other cognitive deficits do not establish lack of testamentary capacity…The real question is whether the testator's mind and memory are sufficiently sound to enable him or her to appreciate the nature of the property he was bequeathing, the manner of distributing it and the objects of his or her bounty".*

- The testator had received a clean bill of health from her doctors subsequent to the execution of her will.
- All evidence suggested that the testator had capacity up until her death.
- The testator did not forget either of her daughters or their roles in her life.
- The testator and her husband, through their joint wills, conscientiously decided to exclude their daughter for several reasons.
- The decision was informed.
- There is nothing suspicious about these circumstances and as such, the disentitled daughter remained disentitled.

What is a Certificate of Appointment of Estate Trustee?

The term "probate" is no longer used in Ontario. A certificate of appointment of estate trustee **with a will** is a document issued by the court that proves the authority of the Estate Trustee to administer the provisions of the deceased's will. A certificate of appointment of estate trustee **without a will** is a document granted by the court that gives authority to the estate trustee to manage and distribute the estate of the deceased who died without having made a will.

Objecting to a Will Before a Certificate of Appointment is Issued

A challenge to a will involves the procedures set out in Rule 75 of the *Rules of Civil Procedure.* Where possible, it is more efficient and convenient to raise a client's objection to a will or to the issuance of a Certificate of Appointment of Estate Trustee with or without a will prior to a Certificate of Appointment being granted. Rule 75.03 allows a Notice of Objection to be filed with the Estate Registrar in order to prevent a Certificate of Appointment from issuing.

The Notice of Objection must:

i. be signed by the person objecting or by that person's lawyer;
ii. state the nature of the interest of the objector; and
iii. state the grounds for the objection.

It is in the interest of the person challenging the will to advance his or her objection early to alleviate the risk that the Estate is partially or wholly administered. Once the assets are distributed, any challenge to the validity of the will is likely to be a useless exercise. A certificate of Appointment of Estate Trustee with or without a will is not always required. Estates may be administered without the necessity of making an Application for a Certificate of Appointment of Estate Trustee. For example, if all assets are jointly owned between the deceased and others there may be no need for a Certificate. Therefore, a Notice of Objection may not be a certain remedy. It is therefore important to notify the named executor, if you know who the named executor is under the will, of the objection and potential claim. Once a Notice of Objection has been filed, the next step is the filing of the **Notice to Objector** and then the filing of a Notice of Appearance. Following the Notice of Appearance, the propounder of the Will or the objector must bring a Motion for an Order Giving Directions. If there are minors, unborn or unascertained children involved, service of the Motion for an Order Giving Directions must be made on the Office of the Children's Lawyer. Where a beneficiary is a charity or there is a financial interest of a person who is incapable, service must be made upon the Office of the Public Guardian and Trustee.

Objecting to a Will After the Certificate of Appointment is issued

Rule 75.04 addresses the provisions for a revocation of a Certificate of Appointment. Rule 75.05 provides for the return of a Certificate of Appointment pursuant to a motion, including where the moving party seeks a determination of the validity of the testamentary instrument for which the certificate was issued.

The Application or Motion for Directions

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

there is already a Court proceeding because a Certificate of Appointment was obtained or a Notice of Objection was filed, directions may be brought by way of a motion. If not, an Application must be issued for directions rather than a motion.

On a motion or application, the Court may direct, amongst other relief:

i. the issues to be decided;
ii. who are the parties;
iii. whether the Plaintiff must file a Statement of Claim;
iv. procedural orders;
v. timetables;
vi. preservation orders;
vii. that an estate trustee be appointed during litigation and to file such security as the Court directs; and
viii. the particulars of a mediation session to be conducted.

Mediations in Estates Litigation

Rule 75.1 address mandatory mediation in estates matters. Mandatory mediation applies to the following proceedings, amongst others:

i. formal proof of testamentary instruments;
ii. objections to issuing a Certificate of Appointment;
iii. return of a Certificate of Appointment; and
iv. claims against an estate

Evidence in general in Estates Litigation

It is important to obtain orders in the Order Giving Directions for the release of medical records, lawyers' records and financial records. Failure to obtain orders of this nature will pose difficulty to the parties in trying to obtain the release of such records from financial institutions, hospitals, doctors and lawyers for obvious reasons of confidentiality. The interviewing of witnesses should be conducted as soon as possible, and evidence should be taken. Some of the most persuasive evidence comes from friends, relatives and neighbours who are witnesses as to fact. Those witnesses may have made independent observations with respect to events, activities and conduct of the deceased during the time period when the will in question was executed. The evidence of the doctor who treated the testator would be considered very persuasive evidence. It can also be persuasive to have an expert provide a retrospective report based on a review of records and conclusions from those reports. Generally speaking, the Court will approach evidentiary rules in Estates litigation on a more flexible basis.

Limitation Periods

1. Section 9 of the Estates Administration Act

It is important to be aware of section 9 of the Estates Administration Act. This section has the effect of automatically vesting title in real property in the named beneficiaries on the 3rd anniversary of the death of the testator "whether probate has or has not been taken". This is not the case if there is a registered caution. However, the ability of beneficiaries to rely on this 3-year provision is limited by section 10, which essentially requires an examination of the will to determine whether any rights are provided to the trustee.

Section 10 of the Estates Administration Act reads:

> "Nothing in section 9 derogates from any right possessed by an executor or administrator with the will annexed under a will or under the Trustee Act or from any right possessed by a trustee under a will."

Judges have held that property did not vest in the beneficiaries where a will provided the trustee with "…full power to sell, mortgage or otherwise dispose of the property or any part of it".

2. The Limitation Period for Will Challenges

Irving and I are involved in a case where we represent Blake Leibel, one of the sons of Eleanor Leibel. Eleanor Leibel died in June, 2011 from brain cancer. Blake challenged his mom's wills dated April, 2011 by a Notice of Application issued on September 5, 2013. Blake sought a declaration that the wills were invalid on the basis of incapacity and undue influence. Blake's evidence was that Eleanor expressed wishes to him and others that he would be the sole beneficiary of her Estate. Blake further provided evidence that Eleanor did not want her sister or her husband, from whom she was separated, to be her Estate Trustees. Blake claimed that the residue clause of Eleanor's primary will, which leaves half to him and half to Blake's brother, Cody, is not what Eleanor wanted. The propounders of Eleanor's wills are Blake's aunt and Blake's father, both named as Estate Trustees under the challenged wills. Blake's aunt and father, and the corporations in which the deceased held an interest, brought a motion to strike Blake's will challenge on 2 grounds:

1) that the will challenge was out of time and statute-barred; and
2) in the alternative, Blake was estopped from bringing the will challenge by virtue of the equitable doctrines of estoppel by convention and estoppel by representation.

After hearing the motion, Justice Greer held that Blake's will challenge was statute-barred based on the following analysis. Justice Greer recognized that s.16(1)(a) of the Limitations Act, 2002 provides that there is no limitation period in respect of a proceeding if no consequential relief is

sought (so in other words if declaratory relief only is sought). However, Justice Greer held that Blake claimed consequential relief because:

i. he asked for an Order revoking the grant of the Certificate of Appointment of Estate Trustees with a Will issued to his aunt and his father;
ii. he asked for an Order removing his aunt and his father as Estate Trustees;
iii. he asked for an Order that his aunt and his father pass their accounts as Estate Trustees; and
iv. he asked for an Order appointing an Estate Trustee During Litigation.

Blake argued that the relief he sought was not consequential because it all only takes place following a declaration that the challenged wills are not valid. Justice Greer disagreed with Blake's position and held that a declaration is a "stand-alone Court decision". Justice Greer held that sections 4 and 5 of the Limitations Act, 2002 apply to will challenges. Section 4 of the Act sets out the 2-year limitation period. Section 5 of the Act sets out the discoverability provisions. Justice Greer held that under the Act, a limitation period starts to run from the date of the testator's death, subject to discoverability. 2 years from the date of death then, ends the limitation period in most will challenges. Justice Greer applied principles from the Ontario Court of Appeal decision, Lawless v. Anderson. Pursuant to that decision, she held that limitation periods begin to run when one discovers the material facts necessary to plead a reasonable cause of action and not when one determines that a claim is winnable or viable. While we disagreed with her findings (but were not instructed to appeal), Justice Greer held that in applying the "discoverability principle," Blake had the knowledge to commence a will challenge on or before July 31, 2011. More particularly, Justice Greer held that by July 31, 2011, Blake knew the following facts:

Prior to Eleanor's death, Blake knew that Eleanor had recovered from lung cancer but now had brain cancer.

i. He knew Eleanor had changed her previous Wills.
ii. He knew the date of Eleanor's death.
iii. He received copies of the Wills prior to July 31, 2011.
iv. He knew who the Estate Trustees were under the Wills.
v. He knew what Eleanor's assets were.
vi. He signed corporate documents for a company now owned by her Estate prior to July 31, 2011.
vii. He had communicated with his mother's former estates lawyer about his concerns and she gave him the names of estates lawyers to consider as independent legal advisors.

Eleanor Leibel had a primary will for which a Certificate of Appointment was issued. There was no Certificate of Appointment issued in respect of the Eleanor's secondary will. Justice Greer held that this did not impact upon the limitation period because both wills would have to be

challenged since they were made at the same time and signed by the testator, one after the other. If one will was invalid, the other will would also be invalid.

When Will Challenges might be precluded based on the conduct of a beneficiary

Pursuant to the decision of Justice Greer in Leibel, a beneficiary may not be permitted to challenge a will:

i. if the beneficiary benefited under its terms; and
ii. the beneficiary took no steps to indicate his or her objection to the will.

Following Eleanor Leibel's death, and before commencing his application:

i. Blake received $1.7 million from the proceeds of sale of a house his mother had left to him in one of the April 2011 wills;
ii. Blake obtained legal advice in respect of the money and arranged to lend some of the proceeds of the sale of the house to one of the deceased's corporations; and
iii. Blake selected and received items of personal property he wanted from the Estate.

In support of his will challenge, Blake asserted that despite his conduct in co-operating with the Estate Trustees: he did not tell the estate trustees that he would not bring a will challenge and he did not sign any acknowledgment that the April 2011 wills were valid.

The criterion for estoppel by convention:

1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly).
2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

The criterion for estoppel by representation:

1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part the person to whom the presentation is made;
2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made;

3) Detriment to such person as a consequence of the act of omission.

In noting that Blake had worked co-operatively with the Estate Trustees on the basis of the 2011 wills, and took no steps until September 2013 to indicate his opposition to the wills, Justice Greer found that Blake was estopped from challenging the will on the basis of estoppel by convention and estoppel by representation.

Estates Trustees During Litigation

As stated earlier, a motion or application for direction often necessitate obtaining an Order for a Certificate of Appointment of an Estate Trustee During Litigation. In most cases, the estate of a deceased needs to be administered in some fashion until the validity of a will is determined. Therefore, there is a need for someone who can be granted the authority to act as Estate Trustee while the litigation is proceeding until it is concluded. The basic rule is that a party unconnected with the litigation is the most appropriate person to be appointed. The authority for appointing an ETDL is found in s.28 of the Estates Act. The main duties of an ETDL will be to safeguard the assets of the estate and to pay the debts. The ETDL has a duty to defend claims made against the Estate and the authority to settle these claims. An ETDL is considered to be an officer of the Court. An ETDL can apply for the opinion, advice and direction of the Court. Compensation to an ETDL is usually calculated in the same manner as Estate Trustee compensation and must be "fair and reasonable". In the motion or application, the moving party should propose an ETDL and provide the proposed ETDL's consent. Security will normally be required unless the ETDL is a trust company or is able to satisfy the Court that security is not required. It is difficult to avoid the necessity of posting security. There are strategic reasons for seeking to appoint an ETDL because the fees for the services get paid from the Estate.

Costs in Estates litigation

The traditional approach was that the costs of all parties were ordered payable out of the estate when there was an estates dispute. The traditional approach has more recently been displaced by the "loser pays" model. This model is subject to the Court's discretion and consideration of the relevant factors under section 131 of the Courts of Justice Act and Rule 57 of the Rules of Civil Procedure. However, there is authority from the Ontario Court of Appeal which states that where the difficulties or ambiguities giving that rise to the litigation are caused by the testator, it is appropriate for the testator, through his or her estate, to bear the costs of the resolution. The Ontario Court of Appeal has held that if there are **reasonable grounds** upon which to question the execution of the will or the testator's capacity in making a will for public policy reasons those questions should be resolved without cost to those questioning the will's validity. The obvious public policy consideration is that Court should give effect only to valid wills that reflect the

intention of competent testators. The *McDougald Estate v. Gooderham* decision of the Ontario Court of Appeal sets out these principles in greater detail.

Dependant's support claims

Dependant Support Claims pursuant to part V of the *Succession Law Reform Act*

A Dependant support claim is a claim made against the estate of a deceased person by a dependant who means the definition of dependent and the test under the Succession Law Reform Act. A dependant is defined as a spouse, parent, child, or brother or sister of the deceased to whom immediately before the death the deceased was providing or had a legal obligation to provide support.

Section 1 of the Success Law Reform Act addresses the def'n of "spouse" to include:

i. 2 people who are married to each other;
ii. 2 people who have cohabitated continuously for not less than 3 years or
iii. cohabitated in a relationship of some permanence if they are the natural or adoptive parents of a child.

Given the expanded definition of spouse, a person can die with multiple spouses, all of whom are potential dependants. There are no age restrictions on children who are eligible to apply for support from the estate of the parent. Section 58 of the Succession Law Reform Act comprises the 2nd step in analyzing whether the deceased has made adequate provision for the proper support of his or her dependants. A court must evaluate what has been given under the terms of the Will, or intestacy, and then determine what is **adequate** support. The determination of what constitutes adequate support is a factual inquiry based upon the circumstances of each individual case. The Courts are guided by s.62 of the Succession Law Reform Act. The Order for payment of support can be from income or capital of the estate or both. A claim for support can be satisfied by non-traditional assets such as life insurance or a group policy of insurance. A dependent's support claim can be commenced by the issuance of a Notice of Application pursuant to the Succession Law Reform Act and Rules 14.05, 74.15 and 75.06 of the Rules of Civil Procedure. Section 67 of the *Succession Law Reform* Act provides for the freezing of the distribution of estate assets until the determination of the dependent's support claim. Section 61 of the *Succession Law Reform* Act provides that an application for dependant's support must be made within 6 months from the issuance of the Certificate of Appointment of an Estate Trustee. However, notwithstanding the 6 month limitation period, s.61(2) of the *Succession Law Reform* Act provides that the Court, at its discretion, may allow an Application to be made at any time with respect to any portion of the estate that remains undistributed at the date of the application. Accordingly, an application may be made beyond the 6-month period if estate assets still exist, and with leave.

Family Law Claims in estates matters

A surviving spouse who is not satisfied with the provisions made under a will may rely upon the statutory provisions under the Family Law Act and make a claim against an estate for an equalization payment from the estate. A surviving spouse can therefore elect to either receive what was left under the will or on intestacy or rely upon s.5 of the Family Law Act to receive an equalization payment thereunder. The equalization payment made pursuant to the Family Law Act is one half of the difference in the value of the net family properties of the deceased spouse and the surviving spouse. The evaluation date for purposes of calculating net family property is the day before death. Once the election is made to receive entitlement under the Family Law Act, the gifts to the spouse in the deceased spouse's will are revoked. The Will is then interpreted as if the surviving spouse had died before the other. A spouse may make an election under the Family Law Act and simultaneously commence a dependant's support claim under the Succession Law Reform Act.