



Addressing Estate Litigation Through Will Drafting: Part 2

Can a Will be Used to Authorize or Facilitate Estate Litigation?

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Our last two Solicitor's Tips have addressed how attempts can be made to discourage estate litigation through will drafting. This month, we complete our discussion of will drafting and estate litigation by considering the opposite situation – whether a testator can encourage or authorize litigation through a will.

Will instructions authorizing litigation may be disregarded

The issue of whether a will can include terms authorizing litigation was addressed by the British Columbia Supreme Court in [Ketcham v Walton, 2012 BCSC 175](#). The testator in this case disinherited his adult children and included a clause in his will instructing the executor of his estate to take an active role in defending the will if either child tried to vary the division of property under its terms. In Ontario, a similar kind of application can be made under [Part V of the Succession Law Reform Act](#) (the "SLRA"). The will in [Ketcham](#) also instructed the executor to pay for the costs of any litigation, including appeals, out of the assets of the estate, even if they were depleted as a result, to ensure that the testator's intentions were carried out.

After the testator died, the children commenced a will variation action. The executor applied to the court for an order permitting him to defend the terms of the will and for the estate to fund payment of his related legal costs. The court refused to grant either order, rendering the pertinent clause in the will ineffective.

While [Ketcham](#) may not be binding in Ontario, it does demonstrate why it may not be advisable to include instructions in a will to either engage in estate litigation, particularly to oppose a claim for dependant's relief under [Part V of the SLRA](#), or to have the estate fund legal fees incurred by the executor in respect of any estate litigation without limitation.

A will should not instruct an estate trustee to resist a dependant's support claim

There are a number of reasons why it may be inappropriate to instruct an estate trustee to contest a dependant's support claim. First, it is unnecessary to instruct an estate trustee to represent the estate in the event of litigation. If the estate trustee has already accepted the appointment, he or she will automatically have a duty to represent the estate if a claim is commenced.

Second, directing an estate trustee to take an active role in litigation may be inconsistent with the estate trustee's neutral position. As noted in [Ketcham](#), "the characteristic of neutrality is fundamental to the role of executor". A duty of neutrality has also been recognized in Ontario with respect to dependant's support under the SLRA: see, for example, *McAdam v Davidson Estate*, 2001 CarswellOnt 2536 (SCJ) at paras 18-19. Moreover, instructing an estate trustee to oppose

a claim is inconsistent with the primary duties of an executor, which include preserving the assets of the estate, paying debts, and distributing the balance of the estate to the beneficiaries entitled under the will or in accordance with a court order: see [Quirico v Pepper Estate, 1999 CanLII 5628](#) (BC SC), para 15. If a will includes instructions to aggressively defend a dependant's support claim, the estate trustee may simply be unable to comply with those instructions.

Third, if a claim is made for dependant's support, an estate trustee does not “defend” the will by contesting the support claim. As noted by the British Columbia Court of Appeal, an action brought under dependant's relief legislation actually presumes that the will is valid: see [Vielbig v Waterland Estate, 1995 CanLII 2544](#) (BC CA) and [Stearnberg v Stearnberg, 2007 BCSC 953](#).

A will should not instruct an estate trustee to use the estate to fund estate litigation

It may also be inappropriate to use a will to instruct an estate trustee to deplete the assets of an estate in order to fund estate litigation. In [Quirico](#), the court expressly held that an executor should not use estate funds to finance dependant's support litigation in light of the principle of neutrality: “It is a matter of indifference to the executor how the estate should be divided. He or she need only comply with the terms of the will or any variation of it made by a court.”

More importantly, using a will to finance opposing a valid claim for dependent's support may also be void for public policy reasons. The court explained in [Ketcham](#):

The clause does not directly divest the children of an inheritance, but it does have the potential to deny them the fruits of a victory. Since they have a statutory right to challenge the will ... any clause that attempts to deny them this right (or, by extension, any effective remedy under this right), should offend public policy and be void.

Conclusion

While a clause encouraging litigation, like the one in [Ketcham](#), has not yet been addressed by the courts in Ontario, including such a clause in a will could be an exercise in futility. There is a real risk that including a clause that instructs an estate trustee to either contest a dependant's support claim, and/or to use the estate to fund litigation could be disregarded in the event of estate litigation. While a testator may be able to take steps to help prevent litigation after he or she is gone, it appears that encouraging litigation is less likely to be effective.