

Contentious Estates Update 2022

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WHALEY ESTATE LITIGATION PARTNERS

Overview

- Today we will look at:
 - Costs awards and conduct in litigation
 - Admitting testamentary documents deficient of formalities
 - Courts dealing with complex issues where elder abuse is alleged
 - Issues surrounding the capacity to marry
 - Digital Changes that are here to stay



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Introduction – Rising Estate Claims

- LawPRO: 14% of all claims are Wills & Estates claims (up from 11% in 2018)
- BMO Investorline study (2014): One trillion dollars will change hands in Canada over next two decades
- Succession and inner family conflict



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Contentious Family Disputes

- *Sandwell v. Sayers*, 2022 BCSC 605
 - Transfer of joint tenancy – testator’s second thoughts
- *Yu (Re)*, 2021 BCSC 1793
 - Children accept gifts of \$800,000 = conflict of interest as attorneys
 - PGT appointed committee of property



Costs Awards

- Rise in number of estate claims coming to litigation
- Emotional and contentious conflicts, often involving bitter financial disputes



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Indemnification Principles

- *British Columbia (Minister of Forests) v Okanagan Indian Band*, [2003] 3 S.C.R. 371
 - They are an award to be made in favour of a successful or deserving litigant, by the loser; Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time; They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding; They are not payable for the purpose of assuming participation in the proceeding.



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Cost Award Principles in Estate Litigation

- *Neuberger v. York*, 2016 ONCA 303
 - Award must be fair and reasonable in all the circumstances
- *McGrath v. Joy*, 2022 ONCA 119
 - Endorses a “blended-costs” approach – balancing public policy



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Statutory Considerations

- Ontario – s.131 *Courts of Justice Act*
 - Provides courts with discretion to determine by whom and to what extent the costs of a proceeding shall be paid
- *Rules of Civil Procedure*
 - Rule 57 – partial and substantial indemnity percentages



Constraints on Recovery

- Distinguishing between full & partial indemnification
- *Bayford v. Boese*, 2021 ONCA 533, 69 ETR 4th 216
- “a finding of fraud, attempted fraud, may justify an award costs of an elevated scale”
- “reprehensible, scandalous or outrageous conduct”



Questionable Conduct

- *Estate of Felice Pipito (Re)*, 2022 ONSC
 - Legitimacy of a joint tenancy
 - Substantial indemnity
 - Self-represented litigant: “driven by spite, venom and antipathy to the opposing party...”



“Objectionable” Conduct

- *Toller James Montague Cranston (Estate of)*, 2021 ONSC 3704
 - World famous artist and figure skater died intestate in Mexico leaving substantial estate
 - Trustee compelled to provide accounting; applicants objected to over 300 expenses



Reprehensible Conduct: Recording

- *Rudin-Brown v. Brown AND Brown v. Rudin-Brown*, 2021 ONSC 6313
 - Costs award determination in a *Substitute Decisions Act* proceeding
 - Failure to respond to settlement offers, reprehensible conduct recording vulnerable older adult



Conduct of Trustees

- *Dewaele v. Roobroeck*, 2021 ONSC 1604
 - Substantial indemnification
 - Co-estate trustee misconduct
 - Their behavior brought the administration of the estate to a standstill and was likely to continue; removed as co-estate trustees



An Obviously Weak Case is Misconduct

- *Malacek v. Young*, 2021 BCSC 2219
 - Special Costs award for making unsubstantiated allegations in high stakes and emotional estate litigation
 - Daughters allegations against 37-year marriage



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Outside the Formal Requirements

- Recent cases where courts have admitted testamentary documents that don't meet the formal requirements
- Legislative amendments in curative and validating provisions (B.C. and ON)



Suicide Note – Holograph Will

- *McGrath v. Joy*, 2022 ONCA 119
 - Issue: consumption of alcohol and hash oil in the day before the creation of the note and subsequent suicide
 - Court of Appeal admitted the holograph will



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Ontario's New Validating Provision

- *Succession Law Reform Act*, Section 21.1 - validating provision
 - **21.1** (1) If the Superior Court of Justice is satisfied that a document or writing that was not properly executed or made under this Act sets out the testamentary intentions of a deceased or an intention of a deceased to revoke, alter or revive a will of the deceased, the Court may, on application, order that the document or writing is as valid and fully effective as the will of the deceased, or as the revocation, alteration or revival of the will of the deceased, as if it had been properly executed or made.



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Validating Provisions in Canada

- Manitoba's legislation
 - The first provision in Canada, which most others are modelled off, came from Manitoba in s.23 of the *The Wills Act*.



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British Columbia's Curative Provision

- *Wills, Estates and Successions Act*
 - Section 58 – curative provision
 - *Bishop Estate v. Sheardown*, 2021 BCSC 1571
 - Unexecuted will – COVID-19 restrictions led to cancelled appointment for execution



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Suicide Note – Curative Provision

- *Gregoire v. Cordani*, 2020 BCSC 276
 - Suicide note admitted as holograph will
 - *WESA* s. 58 – curative provision which provides the court with discretion to order that a record that does not conform with s. 37 is fully effective as a will



Similar Claims to be Expected in the Future

- *Sinyor et al.*, “Last wills and testaments in a large sample of suicide notes: implications for testamentary capacity.”
 - Significant financial assets bequeathed
 - Should we expect more claims in the future?



Elder Abuse Allegations

- Courts dealing with complex and obvious cases where elder abuse is alleged
- What COVID revealed:
 - Rise in reports of elder abuse
 - Lack of awareness and action



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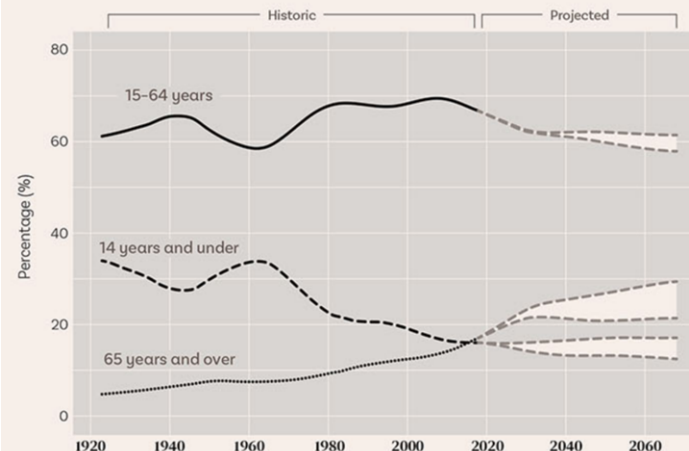


What the Numbers Tell Us

- Canada's population continues to age
- Average age increasing from 41.4 years on July 1, 2020, to 41.7 years on July 1, 2021.
- Almost one in five (18.5%) Canadians are now aged 65 and older,
- The number of centenarians rose 1,100 year over year to 12,822 as of July 1, 2021
- Fast growing demographic – 85 years old and over

AGE STRUCTURE

Beginning in 2016, there were more seniors (aged 65 and over) than children (aged 14 and under) in Canada. This pattern would continue over the next 50 years according to all projection scenarios.



Persons of working age (15 to 64 years) could decrease as a share of the total population, from 67% in 2018 to between

58% and 61% in 2068.

By 2068, seniors could account for between **21% and 30%** of all Canadians, up from **17%** in 2018.



In 2068, there could be between

63,300
and
113,000
Canadians aged 100 and over, up from **10,000** in 2018.

Source: Statistics Canada. 2019. Population Projections for Canada (2018 to 2068), Provinces and Territories (2018 to 2043).

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Criminal Law Sanctions

- Criminal Code
 - Section 331: Theft by Person Holding Power of Attorney
 - Section 215 (1)(a): Failing to Provide the Necessities of Life



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Rising Reports of Abuse and Neglect

- Office of the Seniors Advocate British Columbia, “Hidden and Invisible: Seniors Abuse and Neglect in British Columbia”:
 - 49 % increase in reports of abuse, neglect, and self-neglect
 - 87 % increase in reports of financial abuse - VPD



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Most Canadians: Unaware of the Danger

- Canadian Securities Administrators, “Securities Regulators’ study reveals many Canadians unaware of the signs of financial elder abuse”:
 - 42 % surveyed could not recognize the signs of financial abuse
 - Only 47 % know where to report suspected cases



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Breach of Trust

- *R v. Cvetas*, 2022 ONSC 1640
 - Theft over \$5,000 – accused is a banking exec.
 - \$317,000 withdrew from joint account of 81-year-old godmother
 - Breach of trust as an Attorney for Property and Personal Care



Breach of Trust in Care

- *R v. Duffenais*, 2021 CanLII 53781 (NL PC)
 - Assault - indignity
- *R v. Murphy*, 2022 ABPC 31
 - Assaults on non-verbal dementia unit patients
- *R v. Barker*, 2019 NSPC 24



Vulnerable Older Adults Without Capacity

- *SF (Re)*, 2021 CanLII 85842
 - Involuntary patient at Mount Sinai Hospital
 - Had over \$200,000 stolen from her
 - Involvement of individual posing as financial advisory – actually an investment person acting fraudulently



Dealing with Unfounded Allegations

- *Dunn v Baird Estate*, 2022 BCSC 498
 - Application pursuant to s. 151 of WESA
 - Allegations based on conjecture and suspicion
 - Special costs awarded against applicants



Scams Targeting the Elderly

- *Franiel v Toronto-Dominion Bank*, [2020] ABQB 66
 - 81-year-old falls victim to 26 scams over 10 months
 - Loses \$241,730 before her son catches wind
 - Argues face-to-face dealings at bank should have raised red flags



Issues Surrounding the Capacity to Marry

- Consequences of the low threshold to get married
- Closing the loopholes for predatory marriages
 - Revocation of will legislation in Canada
- Statutory solutions in the United States



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Capacity to Marry at Common Law

- *Durham v. Durham*
 - “the contract of marriage is a very simple one, one which does not require a high degree of intelligence to comprehend”



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Marriage Legislation in Canada

- Silent on the Capacity to marry
- Section 7 – *Marriage Act*, Ontario
- Caveat provisions
 - BC, NB, QC



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Revocation of Will Legislation Canada

- In Alberta, BC, and Quebec, a marriage did not revoke a will
- New amendments in Ontario, Saskatchewan, and Yukon – a marriage no longer revokes a will in these provinces



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Caselaw on the Capacity to Marry

- *Banton v. Banton*, 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at 244
- *Hunt v. Worrod*, 2017 ONSC 7397
- *Devore v. Poulain*, 2017 BCSC 1298
- *Chuvalo v. Chuvalo*, 2018 ONSC 311



Electronic Wills

- Uniform Law Conference of Canada
 - *Uniform Wills Act* of 2015
 - *2020 Uniform Wills Act*
 - *2020 Uniform Enduring Powers of Attorney Act*



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Electronic Wills in British Columbia

- *Bill 21: Wills, Estates and Succession Amendment Act, 2020*
 - Amends *WESA* by providing new definitions and amending section 35.1 to allow for electronic form, signatures, and witnessing
 - Adds section 35.2 and 35.3 recognizing electronic presence and signature



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Digital Changes – Here to Stay?

- COVID-19 – temporary measures that became permanent
- Remote Witnessing and Signing



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- *Pandemic Response Statutes Amendment Act*
 - Amends:
 - *Personal Directives Act*
 - *Powers of Attorney Act*
 - *Wills and Succession Act*



British Columbia

- Ministerial orders under the *Emergency Program Act*
 - Ministerial Order No. M162 (*Electronic Witnessing of Enduring Powers of Attorney and Representation Agreements*)
- Bill 21 – adds s. 35.2 to *WESA*



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Manitoba

- New regulations added to:
 - *Powers of Attorney Act*
 - *Wills Act*
 - *Manitoba Evidence Act*
 - *Homesteads Act*
 - *Real Property Act*
 - *Health Care Directives Act*



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New Brunswick

- *An Act Respecting the Enduring Powers of Attorney Act and the Wills Act*
 - allowing remote witnessing and signature of wills and enduring powers of attorney using an electronic means of communication
 - These amendments are to be in effect until December 31, 2022.



Newfoundland & Labrador

- *Temporary Alternate Witnessing of Documents Act*
 - Permits the witnessing of Wills where the witness is a lawyer and the means are audio-visual technology



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Nova Scotia and P.E.I.

- No legislation or regulations which deal with remote signing, however, in Nova Scotia, the virtual witnessing of probate documents is permitted in certain situations



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- Bill 245, *Accelerating Access to Justice Act*, 2021
 - Amended the *Succession Law Reform Act* and the *Substitute Decisions Act* retroactively to April 7, 2020
 - April 7, 2020 – Lieutenant Governor in Council made an Order under s. 7.0.2 (4) – the *Emergency Management and Civil Protection Act* – permits virtual execution of wills and powers of attorney



- Quebec Bar guidelines re: execution of wills by lawyers:
 - Electronic signatures of the testator and witnesses are permissible as long as the technology used permits identification of the testator and witnesses and confirmation of the testator's consent
 - The testator and witnesses must be able to see and hear each other simultaneously so that the witnesses can hear the testator's declaration that the document is her/his will and everyone sees each other signing the document
 - The testator and witnesses must be able to see the will
 - The integrity and confidentiality of the will and the signing process must be maintained.



Saskatchewan

- In 2020, the Law Society of Saskatchewan shared that:
 - we are happy to announce that today, the Government of Saskatchewan repealed the temporary emergency regulations related to remote execution of certain documents and wills and replaced those regulations with permanent regulations allowing for remote execution of documents via electronic means (i.e. video calls) to continue long-term beyond the end of the public emergency period



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THANK YOU!

QUESTIONS?



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