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Arguing Against a Will Challenge at the Minimal Evidentiary Threshold

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To have a will proven in solemn form in the province of Ontario, a will challenger must now meet the minimal evidentiary threshold. The desirability of answering a will challenge at this stage should not be underestimated – a complete answer to the will challenge can result in the total dismissal of the litigation before considerable time and money has been spent in propounding the will. This article explores how the propounder of a will can effectively rebut a will challenge at the threshold stage, highlighting simple strategies that might be available based on recent case law. We begin by addressing what the minimal evidentiary threshold is and the type of evidence that must be adduced to satisfy it before turning our attention to what a complete answer to a will challenge may look like, how the propounder of a will can answer such challenges, and when a challenge should (or should not) be answered.

The Minimal Evidentiary Threshold

First described by the Court of Appeal in *Neuberger v York*, the minimal evidentiary threshold requires the party who wishes to challenge a will to adduce "some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded".[1]

The threshold serves at least two purposes: First, it ensures that disgruntled relatives cannot financially exhaust the deceased's estate and delay its administration through groundless will challenges, as any challenge that does not meet the threshold cannot proceed.[2] Second, the threshold protects the deceased's privacy by limiting access to their financial, legal and medical information.[3] Since production cannot be ordered unless the threshold is met,[4] this procedural hurdle is determinative of the challenger's entitlement to document discovery.[5]

Evidence Needed to Satisfy the Threshold

A will challenge premised on "meagre allegations" cannot proceed.[6] While the minimal evidentiary threshold has been described as a low threshold,[7] the applicant must provide some actual evidence to ground the will challenge. It is not enough to rely on pleading uncorroborated facts in support of the application,[8] or the applicant's suspicions or speculations.[9] Evidence submitted in support of the application should also be relevant to the basis or bases on which the will is being challenged, meaning that the evidence makes "more or less likely an inference that a fact exists or existed".[10]

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[1] 2016 ONCA 191 at para 80, leave to appeal refused [2016] SCCA No 207 [*Neuberger*].
[2] *Johnson v Johnson*, 2022 ONCA 682 at para 16, leave to appeal refused 2023 CanLII 26747 (SCC) [*Johnson*].
[3] *Whitfield v Glover*, 2024 ONSC 1266 at para 110 [*Whitfield*].
[4] *Ibid* at para 108.
[5] *Bitaxis Estate v Bitaxis*, 2023 ONCA 66 at para 5, leave to appeal refused 2023 CanLII 72137 (SCC). Also see *Seepa v Seepa*, 2017 ONSC 5368 at para 35 [*Seepa*]; *Johnson*, *supra* note 2 at para 17.
[6] *Whitfield*, *supra* note 3 at paras 109-110.
[7] See, for example, *Zarrin-Mehr v. Shokrai*, 2024 ONSC 1754 at para 26(c) [*Zarrin-Mehr*].
[8] See *Naismith v Clarke*, 2019 ONSC 5280 at para 20(d). [*Naismith*].
[9] *Graham v McNally Estate and Blais*, 2024 ONSC 4006 at para 32 [*Graham*]; *Zarrin-Mehr*, *supra* note 7 at para 26(e).
[10] *Dinally v Dinally*, 2023 ONSC 6178 at paras 39-40, 46 [*Dinally*].

However, it may not be necessary to actually prove the evidence adduced to meet the minimal evidentiary threshold – the evidence simply must support the will challenge if it were accepted at a hearing.[11] This "preliminary vetting process is not to be confused with making findings of fact at trial", since the court is not required to determine whether or not the applicant's evidence is true.[12] The minimal evidentiary threshold is also not analogous to summary judgment,[13] in that it is not necessary to prove that there is a genuine issue requiring a trial in order to meet the threshold.[14]

Answering a Will Challenge at the Minimal Evidentiary Threshold

If a will challenge satisfies the minimal evidentiary threshold, the propounder of the will – usually the estate trustee – may answer the challenge. Typically, the challenge can proceed if the respondent fails to answer the challenger's evidence.[15] On the opposite end of the spectrum, if a "complete answer" is provided, then the will challenge ought to be dismissed.[16]

When assisting a client who is responding to a will challenge, there are three essential questions to consider: First, what exactly is a complete answer to a will challenge? Second, how can the propounder of a will answer a will challenge? Third, in terms of strategy, when should a respondent answer a will challenge, or alternatively, refrain from answering a challenge?

Providing a "Complete" Answer

In Ontario, a will challenge is answered completely if, after measuring the evidence adduced by the applicant challenger against the evidence answered by the propounder of the will, there are no conflicts in the parties' evidence that the court cannot fairly resolve on the record before it.[17] The evidence advanced by the propounder of the will must be largely uncontradicted to have a will challenge dismissed at this early stage.[18]

Ways to Answer a Challenge

In most cases, the propounder of a will can respond to a will challenge in two ways.[19] First, the respondent may submit evidence to establish the validity of the will, such as sworn affidavit evidence outlining steps taken to investigate that document's validity, documentary disclosure obtained from third parties, or affidavit evidence from third parties, such as the lawyer who prepared the deceased's will.[20] Whether the respondent succeeds in having a will challenge dismissed at this stage of the litigation may hinge on the quality of their investigation into the validity of the will.

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[11] *Zarrin-Mehr*, *supra* note 7 at para 26(b).
[12] *Giann v Giannopoulos*, 2023 ONSC 5412 at para 25 [*Giann*].
[13] *Seepa*, *supra* note 5 at para 46. This passage is also quoted in *Graham*, *supra* note 9 at para 46.
[14] See *Johnson*, *supra* note 2 at para 17.
[15] *Naismith*, *supra* note 8 at para 20(e).
[16] See *Giann*, *supra* note 12 at para 25.
[17] *Johnson*, *supra* note 2 at para 18, quoting *Seepa*, *supra* note 5 at para 39.
[18] See *Giann*, *supra* note 12, a case where the propounder's evidence was not rebutted and the will challenge was dismissed. This standard has also been recognized in other jurisdictions – see, for example, *McStay v Berta*, 2021 SKCA 51 at para 22 [*McStay*].
[19] It may also be possible to argue that affidavit evidence submitted in support of the will challenge is inadmissible: see *Zarrin-Mehr*, *supra* note 7. However, this strategy is beyond the purview of this article.
[20] See, for example, *Zarrin-Mehr*, *ibid* at para 47.

Strategy 1: Avoid Cherry-Picking

If the propounder of the will produces third-party disclosure when responding to a will challenge, that disclosure "should be complete and not cherry-picked".[21] An answer to a will challenge should not be premised on a partial production made possible by an "informational imbalance" that unfairly benefits the propounder of the will.[22]

Strategy 2: Fill in the Gaps

If a "cherry-picked" version of events prior to the testator's death was presented to satisfy the threshold, the respondent should provide a full and balanced picture of the circumstances surrounding the making of the will in response,[23] with a focus on contextualizing the events presented by the will challenger.[24]

Strategy 3: Find a Reasonable Explanation

When responding to a will challenge premised on unexpected changes to the will late in the testator's life, the propounder of the will may be able to defeat the challenge by showing the court that "there was a rational and entirely understandable reason" for the testator to change the will.[25]

The second way to respond to the will challenger's evidence is by challenging it through cross-examination.[26] The applicant's performance on cross-examination could contribute to the dismissal of a will challenge, given that the court has the power to weigh the parties' unproven evidence and to assess credibility when determining whether a will challenge should be allowed to proceed.[27]

Strategy 4: Highlight Cherry-Picking by the Applicant

If the will challenger has put forward a skewed or distorted picture of the circumstances prior to the testator's death in order to challenge the validity of a will, using cross-examination to establish that the challenger's evidence was cherry-picked can undermine the challenger's credibility, in addition to undermining the will challenge.

[21] *Dinally*, *supra* note 10 at para 51.
[22] *Ibid*. Courts have also taken a similar approach in other jurisdictions; see, for example, *Gow Estate, Re*, 2021 ABQB 305.
[23] An executor also has a legal duty to provide such an account: see *Sweeney Estate (Re)*, 2020 NSSC 340 at para 42.
[24] Providing a thorough account was very effective in *Giann v. Giannopoulos*, *supra* note 12.
[25] *Ibid* at para 31. See also *Johnson*, *supra* note 2 at para 11.
[26] See *McCormick v McCormick*, 2021 ONSC 5177; *Zarrin-Mehr*, *supra* note 7 at para 47.
[27] *Whitfield*, *supra* note 3 at para 113. See also *Giann*, *supra* note 12 at paras. 20-21. In other jurisdictions, in comparison, weighing the evidence and assessing credibility when determining whether a will challenge may proceed may be a reviewable error: see *McStay*, *supra* note 18 at paras 27, 50-51.

When Not to Answer a Challenge

It may seem strategic *not* to answer a will challenge under a number of circumstances, including:

- if the propounder of the will believes that the applicant has not adduced sufficient evidence to meet the minimal evidentiary threshold;
- the estate would be distributed on intestacy in a fashion very similar to that outlined under the testator's will; [28] or
- if the estate is "small".[29]

However, not answering such will challenges is likely a poor strategy, even if it seems impractical to respond. If the applicant meets the threshold under any of the circumstances described above, the will challenge will almost certainly be permitted to proceed, necessitating further expense to defend the will.[30] Rather than ignore such challenges, it would be more strategic to answer at the threshold stage but limit the resources invested in preparing a response. Alternatively, it may make more sense to work out a settlement. Simply choosing not to respond is a big gamble that may not pay off.

On the flip side, the propounder of a will also takes a gamble any time they submit evidence in response to a will challenge, since the court may use that evidence to find that the threshold has been met. For example, the threshold may be satisfied if the respondent submits a video of the will being executed which raises concerns as to the validity of that instrument.[31]

Strategy 5: Safeguard Legal Inferences in Favour of the Will

When responding to a will challenge, the propounder of a will should refrain from admitting evidence which could displace a legal presumption or inference which benefits the will.[32]

The respondent's evidence on cross-examination may also be used to meet the threshold, since "[e]vidence obtained by cross-examining a witness, including a party, may be used by any party".[33] The risk of the threshold being met this way also cannot be avoided if the will propounder responds to the will challenge – once affidavit evidence is submitted by the propounder, that party cannot refuse to be cross-examined.[34]

Strategy 6: Limit Cross-Examination

The propounder of a will can try to limit the scope of cross-examination on their affidavit by being strategic about what information they choose to include in their affidavit.

[28] This conundrum was noted in *Maloney v Maloney*, 2019 ONSC 5632 at para 14.
[29] *Rules*, *supra* note 2, r 74.1. A "small estate" is currently valued at $150,000 or less: see *Small Estates*, O Reg 110/21.
[30] See, for example, *Zarrin-Mehr*, *supra* note 7 at paras 47, 53.
[31] This scenario occurred in *Carinci v Carinci*, 2023 ONSC 6094 [*Carinci*]. See paras 14-22, 39.
[32] *Ibid* at para. 21.
[33] *Ibid.*
[34] *Dinally*, *supra* note 10 at paras 48, 51.

However, withholding information as to the circumstances surrounding the making of the will at the minimal evidentiary threshold could also backfire for the propounder of the will, as demonstrated by Justice Myers' decision in *Carinci*.[35] While the estate trustee in this case gave evidence in an attempt to give the deceased "an air of independence", the court found that it was not credible and instead fed "an inference of dependence".[36] Had the estate trustee simply "admitted the obvious", Justice Myers suggested that "she might have gone a long way to dispel the suspicious circumstances".[37]

Strategy 7: Prioritize Credibility

When responding to a will challenge, the propounder of a will should refrain from speculating, giving evidence they are uncertain of, or trying to paint an inaccurate picture of the circumstances leading up to the creation of the will. Not only is such evidence not useful to the court, it could ultimately damage the respondent's case by undermining their credibility.

Closing Thoughts

While it will not always be possible for the propounder of a will to have a will challenge dismissed at an early stage on the basis of a failure to meet the minimal evidentiary threshold, the primary goal at this stage of the proceedings ought to be simple – to provide a full and balanced picture of the circumstances surrounding the making of the will in order to establish the validity of that instrument. In addition, undermining the credibility of the will challenger may also be a valid objective where appropriate. Since there is a danger that the court may use the evidence of the will propounder to find that the threshold has been met, it is also essential to ensure that the will propounder's evidence is focused, credible, and does not undermine any legal presumptions or inferences that the court could otherwise use to uphold the validity of the challenged will.

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[35] See *Carinci*, *supra* note 31.
[36] *Ibid* at para 35.
[37] *Ibid.*