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ESTATE, TRUST AND CAPACITY LAW BREAKFAST SERIES

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Question & Answer Session with Paul Trudelle, Jordan Atin and Anne Werker

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January 21, 2010

New Rules of Court for Ontario

Posted on January 5, 2010 by Hull & Hull LLP

As all litigators in the province of Ontario likely know by now, January 1, 2010 ushers in not only a new decade but New Rules of Civil Procedure. The New Rules apply to all matters, regardless of when they were commenced.

The amendments to the Rules effected by Ont. Reg. 438/08 are the most extensive and significant since the Rules were adopted in 1985. The fundamental goal of the reform is to make the civil justice system more affordable and accessible for Ontarians.

Some of the more significant changes are as follows:

Proportionality – In April of 2009 we saw a movement toward proportionality of time and expense with the interests at issue in estate litigation upon the introduction of the New Practice Direction for the Estates List of the Superior Court of Justice in Toronto. New Rule 1.04(1.1) brings this factor into play for litigation in all jurisdictions and mandates that Court Orders and Directions be proportionate to the importance and complexity of issues and amounts at stake.

Summary Judgment – Rule 20 expands the Court's discretion to assess credibility, weigh evidence, conduct mini-trials with oral evidence, and award substantial indemnity costs against a party acting unreasonably or in bad faith.

Expert Evidence – Experts must provide fair objective and non-partisan opinion, give opinion evidence only on matters that are within their expertise, and assist the Court as reasonably required. This duty to the Court prevails over any obligation experts owe to the party who retained them. Expert reports must be filed 90 days before the pre-trial conference and responding expert reports must be served 60 days prior to the pre-trial conference.

Discovery – Among the many changes regarding discovery is a new definition of relevance. The phrase "relating to any matter in issue in the action" has been replaced with "relevant to any matter in issue in the action". This changes the test to one of simple relevance. Proportionality comes into play again in Rule 29.2, which sets out the considerations that must be made in determining questions to be answered or documents to be produced. Parties must agree to a written discovery plan (Rule 29.1) and there is a 7-hour time limit on oral examinations for discovery (R. 31.05.1).

Time – Calculation of time pursuant to Rule 3.01(1)(b) for notice periods of 7 days or less excludes holidays. There are also earlier deadlines for service and filing of materials for motions (Rule 37) Applications (Rule 38) and appeals from interlocutory orders (Rule 61).

If your New Year's resolution is to learn the New Rules and their impact on your estates practice, you should attend the OBA Trusts and Estates Section Seminar, "Stay on top of the New Rules of court" on January 6, 2010.

Program Chair, Jane Martin, and speakers, Mr. Justice David M. Brown and Madam Justice Lois B. Roberts of the Superior Court of Justice, and Hull & Hull's own Suzana Popovic-Montag, will guide you through the changes and provide an opportunity to ask questions regarding implications for estates practitioners.

For more on this topic see Gary Watson's summary of the amendments and Marni Pernica's recent article in OBA's Deadbeat magazine. Previous Hull & Hull commentary by Rick Bickhram and Paul Trudelle can be found here and here.

I suspect that following the New Rules is one Resolution you will be sure to keep!

Sharon Davis

Court Provides Further Guidance on Dispensing with Bonds

Posted on December 1, 2009 by Hull & Hull LLP

In the recent decision in *Re Andrews Estate*, the Superior Court of Justice at Toronto, provided further clarification regarding dispensing with an administration bond.

A prospective executor is generally required to post a bond before probate is granted if (1) the executor resides out of the province; (2) a person has died with a will, but fails to name an executor; and (3) a person has died without a will.

The earlier decision out *Re Henderson Estate* set out what an executor applying for probate should file in support of a request that the court dispense with the requirement of a bond and, in particular, what evidence should be contained in an affidavit (commonly called, an "affidavit of debts").

Re Andrews elaborated on the requirements found in *Re Henderson* and, in particular, the number of affidavits of debts that must be filed and the form they are required to take.

There were two executors applying to dispense with a bond. In support of the application, one of the two filed an affidavit containing the information required by *Re Henderson.* The court office rejected it on the basis that each executor had to swear an affidavit. The Court found that this was not the case saying that to do so was redundant and did little than create unnecessary paper work. Instead, the affidavit of one of the two was sufficient.

In this case, the applicants had re-filed the materials, with the other executor swearing an affidavit. This second attempt was rejected by the court office on the basis that the affidavit did not specify that it was made in support of a motion to dispense with a bond. The court found that there was nothing in the *Estates Act* or *Rules of Civil Procedure* that required this type of language to be included.

In the end concluded that, on the basis of the materials filed, it was an appropriate situation to dispense with a bond – and also apologized to the applicants for the delay.

Have a great day,

Megan F. Connolly

E-Mail Trumps "Snail Mail" - A Welcome Initiative

Posted on October 27, 2009 by Hull & Hull LLP

Last week, Mr. Justice Brown released an Endorsement involving an Application for Confirming of Resealing of Appointment, in which he directed the Estates Registrar to offer to Applicants for Certificates of Appointment the option of communicating with the Estates Office by e-mail.

Lawyers with experience in obtaining Certificates of Appointment of Estate Trustee (and other related probate documents) are familiar with the standard form corrections notice issued by the Toronto Region Estates Office, and the inherent delays that may result from dealing with such correction notices. Refer to our firm blog (by Natalia Angelini) and podcast (by David Smith and me) for further information on this issue. The practice to date has been for the Toronto Estates Office to send a standard form corrections notice to the Applicant which identifies the deficiencies in the filed materials. Frequently there arises a back-and-forth between the Applicant and the Estates Court via regular mail while the Applications are rectified and processed.

The issue before the Court on this matter was whether the Toronto Region Estates Office could communicate by e-mail with Applicants for Certificate of Appointments to inform them of their corrections, and to receive corrections from them. As Mr. Justice Brown remarked in his Endorsement, the Court is relying on "snail mail" to conduct its business in 2009. He suggested that real access to justice requires the provision of a variety of ways to communicate, and; "more fundamentally, the time has come to recognize the stark reality that our court ... lags unacceptably behind in the use of electronic communication with our court users". The Court concluded that it could not find anything in the *Rules of Civil Procedure* prohibiting reliance on electronic communications, and therefore on a "go forward" basis the Court should offer every Applicant the option of communicating by e-mail with the Toronto Region Estates Office in respect of corrections to deficiencies in the Application.

The *Rules of Civil Procedure* should be interpreted to secure the "most expeditious" determination of every civil proceeding (Rule 1.04(1)). This welcome and progressive initiative should go a long way towards realizing that objective.

Sarah Hyndman Fitzpatrick

Capacity Litigation: A Clarification on Costs

Posted on September 25, 2009 by Hull & Hull LLP

A September 8, 2009 endorsement of Justice D.M. Brown helps to clarify the costs of capacity litigation.

Fiacco v. Lombardi, 2009 CanLII 46170 (ON S.C.) involves four siblings who disputed the management of their mother's property. She executed a continuing power of attorney for property appointing all four of her children as her attorneys to act jointly. That didn't go so well.

The mother suffers from dementia. In 2008, the four children entered into contested guardianship litigation over their mother; two were appointed guardians by on January 23, 2009 by Order of Cameron J. That round of litigation cost the mother $30,022.22.

The two children who were not appointed were ordered to provide information about their mother's assets and the original will of their mother to the guardians, and to transfer assets to the guardians. They did not act quickly.

Justice Brown states, at paragraph 14, that "The view...that the Order did not require compliance forthwith was dead wrong: when a court appoints guardians of the property of an incapable person, any other person with notice of the order is required to deliver up immediately to the guardians all property of the incapable person that he or she might possess."

At paragraph 10, His Honour states that the "respondents acted contrary to their obligations under the *SDA* [*Substitute Decisions Act*] and they obstructed their mother's guardians in discharging their statutory duties."

The *SDA* at sections 33.1 requires guardians to make reasonable efforts to determine if an incapable person has a will; and sections 33.2(1) and (2) require a person who has the incapable person's will to deliver it to the guardian "when required by the guardian."

The Court did not approve of the children seeking further funds ($29,154.14) from their mother's estate to "fund their continuing sibling rivalry."

Justice Brown emphasized that "capacity litigation should reflect the basic purpose of the *SDA* – to protect the property of a person found to be incapable and to ensure that such property is managed wisely so that it provides a stream of income to support the needs of the incapable person: *SDA*, sections 32(1) and 37."

His Honour states that members of the Bar should not presume that all parties to contested capacity litigation will have their costs paid by the estate of the incapable person.

This endorsement emphasizes that family fights cost everyone involved.

Enjoy the weekend.

Jonathan

From PROBATOR, VOLUME 13, NUMBER 1, FEBRUARY 2009

A Quartet of Practical Practice Tips

by Paul Trudelle

As you may know, Mr. Justice Brown has been developing a new practice direction for the Estates List in Toronto which will incorporate changes to estates practice in Toronto. Mr. Justice Brown has also released a number of recent decisions that are highly informative to the Estate Bar.

In this issue, I will refer to four of the decisions that will be of assistance to not just the litigator, but to the estates practitioner, as well.

Multiple Wills: Proof of Non-Revocation1

The first two decisions deal with issues related to multiple wills. As noted by Mr. Justice Brown, multiple wills are a commonly used estate planning device.

When the estate trustee files an application for a Certificate of Appointment for the General (Primary) Will, they must provide some evidence to the Estates Office that the General (Primary) Will remains in force and has not been revoked by the Excluded Properties (Secondary) Will. This evidence can be in the form of an affidavit confirming that the General Will remains in force and has not been revoked by the Secondary Will.
This is to overcome the problem whereby the Estates Office is often not able to determine, on the face of the General Will alone, that the General Will remains in force notwithstanding the existence of the Secondary Will.

Multiple Wills: Different Executors2

Where a testator makes two wills, with each will covering different assets and each naming different Estate Trustees, the local estates registrar can issue separate Certificates of Appointment of Estate Trustees to the different Estate Trustees, limited to the assets referred to in each of the wills.

This decision clarifies the effect of s. 17 of the *Estates Act*, which provides that unless there is a special order of the court, no probate or administration shall be granted until the local registrar has received a certificate from the Estate Registrar for Ontario indicating that no other application has been made in respect of the property of the deceased. Mr. Justice Brown concluded that the section was purely administrative and that it should not be read as altering the common law that a testator may make multiple wills naming different Estate Trustees to deal with different property. Mr. Justice Brown read s. 17 to refer to no other application having being made with respect to the "same property":

(Bonus practice tip: Mr. Justice Brown noted if both Estate Trustees apply at the same time, the grant is made on the same instrument, with the power of each Estate Trustee being distinguished.)

Place of Commencement of Application: Certificate of Appointment3

Section 7(1) of the *Estates Act* provides that an application for a grant of probate shall be made to the Superior Court of Justice and shall be filed in the office for the county or district in which the testator had at the time of death a fixed place of abode.

1 Re Kerzner Estate, *2008 CanLII 42020 (Ont. S.C.)*
2 Re Goushleff Estate, *2008 CanLII 53131 (Ont. S.C.)*
3 Re Mcmichael Estate, *2008 CanLII 28443 (Ont. S.C.)*

Even if a Notice of Application seeks other relief, it would appear from Mr. Justice Brown's endorsement that if the Application is for an Order certifying applicants as Estate Trustees, it should be brought in the county or district in which the testator resided at the time of death.

Place of Commencement of Application: Guardianship[4]

Contrasted with the above is the case of an application for guardianship under the *Substitute Decisions Act*. In the case of an application for a grant of probate, s. 7(1) of the *Estates Act* provides specific direction with respect to venue. However, in the case of an application for guardianship under the *Substitute Decisions Act*, there is no similar statutory direction. Accordingly, under Rule 13.1.01(2) of the *Rules of Civil Procedure*, a proceeding may be commenced in any court office in any county named in the originating process. (Rule 13.1.01 expressly applies unless a statute or rule requires the proceeding to be commenced, brought, tried or heard in a particular county.)

Updated Estates List Practice Direction

As stated, Mr. Justice Brown has also initiated a process to update the Estates List Practice Direction for Toronto: the current Pracetice Direction is almost ten years old. He has circulated a draft for comments to members of the Estate List Bench and Bar Committee, and a number of other members of the Bar.

One suggested change includes the implementation of an Estates List Scheduling Court for applications that are to involve a hearing of one hour or more. The purpose of the Scheduling Court would be to put a case timetable in place.

It is expected that the revised Practice Direction, once finalized, is to be implemented early this year.

4 Robertson v. Robertson, *2008 CanLII 53132 (Ont. S.C.)*

Ashton Estate v. South Muskoka Memorial Hospital Foundation, 2008 CanLII 21421 (ON S.C.)

BARRIE COURT FILE NO.: 08-0103
DATE: 20080506

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
HARVEY PAUL WROE, Estate Trustee of the Estate of Hugh Williams Ashton, Deceased Applicant	G. Wood, for the Applicant
- and -	
SOUTH MUSKOKA MEMORIAL HOSPITAL FOUNDATION, HUGH E. ASHTON, IAN BRUCE ASHTON, C. PAUL ASHTON, ESTHER J. ASHTON, M. ANNE CAMPBELL, ELLEN I. JARMAN, MARTHA G. ROBERTSON and MARY LYNN WROE Respondents	No one appearing for the Respondents
	HEARD: April 15, 2008

McISAAC J.

[1] This is an application for the determination of rights under a will brought under R.14.05(3)(d) by one of two estate trustees. The other estate trustee has not joined in the application as she is also an affected beneficiary. She has been duly served as a respondent along with all other effected beneficiaries. None of them appeared at the hearing of the application.

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CHRONOLOGY

1987	having attained 69 years of age, the testator had transferred his RRSPs into two RRIFs
1997	the testator transferred and merged these two RRIF's into one RRIF with TD Evergreen Investment Services – Account #817-5007-T;
1998	the testator executed a beneficiary designation for his "Mutual Fund RSP – Account Number 817-5007-T" in favour of his eight children;
2001	the testator executed his will in which he conveyed 95% of the residue of his estate to his eight children in unequal shares and he specifically appointed each of them beneficiaries of any "pension plan benefits or registered retirement savings plan" that he may own;
2007	the testator died at which time the RRIF was valued at approximately $370,000.00

ISSUES

1. Does the Nomination of Beneficiary executed in 1998 in favour of his eight children constitute a valid designation under section 5.51(1)(a) of the *Succession law Reform Act* ("SCLRA")?

[2] I am satisfied that this document is a valid designation despite purporting to deal with his "Mutual Fund RSP". In my view, the designation is saved by the specific reference therein to the RRIF account number. Since no contrary intention was expressed in this designation, each child would take in equal shares.

2. Does the revocation clause in the will constitute a valid revocation of the 1998 designation pursuant to section 52(1) of the SLRA?

[3] This revocation is only effective if it "relates expressly to the designation, either generally or specifically": see section 52(1). This clause purports to revoke "all wills and testamentary dispositions of every nature or kind whatsoever made by [the testator]". I am satisfied that the designation in 1998 was a "testamentary disposition" for the purposes of this sub-section and this clause in the will effectively cancelled it: see *Laczova Estate v. Madonna House* [2001] O.J. No. 4992 (C.A.) at paragraph 9.

3. Does the will convey the proceeds of the testator's RRIF to his eight children in unequal shares?

[4] At the time of his death the testator was not the recipient of any pension plan benefits nor did he own any RRSPs. He was, however, receiving payments from his RRIF which was a derivative of his RRSPs. These had been required to be converted into RRIF's under the *Income Tax Act*. This circumstances distinguishes this situation from the one that prevailed in *Re: Konanz* (1978) 88 DLR (3d) 82 (Sask. C.A.) where the court refused to include the testator's "term deposits" in a bequest of "all my bonds and debentures" which contained no such direct link.

[5] At the time he executed this will in 2001, the testator must have had in mind his RRIFs when he "appointed" his eight children beneficiaries of "any pension plan benefits or Registered Retirement Savings Plan that [he] may own". Since this "appointment" forms part of the general bequest to his children of 95 percent of the residue of his estate in unequal shares, I find that it simply constitutes a "far greater certainty" term that does not modify in any way the general bequest that preceded it.

[6] For these reasons, I find that the eight children of the testator are beneficiaries of the RRIF in the unequal shares provided for in the will.

CONCLUSION

[7] Order accordingly.

[8] The estate trustee will have his costs for this application out of the estate on a full indemnity scale to be assessed upon the passing of accounts.

McISAAC, J.

Released: May 6, 2008