HULL & HULL'S
ESTATE, TRUST AND CAPACITY LAW
BREAKFAST SERIES

SOLICITOR'S NEGLIGENCE IN ESTATE MATTERS

"Will Drafting Considerations for the Civil Litigator"

"Some Minefields To Be Avoided"

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Will Drafting Considerations for the Civil Litigator

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WILL DRAFTING CONSIDERATIONS FOR THE CIVIL LITIGATOR

Introduction

Great care must of course be taken in circumstances where the solicitor had reasonably concluded that his client has diminished capacity and yet still wishes to at least prepare a will or do some estate planning.

In such circumstances, the solicitor must of course conduct herself carefully.

However, circumstances such as this can often lead to litigation and as such there are of course certain steps that can be taken to limit the "extent of the battle" at a later date.

Legal Issues

(a) Testamentary Capacity

Determination of whether or not a person has testamentary capacity is a question of fact. While the definition itself has been considered by many

courts, the law in recognizing leading authority which describes the degree of mental capacity necessary to prepare a will is found in *Banks v. Goodfellow*[1].

The underlying principle is that the testatrix' mind must go with her testamentary act, whether making or revoking a will.

When one reviews the numerous cases that consider the question of testamentary capacity, it appears that the application of the definition by the courts has been more subjective than objective.

The same legal issues that a Judge must consider during a will challenge proceeding when hearing an issue of testamentary capacity must also be considered by the solicitor who is drawing the will for her client or a new perspective client. The question of whether or not the client possesses testamentary capacity at the time can be a difficult determination.

In making this assessment, the solicitor should ensure that the client meets the standard elements of the definition of testamentary capacity.

As is usually the case, the solicitor's determination as to whether or not her client has testamentary capacity, will be based primarily on her observations of the client and the surrounding circumstances.

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[1] (1870), L.R. 5 Q.B. 549.

Persons of marginal capacity are often targets of increased efforts to influence their testamentary dispositions.

As such, in making an assessment of a client's capacity the question of undue influence and the level of influence is important.

(b) Undue Influence

The following is a list of some questions to consider in respect of whether or not the client is being unduly influence to make testamentary disposition decisions:

- Did someone other that the client select the solicitor or arrange the appointment?

- If so, is such arrangement inconsistent with previous appointments.

- Who drove the client or accompanied the client to the appointment?

- If so, is this arrangement inconsistent with previous appointments.

- Is a third person present during the initial

interview?

- Is the solicitor able to arrange a meeting with the client alone? If not, is there a good reason?

- Does the proposed plan:

  - favour one or more relatives over other relatives having a similar family relationship?

  - favour non-relatives over relatives?

- If favouritism is proposed by the client, is it a departure from the existing estate plan?

- Does the client have a rational reason for the proposed favouritism?

- Is there any indication that the preferred persons are promoting the favouritism?

- Are there existing jointly held assets by the client and the favoured beneficiary?

- If the beneficiary holds jointly owned assets with the client then how was the jointly owned asset created, for how long, the size of the asset and the use of the asset itself?

- Is the favoured beneficiary designated as a beneficiary under a RRSP or life insurance policy, etc. and if so, what is the history of such assets including their creation, duration and magnitude?

- After the initial interview, does the estate plan change to favour one or more beneficiaries over another or diminish or delete a disposition and if so, does the client state a rational reason for the change?

- Is there any evidence that the client is discussing her dispositions with the beneficiaries during the planning process.

The following is a list of questions that I use at examinations for discovery. It can be a useful tool to review in order that solicitors can get a sense of the approach and the type of questions that may be asked of them if the matter is ultimately litigated:

GENERAL QUESTIONS:

Education of deceased;

Employment of deceased;

Relationship of interested parties to deceased;

Particulars and production of previous wills and other pertinent documents such as separation agreement, inter vivos settlements, letters, etc;

Names of prior solicitors;

SPECIFIC QUESTIONS:

Ability of deceased to understand the will;

Ability of deceased to understand the language;

Any hearing problems;

Ability of deceased to read the will;

Dependency of the testator on persons interested and vice versa;

Statements by the testator concerning testamentary intention or acts;

Names of acquaintances with whom the testator had a close relationship;

Idiosyncrasies of deceased;

Statements or facts relating to the testator's feelings towards a beneficiary or other person interested;

Medical evidence:

(a) Known physical capacities or incapacities;

(b) Known mental capacities or incapacities;

(c) Expert evidence determined after death, for example psychiatric evidence based upon evidence obtained from relatives or friends without an actual examination of the testator as dealt with under the heading of Medical Evidence;

(d) Hospital records or autopsies;

(e) Any medical opinions as to testamentary capacity or mentality at the time of execution;

(f) Any fact which would indicate senility or mental illness;

Particulars of execution:

(a) Sequence of signing;

(b) Position of testator;

(c) Position of witnesses;

(d) Ability of witnesses to see testator;

(e) Actual or implied acknowledgment of signature;

(f) Request by testator for witnesses to sign;

Facts relating to instructions given to solicitor on preparation and execution of will;

(a) Length of testator's acquaintance with solicitor;

(b) Who made the arrangements for the appointment;

(c) Was the solicitor of the testator his ordinary solicitor or was he the solicitor of choice of the beneficiary or a solicitor spuriously chosen at the last moment;

(d) Person accompanying testator to solicitor's office;

(e) Presence or absence of persons in solicitor's office at time for instructions or execution and at time of interviews with the deceased;

(f) Extent of solicitor's acquaintance with the deceased;

(g) Production of solicitor's notes of meetings with the testator;

(h) Details of questions put to testator concerning assets;

(i) Questions put to testator concerning relatives (born out of wedlock);

(j) Questions put to testator re other persons who might benefit, for example a housekeeper or as suggested by solicitor taking instructions;

(k) Evidence of questions put to testator concerning prior wills;

(l) Evidence of questions put by solicitor to testator to explain changes in wills;

(m) Testator's reasons for changes in wills;

(n) Testator's memory as to recent events;

(o) Testator's memory as to remote events;

(p) Other tests conducted by the solicitor for testamentary capacity;

(q) Evidence of testator's questions concerning cloistering of testator;

(r) Ability of testator to be influenced - strength of mind;

(s) Ability of testator to influence others - strength of mind;

(t) Historical events or afflictions which might influence the testator's mind in relation to the making of a disposition;

(u) Ability of beneficiary to coerce testator;

(v) Evidence of any acts of physical or mental cruelty either by or against the testator;

(w) Inducements held out by the beneficiary of the testator;

(x) Inducements held out by the testator to the beneficiary;

(y) Any other tests conducted by the solicitor in relation to undue influence;

(z) Particulars of any discussion between solicitor and testator as to tax or Succession Duty implications of the will;

(aa) The manner in which the instructions for the typing of the will were given by the solicitor to his staff;

(bb) Length of time elapsing between first meeting with testator and meeting at which testator executed will;

(cc) Persons accompanying the testator to solicitor's office on the second visit for the execution of the will;

(dd) Persons present at the solicitor's office at the time of the second visit for the purpose of executing the will;

(ee) Evidence of reading over of the will to the testator;

(ff) Particulars of items especially discussed with the testator;

(gg) Statements made by deceased after execution, eg. glad that the ordeal was over;

(hh) Any notable changes in testator's behaviour, mental or physical health before and during the time that the will was being prepared and upon the second visit for the purpose of executing the will;

(ii) Any correspondence by or from the testator to the solicitor;

(jj) Any suspicious circumstances.

Practical Strategic Steps to Consider

If the client intends to make a testamentary disposition which favours one client over another, then at the initial interview it should be made clear to the client that there is of course the possibility of subsequent litigation which given the client's instructions is reasonably foreseeable. Some explanation should be given to the client as to the nature and scope of the litigation and the potential results. Furthermore, an overview of the costs consequences of the litigation should be provided.

In cases where litigation is reasonably foreseeable it may be appropriate to discuss and consider with your client some strategic and tactical steps that can be taken in her lifetime to ensure that the will or trust is held to be valid at some later date. Presumably, considerations can be given to defending against subsequent litigation.

The strategic and tactical steps that can be taken can of course be incorporated into the estate plan itself during the client's lifetime.

Needless to say, throughout the process of preparing the strategic plan, the solicitor should be constantly mindful that careful notes and records must be created throughout the process so that the estate plan and the steps to uphold the will or trust are fully documented and communicated to the client.

The following is a list of considerations to keep in mind when making the will or trust litigation proof:

1. Avoid preparing the estate plan through third party professionals. To the extent that it is possible, contacts and communications should be directly between the solicitor and her client. Continue to encourage your client to travel to the meetings with you alone and make the appointments personally. Furthermore, do your best to exclude family members from any of the meetings or other phases of the planning process.

2. If you are faced with a situation where your client has chosen to favour one family member over another then create a comprehensive record of your client's intentions. At the minimum, your client's handwritten note or letter describing the reasons for his or her decision can be helpful. Some have even suggested that an audio tape be prepared. Whatever choice of communication vehicle is used, it is most important that it has been genuinely produced by the client.

3. In terrorem clauses

FORFEITURE OF GIFTS IN A WILL

An effective means of dissuading beneficiaries from frivolous or unwarranted challenges to a will is to provide a clause in the will that if its validity is challenged by the beneficiary who receives the gift, that entitlement to the gift is forfeited.

Such a clause is often referred to as an "in terrorem" clause and is really a condition imposed by the willmaker on the gift. Such a condition if carefully and properly drawn is legal and enforceable and while it is true that, like all clauses of forfeiture, the courts will construe such a clause strictly, such clauses must be approached with great care and some trepidation if a challenge to the will is being considered by the beneficiary who receives the gift.

A condition of this nature is particularly effective in avoiding litigation in situations where the willmaker has designated unequal gifts among, say his children, for whatever reason, which gifts are perceived as unfair by one or more of the children, for whatever reason.

If such a gift to a disappointed beneficiary is substantial and meaningful, that beneficiary should be seriously dissuaded from a frivolous or spiteful challenge to the validity of the will if such a clause is included in the will, whereas if it were not

present and his gift, in any event of the litigation would be substantial, such a frivolous or spiteful challenge might well be taken.

In preparing such a clause, the draftsman must be careful to limit the condition to challenges to the validity of the will and not to proceedings relating to interpretation or related matters over which the court has exclusive jurisdiction, otherwise the clause may well be ineffective.

A more comprehensive treatment of this topic is contained in Canadian Forms of Wills, Sheard Hull Fitzpatrick, fourth edition, page 119.

A form for such a clause is contained at page 119 of that text as follows:

> **"I declare that if any beneficiary of this my Will shall, within ____ years after my death and without the consent in writing of my Trustees, which my Trustees in their discretion may give or withhold, institute any action or proceeding in which the validity of this my Will or any Codicil thereto is sought to be impeached, then, in every such case, such beneficiary shall absolutely forfeit and lose all interest in and right to any gift to him hereunder or under any Codicil hereto and every gift so forfeited shall fall into my residuary estate unless it is a gift of a share of my residuary**

estate, in which case it shall devolve as though such beneficiary had died at the time such action or proceeding was instituted".

4. In circumstances where medical evidence is required then some consideration should be given to obtaining more than just a "one line" letter from the client's family physician. If the circumstances are such that the question of capacity is truly an issue then some consideration should be given to encourage the client to obtain an expert opinion as to his or her capacity to make a will or create the trust. With the client's consent, you could seek to examine his or her medical records and interview the client's physician(s). Some consideration may also be given to insisting that the client attend at his or her family physician to obtain a current physical examination.

Conclusion

While one is not always able to predict litigation, the solicitor who prepared the will and obtained the instructions from the clients, and who is preparing an estate plan, is often alerted to the prospect of litigation by virtue of the circumstances surrounding the preparation of the documents themselves. Presumably, any steps taken by the solicitor at the outset will go a long way to help him to avoid unnecessary legal costs and expenses in the future.

PRECEDENT ADR CLAUSE FOR LAST WILL AND TESTAMENT

(jointly created in the early 1990's by David Simmonds of Gowlings, Barrister and Solicitor (Ottawa) and Ernest G. Tannis of the ADR Centre (Ottawa), Solicitor and Mediator)

IT IS MY INTENTION that any dispute involving the persons interested in my estate shall, to the extent practicable, be resolved by Alternative Dispute Resolution ("ADR") employing negotiation among those involved in the dispute with the assistance of my Trustees and legal counsel as needed throughout and invoking where appropriate direct mediation, conciliation, or any hybrids thereof, or arbitration by my Trustees or as my Trustees may establish pursuant to the Arbitration Act (Ontario), R.S.O. 1990, with the alternative of litigation as a last resort; to ensure the privacy of my estate's affairs, to retain and facilitate goodwill among my Trustees and the persons interested in my estate, and to manage ongoing conflict by cost minimization and the creative pursuit of reasonable settlement options; subject to any necessary, emergency or unavoidable application to a Court of competent jurisdiction by my Trustees for directions or interpretation of any other usual or historical role provided by the Courts in estate matters (hereinafter referred to as the "ADR provision").

a. It is my hope that while the Court's public policy supervision is respected, the beneficiaries and their counsel shall not unintentionally, unwisely, or wastefully usurp my estate's assets in conflict situations adverse to the financial and personal interest of those entitled to benefit.

b. It is my intention that, quite apart from the award of costs that might ordinarily follow from a judicial or arbitral decision on the merits of a proceeding by or in respect of my estate, the judicial or arbitration body settling costs take into account the extent to which the various parties to the proceeding have complied with the spirit, letter and intention of this ADR provision, before and during any contentious or adversarial proceedings, including the discretion to charge any costs against a beneficiary's interest who has not so complied; all costs incurred as a result of my Trustees' unfettered, discretionary action shall be paid by my estate and my Trustees are fully indemnified thereof.

c. If my Trustees determine that a person interested in my estate has failed to comply with this ADR provision, my Trustees shall, to the extent that the terms of this my Will so permit, first charge the interest of such person in my estate, and not the general estate capital, with the amount that they determine represents the costs to the estate and the persons interested in the estate arising from such failure.

d. Notwithstanding anything else in this Will, a person accepting a benefit from the estate shall be deemed to have accepted such benefit on the condition that he or she shall submit to this ADR provision; so that he or she shall in determining whether to accept a benefit from the estate have been put to his or her election whether to accept such benefit on such terms, or renounce it; and my Trustees shall ensure that such person is made aware of this provision prior to accepting such benefit. If he or she determines not to accept a benefit from the estate, he or she shall be deemed not to have been alive at any time he or she would otherwise be required to have been alive in order to receive such a benefit.

e. Unless clearly indicated to the contrary by the parties and their legal counsel, or until a mutually legally-binding agreement is arrived at, all negotiations and dispute resolution processes employed shall be considered conducted on a without prejudice basis.

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Alternative Dispute Resolution (ADR) Provisions

a. Negotiate If a dispute arises out of or emerges in relation to any aspect of this agreement, the parties shall negotiate in good faith, to mutually resolve same; should the matter not be settled in this way, the parties shall explore and implement jointly approved appropriate processes of alternative dispute resolution (ADR), enlisting the assistance of one or more third party neutrals, including, where appropriate, use of mediation.

b. Mediation Should the parties invoke mediation, such process shall be pursuant to the rules of the Arbitration and Mediation Institute of Canada, failing such rules, of the American Arbitration Association.

c. Arbitration Should the matter still not be finalized to mutual satisfaction within 60 days of the dispute first arising (or such shorter or longer period if all parties so agree), either party may invoke the arbitration process pursuant to the rules of the Arbitration and Mediation Institute of Canada, failing such rules, of the American Arbitration Association.

d. Urgency Notwithstanding the foregoing, only in cases of emergency or potential irreparable jeopardy to any legal rights or interests, either party may immediately, prior to or concurrently, commence litigation proceedings in the appropriate form.

e. Continual Negotiation However, the parties and their lawyers, during mediation, arbitration, litigation or any other ADR proceedings or any combination thereof, shall continue to negotiate, whenever possible and to continually seek settlement options and processes.

f. Without Prejudice Unless clearly indicated to the contrary by the parties and their legal counsel, or until a mutually legally-binding agreement is arrived at, all negotiations and dispute resolution processes employed shall be considered conducted on a without prejudice basis.

g. Confidentiality Statements made and documents produced pursuant to this ADR clause, including notes, records and recollections of the parties and any neutrals are not otherwise discoverable, are not subject to disclosure through discovery or any other process and are not admissible into evidence for any purpose, including impeaching credibility. All sessions are confidential and protected from disclosure for all purposes, and neither the third party neutrals, nor any materials, verbal or written, are compellable by subpoena as witnesses.

h. Costs If the dispute cannot be mutually settled by the parties within the period referred to above and an adjudication is required, whether by an arbitrator or a judge, the adjudicator in determining the award of costs shall take into consideration whether or not the parties did or did not comply with the spirit, letter and intent of this dispute resolution provision.

i. Intent This ADR clause is meant to assist corporations and individuals doing business in North America or internationally to provide a cost effective, collaborative process for the resolution of disagreements without recourse to domestic Courts in the Nations, States, Provinces, Territories or other jurisdictional areas where the parties reside, businesses have their head offices or operations.

June 2000

HULL & HULL
BARRISTERS AND SOLICITORS

ESTATE, TRUST AND CAPACITY LAW BREAFAST SERIES

Thursday, June 22, 2000
8:15 a.m.

SOME MINEFIELDS TO BE AVOIDED

1) Sections 44 and 45 of the *Estates Act of Ontario*;

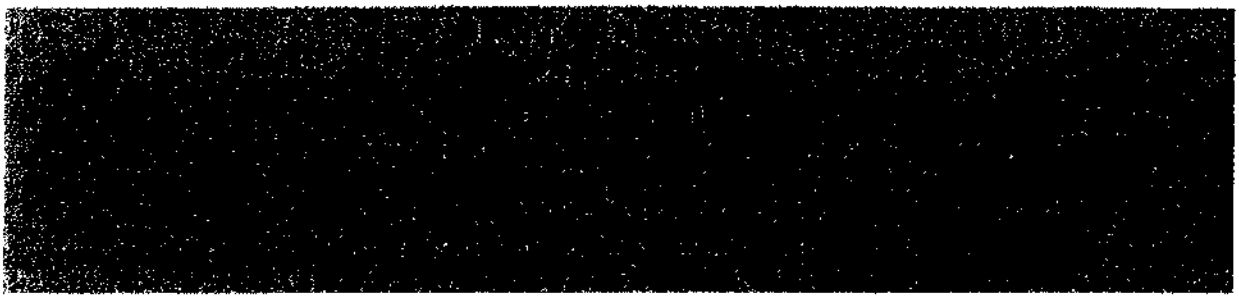
2) Sections 38(2) and (3) of the *Trustee Act of Ontario*;

3) Ascertainment of Heirs on Intestacy;

4) Sending wills out for execution by clients.

THE PROBATER

Volume 2, Issue 1 April 1998



A Minefield To Avoid When Claiming Against An Estate

A little known limitation period respecting claims against an estate is contained in Sections 44 and 45 of The Estates Act of Ontario, R.S.O. 1990, c. E.21, which was brought into sharp focus by the recent case of Ethier v. Raspberry, 16 E.T.R. (2d) 197.

Briefly, Sections 44 and 45 of The Estates Act deal respectively with liquidated and unliquidated claims against an estate and were originally passed, in order to expedite the winding up of estates of deceased persons by affording to personal representatives a means of determining, within a reasonable time, the legal validity of claims which they thought should be contested.

The provisions of these sections are not only archaic and vestigial, they are completely superfluous, as adequate means and processes have developed over the years to put forward claims against an estate. These sections which contain a complete code of procedure, provide generally that where a claim or demand is made against the estate of a deceased person or when the personal representative has notice of such a claim or demand, the personal representative may serve a notice in writing that the personal representative is contesting the claim in whole or in part and must refer to the appropriate section of the act.

Within thirty days after the receipt of such notice of contestation of claim, or within three months thereafter, if the Judge of the Ontario Court (General Division) on application so allows, the claimant may, upon filing with the registrar a *Statement of Claim* verified by an affidavit and a copy of the notice of contestation, apply to the Judge of the Ontario Court (General Division) for an order allowing the claim and determining its amount and the Judge will then hear and determine the matter.

The sections then go on to provide that if the claimant does not make such application within the prescribed times the claimant shall be deemed to have abandoned the claim and it is forever barred. These are words of finality.

In the Ethier v. Raspberry case, the claimant's solicitor wrote to the solicitor for the personal representatives by a letter dated January 17, 1994 advising that he acted for the claimants "in a proposed action". No mention was made in the letter as to the amount or basis of the claim. Subsequently, on June 7, 1996, the plaintiff's solicitor commenced an action against the personal representatives of the estate and on that date wrote to the solicitor for the personal representatives requesting that solicitor to accept service of the Statement of Claim, a copy of which was enclosed in the letter.

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...continued

The solicitor for the personal representatives then served a Notice of Contestation of claim under Section 44 of The Estates Act on June 21, 1996 contesting the Plaintiff's claim and requiring the claimant to comply with the terms of that section, which required the claimant to file a Statement of Claim verified by affidavit and to bring an application for the claim within thirty days, or , with leave of the Judge, within three months.

The Statement of Claim was served personally on the personal representatives on August 14, 1996 and a Statement of Defence was served on September 5, 1996. No affidavit verifying the claim or application for an order allowing the claim was ever filed by the plaintiffs.

The trial Judge held that on a plain reading of the statute, once the claimant received a Notice of Contestation of Claim and that the claimant intended to pursue this claim, the claimant was obliged to comply with the statute and to file a Statement of Claim and affidavit of verification thereof and to bring the application, and if this was not done, the plaintiffs were deemed to have abandoned their claim and it was forever barred.

The trial Judge also relied on the case of Dunn v. McNeil Estate (1995) 8 E.T.R. (2d) 313 (N.B.Q.B.) which held on statutory language almost identical to section 44 of The Ontario Statute, that the failure to comply strictly with the provisions of the statute was fatal and this failure to comply with the statutory requirements resulted in the abandonment of the claim and the claim was forever barred.

While the decision in Ethier v. Raspberry is under appeal, whether or not the appeal succeeds, the sections will remain and must be attended to, and persons involved in claims against estates should have these sections on their checklist to avoid a professional liability claim.

Rodney Hull

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YET ANOTHER MINEFIELD TO BE AVOIDED WHEN CLAIMING AGAINST AN ESTATE

Hitherto, solicitors contemplating the taking of action against estates to whom the words *"Smallman v. Moore"* were not called unbidden to the lips, took great comfort from the marginal notes "actions against executors and administrators for torts" opposite subsections 38(2) and (3) of the *Trustee Act of Ontario* which provides as follows:

> 38(2) "Except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of his or her person or to another person's property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong.
>
> 38(3) **Limitation of actions.** – An action under this section shall not be brought after the expiration of two years from the death of the deceased."

In the case of *Smallman v. Moore* [1948] S.C.R. 295, [1948] 3 D.L.R. 657, the Supreme Court of Canada held that, based upon well established principles of statutory interpretation, the marginal notes form no part of the statute and in the case of these subsections, the Court held that the marginal notes were not of assistance in the interpretation of the section and presumably are to be ignored in interpreting them.

While the rejection of marginal notes by Courts as being of no assistance in the interpretation of the statute can be justified on well established principles of statutory interpretation as set out above, they are rare and in my view, when such a decision has

been made it should be forcibly brought to the attention of the profession, especially when it is the Supreme Court of Canada which makes the decision.

Not only has this not been done, astonishingly, those marginal notes have been perpetuated in the subsequent statutory revisions up to date and no mention is made of this case in the *Ontario Statute Citator* or other legal publications to which general practitioners would ordinarily consult respecting this section.

Solicitors have, until recently, had little reason to have this problem respecting periods of limitations involving actions against estates raised, and except in the case of *Murphy v. Welsh* (1993), 106 D.L.R. (4th) 404, a decision of the Supreme Court of Canada which involved competing limitation provisions in the *Limitations Act* of Ontario and the *Highway Traffic Act* of Ontario the problem does not seem to have been raised.

That case related to tortious liability.

This decision could not be expected to excite solicitors to a review of the jurisprudence respecting subsections 38(2) and (3) as it would have appeared to simply strengthen the concept that subsections 38(2) and (3) referred only to actions involving torts as indicated by the marginal notes.

It was not until the case of *Roth v. Weston Estate*, 36 O.R. (3d 515) and *Edwards v. Law Society of Upper Canada* (11 March, 1998), Toronto (94-CQ-48311) (Ontario Court, General Division) [unreported] respectively, decisions of Goudge J.A. of the Ontario Court of Appeal and Sharpe J. of the General Division that the serious question of the classification applicable to a cause of action against an estate pursuant to subsections 38(2) and (3) was vividly brought to the notice of the profession.

In the case of *Roth v. Weston Estate*, two podiatrists who had been practicing together as partners, entered into an agreement to fund the purchase of each other's interest in the partnership on their respective deaths by taking out life insurance policies on each other's lives.

One of the parties committed suicide within the two-year period specified in the policy and the other partner sued the estate of the partner who committed suicide.

Unfortunately, the action against the estate of the partner was commenced outside the limitation period of two years set out in subsection 38(3) of the *Trustee Act of Ontario* and the Court of Appeal held that on the basis of *Smallman v. Moore*, subsection 38(2) did not apply only to tortious acts but also to personal injury or damage arising out

of breach of contracts other than ordinary commercial contracts where the breach did not involve personal injury or damage.

Similarly, in the case of *Edwards v. Law Society*, Sharpe J. after reviewing the applicable authorities including *Roth v. Weston Estate* (supra) held in a case of breach of trust which was not fraudulent, that such a cause of action was included in subsection 38(2) and was excluded from the provisions of section 44 of the *Limitations Act of Ontario* which provides for a six-year limitation period.

Both of these judgments referred to the Judgement of Locke J. in *Smallman v. Moore* at page 298 (S.C.R.) and 666 (D.L.R.) of his Judgment where he states:

> "It is true that the manner in which redress is to be obtained for the injury is by an action for breach of contract but, in considering whether the words "a wrong to another in respect of his person" in s. 37(2) of the *Trustee Act* apply, it is I think the nature of the injury rather than the form of the action in which redress may be obtained which is to be determined. That the breach of a contract of this nature is a mere personal wrong, is, in my opinion, concluded by authority: the injury occasioned is a personal injury to the plaintiff. Such an injury is, in my view, a wrong to the plaintiff "in respect of his person" within the meaning of the section, whether it results from a breach of contract or is occasioned by a tort. In the *Sussex Peerage* Case (1844), 11 Cl. & Fin. 85 at p. 143, 8 E.R. 1034, Tindal C.J. said:
>
> "The only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words

> themselves alone do, in such case, best declare the intention of the lawgiver."
>
> Assigning to the words "a wrong to another in respect of his person" their natural and ordinary meaning, I consider they include an action in respect of a personal injury of this nature irrespective of the form of the remedy. If this were not clear some assistance in assigning the proper meaning to the words is given by the fact that cases of libel and slander are excepted. If "a wrong to another in respect of his person" was intended to mean a bodily injury or trespass to the person, it would have been unnecessary to except libel and slander where the injury is personal in its nature: the fact that these actions are excepted indicates to me that the intention was that a wider meaning should be given to the expression and that actions for all injuries of a personal nature should be included."

In his Judgment in *Roth v. Weston Estate*, Goudge J.A. at page 515 of his judgment, after referring to the passage at page 298 (S.C.R.), 666 (D.L.R.) of Locke J.'s reasons set out above, stated as follows:

> "The court made clear that at common law an action for general damages for breach of promise to marry did not survive the death of the promisor because although an action for breach of contract, it really arose from the personal conduct of the promisor and affected the personality of the promisee. However, the court concluded that such an action was encompassed within s. 38(2) of the Act as being in respect of a wrong to the person of another and, as a result, survived the death of the promisor.
>
> It is in this light that the plaintiff's action must be analyzed to determine if it comes within s. 38(2). It is not necessary to determine whether the action would succeed but simply whether, as pleaded, it comes within the subsection as an action for an alleged wrong done by the deceased in respect of the person of another.
>
> I conclude that as set up by the plaintiff this is such an action. The core of the plaintiff's case is that the deceased failed to disclose to the plaintiff the condition from which he was suffering that led to his

> untimely death and that, in taking his own life in these particular circumstances, the deceased breached his personal fiduciary duty to the plaintiff. As well, the plaintiff alleged that the deceased breached a contractual term that he was required not to conduct himself in such a way as to disentitle the plaintiff from receiving insurance benefits. As a result, the plaintiff asserted that he suffered significant personal loss.
>
> In other words, the plaintiff's case is focused on the personal conduct of the deceased, the personal duty alleged to be owing by the deceased to the plaintiff, and the resulting personal consequence to the plaintiff.
>
> In my view, this action is not properly characterized, as the appellant would have it, as simply one for breach of a commercial contract. Rather, it is, in the language of s. 38(2) as elaborated in *Smallman, supra,* one for a wrong alleged to have been done by the deceased in respect of the person of another. In the interest of finality in the administration of estates, s. 38(3) requires that such an action be commenced within two years of the death of the deceased. It was not. The motions judge correctly found that the action must be dismissed."

It would seem clear that a "personal loss" as contemplated by Goudge J.A. as being included in subsection 38(2) of the *Trustee Act* must arise out of causes of action for contracts involving a fiduciary or personal relationship and accordingly, damage arising in connection with fiduciary or personal relationships such as partnership, solicitor and client, trustee and *cestui que* trust, director and shareholder, officer and director, majority and minority shareholders, employee and employer, guardian and ward, committee and patient and financial advisor and client to mention but a few, should be considered to be causes of action that should be commenced within the two-year period

which is contemplated by subsection 38(2) in accordance with the cases referred to above.

This judgment is referred to with approval by Sharpe J. in the *Edwards v. Law Society* and seems to indicate that there must be a fiduciary element to the transaction which was present in each of the cases referred to.

The nice question remains as to what is a fiduciary or personal contract as opposed to a "commercial transaction" in connection with the interpretation of the subsections and the cases.

While it may be relatively easy to conclude what is a commercial contract when entered into between two or more informed businessmen, dealing in connection with their respective occupations or businesses, it is not so easy to conclude what is a "personal contract" between persons involved in transactions with ordinary members of the public who, for many reasons, consider the transaction to be of a "personal" nature such as the purchase of an automobile or other object which may well not relate to ordinary commercial considerations.

Accordingly, in view of the somewhat confusing state of the jurisprudence, one should be very wary in determining the time during which any action against an estate is to be commenced which is not clearly commercial in its nature.

Indeed, it must be a rare care in which a solicitor should delay the commencement of an action against an estate past the two-year period, although some comfort can be taken from the fact that s. 38(3) is subject to the doctrine of "discoverability" Mackey Estate v. Mackey (1986), 24 E.T.R. 174.

Caveat Consiglio.

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BARRISTERS AND SOLICITORS
Estate, Trust and Capacity
Litigation

PROCEDURES AND RESPONSIBILITIES OF THE PERSONAL REPRESENTATIVE RESPECTING THE ASCERTAINMENT OF HEIRS ON INTESTACY OR PARTIAL INTESTACY

By: Rodney Hull Q.C.

In most cases the ascertainment of the identity of heirs on an intestacy or on a partial intestacy is often a simple and routine task, when family members are well known and close and can be readily and positively identified.

It is otherwise where the identity of family members must be ascertained at relatively remote degrees of consanguinity, such as nephews and cousins or even remoter degrees of consanguinity.

Difficulties frequently occur in cases involving estates of persons who have emigrated from foreign lands to this country, leaving no close relatives in this jurisdiction.

These cases are made even more difficult when human disasters or acts of genocide such as the Holocaust or the recent difficulties in Eastern Europe complicate this process.

Another serious problem in tracing heirs arises out of the Iron Curtain which divided Eastern and Western Europe from the cessation of hostilities in the Second World War in 1945 to 1985.
During this period, little, if any information was available regarding births, marriages or death or other vital statistics of persons who resided behind the Iron Curtain. Similar problems also arise in other jurisdictions where their vital statistics are not well or accurately recorded.

In these difficult cases, great care must be taken to ensure that some degree of certainty can be achieved as to the identity of relatives so that the correctness of the distribution cannot be challenged.

Matters are made even more difficult when determinations of degrees of consanguinity must be determined independent of whether a person's relationship arises within or outside marriage as provided by section 1(1) of The Childrens' Law Reform Act.

In most cases personal representatives rely on their solicitors to advise and guide them as to how to ascertain the identity of heirs in each case.

Accordingly, it is necessary for the solicitor to recognize that such faith is reposed in him or her and the solicitor should ensure that the advice given to the personal representatives respecting the requisite efforts which should be made to ascertain heirs will give protection to that solicitor from a claim of negligence at the suit of disappointed heirs who have not been located.

It cannot be emphasized too strongly that you should put in writing to your client that he or she is the personal representative and while you are prepared to assist in the search for heirs, he or she must bear the ultimate responsibility for

determining the identity of those persons who share in the estate.

If great care is not taken to have this firm understanding clearly documented, the solicitor will be blamed for any oversight in the search.

Just what searches should be made must be determined in the circumstances of each case, and while the requirements of section 24 of the Estates Administration Act relating to searches for persons born outside marriage in Ontario may be of some assistance respecting births or deaths in Ontario, they are not helpful in ascertaining the rights of inheritance of persons who take on the death of persons whose origins are outside Ontario.

It would seem that while little, if any guidance is set out in the cases as to the standard of care that should be exercised by personal representatives respecting the ascertainment of heirs it would seem that "all reasonable and proper searches" would describe the standard of care appropriate to this task.

While this may be a term of doubtful definition, certain steps to this identification would appear to be appropriate.

First of all, the solicitor for the personal representative should have the client make out a family tree, and if all beneficiaries of the lowest degree can be ascertained with certainty, then the intestate portion of the estate can be distributed accordingly.

Sections 42 to 47 of the Succession Law Reform Act sets out the priorities of the persons and classes of persons who take on intestacy and while clear as to what categories of persons take in the usual designation of relatives some difficulty may be encountered in the calculation of the degrees of consanguinity as set out in Section 47(8) of the Act, such a calculation can be made by a genealogist or solicitor more familiar with this problem and their advice sought.

If, after obtaining the information available and consulting the statute, there is some doubt, then enquiries of friends and relatives should be made.

Remember that when ascertaining the identity of ascendants as opposed to descendants of an intestate, the degrees of consanguinity must be determined on both the maternal and paternal sides of the deceased.

If doubt continues, newspaper or other forms of advertisement in appropriate locations for heirs should be undertaken. An advertisement for creditors alone is not sufficient.

If this does not result in a reasonable degree of certainty, then the personal representative should seek assistance from a genealogical search firm.

If doubt still persists, then an application to the Court should be made for the assistance of the Court in making the determination and an order of the Court will protect the personal representative.

**Please note: *The Probater* is a quarterly newsletter provided as an information service. It is a summary of current legal issues of concern to estate law practitioners. The comments and articles are not meant as legal opinions and readers are cautioned not to act on information provided without seeking specific advice with respect to the particular situation.

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Don't Send A Will Out For Execution By A Client Alone

by Rodney Hull, Q.C.

Two recent English cases of its High Court of Justice, Re Gray, an unreported judgment of June 24, 1997, of Lloyd J., Chancery Division and Esterhuizen v. Allied Dunbar, [1998] 2 FLR 668, a judgment of Longmore J., The Queen's Bench Division, have brought into sharp focus the problems and exposure faced by a solicitor who sends out a Will for execution by a client without the supervision of a solicitor or other legally-trained person.

In view of these cases, it would appear that no matter how explicit and clear are the instructions for the unsupervised execution of the Will by a client without legal assistance, the formalities attendant upon the legal and proper execution of a Will as provided by the statute are sufficiently complex that a client not legally trained should not be trusted to undertake this ceremony alone.

I use the word "ceremony" advisedly as the process of execution of a Will involves at least three participants, with a prescribed ritual of which all solicitors are familiar.

If it is impossible for the solicitor who prepared the Will to be physically present on the occasion of its execution, the ceremony can be supervised by another solicitor or legally-trained person or a telephone call between the client and the solicitor who prepared the Will or any other solicitor or legally-trained person at the time of execution of the will.

This should ensure proper execution in accordance with the terms of section 4 of the *Succession Law Reform Act*, thus assuring the validity of the Will, at least from the standpoint of its execution.

These recent English cases should cause any solicitor to be skeptical about an unsupervised execution ceremony, not only from the standpoint of the wording of the instructions, which may or may not be understood by the client, depending upon the sophistication of the client's ability to deal with words, but also from the standpoint of the nature of the client, himself or herself.

We are all familiar with the swashbuckling client who would consider the ceremony described in the instructions to be so much gobbledygook, and may wish to cut some corners, or the client who simply will not turn his mind to the dictated detailed instructions provided and other clients with frailties too numerous to mention.

Thus, I say that based on these cases, never, or hardly ever, can an unsupervised execution of a Will by a client be justified and the solicitor will be at risk if such an execution is attempted.

And this is so, no matter the clarity of the instructions or the reason for executing the document without the supervision of the lawyer or other legally-trained person except in the most extended of circumstances.

While at first blush, this statement may appear to be overly ominous, it reflects what is the clear thrust of Longmore J.'s stern wording set out respectively on pages 674 and 677 of the report, which constitute clear words of warning to solicitors who send wills out for unsupervised execution by a client.

These words are:

> "... a prudent solicitor regards it as his duty to take reasonable steps to assist his client in and about the execution of his will, rather than merely to inform the client how it is to be signed and attested. This means that once the client has approved the draft of a will a prudent solicitor will either invite the client to his office so that the will can be executed there or visit him with a member of his staff to execute the will at the client's house."

and

> "Any testator is entitled to expect reasonable assistance without having to ask expressly for it. It is in my judgment not enough just to leave written instructions with the testator. In ordinary circumstances, just to leave written instructions and to do no more will not only be contrary to good practice but also in my opinion negligent."

In Re Gray, which was decided before Esterhuizen, Lloyd J. stated as follows:

> What steps are appropriate in discharge of these various duties in any given situation may depend on who the client is and the view that the solicitor has formed, or ought to have formed if acting with reasonable competence, as to the ability of the client to understand and follow advice as to the relevant procedures.

In *Esterhuizen*, Longmore J., while not faced with it, did not agree with this statement and comments on this concept by stating as follows:

> "There was some suggestion in argument that this might depend on how competent or intelligent the testator was perceived to be but I cannot believe that is correct, save insofar as the actual performance of the duty may vary according to a defendant's perception of his client."

It would seem that Longmore J. in *Esterhuizen* was not commenting on Lloyd J.'s statement set out above as no reference to *Re Gray* is contained in the reasons of Longmore J. in *Esterhuizen*, and one must assume that Longmore J.'s judgment was given without the judgment of *Re Gray* having been brought to his attention.

Thus, we have two conflicting opinions by these judges respecting that point.

In *Esterhuizen*, the solicitor was held liable and in *Re Gray*, the case against the solicitor was dismissed.

With respect to the words of warning in *Esterhuizen*, in my view the proper counsel of caution would seem to be to harken to the words and principles of Longmore J. in *Esterhuizen*, that if a solicitor wishes to avoid exposure to a claim arising out of sending a will out for execution by a client, legally unsupervised notwithstanding the inclusion of detailed instructions.

It is interesting to note that Longmore J. held in *Esterhuizen*, apart from the problems arising in connection with the execution of the will, that financial institutions who hold themselves out as capable of drawing wills for consideration will be held to the same standard of care as that required of a solicitor. It is also worthy of note that in *Esterhuizen*, the defect in the execution of the Will was that only one witness signed the will.

In *Re Gray*, the defect was that both witnesses were not present together at the time of execution and in neither case was there any suggestion by either of these judges that these defects were **not** fatal to the validity of the will and no suggestion was made in either case that strict compliance with the execution provisions of the statute should have any effect on the perceived invalidity of the wills.

This should give some serious doubt to the authority of the cases of *Sisson v. Park Road Baptist Church* 24 E.T.R. (2d) 18 in the Ontario High Court of Justice and *Kraus v. Toni* 1999 B.C.J. 2075 in the British Columbia Supreme Court each of which holds that one signature is sufficient for execution of a will and these cases should not be relied upon to permit the relaxation of complying with the strict terms of the statute respecting execution.

If it is completely impractical to have a will executed under the supervision of a legally-trained person, then, while obviously full and complete instructions should be given to the client, it is essential as well that upon receipt of the will by the solicitor from the client after its purported execution, that the solicitor has a strict duty imposed upon him to review the will in the circumstances surrounding its execution and ensure that the will was properly executed.

As a counsel of perfection, the solicitor should inquire of the client as to the conduct of the execution ceremony and it would be most beneficial to obtain an affidavit of execution by the solicitor from each witness.

Caveat Consigliore

Hull & Hull is pleased to announce the establishment of a continuing breakfast series on estate-related issues.

The Hull & Hull Estate, Trust and Capacity Law Breakfast Series provides members of the bar with presentations by one of Canada's leading Estate firms on topics of importance to estate practitioners.

The inaugural breakfast, Friday, April 7, 2000, will feature Rodney Hull, Q.C. presenting "Pitfalls in Drafting". For more details, please see the enclosed registration form.

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