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Evidence In Estate Litigation and What to Watch for as the Drafting Solicitor: Key Issues and Update

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EVIDENCE IN ESTATE LITIGATION AND WHAT TO WATCH FOR AS THE DRAFTING SOLICITOR: KEY ISSUES AND UPDATE[1]

A. Sean Graham, Hull & Hull LLP

Estate litigation has one important difference from most other forms of litigation: by definition, the source of the strongest, most relevant *viva voce* evidence, the deceased, is unavailable to the litigants. Therefore, what might normally be relatively unimportant documentary or third party evidence can become crucial in estate litigation.

The issue of the existence and strength of evidence supporting claims by or against an estate, or evidence used to support different positions in the context of the interpretation of a testamentary document, continues to develop. Relatives and solicitors who acted for a deceased during lifetime are often taken aback by claims by or against the deceased's estate after the fact. Interpretation disputes will almost certainly come as unpleasant surprises to solicitors who drafted ambiguous Wills, and less of a surprise to solicitors in cases of Will kit or holograph Wills, where lack of clarity is more common. Recent caselaw suggests that even absent ambiguity in the Will, interpretation disputes can nevertheless sometimes proceed. Complaints and frustration frequently arise from the perceptions of both solicitors and their clients, that evidence relied on with respect to estate litigation is scanty and unreliable. Nonetheless, the beneficiaries of the estate and estate trustee can be put to tremendous delay, risk and expense by that very evidence and the claims it bolsters.

Often when confusion has either been created by the testator through words or actions, or manufactured by disappointed would-be claimants or beneficiaries after the fact, one or both sides to litigation may find the testator's solicitor to be a convenient target for blame. Perfect protective action during the estate planning process is probably not feasible, but some relatively effort-free steps and suggestions for inclusion of passages or points in reporting letters may be of some assistance.

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[1] This paper is not intended as general legal advice or for use in any particular situation. It is presented for discussion purposes only. Any specific matter requires its own analysis.

Section 13 Evidence Act

The starting point to the discussion is Section 13 of the *Evidence Act*[2] ("Section 13") which states as follows:

> 13. Actions by or against heirs, etc. – In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased unless such evidence is corroborated by some other material evidence.

Section 13 embodies the legislature's attempt to ensure that estate litigants must meet a basic threshold of evidentiary support for allegations before a claim can proceed. It is not enough to simply state that the testator owed a claimant money or *vice versa.* This begs the question of what standard or quality must that evidentiary support possess. A review of the case law suggests that, despite some ongoing judicial inconsistencies, the standard of evidence required to meet the initial bar raised by Section 13 is not a high one.

Burns Estate v. Mellon[3]

In the *Burns v. Mellon* case, the Ontario Court of Appeal dealt with fact situation involving the transfer of $195,000 from an elderly testator to a friend with whom the testator had "a lot of phone calls and three lunches"[4]. The recipient testified that the transfer was a gift, and the issue then became whether there was a rebuttable presumption of resulting trust in favour of the testator's estate.

The argument that corroborative evidence should meet a higher bar than the ordinary balance of probabilities is described, and rejected, by the Court:

> Section 13 addresses the obvious disadvantage faced by the dead: they cannot tell their side of the story or respond to the living's version of events. (Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (1999) at 994.)
>
> Section 13 applies to this case because Ms. Mellon claims to have received a gift from someone who is no longer alive. The appellant submits that when s. 13

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[2] R.S.O. 1990, c.E.22, as amended
[3] (2000), 34 E.T.R. (2d) at 175, 2000 Carswell Ont. 1990 (OCA)
[4] Ibid, para. 2

applies, proof is required on the criminal standard, or at least on a standard higher than the civil standard of the balance of probabilities. She relies on the following passage from the reasons of Middleton J.A. in *Bayley* v. *Trusts & Guarantee Co.* ((1930), [1931] 1 D.L.R. 500 at 505 (Ont. C.A.))

> [T]he Court should always have present to its mind the danger of relying too implicitly upon the evidence of the living in establishing a claim against the dead. The proper judicial attitude in the first place towards the evidence of the living claimant ought to be one of suspicion, even when that evidence is corroborated within the meaning of the statute, and effect ought not to be given to it unless the effect of the entire evidence, including that which is relied upon as corroboration, is to remove all reasonable doubt from the judicial mind.

While the *Bayley* decision had been followed in some cases, in *Burns v. Mellon* the Court of Appeal clearly stated that the applicable threshold under Section 13 is the usual balance of probabilities standard. The more rigorous standard arising from a suspicious judiciary recommended in the *Bayley* case, namely that the claimant must "remove all reasonable doubt from the judicial mind", was specifically discarded:

> In principle, I see no justification for applying the criminal standard in a civil action. A criminal prosecution differs fundamentally from a civil action, and the criminal standard serves different ends and operates on different assumptions from the civil standard. (See *R. v. Schwartz*, [1988] 2 S.C.R. 443 (S.C.C.), at 462, per Dickson C.J.C. and Lamer J.) Moreover, nothing in s. 13 itself suggests that the Legislature intended to displace proof on a balance of probabilities with proof beyond a reasonable doubt.
>
> Supreme Court of Canada jurisprudence has repeatedly emphasized that in civil cases – even in civil cases where the alleged conduct is morally blameworthy or might attract penal sanctions – the standard of proof is on a balance of probabilities. Within that standard, the degree of proof may vary depending on what is at stake.
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> ...
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> Similarly in *Vout v Hay* ([1995] 2 S.C.R. 876 (S.C.C.), at 888), where a will was alleged to be invalid because of suspicious circumstances and undue influence, McLachlin J. held that the civil standard of proof on a balance of probabilities, not a higher standard, applied, though "the evidence must, however, be scrutinized in accordance with the gravity of the suspicion."
>
> I therefore conclude that both principle and recent case law support the application of the civil standard in this case, and neither *Bayley* nor *Johnstone*

justify departing fom that standard. As Roberts J. properly applied the civil standard, I would not give effect to this ground of appeal.

Having established the appropriate standard under Section 13 to be the usual civil balance of probabilities, the Court then turned to the substance of the evidence itself to determine whether it was sufficient. The allegedly corroborative evidence of the recipient that the transfer was a gift and not subject to resulting trust is described as follows:

> (a) Burns made a holograph will in March 1996, about 10 months after the transfer. In his will he made detailed reference to all his assets, even an asset of only $2,500. He referred to the $100,000 loans he had made to each of his daughters, which loans he forgave. But he did not refer to the transfer to Ms. Mellon.
>
> (b) Burns kept no written record of the transfer.
>
> (c) Burns lived for two years after he transferred the money to Ms. Mellon. Yet there was no reliable evidence from any source that he asked for the money back or for an accounting of it at any time before he died.
>
> The appellant submits that the trial judge erred in relying on the absence of a written record and the absence of a demand for repayment of the money, because neither piece of evidence was independent of Ms. Mellon's testimony and neither was of much probative value. I accept that both pieces of evidence carry little weight. However, the will alone reasonably supports the trial judge's finding of corroboration. The will is an especially strong piece of circumstantial evidence because it addresses the vital issue in the case, whether Burns intended the transfer to be a gift or whether he intended the money to be repaid. The will, though short, is quite detailed, and no evidence was led to suggest that Burns' omitted any of his assets.[5]

Therefore the fact that the loan/gift to the friend was not mentioned in the Will, combined with the facts that the deceased kept no written record of the transfer and never asked for the money back, were judged to be sufficient to overturn the presumption of resulting trust arising from the transfer. It is noteworthy that none of

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[5] Ibid, paragraphs 29, 30

these pieces of evidence required active steps by the testator: they all arise from what the testator *did not do*, hence are intrinsically circumstantial in nature.

As in many cases in this area, one can speculate as to whether the deceased's beneficiaries would have expected at the outset for this circumstantial evidence would have been sufficient to meet the standard under Section 13, particularly when they were ostensibly supported by a presumption of resulting trust. There appears to have been no evidence of any action which confirmed the loan as a gift; rather it was omissions of the deceased, such as the omission to mention the loan in the Will, the omission to ask for repayment and the omission to make any record of the payment, which carried the day in the *Mellon* case.

Proceedings dismissed

In an environment where circumstantial omissions by the testator alone can corroborate a claim by or against an estate, the bar established by Section 13 is not a high one, but it is no mere formality either.

Johnson Estate v. Nagy[6] provides a useful comparison with *Burns v. Mellon*, since in this case the presumption of resulting trust was upheld due to failure of a self-represented recipient of a gift to corroborate intention to gift and thereby surmount the presumption of resulting trust. *Burns v. Mellon,* the most recent binding decision on point, is not mentioned in the decision. Instead, prior Ontario Court of Appeal decisions more in keeping with the very reasoning rejected in *Burns v. Mellon* are relied on.

> In the present case therefore, it is presumed that Mr. Johnson conveyed this sum of money to Ms. Nagy in trust to be held for Mr. Johnson's benefit. Ms. Nagy claims that this money was a gift to her. The onus is on Ms. Nagy to establish that Mr. Johnson intended the transfer of this $75,000 to be a gift.
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> The second legal principle that is important is that which is set out at s.13 of the Ontario Evidence Act. It reads as follows:
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> > 13. In an action by or against the heirs, next of kind, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his

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[6] 2006 Carswell Ont 4641, 26 E.T.R. (3d) 217.

> or her own evidence in in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other materials evidence.

This section means that in order to establish that there was a gift in this case, Ms. Nagy simply cannot rely upon her own testimony. Ms. Nagy must provide some corroborating evidence of her position that this was a gift. If there is not sufficient corroborating evidence then I cannot, in law, find that there was a gift and the money must be returned to Mr. Johnson, or in this case to his estate.

The type of corroborating evidence required in a case like this must be something significant. There is a general view that a living person must meet a high threshold in order to establish a claim against a deceased person.

Several courts have attempted to try to characterize the type of evidence required. For example, in the case of *McMaster v. Byrne* (1950), [1951] O.W.N. 1 (Ont.C.A.) at page 6, the Ontario Court of Appeal wrote:

> The corroboration required must be evidence of something essential to be shown before the party can, upon his own evidence, obtain a decision in his favour. It must be evidence of a material character supporting the case to be proved and may be afforded by circumstances.

Similarly in the older case of *Johnstone v. Johnstone* (1913), 28 O.L.R. 334 (Ont.C.A.) at page 337 the Ontario Court of Appeal wrote:

> In weighing the conflicting evidence it is not sufficient that the preponderance of evidence may turn the scale slightly in favour of a gift. the preponderance must be such as to leave no reasonable room for doubt as to the donor's intentions. If it falls short of going that far then the contention of a gift fails.

In light of those two legal principles I need to consider whether or not Ms. Nagy has proven that the money she received was a gift, and whether she has provided enough corroborating evidence of her position.[7]

The Court found that Ms. Nagy had not met the standard. Clearly, *Burns v. Mellon* needs to be taken as the authoritative approach, but the *Johnson v. Nagy* case does support a cautionary approach to the issue given what appears to have been significant confusion in assessing the applicable standard. It is noteworthy that the unsuccessful party in the latter case was self-represented and the Court found her to be a poor witness:

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[7] Ibid, Carswell, paragraphs 21 to 27.

> Because she has given me so many inconsistent possibilities I have trouble believing any part of her evidence. Also, the fact that she seems to have deceived, consciously or unconsciously, Mr. Johnson on February 2oth about Mrs. Parisee's desire to separate, makes me question her credibility even further.[8]

In the *Glen v. Kirkby McLean Estate (2006), 23 E.T.R. (3d) 272, Carswell Ont. 886* case, a dependant's relief claim against an estate was dismissed due to failure to provide corroborative evidence as required under Section 13 of the *Evidence Act*. The claimant was an applicant for dependant's relief on behalf of herself and her disabled son, who was not the child of the deceased. The applicant claimed to be a common-law spouse, but could not provide corroborative evidence of cohabitation for three years required by section 57 of the *Succession Law Reform Act* (Ontario). The Court found that while the applicant had led evidence that it had been the deceased's intention to make a Will naming the applicant as beneficiary, there was no evidence corroborating that claim and therefore that aspect of the claim was dismissed, in addition to the dismissal of the dependant's relief claim.

The *Burns v. Mellon* case suggests that the quality and standard of evidence required to corroborate a claimant's *viva voce* evidence on behalf of or against an estate is not to the standard of what we would normally expect would be the case in the average action. The reason for this, of course, is that the evidence need only corroborate the *viva voce* evidence, not replace it. Therefore, a party relying on personal recollection need only corroborate that recollection, not prove it independently.

It is often the case that parties at the outset of litigation may have some lay person's understanding of the concept of hearsay evidence and simply assume that a story told by a claimant will not be given any weight or credence, or even admitted, by the Court. That, however, is not the case and Section 13 assists in resolving that problem.

Of course, merely meeting the standard under Section 13 does not establish a case in the whole on the balance of probabilities, since the other side is likely to have

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[8] Ibid, paragraph 40.

evidence of their own, disputing a claim by or against an estate, which evidence is likely to be corroborated as well. Meeting the standard required by Section 13 is not dispositive of the issue at hand, only of the party's entitlement to proceed to argument on the substance of the dispute. There is, however, something of a pattern whereby if corroborative evidence is accepted a claim tends to succeed.

Interpretation of Wills

Naturally, any drafting solicitor plans against the possibility of an interpretation of a Will, but human error sometimes intrudes and interpretation applications are necessary.

The general law where an interpretation is necessary is neatly summarized at Chapter 10.6 of Brian Schnurr's analysis in Carswell's Estates Partner:

> There is a long-established tradition in the law of interpretation of wills that a court must initially construe a will without regard to any evidence other than the will itself. Having concluded this exercise, the court then inquires whether there are subjets and objects in the outside world which match the description of those in the will and, if there are, that is the end of the matter. Evidence of surrounding circumstances showing that the testator intended something else is excluded.
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> Only if the words used in the will do not match external subjects or objects is there an ambiguity and the court may then consider evidence of surrounding circumstances at the time the will was made, such as the character and occupation of the testator; the amount, extent and condition of his or her property; the number, identity and relationship to the testator of his or her immediate family and other relatives; and the persons who comprised his or her circle of friends and any other natural objects of his or her bounty. The court may, therefore, as is often said, sit in the testator's armchair and look at the matter in the way the testator could have done when he or she made the will. Such evidence may then be used to attempt to resolve the ambiguity. Direct evidence of the testator's intention is inadmissible to resolve the matter, however, unless there is an equivocation. If the ambiguity cannot be resolved, even with the use of evidence of surrounding circumstance, the gift in question fails for uncertainty.

This statement of the traditional law provides a practical approach to interpretation of wills, and one which, if not followed, might lead to extremely negative consequences. If the Court could go outside the language of the will at the outset of analysis, every will might be subjected to interpretive litigation. This would almost

certainly in turn defeat the intentions of a great many testators, virtually none of whom would be pleased to see litigation over the interpretation of their wills.

The recent case of *Mladen Estate v. McGuire*[9] suggests that a reliance on the traditional understanding of how interpretation difficulties have been resolved may be frustrated when applied in a given case. While the traditional approach requires 'ambiguity' in a will before looking to extrinsic evidence of intention, in *Mladen* the Court followed a line of recent cases which require a 'contrary intention' in the Will. The Court, however, seems to have taken the point further, applying the 'testator's armchair' analysis not to resolving an ambiguity or contrary intention, but rather to identify or create one in the face of an otherwise unambiguous Will. The Court stated the issue as follows:

> Under Ontario law, a lapsed residuary gift passes as on an intestacy, unless there is a contrary intention in the will. The question that materialized during oral argument is this: in determining if there is "a contrary intention in the will" can the judge sit in "the testator's armchair" and consider all of the surrounding circumstances, or is he or she limited to the language in the will?[10]

This approach, it would appear, is quite a departure from the usual analysis and cause for concern among will drafters and litigators alike. Whereby in the past extrinsic circumstances would have been inadmissible until ambiguity or contrary intention was present, in *Mladen* extrinsic evidence was apparently allowed to create that contrary intention at the first stage, then in turn allow the Court to determine what the testator intended in the second stage.

On a plain reading of the will in *Mladen,* there was clearly a partial intestacy of a portion of the residue. The Court also was made aware, by affidavit evidence, that the testator had been encouraged to avoid the intestacy, because one of the residuary beneficiaries predeceased the testator. The testator replied that she was considering changes, but no changes were ever made.

The Court determined the matter as follows:

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[9] 2007 CarswellOnt 1976.
[10] Ibid, paragraph 2.

> In short, there is nothing in the language of the Will itself that would allow me to conclude that if Shirley [the testator] was predeceased by her Aunt Bea, that she would have intended that Aunt Bea's portion should go only to Bonnie and Roger [the surviving residuary beneficiaries][11].

On a traditional analysis, the Court would presumably stop at this point and Order that the lapsed residuary gift be distributed as on an intestacy. The Court in *Mladen*, however, went considerably further in its analysis:

> Thus, if I am limited to the language in the Will, I would find in favour of the next of kin, that is, all five first cousins. If I can sit in the testator's armchair in order to determine whether there is "a contrary intention in the will" and I consider Shirley's knowledge of an relationship with her family, I can easily discern such a contrary intention, with the result that Aunt Bea's portion would go to Bonnie and Roger.
>
> The case law on this point is not determinative. There is authority for the proposition that I am restricted to the language in the Will and cannot consider the surrounding circumstances: see, for example, *DiMambro Estate v. DiMambro,* [2002] O.J. No. 4393 (Ont. S.C.J.) at para. 26.
>
> There is also case law that would allow me to sit in the testator's armchair and consider the surrounding circumstances: see, for example, *Mackie Estate v. Harris,* [1986] O.J. No. 289 (Ont.H.C.) at para 13 and 1; and *Campbell v. Shamata,* [2002] O.J. No. 99 (Ont.S.C.J.) at para 7.
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> I am persuaded, however, by the reasoning of my colleague, Madam Justice Molloy in *Campbell v. Shamata,* at para. 7:
>
> > ...to determine whether a contrary intention appears in the will, it is necessary to interpret the will itself. If there is a clear clause one way or the other, that may well be the end of the matter. However, I do not read any of the authorities cited as standing for the proposition that the ordinary rules for the proper interpretation and construction of the terms of the will do not apply. On the contrary, it seems to me that one must interpret the will in accordance with the well-established principles of construction and then decide whether, given a proper interpretation, a contrary intention is set out in the will. In some circumstances, depending on the wording of the will, surrounding circumstances will have no bearing and cannot be taken into account. In other cases, a consideration of surrounding circumstances may be necessary to properly interpret the will an dgive effect ot the wishes of the testator.. .the so-called "armchair rule" for the

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[11] Ibid, paragraph 25.

> interpretation of provisions of a will has been part of the common law for a very long time. It would take clear statutory language to displace it.
>
> I conclude, therefore, that in determining whether there is an intention in the will that is contrary to the general rule in *Kossak Estate, supra,* that a lapsed residuary gift passes on intestacy, I am entitled to sit in the "testator's armchair" ...
>
> In this case, I have found "a contrary intention in the will" based on the uncontradicted affidavit evidence that Shirley considered Bonnie and Roger to be her only first cousins and together with Aunt Bea her remaining family...[12]

Again, on a plain reading of the will in the case, there was unambiguously a partial intestacy and no contrary intention anywhere discernible. Even more striking is that the testator had actually been warned about the intestacy and done nothing to change her will. The Court, however, favoured affidavit evidence of apparently self-interested parties as to how much the testator loved them, how she considered them to be her only remaining family and how she did not really know the intestate beneficiary relatives. On the strength of that evidence, the Court found contrary intention, and found against the intestacy that would otherwise have resulted.

Mladen has not been significantly referred to in subsequent caselaw, although that may be a result of its recent vintage. Until the issue is dealt with further, solicitors may well wish to qualify what might otherwise be strong opinions by suggesting that, given the uncertainty in how any given interpretation issue might be dealt with by the Court, a matter ought to be put to the Court for determination regardless of the apparent strength of one particular position.

Recommendations for the drafting solicitor

Eliminating or discounting the existence of possible Section 13 evidence in preparing an estate plan is an extremely difficult challenge to meet, in my view. The evidence which might corroborate a claim might well be created after the Will is drafted. The testator may have no idea the evidence is even in existence. In fact, in the *Burns v. Mellon* case, there was no such hard evidence, and in fact, the corroborative evidence

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[12] Ibid, paragraphs 27 to 33.

was implied from what the testator did not do. It may well be that testators, particularly elderly testators, may be subject to manipulation by cynical and self-interested parties who have the testator sign or create all manners of evidence not knowing what the intention is behind the scheme. Meeting the standard required to prove a claim of undue influence, it is submitted, is far more difficult than meeting the corroborative evidence standard under Section 13 of the *Evidence Act*.

A drafting solicitor will likely wish to canvass such issues in completing an estate plan and also confirm that these issues have been canvassed in a reporting letter. Given the growing number and frequency of attacks by or against an estate, such as dependant's relief, resulting trust, proprietary estoppel, *quantum meruit* claims and so forth, a perfect protection for a testator against claims seems to me to be a standard of perfection that is unlikely to be attainable. Some protection, however, is possible. Testators can be asked questions aimed at identifying possible litigation. Some such questions might be the following, among any number of further questions that solicitors deem appropriate to their practice in general and to any given situation:

1. Have you given anybody a large gift or made a large transfer in the past?

2. Do you intend to make such a gift or transfer?

3. Do you owe anyone money? Does anyone claim that you owe them money which you deny owing them?

4. Do you support any relatives with regular gifts, if so are you aware they might claim to be a dependant after your death?

5. Do you live with anyone, or have you lived with anyone in the past who might claim to be a spouse and seek support from your estate?

6. Have you made any promises to pay anybody for any service provided or any other reason out of your estate? Have you told people or led them to believe they might inherit from your estate that are not in the Will?

7. Is anyone providing services to you, for example care-giving, maintaining your home, paying your bills for you or anything else for which they might want payment after your death?

8. Do you own any joint property, whether real estate or other property, with anyone, and if so what is your view about who beneficially owns that property?

9. Have you written letters or made comments to anyone about who will inherit your estate? Do you intend to tell anyone about your will once it is signed?

10. Is there anyone who is not going to be a beneficiary of your estate that expects to be?

Obviously, these questions are only a starting point, and many further questions might be needed once the initial answers start to come. These discussions could then be documented in a reporting letter. Whether the documentation comes in the form of general statements applicable to any case or specific analysis of specific trouble areas will presumably depend on each solicitor's preferences and each particular set of facts.

One risk of this approach is that in opening up this analysis a solicitor is in effect broadening a retainer from what a client might consider to be a relatively simple will to a warranty of protection from claims. To avoid this, solicitors will no doubt wish to specifically restrict the scope of the retainer in the reporting letter to make clear that no protection is guaranteed. Also, if this analysis leads to clear issues, then perhaps the retainer can be formally extended to include attempting to bulletproof the estate plan. Given the increased work involved, not to mention the risk to the solicitor, one would hope that clients would accept the increased fees that will result.

The low standard for meeting the requirement under Section 13 established in the *Buns v. Mellon* case, combined with the difficulty in achieving certainty on how evidence is to be treated or when it is to be applied demonstrated notably in *Mladen,* makes it difficult to predict how claims against estates or interpretation issues will be resolved. This takes place in an environment of increasing claims against estates, bolstered to some extent in some jurisdictions by mandatory mediation where very often the evidence is never genuinely tested.

All of this makes for significant uncertainty in advising clients not only after litigation is commenced, but even at the estate planning and will making stage. It

seems to me that the famed "simple will" is becoming an evermore elusive creature. In the context of the myriad of claims that can be made against an estate and increasing uncertainty involving what were thought to be time-honoured principles of will interpretation, the "simple estate plan" may not exist at all.