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Creditors, Spousal And Dependents'
Claims”**

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Getting Wills Signed in Difficult Situations- Due Execution for Solicitors

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Execution of a will can sometimes pose serious challenges to the practitioner retained to prepare an effective will. Challenges to the validity of a will on the basis of due execution are common, as are solicitor negligence actions where the will fails as a result of improper execution. The focus of this paper is the formal requirements of due execution, and how they can be met in difficult situations.

(Situations involving potential issues of lack of testamentary capacity, undue influence, fraud or suspicious circumstances can also present difficulties for solicitors. A discussion of these circumstances is outside the purview of this paper.)

Sections 3-7 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 as amended ("SLRA") provides the framework for the valid execution of a will.

Recently, the court has affirmed that there is no provision in the SLRA which allows a court to admit a document to probate as a will where the required formalities have not been observed: there is no doctrine of "substantial compliance" with the law.¹

¹ *Sills v. Daley* (2002), 64 O.R. (3d) 19 (Ont. S.C.J.) per O'Flynn J., discussed below. There, it is noted that Manitoba and Saskatchewan have "substantial compliance" legislation. It also is enacted in Prince Edward Island and Quebec.

For a full discussion of "substantial compliance" vs. "mandatory compliance", see I. Hull, "Due Execution: Is One Signature Really Enough?" in 30 E.T.R. (2d) 23

Formal compliance therefore appears to be the rule. Formality, however, is not without its critics, who argue that strict compliance often unduly interferes with the clear intentions of the testator.²

The formal requirements for validity apply not only to the making of a will, but also to the alteration of a will, as well.³

Section 3 provides that a will is valid only when it is in writing. "Writing" is defined in s. 29 of the *Interpretation Act*, R.S.O. 1990, c. 1.11 as including words printed, painted, engraved, lithographed, photographed, or represented or reproduced by any other mode in a visible form. There is no provision for videotaped wills in Ontario.

A will may be written in a foreign language. However, the court must be furnished with an authenticated translation. Alternatively, non-English speaking testator can have the English will read to him by a translator. The translator should swear an affidavit averring that the will was read over to the testator and that he or she appeared to understand it.

² "The rule of literal compliance with the *Wills Act* is a snare for the ignorant and the ill-advised, a needless hangover from a time when the law of proof was in its infancy. In the three centuries since the first *Wills Act* we have developed the means to adjudicate whether formal defects are harmless to the statutory purpose. We are reminded "that legal technicality is a disease, not of the old age, but of the infancy of societies." The rule of literal compliance has outlived whatever utility it may have had." Professor J. H. Langbein, *Substantial Compliance With The Wills Act* (1974-75), 88 *Harv. L. Rev.* 489 at p. 531.

³ SLRA, s. 18 (1) Alterations in will — Subject to subsection (2), unless an alteration that is made in a will after the will has been made is made in accordance with the provisions of this Part governing making of the will, the alteration has no effect except to invalidate words or the effect of the will that it renders no longer apparent.

SLRA, s. 18 (2) How validly made — An alteration that is made in a will after the will has been made is validly made when the signature of the testator and subscription of witnesses to the signature of the testator to the alteration, or, in the case of a will that was made under section 5 or 6, the signature of the testator, are or is made,

(a) in the margin or in some other part of the will opposite or near to the alteration; or
 (b) at the end of or opposite to a memorandum referring to the alteration and written in some part of the will.

Section 4(1) provides that, except in the case of the will of a member of forces on active service, or in the case of a holograph will, a will is not valid unless,

- (a) at its end it is signed by the testator or by some other person in his or her presence and by his or her direction;
- (b) the testator makes or acknowledges the signature in the presence of two or more attesting witnesses present at the same time; and
- (c) two or more of the attesting witnesses subscribe the will in the presence of the testator.

Signed

The requirement that the will be "signed" has been loosely interpreted, with the intention of the deceased being determinative.

Courts have accepted⁴ wills where:

- the will bears the signature of the testator;
- the will bears part of the signature of the testator;
- the will bears the initials of the testator;
- the will bears a mark made by the testator intended to represent the testator's name (even in situations where the testator is able to write his name, or in situations where the mark of a physically handicapped testator is guided by someone else;

⁴ However, in many cases, the Courts have rejected wills in similar circumstances.

- the will is impressed with the stamp of the testator;
- the testator signs the will using an assumed name;
- the testator signs the will using her title (eg. "Mother");
- the testator signs the will using her name from a previous marriage;

- the will is signed by another person at the instance of the testator (signature by an amanuensis). Such direction requires some act or advice from the testator to the signor, who is required to indicate that the will is being signed at the behest of the testator. The person signing on behalf of the testator may serve as one of the witnesses, as may the drafter of the will. For example, blind person can clearly make a will and sign it or have an amanuensis sign it. When applying for probate, the executor must prove that the testator knew and approved the contents. The will does not need to be read to the testator in the presence of the witnesses, although this is desirable and of assistance in proving knowledge and approval. If someone else signs for the testator, the attestation clause should state that this is done in the testator's presence and at his or her request and also, if the testator is unable to read, that the will was read over to the testator and that he or she appeared to understand it.

The onus of proving due execution is on those propounding the will. The burden is on the propounder on the balance of probabilities.

The position of the signature is important, and section 7 of the SLRA impacts the validity of the will and the position of the signature⁵. Essentially, the signature must be at the end of the will. While a will is not rendered invalid if it is not signed at its end, but rather, at some other place, no effect will be given to dispositions underneath or following the signature.

Case law applying this section (or the equivalent section in other provinces) is hard to reconcile. What emerges is that the court will strive to uphold the validity of the Will that has a signature at a point other than at its end if at all possible. Courts will attempt to read the pages of a will in another order, or apply the doctrine of incorporation by reference in order to validate the will. In some cases, however, this is simply not possible. A will signed only at the commencement was not accepted in Ontario in *Re Wright*⁶.

⁵ 7. (1) Position of signature — In so far as the position of the signature is concerned, a will, whether holograph or not, is valid if the signature of the testator made either by him or her or the person signing for him or her is placed at, after, following, under or beside or opposite to the end of the will so that it is apparent on the face of the will that the testator intended to give effect by the signature to the writing signed as his or her will.

(2) *Idem* — A will is not rendered invalid by the circumstance that,

(a) the signature does not follow or is not immediately after the end of the will;
 (b) a blank space intervenes between the concluding words of the will and the signature;
 (c) the signature,

(i) is placed among the words of a testimonium clause or of a clause of attestation,
 (ii) follows or is after or under a clause of attestation either with or without a blank space intervening, or

(iii) follows or is after, under or beside the name of a subscribing witness;
 (d) the signature is on a side, page or other portion of the paper or papers containing the will on which no clause, paragraph or disposing part of the will is written above the signature; or
 (e) there appears to be sufficient space on or at the bottom of the preceding side, page or other portion of the same paper on which the will is written to contain the signature.

(3) *Idem* — The generality of subsection (1) is not restricted by the enumeration of circumstances set out in subsection (2), but a signature in conformity with section 4, 5 or 6 or this section does not give effect to,

(a) a disposition or direction that is underneath the signature or that follows the signature; or
 (b) a disposition or direction inserted after the signature was made.

⁶ [1962] O.W.N. 122 (Surr. Ct.).

A signature on the envelope of the will has been accepted as a valid signature where the court found that the circumstances precluded fraud, the envelope had a close connection with the sheet of paper, both documents were written on the same occasion and in the presence of the attesting witnesses, and the safekeeping of the documents showed that they were genuine.⁷

Section 7 of the SLRA specifically applies to all wills, whether holograph or not.

Acknowledged

The SLRA does not require that the testator actually sign the will in the presence of the witnesses. Rather, a will can be valid if the testator makes *or acknowledges* the signature in the presence of two or more attesting witnesses.

Acknowledgement requires:

- a. that the signature be on the document at the time of the acknowledgement;
- b. that the witnesses see or have the opportunity to see the signature;
and
- c. that the testator, by acts or words, indicate that he signed the document. The witnesses do not need to know that they are attesting to a will.

⁷ There are also cases to the contrary.

Attested

Formal validity of a non-holograph will requires that two witnesses sign the will. In the case of *Sills v. Daley, supra*, the court held that it could not accept a will for probate where it was executed by only one witness. "To declare the Will as valid, would be to bypass the clear provision of the [SLRA] and to create a discretion in this court which is not found in the [SLRA]."

Sills v. Daley distinguishes, narrowly⁸, the 1998 decision of *Sisson v. Park Street Baptist Church*⁹. There, the will was signed by the testator in the presence of the solicitor and his secretary. The secretary signed as a witness, but through inadvertence, the lawyer did not sign as a witness. Murphy J. confirmed that there was no substantial compliance provision in the Ontario legislation, but went on to hold that the court was entitled to develop the common law to allow a document to probate where there has been substantial compliance.

The SLRA requires that the witnesses each subscribe the will in the presence of the testator. They must also be present at the same time when the testator makes or acknowledges his signature. In *Simkins Estate v. Simkins*,¹⁰ the court granted probate where the testator signed the will in the presence of only one of the witnesses, who then subscribed the will. The testator, moments later, acknowledged his signature in the presence of both of the witnesses, and the second witness signed the will. The court held that while, technically, the first witness should have re-signed the will, "To rule such a will invalid is an absurdity and, what is worse, a total defeat of the acknowledged intent of the testator by means of a document that complied with all the formalities, save and except the exact sequence, that have been held to be necessary."

⁸ O'Flynn J. states that *Sisson Park* i. was unopposed; and ii. the error was made through inadvertence. However, O'Flynn goes on to state that there is no discretion to bypass the clear provisions of the SLRA, thereby appearing to overrule *Sisson Park*. O'Flynn also expressly followed the B.C.S.C. decision in *Bolton v. Tartaglia* (2000), 33 E.T.R. (2d) 26. There, a witness did not attest the will out of sheer inadvertence. The court stated: "In the case at Bar it is clear that the witness intended to place her signature on the document, and she simply forgot to do so. There is therefore only one attesting witness who subscribed the Will. Thus, the requirements of the Act have not been met and my duty, although unpleasant, is clear."

⁹ (1998), 24 E.T.R. (2d) 18 (O.C.G.D.) per Murphy J.

¹⁰ (1992), 45 E.T.R. 287 (B.C.S.C.)

Except as held in *Simkins*, supra, witnesses must sign after the testator and not before. They need not both be present when they sign as witnesses, although they both need to be present when the testator signs or acknowledges her signature. Therefore, a will can be valid where one witness leaves before the other witness signs.

The testator must be able to see the witnesses attest, if he chooses. Thus, if a testator is unable to move, and is not facing the witnesses when they sign, the will may be invalidated. Similarly, witnesses must have the opportunity of seeing the testator's signature, whether it be signed in their presence, or acknowledged. A will will not be valid where the testator's signature is covered up.

Where a will is in a language that is foreign to the testator, there is no requirement that both subscribing witnesses must understand the language of the testator so as to be able to say that the will was properly interpreted. Even if neither witness can speak the language of the testator, the will may be proven by producing an interpreter who swears that he properly interpreted the will to the testator before it was executed. Similarly, with a blind or illiterate testator, there is no requirement that the will be read over to the testator in the presence of the witnesses.¹¹

Section 4(2) of the SLRA provides that no form of attestation by the witnesses is necessary. However, it is considered good practice to make use of an attestation clause in which the witnesses attest to the satisfaction of the statutory requirements.

Not only must the testator be physically present when the witnesses signed the will, but they must be mentally present, as well. Signing in the presence of an unconscious testator is not compliance.

¹¹ However, this is a good practice, and may avoid future problems: see *Brewster Estate v. Brewster*, [1989] 75 Sask. R. 279

The witnesses do not need to know that the document that they are witnessing is a will.

The form of signature of the witnesses can be the same as the forms acceptable for the execution by the testator, with the exception that the witnesses cannot direct another or authorize another to sign on his behalf. Witnesses must actually sign the document and, unlike testators, are not permitted to direct someone to sign on their behalf.

Exceptions

As noted, the requirement of two or more attesting witnesses does not apply in the case of the will of a member of forces on active service, or in the case of a holograph will.

a. Member of Forces on Active Service

A "member of forces on active service" is any person who is,

- (a) a member of the Canadian Forces placed on active service under the National Defence Act (Canada);
- (b) a member of any other naval, land or air force while on active service; or
- (c) a sailor when at sea or in the course of a voyage.

Such a person may make a will by a writing signed by him or her or by some other person in his or her presence and by his or her direction without any further formality or any requirement of the presence of or attestation or signature by a witness

Proof of "active service" can be made by producing a "certificate purporting to be signed by or on behalf of an officer having custody of the records certifying that he or she has custody of the records of the force in which a person was serving at the time the will was made, setting out that the person was on active service at that time". If such a certificate is not available, a member of a naval, land or air force is deemed to be on active service after he or she has taken steps under the orders of a superior officer preparatory to serving with or being attached to or seconded to a component of such a force that has been placed on active service.

b. Holograph wills

Holograph wills are valid under the SLRA without formality and without the presence, attestation or signature of a witness, if they are made wholly in the handwriting and signature of the testator.

The requirement that the holograph will be "wholly" in the handwriting of the deceased means that a will that is typewritten by the deceased will not qualify as a holograph will.

The SLRA does not specify the nature of the writing, but only that the document be in writing. Courts in other jurisdictions have accepted wills written on eggshells, or scratched on the fender of a tractor.

Where a stationer's will is not properly witnessed, the document will be reviewed with a view determining whether it can be considered a holograph will. If a dispositive intent can be gleaned from the handwritten portions of the document, that portion of the document may be admitted as a holograph will.

A valid holograph will does not require witnesses. Thus, as a witness's attestation is superfluous, a bequest to the witness is not voided by s. 12(1) of the SLRA.¹²

¹² SLRA, s.12(1) Bequests to witness void — Where a will is attested by a person to whom or to whose then spouse a beneficial devise, bequest or other disposition or appointment of or affecting property, except charges and directions for payment of debts, is thereby given or made, the devise, bequest or other disposition or appointment is void so far only as it concerns,
(a) the person so attesting;
(b) the spouse; or
(c) a person claiming under either of them,
but the person so attesting is a competent witness to prove the execution of the will or its validity or invalidity.

SLRA, s. 12(4) Exception — Where a will is attested by at least two persons who are not within subsection (1) or where no attestation is necessary, the devise, bequest or other disposition or appointment is not void under that subsection."

THE FAMILY MEETING – A PRE-EMPTIVE STRIKE AGAINST ESTATE LITIGATION

IAN HULL

Introduction

As the transfer of wealth from one generation to the next proceeds in Canada, the inevitable growth in estate litigation will no doubt continue. In fact, statistically the transfer of wealth in Canada is moving along at an extraordinary rate.

Lawyers continue to be faced with clients who come to see them hoping to create an estate plan that is geared to either in part resolving future conflicts and/or facing those conflicts in the estate planning process itself.

There currently exists an excellent regime whereby lawyers, estate planners, accountants, insurance agents and other allied professionals work together with the client to create a plan that makes sense both from a tax standpoint and from the family dynamics perspective.

Many of these existing estate plans work as the percentage of estate matters that are litigated continue to be proportionately relatively small.

However, while the amount of litigation, on a percentage basis, may be small, two difficulties arise in the litigation context. First, even that small percentage of estate

litigation that does get created on the death of the client is usually extremely painful for the family both financially and emotionally. Second, even when you think you have all the "t"s crossed and the "i"s dotted, the advent of estate litigation usually occurs on a fairly random basis. Meaning, no matter how hard you try, if the underlying family dynamics have not been considered then even the best laid plans may well fall into the "black hole" of estate litigation.

Presumably, more than just good documentary planning on the part of your client is now needed.

Historically, the whole estate plan was structured without the input of those who are most affected by the result, namely, the family members. It is the additional component of the family dynamics that is a significant source of the instigation into the estate litigation process.

Within the confines of the estate litigation arena, the process and the fight can be incredibly harmful to the family relationships, often devastating and financially problematic.

Bringing in the Family

The prospect of opening up your client to the full family dynamics during his or her lifetime is a difficult sales pitch. Typically, your client does not even want to deal with

the issue of death one-on-one with you as the lawyer and the prospect of bringing in various family members, including non-blood related, is a daunting task for your client to consider.

Having said that, in my experience, having litigated over estate matters that were planned almost to perfection right through to a mess that was created by either the planning process itself or the client (i.e. homemade Wills or handwritten Wills), the ability of a lawyer to predict that the existing estate plan will run smoothly after death is, in my view, very much in doubt.

Currently, disputes come from all angles within the client's world and they are usually very surprising to the family members. For example, your client might be quietly sending \$500.00 per month to relatives overseas, an amount that would not attract much attention to him or her when preparing an estate plan and, nonetheless, which might result in a claim by the relatives against the assets of the estate as a dependant upon your client's death.

More to the point of the family dynamic itself, many family members do not know and understand the nature and effect of the Will itself. For example, many issues are litigated over the question of executor's compensation. In particular, if one family member is chosen over another as executor, the fact that that individual was chosen may bring with it an emotional consequence after your client's death. One brother may be upset by the fact that he is not running the show, so to speak, and an easy way to get at his sister/executor is to make trouble in the context of the compensation that she might claim.

Another example of problems that may arise in a well-planned, carefully constructed estate plan is the transfer of wealth through a family-run company. For example, if one of the siblings is currently running the company and is given the shares on your death, it may be an entirely justified fair and/or equal distribution in the context of the other siblings; however, the event itself may either come as a surprise to the other siblings or, more importantly, may be seen as an unequal distribution which is challenged in the context of an estate litigation proceeding.

What is the solution?

Of course, there is no definitive solution to this problem as the frailties of human nature prevail and it is impossible to predict with certainty that any steps taken before death on behalf of your client will result in the perfectly, unchallenged and undisrupted administration of his or her estate.

However, there are two aspects which should be considered.

(a) The existing approach

There is simply no substitute for good, effective and comprehensive estate planning. Using well-qualified counsel, with the assistance of the necessary allied professionals, one takes a giant step forward in the preventative strike regime.

From a documentary standpoint, consideration should be given to the drafting techniques employed through the estate planning process. For example, the use of trusts, *inter vivos* trusts, trusts within the Will, *in terrorem clauses* (i.e. it will cost you big time if you litigate) included in the Will and other drafting tools can go a long way to create a bulletproof estate plan.

(b) The family meeting approach

Notwithstanding all of the efforts on the part of your client to create an individual estate plan that is protected from attack, the one important consideration missing in the existing approach is the role of the beneficiaries themselves.

In fact, arguably, the whole estate planning process should also be looked at from the bottom up.

This view from the bottom should, in my opinion, be conducted live as opposed to projected by the client's estate planning professionals.

To the extent that it is possible, full, direct family participation in the estate plan can presumably add another important and effective pre-emptive strike against problems after death.

As to the sales pitch to the client, presumably a five-minute discussion with your client advising him or her that if the estate plan comes under attack for any reason, which can ultimately never be entirely foreseen or predicted, then tens of thousands of dollars will

be spent on lawyers, accountants and other professionals cleaning up the mess. This prospect alone will, no doubt, send shivers down your client's back. However, you will also, no doubt, be faced with the sensible reaction on the part of your client that if his/her beneficiaries can't get along then so be it. Further, then, your client's impression may be that it will be their loss if they want to fight amongst themselves.

Having said that, the one thing that will likely resonate in your client's mind, in any event, is the fact that his or her whole estate plan can be thought over and substantially restructured, ignoring many of his or her wishes in the context of a fight later in the day.

Finally, your client needs to understand that the impact of the estate plan may result in emotional strife within the family that could ruin relationships or make it worse within the family for the rest of their lives and bitter feelings may be harbored in respect of your memory.

Presumably, the three-part combination of incredible waste of money, completely ignoring your wishes and the lifelong emotional impact on the family will leave its mark in your client's mind.

ADVISING EXECUTORS AND TESTATORS ON CREDITORS, SPOUSAL AND DEPENDANTS' CLAIMS

I. Introduction

After accomplishing the task of determining what the assets and liabilities of the estate are, one of the primary obligations of an executor is the payment of the debts and liabilities. The proper performance of these duties by an executor are often overlooked in a standard administration where there are sufficient assets to pay relatively simple liabilities.

At the outset, most clients and most executors do not understand that an executor has a fiduciary obligation and duty to protect the creditors of the estate.¹ Furthermore, a creditor of an estate cannot be prejudicially affected by the terms of a Will. Those rights are fixed and determined by the law and not by any manner controlled by the Will of the debtor.²

2. The Duty to Pay Debts and Compromise Claims

Most Wills include a clause that states that an executor is to pay all the debts of the estate. Section 48 of the *Ontario Trustee Act* specifically gives authority to a personal

¹ *Ontario (Attorney General) v. Ballard Estate* (1995), 6 E.T.R. (2nd) 311 (Ont. Gen. Div.); *MacCulloch Estate v. MacCulloch* (1986), 22 E.T.R. 34 (N.S.C.A.), leave to appeal refused (1986), 70 N.R. 81 (S.C.C.).

² *Widdifield on Executors and Trustees* (6th ed.) Carswell at p. 3-1.

representative to pay or allow any debtor claim on any evidence that a representative thinks is sufficient.

Unfortunately, Section 48 of the *Trustee Act* does not provide much guidance with respect to the nature and extent of that duty.

The leading case is the Ontario Court of Appeal decision in *Commander Leasing Corp. v. Aiyede Estate*³. In this case, the executrix and the deceased's spouse, paid part of the money owed by the estate pursuant to two outstanding lease agreements and then distributed the remainder of the assets of the estate without paying the balances of the money owing to the creditor. The creditor commenced an action against the executrix, both personally and in her representative capacity. The Court of Appeal held that in distributing the entire estate, to the benefit of the surviving spouse, the executrix acted in clear disregard of the creditor's outstanding claim and was in breach of her duty as executrix of the estate.⁴ It should be noted that a compromise, on the part of an executor, can only be on things doubtful and contestable. Its object must be the ending or preventing of litigation.⁵ In *Vanek v. O'Hara*⁶ the Court held that it should not easily override the discretion of executors in making compromises in relatively minor matters.

³ (1984), 44 O.R. (2nd) 356, 16 E.T.R. 183 (C.A.).

⁴ *Ibid.*, at p. 187 (A.T.R.).

⁵ Widdifield on Executors and Trustees (6th ed.) Carswell at p. 3-50

⁶ (1995), 7 E.T.R. (2nd) 187 (Ont. Gen. Div.) at p. 193.

3. Estates Act

The *Estates Act* provides for an expeditious way of dealing with money claims or demands made against the estate. These summary procedures allow the personal representative to resolve any doubtful debts against the estate. If a party wishes to make a claim against an estate pursuant to the *Estates Act*, reference should be made to Rule 75.08 of the *Rules* which prescribes the form (75.14) to be utilized when making a claim. This form sets out the amount of the claim together with the grounds for the claim.

(a) Notice of Contestation

If the estate of a deceased person or the estate trustee knows of a claim against the estate before distributing the assets, the estate trustee should follow the steps set out in the *Estates Act*. For a liquidated debt, Section 44 applies and for unliquidated debts, Section 45 applies.

Under Section 44 of the *Estates Act*, the personal representative may serve the claimant with a written notice contesting the claim in whole or in part where the claim has been made against the estate, or where the personal representative has notice of a claim or debt, including one that is not presently payable. A prescribed form for such notice is the Notice of Contestation (Form 75.13). The form should

⁷ R.S.O. 1990, c. E.21.

include a brief statement of the grounds for contesting the claim and should refer to the section of the Act under which the notice is being sent.

Service of the notice on the claimant should be personal, although a judge may order substitutional service or service by mail where appropriate.

(b) Application for Order allowing claim

The claimant has thirty days after receipt of the Notice of Contestation to apply for an Order allowing the claim if it is a liquidated amount. Failure to file the application within this time limit bars the claim forever. However, the judge may grant permission to file a late application where the claimant applies for the extension within three months after being served with the Notice of Contestation.

The application must be accompanied by a Statement of Claim with proof of prior service on the estate trustee and a copy of the Notice of Contestation. An affidavit verifying the Statement of Claim and showing the names and addresses, where possible, of all beneficiaries of the estate, including residual beneficiaries and indicating which are infants, must also be included.

When the Statement of Claim and Notice of Contestation are filed, the Court Registrar shall fix a date for the hearing.

Notice of the application must be served not less than seven clear days before the date scheduled to hear the application on all those persons interested in the estate as the Court directs, as well as to the personal representative.

If the claim is a liquidated amount under \$800, the judge may hear the claim on the return of the application. Where it is \$800 or more, with the consent of the parties, the judge may hear the matter under the *Estates Act* provisions. Or the judge may direct the claimant to bring an action for the recovery of his or her claim and set a date for the hearing. If so, the Notice of Appointment must be served on those interested persons specified by the judge.

In cases where an unliquidated claim is made, the application involves applying for an Order for directions. The judge may hear the application for directions and make an Order he or she considers just, or he or she may direct the applicant to bring an action for recovery of the claim.

If the claim is not presently recoverable, the judge may prescribe the time after which the claimant may proceed. The Order of the judge is not enforceable by execution until the claim becomes payable.

No proceedings may be taken to enforce payment of a claim without the permission of the judge where the claim is established under the provisions of the *Estates Act*.

4. Priority of Claims and the Insolvent Estate

There are certain expenses which are treated in priority in respect of payment on the assets of the estate.

The first is, of course, the costs of the burial and those expenses are first charged upon the assets of the estate.

Insolvent estates may be administered according to provisions set out in the *Bankruptcy and Insolvency Act*, or in accordance with the legislative provisions concerning insolvent estates such as the procedures set out in the *Trustee Act*. There are other procedures available, for example, an estate trustee may bring an application pursuant to Rule 65 of the *Rules of Civil Procedure* to administer the estate of the deceased and obtain judgment for administration. Furthermore, the trustee has the option of bringing an application for the opinion, advice and direction of the Court in respect of any question relating to the management or administration of the trust pursuant to Section 60 of the *Trustee Act* and Rule 14 of the *Rules of Civil Procedure*.

5. Bankruptcy

Section 136(1) of the *Bankruptcy and Insolvency Act* provides that, in the case of a deceased bankrupt, subject to the rights of secured creditors, reasonable funeral

and testamentary expenses incurred by the legal personal representative of the estate are paid in priority.

(a) *Trustee Act*

Section 50(1) of the *Trustee Act* sets out a scheme whereby the estate trustees can take tentative steps to bankruptcy proceedings. This particular provision includes the right of a trustee to pay debts proportionately without preference or priority.

Secured creditor protection is dealt with in section 57 and 58 of the *Trustee Act*.

Section 57(2) provides that a personal representative can compel the secured creditor to prove his or her claim and provide particulars and Section 58 allows the personal representative to apply to the Court for an Order requiring the creditor to value his or her security within a specific timeline.

6. *Family Law Act and Succession Law Reform Act Claims*

Given the right of a surviving spouse, subject to a contract to the contrary, section 6(1) of the *Family Law Act* provides for the right of the surviving spouse to make an equalization claim against the assets of the estate.

Since the 1970s, a general statutory proposition prevails that the value of "family property" should be split up equally when the marriage ends, regardless of which spouse holds to the property.

With the coming into force of the *Family Law Reform Act*, 1986⁸ Ontario established a deferred community of property regime which adds a new dimension in relation to its impact upon surviving spouses and estates of deceased spouses and other persons who have an interest in their estates.

While the deferred community of property regime⁹ did not change the substantive law of succession, it had the effect of adding to or taking away property and rights to property previously thought to be those assets of a testator and surviving spouses.

The impact affected the rights of the estates of a deceased spouse and a surviving spouses and had a serious impact upon the entitlement of other persons interested under estates of a deceased spouse.

(i) **Nature of Claim**

While the primary emphasis of dependant relief provisions intended to be the needs of the dependant having regard to his or her custom standard of living; the considerations applicable to a division of assets following marriage breakdown

⁸ R.S.O. 1980, c. 152 [Repealed and replaced by the *Family Law Act* 1986, S.O. 1986, c. 4.]

⁹ Alberta: *Matrimonial Property Act*, R.S.A. 1980, c.M-9, British Columbia: *Family Relations Act*, R.S.B.C., c. 121, Pt. 3 (Sections 43-55), Manitoba: *Marital Property Act*, R.S.M. 1987, c.M 45, Saskatchewan: *Matrimonial Property Act*, S.S. 1979, c. M-6.1.

are dramatically different and irrelevant to those which come into play upon the death of a spouse and are not applicable to support Applications. Where the community has declared that spouses should share certain assets equally on a divorce or voluntary separation, the allocation of the assets is very different than that for dependants.¹⁰ In *Re Mannion*¹¹, the question of law upon which the appeal was founded was the submission of the appellant that once it has been shown that a testator has not made adequate provision for the proper support of a dependant, resort must be had not only to the provisions of the SLRA, but also to the *Family Law Reform Act* (as it then was) in determining what provision should be made to provide such support. The Court of Appeal held that when determining what is adequate provision for support where the *Family Law Reform Act* applies, consideration of both the SLRA and the *Family Law Reform Act* must be made.¹²

¹⁰ *Richards v. Person* (1983), 49 B.C.L.R. 43, 15 E.T.R. 193 (C.A.); *Re Mannion* (1984), 45 O.R. (2d) 339, 16 E.T.R. 190 (C.A.).

¹¹ *IBID.*

¹² see also *Palachik v. Kiss* (1983), 33 R.F.L. (2d) 225, 146 D.L.R. (3d) 385, 47 N.R. 148 (S.C.C.).

APPENDIX "A"

Trustee Act

Administration of Estates

48. (1) **Power, to pay debts** — A personal representative may pay or allow any debt or claim on any evidence that the representative thinks sufficient.

(2) **To compound, etc.** — A personal representative, or two or more trustees acting together, or a sole acting trustee, where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof may, if and as they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of these purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as seem expedient without being responsible for any loss occasioned by any act or thing done in good faith.

49. (1) **Application of income of estate of deceased person** — Unless a contrary intention appears from the will,

(a) the personal representative of a deceased person, in paying the debts, funeral and testamentary expenses, estate, legacy, succession and inheritance taxes or duties, legacies or other similar disbursements, shall not apply or be deemed to have applied any income of the estate in or towards the payment of any part of the capital of any such disbursements or of any part of the interest, if any, due thereon at the date of death of such person;

(b) until the payment of the debts, funeral and testamentary expenses, estate, legacy, succession and inheritance taxes or duties, legacies, or other similar disbursements mentioned in clause (a), the income from the property required for the payment thereof, with the exception of any part of such income applied in the payment of any interest accruing due thereon after the date of death of the deceased, shall be treated and applied as income of the residuary estate.

but, in any case where the assets of the estate are not sufficient to pay the disbursements in full, the income shall be applied in making up such deficiency.

(2) **Idem** — Subsection (1) shall be deemed always to have been part of the law of Ontario.

(3) **Part application of other rules validated** — Despite subsections (1) and (2), in any case in which the personal representative has before the 30th day of May, 1961 applied any rule of law or of administration different from the provisions of subsection (1), such application is valid and effective.

50. (1) **In case of deficiency of assets, debts to rank proportionately** — On the administration of the estate of a deceased person, in the case of a deficiency of assets, debts due to the Crown and to the personal representative of the deceased person, and debts to others, including therein debts by judgment or order, and other debts of record, debts by specialty, simple contract debts and such claims for damages as are payable in like order of administration as simple contract debts shall be paid proportionately and without any preference or priority of debts of one rank or nature over those of another but nothing herein prejudices any lien existing during the lifetime of the debtor on any of the debtor's property.

(2) **Overpayment to creditor** — Where a personal representative pays more to a creditor or claimant than the entitlement under subsection (1), the overpayment does not entitle any other creditor or claimant to recover more than the amount to which the creditor or claimant would be entitled if the overpayment had not been made.

(3) **Relief from personal liability** — Where a personal representative pays more to a creditor or claimant than the entitlement under subsection (1), the court may relieve the personal representative either wholly or partly from personal liability, if it is satisfied that the personal representative has acted honestly and reasonably and for the protection or conservation of the assets of the estate.

51. (1) As to liability of executor or administrator in respect of covenants, etc., in leases — Where a personal representative, liable as such to the rents, or upon the covenants or agreements contained in a lease or agreement for a lease granted or assigned to the testator or intestate, has satisfied all liabilities under the lease or agreement for a lease, which accrued due and were claimed up to the time of the assignment hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and has assigned the lease, or agreement for lease, to a purchaser thereof, the personal representative may distribute the residuary estate of the deceased to and among the parties entitled thereto, without appropriating any part or any further part thereof, as the case may be, to meet any future liability under the lease or agreement for lease.

(2) No personal liability for subsequent claim — The personal representative so distributing the residuary estate is not personally liable in respect of any subsequent claim under the lease or agreement for lease.

(3) Right to follow assets not affected — Nothing in this section prejudices the right of the lessor, or those claiming under the lessor, to follow the assets of the deceased into the hands of the person or persons to or among whom they have been distributed.

52. (1) As to liability of personal representative in respect of rents, etc., in conveyances on rent-charge, etc. — Where a personal representative, liable as such to the rent or upon the covenants or agreements contained in any conveyance on chief rent or rent-charge, whether any such rent is by limitation of use, grant or reservation, or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate, has satisfied all liabilities under the conveyance, or agreement for a conveyance,

which accrued due and were claimed up to the time of the conveyance hereinafter mentioned, and has set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and has conveyed such property, or assigned such agreement for conveyance to a purchaser thereof, the personal representative may distribute the residuary estate of the deceased to and among the persons entitled thereto, without appropriating any part or any further part thereof, as the case may be, to meet any further liability under the conveyance or agreement for conveyance.

(2) No personal liability for any subsequent claim — A personal representative so distributing the residuary estate is not personally liable in respect of any subsequent claim under the conveyance or agreement for conveyance.

(3) Right of grantor, etc., to follow assets not affected — Nothing in this section prejudices the right of the grantor, or those claiming under the grantor, to follow the assets of the deceased into the hands of the person or persons to or among whom they have been distributed.

53. (1) Distribution of assets under trust deeds for benefit of creditors, or of the assets of intestate — A trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or of a particular class or classes of creditors, where the creditors are not designated by name therein, or a personal representative who has given such or the like notices as, in the opinion of the court in which such trustee, assignee or personal representative is sought to be charged, would have been directed to be given by the Ontario Court (General Division) in an action for the execution of the trusts of such deed or assignment, or in an administration suit, for creditors and others to send in to such trustee, assignee or personal representative, their claims against the person for the benefit of whose creditors such deed or assignment is made, or against the estate of the testator or intestate, as the case may be, at the expiration of the time named in the notices, or the last of the notices, for sending in such claims, may distribute the proceeds of the trust estate, or the assets of the testator or intestate, as the case may be, or any part thereof among the persons entitled thereto, having regard to the claims of which the trustee, assignee or representative has then notice, and is not liable for the proceeds of the trust estate, or assets, or any part thereof so distributed to any person of whose claim there was no notice at the time of the distribution.

(2) Right of creditor to follow assets not affected — Nothing in this section prejudices the right of any creditor or claimant to follow the proceeds of the trust estate, or assets, or any part thereof into the hands of persons who have received the same.

(3) Subs. (1) not to apply to heirs, etc. — Subsection (1) does not apply to heirs, next of kin, devisees or legatees claiming as such.

54. Exercise of general power by will, effect of — Property over which a deceased person had a general power of appointment, which he or she might have exercised for his or her own benefit without the assent of any other person, shall be assets for the payment of his or her debts where the same is appointed by will, and, under an execution against the personal representatives of such deceased person, such assets may be seized and sold after the deceased person's own property has been exhausted.

55. Rights and liabilities of executors of executors — Executors of executors have the same actions for the debts and property of the first testator as he or she would have had if in life, and are answerable for such of the debts and property of the first testator as they recover as the first executors would be if they had recovered the same.

56. Liability of personal representative of one who commits waste — The personal representative of any person who, acting with or without authority as executor or administrator, wastes or converts to his or her own use any part of the estate of any deceased person is liable and chargeable in the same manner as the testator or intestate would have been if he or she had been living.

57. (1) Deficiency of assets — On the administration of the estate of a deceased person, in case of a deficiency of assets, every creditor holding security on the estate of the deceased debtor or on the estate of a third person for whom the estate of the deceased debtor is only indirectly or secondarily liable, shall place a value on such security and the creditor shall rank upon the distribution of assets only upon the unsecured portion of the claim after deducting the value of the security, unless the personal representative elects to take over the security as hereinafter provided.

(2) Where personal representative requires creditor to prove claim — The personal representative of a deceased person who is of the opinion that there may be a deficiency of assets may require any creditor to prove the claim and to state whether security is held for it or any part thereof, and to give full particulars of the same and if such security is on the estate of the deceased debtor or on the estate of a third person for whom the estate of the deceased debtor is only indirectly or secondarily liable, to place a specified value on such security and the personal representative may either consent to the creditor ranking for the amount of the claim after deducting such valuation or may require from the creditor an assignment of the security at an advance of 10 per cent upon the specified value to be paid out of the estate as soon as the personal representative has realized upon such security or is in a position to make payment out of the assets of the estate and in either case the difference between the value at which the security is retained or taken, as the case may be, and the amount of the claim of the creditor, shall be the amount for which the creditor ranks upon the estate of the deceased debtor.

(3) Inspectors, directing of; remuneration of — Where inspectors have been appointed as hereinafter provided or where the estate is being administered under the direction of or by a court, the personal representative in making an election shall act under the direction of the inspectors or of the court, as the case may be, and the remuneration of the inspectors shall be determined by the judge on the passing of accounts.

(4) Where claim based on negotiable instruments — If the claim of the creditor is based upon a negotiable instrument upon which the estate of the deceased debtor is only indirectly or secondarily liable and which is not mature or exigible, the creditor shall be considered to hold security within the meaning of this section and shall put a value on the liability of the person primarily liable thereon as the security for the payment thereof, but after the maturity of such liability and its non-payment the creditor is entitled to amend and revalue the claim.

58. When creditor holding security fails to value same — Where a creditor fails to value any security held by the creditor which under this Act the creditor is called upon to value, the personal representative may apply to the Ontario Court (General Division) for an order that unless a specified value is placed on such security and notified in writing to the personal representative, within a time to be limited by the order, such claimant, in respect of

the claim or the part thereof for which security is held, is wholly barred of any right to share in the proceeds of the estate unless the judge upon the application of the creditor extends the time for the valuation of the security.

59. (1) Calling meeting of creditors where there is a deficiency of assets —

Where in the administration of the estate of a deceased person the personal representative fears that there may be a deficiency of assets or that all the creditors will not be paid in full, the personal representative may call a meeting of creditors and lay before them the situation of the estate and at such meeting inspectors may be appointed by the creditors to assist the personal representative in the administration of the estate and to advise with respect thereto.

(2) Creditors' request for meeting — In any such case the personal representative shall call a meeting of creditors for the purpose aforesaid at the request in writing of creditors holding 10 per cent of the amount of claims filed against the estate.

(3) Appointment of creditor as an inspector — In cases where no meeting of creditors has been held, the personal representative may appoint a creditor or creditors as inspector or inspectors to assist in the realizing and management of the estate but in such case the appointment shall be approved by the judge before the inspectors accept office.

APPENDIX "B"
Bankruptcy and Insolvency Act

INTERPRETATION

2. (1) Definitions. — In this Act,

"affidavit" includes statutory declaration and solemn affirmation;

"assignment" means an assignment filed with the official receiver;

"bank" means

(a) every bank and every authorized foreign bank within the meaning of section 2 of the *Bank Act*,

(b) every other member of the Canadian Payments Association established by the *Canadian Payments Association Act*, and

(c) every local cooperative credit society, as defined in subsection 2(1) of the Act referred to in paragraph (b), that is a member of a central cooperative credit society, as defined in that subsection, that is a member of that Association;

"bankrupt" means a person who has made an assignment or against whom a receiving order has been made or the legal status of that person;

"bankruptcy" means the state of being bankrupt or the fact of becoming bankrupt;

"child" includes a child born out of marriage;

"claim provable in bankruptcy", "provable claim" or "claim provable" includes any claim or liability provable in proceedings under this Act by a creditor;

"corporation" includes any company or legal person incorporated by or under an Act of Parliament or of any province, and any incorporated company, wherever incorporated, that is authorized to carry on business in Canada or that has an office or property in Canada, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, insurance companies, trust companies, loan companies or railway companies;

"court", except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3 and subject to subsection 243(1), means the court having jurisdiction in bankruptcy or a judge thereof, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act;

"creditor" means a person having a claim, unsecured, preferred by virtue of priority under section 136 or secured, provable as a claim under this Act;

"date of the initial bankruptcy event", in respect of a person, means the earliest of the date of filing of or making of

(a) an assignment by or in respect of the person,

(b) a proposal by or in respect of the person,

(c) a notice of intention by the person,

(d) the first petition for a receiving order against the person, in any case

(i) referred to in paragraph 50.4(8)(a) or 57(a) or subsection 61(2), or

(ii) where a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal, or

(e) the petition in respect of which a receiving order is made, in the case of a petition other than one referred to in paragraph (d);

"debtor" includes an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada and, where the context requires, includes a bankrupt;

"General Rules" means the General Rules referred to in section 209;

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

"locality of a debtor" means the principal place

(a) where the debtor has carried on business during the year immediately preceding his bankruptcy,

(b) where the debtor has resided during the year immediately preceding his bankruptcy, or

(c) in cases not coming within paragraph (a) or (b), where the greater portion of the property of the debtor is situated;

"Minister" means the Minister of Industry;

"official receiver" means an officer appointed under subsection 12(2);

"person" includes a partnership, an unincorporated association, a corporation, a cooperative society or an organization, the successors of a partnership, association, corporation, society or organization, and the heirs, executors, liquidators of the succession, administrators or other legal representative of a person, according to the law of that part of Canada to which the context extends;

"prescribed"

(a) in the case of the form of a document that is by this Act to be prescribed and the information to be given therein, means prescribed by directive issued by the Superintendent under paragraph 5(4)(e), and

(b) in any other case, means prescribed by the General Rules;

"property" includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, and whether situated in Canada or elsewhere, and includes obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property;

"proposal" means

(a) in any provision of Division I of Part III, a proposal made under that Division, and
(b) in any other provision, a proposal made under Division I of Part III or a consumer proposal made under Division II of Part III

and includes a proposal or consumer proposal, as the case may be, for a composition, for an extension of time or for a scheme or arrangement;

"public utility" includes a person or body who supplies fuel, water or electricity, or supplies telecommunications, garbage collection, pollution control or postal services;

"resolution" or "ordinary resolution" means a resolution carried in the manner provided by section 115;

"secured creditor" means a person holding a mortgage, hypothec, pledge, charge, lien or privilege on or against the property of the debtor or any part thereof as security for a debt due or accruing due to him from the debtor, or a person whose claim is based on, or secured by, a negotiable instrument held as collateral security and on which the debtor is only indirectly or secondarily liable;

"settlement" includes a contract, covenant, transfer, gift and designation of beneficiary in an insurance contract, to the extent that the contract, covenant, transfer, gift or designation is gratuitous or made for merely nominal consideration;

"sheriff" includes a bailiff and any officer charged with the execution of a writ or other process under this Act or any other Act or proceeding with respect to any property of a debtor;

"special resolution" means a resolution decided by a majority in number and three-fourths in value of the creditors with proven claims present, personally or by proxy, at a meeting of creditors and voting on the resolution;

"Superintendent" means the Superintendent of Bankruptcy appointed under subsection 5(1);

"trustee" or "licensed trustee" means a person who is licensed or appointed under this Act, R.S.C., c. B-3, s. 2; R.S.C. 1985, c. 31 (1st Supp.), s. 69; 1992, c. 27, s. 3; 1995, c. 1, s. 62(1)(a); 1997, c. 12, s. 1(1-3, 5); 1999, c. 28, s. 146; 1999, c. 31, s. 17(1).

42. Trustees shall not purchase, directly or indirectly,
- (a) property of any debtor for whom they are acting with respect to a professional engagement; or
 - (b) property of any estates in respect of which the Act applies, for which they are not acting, unless the property is purchased
 - (i) at the same time as it is offered to the public,
 - (ii) at the same price as it is offered to the public, and
 - (iii) during the normal course of business of the bankrupt or debtor. SOR/98-240, s. 1, part.

Petition for Receiving Order

43. (1) **Bankruptcy petition.** — Subject to this section, one or more creditors may file in court a petition for a receiving order against a debtor if, and if it is alleged in the petition that,

- (a) the debt or debts owing to the petitioning creditor or creditors amount to one thousand dollars; and
- (b) the debtor has committed an act of bankruptcy within six months next preceding the filing of the petition.

(2) **Where petitioning creditor is a secured creditor.** — Where the petitioning creditor referred to in subsection (1) is a secured creditor, he shall in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of a receiving order being made against the debtor, or give an estimate of the value of his security, and in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, in the same manner as if he were an unsecured creditor.

(3) **Affidavit.** — The petition shall be verified by affidavit of the petitioner or by someone duly authorized on his behalf having personal knowledge of the facts alleged in the petition.

(4) **Consolidation of petitions.** — Where two or more petitions are filed against the same debtor or against joint debtors, the court may consolidate the proceedings or any of them on such terms as the court thinks fit. R.S.C., c. B-3, s. 25(1-4).

(5) **Place of filing.** — The petition shall be filed in the court having jurisdiction in the judicial district of the locality of the debtor. 1992, c. 27, s. 15.

(6) **Proof of facts, etc.** — At the hearing of the petition, the court shall require proof of the facts alleged in the petition and of the service of the petition, and, if satisfied with the proof, may make a receiving order.

(7) **Dismissal of petition.** — Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.

(8) **Dismissal with respect to some respondents only.** — Where there are more respondents than one to a petition, the court may dismiss the petition with respect to one or more of them, without prejudice to the effect of the petition as against the other or others of them.

(9) **Appointment of trustee.** — On a receiving order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court deems just, to the wishes of the creditors.

(10) **Stay of proceedings where facts denied.** — Where the debtor appears at the hearing of the petition and denies the truth of the facts alleged in the petition, the court may, instead of dismissing the petition, stay all proceedings on the petition on such terms as it may see fit to impose on the petitioner as to costs or on the debtor to prevent alienation of his property and for such time as may be required for trial of the issue relating to the disputed facts.

(11) **Stay of proceedings for other reasons.** — The court may for other sufficient reason make an order staying the proceedings under a petition, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just.

(12) **Security for costs.** — A petitioner who is resident out of Canada may be ordered to give security for costs to the debtor, and proceedings under the petition may be stayed until the security is furnished.

(13) **Receiving order on another petition.** — Where proceedings on a petition have been stayed or have not been prosecuted with due diligence and effect, the court may, if by reason of the delay or for any other cause it is deemed just, substitute or add as petitioner any other creditor to whom the debtor may be indebted in the amount required by this Act and making a receiving order on the petition of the other creditor, and shall thereupon dismiss on such terms as it may deem just the petition in the stayed or non-prosecuted proceedings.

(14) **Withdrawing petition.** — A petition shall not be withdrawn without the leave of the court.

(15) **Petition against one partner.** — Any creditor whose claim against a partnership is sufficient to entitle him to present a bankruptcy petition may present a petition against any one or more partners of the firm without including the others.

(16) **Court may consolidate proceedings.** — Where a receiving order has been made against one member of a partnership, any other petition against a member of the same partnership shall be filed in or transferred to the same court, and the court may give such directions for consolidating the proceedings under the petitions as it thinks just.

(17) **Continuance of proceedings on death of debtor.** — Where a debtor against whom a petition has been filed dies, the proceedings shall, unless the court otherwise orders, be continued as if he were alive. R.S.C., c. B-3, s. 25(6-17).

44. (1) **Petition against estate of deceased debtor.** — Subject to section 43, a petition for a receiving order may be filed against the estate of a deceased debtor.

(2) **Liability of legal representative.** — After service of a petition for a receiving order on the legal personal representative of a deceased debtor, he shall not make payment of any moneys or transfer any property of the deceased debtor, except as required for payment of the proper funeral and testamentary expenses, until the petition is disposed of, otherwise, in addition to any penalties to which he may be subject, he is personally liable therefor.

(3) **Idem.** — Nothing in this section invalidates any payment or transfer of property made or any act or thing done by the legal personal representative in good faith before the service of a petition referred to in subsection (2). R.S.C., c. B-3, s. 26.

Assignments

49. (1) Assignment for general benefit of creditors. — An insolvent person or, if deceased, his legal personal representative with the leave of the court may make an assignment of all his property for the general benefit of his creditors.

(2) Sworn statement. — The assignment made under subsection (1) shall be accompanied by a sworn statement in the prescribed form showing the property of the debtor divisible among his creditors, the names and addresses of all his creditors and the amounts of their respective claims and the nature of each, whether secured, preferred or unsecured.

(3) Filing of assignment. — The assignment made under subsection (1) shall be offered to the official receiver in the locality of the debtor, and it is inoperative until filed with that official receiver, who shall refuse to file the assignment unless it is in the prescribed form or to the like effect and accompanied by the sworn statement required by subsection (2).

(4) Appointment of trustee. — Where the official receiver files the assignment made under subsection (1), he shall appoint as trustee a licensed trustee whom he shall, as far as possible, select by reference to the wishes of the most interested creditors if ascertainable at the time, and the official receiver shall complete the assignment by inserting therein as grantee the name of the trustee. R.S.C., c. B-3, s. 31(1-4).

(5) Cancellation of assignment. — Where the official receiver is unable to find a licensed trustee who is willing to act, the official receiver shall, after giving the bankrupt five days notice, cancel the assignment. 1997, c. 12, s. 29(2).

(6) Procedure in small estates. — Where the bankrupt is not a corporation and in the opinion of the official receiver the realizable assets of the bankrupt, after the claims of secured creditors are deducted, will not exceed five thousand dollars or such other amount as is prescribed, the provisions of this Act relating to the summary administration of estates shall apply.

(7) Future property not to be considered. — In the determination of the realizable assets of a bankrupt for the purposes of subsection (6), no regard shall be had to any property that may be acquired by the bankrupt or devolve on the bankrupt before the bankrupt's discharge.

(8) Where subsection (6) ceases to apply. — The official receiver may direct that subsection (6) shall cease to apply in respect of the bankrupt where the official receiver determines that

(a) the realizable assets of the bankrupt, after the claims of secured creditors are deducted, exceed five thousand dollars or the amount prescribed, as the case may be,

or

(b) the costs of realization of the assets of the bankrupt are a significant proportion of the realizable value of the assets,

and the official receiver considers that such a direction is appropriate. 1992, c. 27, s. 17.

71. (1) *[Repealed 1997, c. 12, s. 67.]*

(2) Vesting of property in trustee. — On a receiving order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with his property, which shall, subject to this Act and to the rights of secured creditors, forthwith pass to and vest in the trustee named in the receiving order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any conveyance, assignment or transfer. R.S.C., c. B-3, s. 50(5).

Scheme of Distribution

136. (1) Priority of claims. — Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal personal representative of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(c) the levy payable under section 147;

(d) wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman for services rendered during the six months immediately preceding the bankruptcy to the extent of two thousand dollars in each case, together with, in the case of a travelling salesman, disbursements properly incurred by that salesman in and about the bankrupt's business, to the extent of an additional one thousand dollars in each case, during the same period, and for the purposes of this paragraph commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for within the six-month period, shall be deemed to have been earned therein;

(d.1) claims in respect of debts or liabilities referred to in paragraph 178(1)(b) or (c), if provable by virtue of subsection 121(4), for periodic amounts accrued in the year before the date of the bankruptcy that are payable, plus any lump sum amount that is payable;

(e) municipal taxes assessed or levied against the bankrupt, within the two years immediately preceding his bankruptcy, that do not constitute a preferential lien or charge against the real property of the bankrupt, but not exceeding the value of the interest of the bankrupt in the property in respect of which the taxes were imposed as declared by the trustee;

(f) the landlord for arrears of rent for a period of three months immediately preceding the bankruptcy and accelerated rent for a period not exceeding three months following the bankruptcy if entitled thereto under the lease, but the total amount so payable shall not exceed the realization from the property on the premises under lease, and any payment made on account of accelerated rent shall be credited against the amount payable by the trustee for occupation rent;

(g) the fees and costs referred to in subsection 70(2) but only to the extent of the realization from the property exigible thereunder;

(h) in the case of a bankrupt who became bankrupt before the prescribed date, all indebtedness of the bankrupt under any Act respecting workers' compensation, under any Act respecting unemployment insurance or under any provision of the *Income Tax Act* creating an obligation to pay to Her Majesty amounts that have been deducted or withheld, rateably;

(i) claims resulting from injuries to employees of the bankrupt in respect of which the provisions of any Act respecting workers' compensation do not apply, but only to the extent of moneys received from persons guaranteeing the bankrupt against damages resulting from those injuries; and

(j) in the case of a bankrupt who became bankrupt before the prescribed date, claims of the Crown not mentioned in paragraphs (a) to (i), in right of Canada or any province, rateably notwithstanding any statutory preference to the contrary. R.S., c. B-3, s. 107(1); 1992, c. 1, s. 143; 1992, c. 27, s. 54(1, 2); 1997, c. 12, s. 90(1, 2).

(2) Payment as funds available. — Subject to the retention of such sums as may be necessary for the costs of administration or otherwise, payment in accordance with subsection (1) shall be made as soon as funds are available for that purpose.

(3) Balance of claim. — A creditor whose rights are restricted by this section is entitled to rank as an unsecured creditor for any balance of claim due him. R.S.C., c. B-3, s. 107(2, 3).

141. Claims generally payable rateably. — Subject to this Act, all claims proved in a bankruptcy shall be paid rateably. R.S.C., c. B-3, s. 112.

144. Right of bankrupt to surplus. — The bankrupt or the legal personal representative of a deceased bankrupt is entitled to any surplus remaining after payment in full of his creditors with interest as provided by this Act and of the costs, charges and expenses of the bankruptcy proceedings. R.S.C., c. B-3, s. 115.

APPENDIX "C"
Rules of Civil Procedure
(Rule 65)

RULE 65 PROCEEDINGS FOR ADMINISTRATION

Synopsis — Proceedings for administration of an estate or the execution of a trust may be instituted by application to the Ontario Court (General Division) under this Rule if the questions between parties cannot otherwise be determined (rule 65.01(2)). The application may result in an order for the rendering of accounts by executors or trustees rather than judgment, or judgment with a reference directed that ensures all matters connected with the estate or trust are finally wound up. See also Rules 74 and 75.

NOTICE TO THE PROFESSION

Estates Court

Commencing May 4, 1992 an Estates Court will sit the first full week of every month, except in July and August, 1992, to deal with all matters relating to estates, mental incompetency and the passing of accounts of all persons having the nature of a trustee. Matters of proven urgency may be heard during July and August by arrangement through the registrar of the Estates Court.

All of the issuing, filing and appointment-setting functions for these matters will be done at the Estates Office, 439 University Avenue, 3rd floor, Toronto, and none of this work will be done through the Weekly Court Office or the offices of the registrar at 145 Queen Street West or at the Court House, 361 University Avenue. Appointments for the relevant matters can be obtained from the Estates Office effective immediately.

The Estates Court will deal with the following matters:

- (a) estate passings of accounts
- (b) trials for proof of wills in solemn form
- (c) trials involving issues of testamentary capacity and fraud and undue influence
- (d) summary procedure for claims against estates estate rules 69 and 70
- (e) applications under Rule 14.05 paragraphs (a), (b), (c), (d) regarding wills and (f) if the trust is created by a will
- (f) Succession Law Reform Act applications Part V
- (g) pre-trials for trials mentioned above
- (h) all proceedings relating to mental incompetency, including declarations, directions and audits
- (i) audits of accounts for persons acting in trustee capacity, e.g., committee of absentee, guardians.

The schedule for the sitting for the week will be as follows:

- Monday - Applications under the Succession Law Reform Act and Rule 14.05 pertaining to estate matters expected to take less than 2 hours
- Tuesday - Estate passing of accounts, all to be called for 10:00 a.m. and mental incompetency audits and other audits, all to be called for 2:30 p.m. subject to the decision of the registrar
- Wednesday - Trials and proof in solemn form expected to take not more than 2 days
- Thursday & Friday - Motions for Directions and other motions and applications expected to take less than two hours.

Dates for applications, motion, audits and mental incompetency matters may be chosen by counsel after consultation with the registrar in the Estates Office.

Trials and applications expected to take longer than 2 days or 2 hours respectively will be tried in a court room other than the Estates Court Room, as assigned by the trial co-ordinator and at a time arranged with the registrar in the Estates Office.

In the event of a proven emergency necessitating a hearing in a week when the Estates Court is not sitting arrangements may be made through the registrar in the Estates Office to have the matter heard.

All trial matters will be pre-tried during the week of the Estates Court by the sitting judge. Pre-trials will be scheduled by the registrar for between 9:00 a.m. and 10:00 a.m. on any day except Tuesday. At the pre-trial the judge shall determine how long the trial is expected to take and note same on the trial record. For trials expected to take more than 2 days counsel will attend the pre-trial having obtained a date from the registrar in the Estates Office to be then noted by the pre-trial judge on the record.

Judges for all trials and estate and mental incompetency matters will be assigned by the Regional Senior Justice from judges on the estates list as far as practicable.

Gown will be worn for all proceedings except pre-trials.

All estate actions, other than those of a general nature where the estate is plaintiff or defendant, such as motor vehicle actions, shall not be subject to case management except so far as the principles may be applied by the judge handling a particular estate trial. Proceedings of a general nature by or against an estate shall be issued out of the general office of the Ontario Court (General Division) and not out of the Estates Office.

Mental incompetency files, including those now active, will be held in the Estate Office.

Members of the profession are reminded that normally proceedings in connection with estates are properly brought in the region where the deceased person died or probate or administration issued. It may be, therefore, that a judge at the pre-trial or on an application may decide that the balance of convenience dictates that the matter be heard other than in Toronto and may transfer the matter to another jurisdiction.

The Estates Court is being tried on an experimental basis. It may be necessary to change these directions from time to time for greater court efficiency and notice of such changes will be posted as needed. After a suitable period the Regional Senior Justice will review the experiment. Comments will be welcomed.

April 3, 1992

Regional Senior Justice Trainor

WHERE AVAILABLE

65.01 (1) A proceeding for the administration of the estate of a deceased person or for the execution of a trust may be commenced by notice of application,

- (a) by a person claiming to be a creditor of the estate of the deceased person;
- (b) by a person claiming to be a beneficiary under the will or on the intestacy of the deceased person or under the instrument of trust; or
- (c) by an executor or administrator of the estate of the deceased person or a trustee.

(2) A judgment for administration of an estate (Form 65A) or for execution of a trust shall be granted only if the judge is satisfied that the questions between the parties cannot otherwise be properly determined.

(3) Where no accounts or insufficient accounts have been rendered, the judge may, instead of granting judgment for administration of the estate or for execution of the trust, order that the executors, administrators or trustees render to the applicant a proper statement of their accounts and may stay the application in the meantime.

CONCORDANCE See former Rules 615, 617, 619 and 620.

WHERE A REFERENCE IS DIRECTED

65.02 (1) A judgment for administration of an estate or for execution of a trust shall direct a reference, and the referee has power to deal with the property of the estate or trust, including power to give all necessary directions for its realization, and shall finally wind up all matters connected with the estate or trust without any further directions, except where the special circumstances of the case require interim reports or interlocutory orders.

(2) Interest on accounts taken in administration proceedings shall be computed on the debts of the deceased from the date of the judgment and on legacies from the end of one year after the death of the deceased, unless the will directs another time for payment.

(3) All money realized from the estate or trust shall forthwith be paid into court, and no money shall be distributed or paid out except by order of a judge or, on a reference, by order of the referee. O. Reg. 465/93, s. 9.

CONCORDANCE: See former Rule 618.

APPENDIX "D"

Estates Act

- 44. (1) Contestation of claims against estate** — Where a claim or demand is made against the estate of a deceased person or where the personal representative has notice of such claim or demand, they may serve the claimant with a notice in writing that they contest the same in whole or in part, and, if in part, stating what part, and also referring to this section.
- (2) Application for order allowing claim** — Within thirty days after the receipt of such notice of contestation 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 their claim verified by 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 the amount of it, and the judge shall hear the parties and their witnesses and shall make such order upon the application as the judge considers just, and if the claimant does not make such application, the claimant shall be deemed to have abandoned the claim and it is forever barred.
- (3) Claim within jurisdiction of Small Claims Court** — Where the claim is within the jurisdiction of the Small Claims Court, an application for the extension of time referred to in subsection (2) and the application for the order shall be made to the judge of a Small Claims Court in which an action for the recovery of the claim might be brought, and the application for the order shall be heard by the judge at the sittings of such court, but where the claimant and the personal representative consent, the applications may be made to the judge of the Ontario Court (General Division).
- (4) Notice in such cases** — Not less than seven days notice of the application shall be given to the personal representative, and where the application is to be made to the judge of the Ontario Court (General Division), shall also be given to the Children's Lawyer if minors are concerned, and to such, if any, of the persons beneficially interested in the estate as the judge may direct.
- (5) Right of persons interested to be heard** — Where the application is made to the judge of the Ontario Court (General Division), in addition to the persons to whom notice has been given, any other person who is interested in the estate has the right to be heard and to take part in the proceeding.
- (6) Consent to jurisdiction of Ontario Court (General Division) in certain cases** — Where the claim, or the part of it that is contested, amounts to \$800 or more, instead of proceeding as provided by this section, the judge shall, on the application of either party, or of any of the parties mentioned in subsection (5), direct the creditor to bring an action for the recovery or the establishment of the creditor's claim, on such terms and conditions as the judge considers just but, where the claimant and the personal representative consent to have the trial before the judge of the Ontario Court (General Division), the trial shall take place and be disposed of before the Ontario Court (General Division) judge under this section.
- (7) Fees and costs when claim within Small Claims Court jurisdiction** — Where the claim is within the jurisdiction of the Small Claims Court, the fees and costs shall be according to the tariff of that court and in other cases the fees payable to the judge of the Ontario Court (General Division) and to the registrar shall be the same as are allowed on an audit in an estate of a value equal to the amount of the claim or so much thereof as is contested, and the fees to be allowed to counsel or solicitors shall be fixed and determined by the Ontario Court (General Division) judge having regard to the amount involved and the importance of the contest.
- (8) Claims not presently payable** — This section applies, even if the claim or demand is not presently payable, and that, for that reason, an action for the recovery of it could not be brought.
- (9) Application for order allowing commission** — The judge may order the issue of a commission to take the testimony of any person or party residing out of Ontario.
- (10) Judge may make an order appointing a person to take testimony** — The judge may make an order for the taking of evidence before trial of any material and necessary witness residing in Ontario who is sick, aged or infirm or is about to leave Ontario and provide to whom notice of the examination is to be given.

(11) **Right to issue summons** — A summons may be issued to enforce the attendance of witnesses to give evidence on any proceeding under this section.

(12) **Rules of court apply** — The Rules of Civil Procedure, so far as they are applicable, apply to every application for such commission or order for examination, the issue, execution, enforcement and return thereof and the judge has power to award costs of all such procedures according to the tariff in force from time to time.

(13) **Permission for enforcement of judgment** — Where a claim is established under this section, no procedures shall be commenced to enforce payment of the claim without the permission of the judge.

(14) **Enforcement of judgment** — Where permission to enforce payment of a claim is given, the order shall be filed in the Ontario Court (General Division) and an execution shall issue as upon a judgment of that court and an order for payment of costs may be entered in the same way.

R.R.O. c. 27, s. 43(2)

45. (1) **Notice of contestation of unliquidated claims** — Where any claim or demand not within the meaning of subsection 44 (1) is made against the estate of a deceased person or where the personal representative has notice or knowledge of the claim or demand, they may serve the claimant with the notice prescribed in the said subsection.

(2) **Application by claimant for order for directions** — Within the time limits mentioned in subsection 44(2), the claimant may, upon filing with the registrar a statement of their claim verified by affidavit and a copy of the notice of contestation, apply to the judge of the Ontario Court (General Division) for an order for directions as to the disposition of the claim or demand, and if the claimant does not make the application, the claimant shall be deemed to have abandoned the claim, and it is forever barred.

(3) **Notice in such cases** — Not less than seven days notice of the application shall be given to the personal representative and to the Children's Lawyer if minors are concerned and to such, if any, of the persons beneficially interested in the estate as the judge may direct.

(4) **Powers of judge** — The judge shall make such order upon the application for directions as he or she considers just and, in particular but without limiting the generality of the foregoing, the judge may,

- (a) direct the claimant to bring an action for the recovery or establishment of their claim on such terms and conditions as the judge considers just; and
- (b) where the claim or demand is not presently recoverable, prescribe the time after which the claimant shall proceed pursuant to the directions.

(5) **Application of parts of s. 44** — When an order is made under subsection (4), subsections 44(9), (10), (11) and (12) apply.

(6) **Right of persons interested to appeal** — If the personal representative does not appeal from an order made under subsection (2) or (4), the Children's Lawyer or any person beneficially interested in the estate may, by leave of a judge of the Divisional Court, appeal therefrom.

(7) **Right of persons interested to be heard on appeal** — Where the claimant or the personal representative appeals from an order made under subsection (2) or (4), the Children's Lawyer and any person beneficially interested in the estate may, by leave of the court that hears the appeal, appear and be heard.

R.R.O. c. 27, s. 43(2)

46. **Summary determination of disputes as to ownership** — Where the personal representative of a person claims the ownership of any personal property not exceeding in value \$800 and the claim is disputed by any other person, the dispute may be determined in a summary manner and section 44 applies with necessary modifications.

47. (1) **Limitations Act not to apply in certain cases** — The *Limitations Act* does not affect the claim of a person against the estate of a deceased person where notice of the claim giving full particulars of the claim and verified by affidavit, is filed with the executor or administrator of the estate at any time prior to the date upon which the claim would be barred by the *Limitations Act*, but where no executor or administrator has been appointed, the notice may be filed in the office of a local registrar of the Ontario Court (General Division).

(2) **Special provision** — Where the claim of a person against any other person would be barred by the *Limitations Act* at any time within three months after the death of the person having the claim, the claim shall for all purposes be deemed not to be barred until three months after the date of such death.