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Motions for the Return of Certificates of Appointment

Ideally, where a will challenge is contemplated, clients will obtain legal assistance in the filing of a Notice of Objection to the Issuance of a Certificate of Appointment of Estate Trustee with a Will to preserve their interests in an estate *prior* to the issuing of such a Certificate. However, sometimes clients will connect with a lawyer or consider a will challenge only after the Certificate of Appointment has been issued and may need help in taking steps to prevent the administration of the estate under the authority of the grant.

Rule 75.05 of the *Rules of Civil Procedure* contemplates a process whereby the Court may order that a Certificate of Appointment be returned to the Court when the moving party is seeking a determination of the validity of the will or codicil in respect of which the Certificate of Appointment was issued, or an application has been made under Rule 75.04 for the revocation of the Certificate of Appointment by reason of fraud, error, an outdated appointment, or some other reason. Sub-rule 75.05(2) specifies that the motion for the return of a Certificate may be made without notice. If the motion is granted, the estate trustee, upon being served with the order, is required to deposit the original Certificate of Appointment with the Registrar and the appointment ceases to be of effect, subject to further Court order, and the moving party is thereafter required to move for directions within 30 days.

In practice, however, it may be difficult to obtain an order directing the return of a Certificate of Appointment depending on the circumstances, especially without notice. In *Re Prong Estate*, 2011 ONSC 632, the Ontario Superior Court of Justice clarified that this relief is discretionary. On a motion under Rule 75.05, Courts may consider such factors as whether there has been any undue delay in bringing the motion and the apparent strength of the grounds for challenging the will and may impose upon the moving party “a due diligence obligation”. Suggesting that capacity is in issue will generally in itself be insufficient, absent an inquiry to determine whether there is any basis to move forward with a will challenge.

While the *Rules of Civil Procedure* may allow for this type of motion on an *ex parte* basis, clients should be cautioned regarding the difficulties in successfully moving for the return of a Certificate of Appointment without notice prior to taking steps to do so.