

The *Probater*

VOLUME 13, NUMBER 3, SEPTEMBER 2009



HULL & HULL LLP
Barristers and Solicitors

Some Friendly Pressure: Rule 74.15, Non-Contentious Orders for Assistance

by Jonathan Morse

Solicitors often provide advice in estate matters at the planning stage. When clients want to organize their affairs, a solicitor is called on to prepare a will, or wills if it is a couple attending or an individual preparing multiple wills. Several years later, a death may occur and issues can arise with respect to the administration of that same estate.

In another scenario, a solicitor may not have prepared the will but may get involved because a client seeks advice on how to obtain information from the estate executor.

The Rules of Civil Procedure contemplate that some matters brought to the Court may not be contentious and, therefore, clients may benefit from the remedies available through Rule 74. Other matters may be contentious and may require the application of Rule 75.

In our experience, solicitors often feel comfortable working on non-contentious matters but they may choose to refer matters to colleagues of the estate litigation bar for one of several reasons including possible conflicts of interest that might exist, or a solicitor may not have experience to proceed in the circumstances.

As noted, Rule 74 deals with non-contentious proceedings. Rule 74.15 specifically provides that various Orders for Assistance may be sought by way of a motion, in addition to the motions that are possible under section 9 of the *Estates Act*.

Rule 74.15(1) provides that any person with a financial interest in an estate may ask the Court for one of various specified Orders for Assistance.

Belz v. Mernick Estate (2000), 31 E.T.R. (2d) 27, [2000] O.J. No. 542 refers to a 1997 decision of Sheard J.: *Workman v. Colson* (1997), 28 O.T.C. 355. At

paragraph 8 of that decision, Sheard J. commented on the two rules:

Rules 74 and 75 of the *Rules of Civil Procedure* came into effect January 1, 1995. These two new rules and their accompanying forms completely revise and replace the former Surrogate Court rules and forms, introducing new terminology and procedures. It is to be expected that it will take time for these new rules to be fully incorporated into the jurisprudence... .

The threshold question is whether there is a financial interest in an estate.

Belz v. Mernick Estate and *Workman v. Colson* both examine the issue of whether one has a financial interest in a[n] estate. In *Belz*, at paragraph 15, Haley J. wrote:

When one examines the structure of Rule 74 and 75 which pertain to estates one sees that Rule 74 is concerned with application for probate of wills and estate administration where there is no will and to that end provides for a person having, or appearing to have, a financial interest in a[n] estate to, inter alia, oblige an executor to probate or renounce probate of a will, produce information about estate assets and to account. There is nothing which allows the court to interfere and make directions about the administration of the estate until there is a passing of accounts. Rule 75 is directed at attacks on the validity of a will or a probate document put forward as a last will. It does not deal with the administration of the estate by the estate trustee. The issues which are referred to under rule 75.06 relate to issues concerning the validity of the will and not to determination of financial interests under the will.

Obtaining enough information to determine whether a client has a financial interest can be a challenge. Section 9(2) of the *Estates Act* allows the Court to examine the testimony of anyone who appears to have knowledge of the last will and testament of the deceased.

continued on back



Some Friendly Pressure... (continued from front)

Assuming, though, that an application is made to the Court to issue a Certificate of Appointment, the onus is on the applicant to notify everyone with a financial interest in the will. In this instance, a beneficiary would be able to use Rule 74.15 as required. For example, the beneficiary may want to know more details of the assets of the estate (Rule 74.15(1)(d) or (e)) or may want to force a witness who is also a beneficiary to provide evidence (Rule 74.15(1)(f)).

These orders are made *ex parte*: that is, without notice to any other party.

Some of the possible Orders under Rule 74.15 may be of use also to one who is looking to the Court to force individuals to consent or object to a proposed appointment of an estate trustee with or without a will. This would be important to allow a named executor to fulfill his or her duties because, conceivably, without an order of the Court under Rule 74.15(1)(c), one could be prevented from proceeding with the application process.

A decision of Justice Brown – *Barletta v. Donne* 2008 WL 5353431 (Ont. S.C.J.) – highlights a recent application of Rule 74.15. The case involved three siblings. Two daughters were appointed as estate trustees while the brother was given a life interest in the deceased’s home and a trust of \$50,000 was to be

established for him. After depleting two guaranteed investment certificates, the estate trustees argued the house had to be sold because there were not enough funds to establish the trust for the brother.

In this case, the applicant brother relied upon Rule 74.15(1)(d) to require the estate trustees to file a statement of assets, and Rule 74.15(1)(h), as well as s. 50(1) of the *Estates Act*, to pass accounts. Justice Brown ordered the estate trustees to account formally as an informal accounting was not complete and the respondents had failed to produce documents as ordered earlier that year by Justice Brown.

With respect to the house, the Order established a schedule for the payment of taxes and insurance by the estate trustees, and provided for a plan for capital improvements.

Significantly, the Court ordered that the parties provide a status report four months later in April 2009 – effectively putting pressure on the parties: “It is important that this matter not be allowed to languish.”

Barletta v. Donne illustrates that the Court is prepared to actively assist in the management of estate matters, particularly by using the powers provided under Rule 74.15 of the *Rules of Civil Procedure*.

Breakfast Series

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

The next Breakfast Series meeting, September 24 2009, will feature a presentation of “*Where There’s A Gift, There’s A Way: The Application of the Cy-Pres Doctrine*” by Megan Connolly, “*The Estate Planning Retainer - Acting for Husband and Wife*” by Suzana Popovic-Montag and “*Recent Case Law Developments for the Estate Solicitor*” by Ian M. Hull.

The Breakfast Series meeting is being held at the Ontario Bar Association, 2nd Floor, 20 Toronto Street, Salon 2 & 3, Toronto, Ontario. Breakfast begins at 8:15 a.m. with the Presentation to follow at 8:30 a.m. A fee of \$30.00 (28.57 + 1.43 GST) is payable to Hull & Hull LLP upon registration by cheque, VISA or MasterCard. Materials included. **This series is now be offered via Webcast.**

A Compact Disc recording of the Breakfast Series will be available at a fee of \$20.00 (\$19.05 + \$0.95 GST).

To Register, please contact Diane Labao at (416) 369-1140 (press 0) or by e-mail to dlabao@hullandhull.com



Trust Experience™

HULL & HULL LLP

Barristers and Solicitors

141 Adelaide St. W., Suite 1700, Toronto, Ontario M5H 3L5

TEL: (416) 369-1140 FAX: (416) 369-1517

EMAIL: ihull@hullandhull.com

WEBSITE: www.hullandhull.com



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

Please note that all back issues of The Probater are available in full text on our website: www.hullandhull.com