



**HULL & HULL LLP**  
Barristers and Solicitors

# **Estate Law Remedies - What to watch out for when administering an Estate**

January 17, 2008

**Ian M. Hull**

**Direct Dial: 416-369-7826**

**Fax: (416) 369-1517**

**E-mail: [ihullandhull.com](mailto:ihullandhull.com)**

**HULL & HULL LLP**

**Barrister and Solicitors**

## **TORONTO**

141 Adelaide Street West, Suite 1700

Toronto, Ontario M5H 3L5

TEL: (416) 369-1140

FAX: (416) 369-1517

## **OAKVILLE**

228 Lakeshore Road East

Oakville, Ontario L6J 5A2

TEL: (905) 844-2383

FAX: (905) 844-3699

**[www.hullandhull.com](http://www.hullandhull.com)**

**[www.hullestatemediation.com](http://www.hullestatemediation.com)**

## **Remedies and Estates**

This paper will address a variety of estate-related remedies. It may come as a surprise to the profession; however, in estate-related litigation and administration matters, urgency does play a role and there are, of course, numerous remedies available to beneficiaries of an estate or trust.

### 1. **Lost Will**

In some non-contentious and contentious situations, the parties are faced with the problem of locating a Will of the deceased.

Proof of a lost Will can be done by reference to Rule 75.02 of the *Rules of Civil Procedure* which provide as follows:

- “75.02 - The validity and contents of a Will that has been lost or destroyed may be proved on an application
- a. by Affidavit evidence without appearance, where all persons who have a financial interest in the estate consent to the proof; or
  - b. in the manner provided by the Court in an Order giving directions made under Rule 75.06.”

Proof of a lost Will requires certain core elements to be proved.

The onus is on the individual putting forward the Will for probate to satisfy the Court that it was duly executed. The particulars of tracing the possession of the Will to the date of death must be properly set out and proof of the contents of the last Will are established. There is also the

important aspect of the rebuttable presumption that the Will was destroyed by the testator with the intention of revoking it.

The general law in relation to proving a lost Will is that the Court must be satisfied that where a duly executed Will is traced to the testator's possession and was last seen in his or her possession, and was not forthcoming after his or her death, it is presumed that it was destroyed by the testator.

To rebut this presumption, there must be sufficient evidence adduced in open Court to show that it was not destroyed by the testator.

The actual Will itself can simply be a photocopy or, in some circumstances where there is sufficient evidence, and only drafts exist or notes taken by the solicitor exist, proof of the Will's content may be difficult but is not prohibited by the Court.

A great deal of the likelihood of success depends on the evidence given in open Court and proof of the lost Will is proceeded in solemn form with Viva Voce evidence.

## 2. **Notice of Commencement of Proceeding**

In circumstances where it is anticipated that a contentious estate matter will ensue after the death of an individual, Rule 74.03 provides that a person who has a financial interest in the estate, which can include a creditor, and who desires information at the commencement of a proceeding, they may file with the Registrar a Request for Notice (Form 74.3).

When the Request for Notice has been filed, that person is entitled to receive a Notice of Commencement of any proceeding in the estate until a Certificate of Appointment of Estate Trustee is issued, unless the Court orders otherwise.

The filing of such a Notice expires after three years and can be renewed.

Rule 74.03 provides as follows:

“(1) At any time before a certificate of appointment of an estate trustee has been issued, a person who appears to have a financial interest in the estate and who desires to be informed of the commencement of a proceeding in the estate may file with the registrar a request for notice (Form 74.3), and thereafter is entitled to receive notice of the commencement of any proceeding in the estate until a certificate of appointment of an estate trustee is issued, unless the court orders otherwise. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 11.

(2) Notice by the registrar under subrule (1) may be sent by regular lettermail to the address shown in the request for notice. O. Reg. 484/94, s. 12.

(3) A request for notice expires three years after it is filed but a further request may be filed at any time before a certificate of appointment of an estate trustee for the estate is issued. O. Reg. 484/94, s. 12.”

### 3. Will Deposit

While on the face of it, technically not a remedy, the availability of depositing a Will and Codicil for safekeeping with the Court is something to consider.

In circumstances where there may be some concern that the testator may lose his or her Will or in circumstances where it may be difficult to locate the testator's Will, consideration should be given to Rule 74.02 which sets out the requirements that must be met prior to a Will being deposited with the Court. Rule 74.02 provides as follows:

"(1) A registrar shall not receive and keep a will or codicil under section 2 of the Estates Act unless the deposit is made by,

- (a) the testator;
- (b) a person authorized by the testator in writing;
- (c) a solicitor who held the will or codicil at the time of retirement from practice;
- (d) the estate trustee of a solicitor who held the will or codicil at the time of the solicitor's death;
- (e) the representative of a trust corporation that held the will or codicil when it ceased to do business in Ontario; or
- (f) a person authorized by the court to deposit the will or codicil. O. Reg. 484/94, s. 12.

(2) An affidavit of execution of the will or codicil (Form 74.8) may be deposited at the same time as the will or codicil. O. Reg. 484/94, s. 12.

(3) The registrar shall cause every will or codicil that is deposited for safekeeping to be enclosed in an envelope that is securely sealed in the presence of the depositor, and shall cause to be endorsed on the envelope the date of the deposit, the name and address of the depositor and of the testator

and estate trustee or trustees named in the will, the date of birth of the testator and the date of the will or codicil. O. Reg. 484/94, s. 12.

#### Notice to Estate Registrar

(4) When a will or codicil is deposited with the registrar, the registrar shall send a notice of the deposit (Form 74.1) to the Estate Registrar for Ontario within seven days after the deposit is made. O. Reg. 484/94, s. 12.

#### Access to Deposited Will or Codicil

(5) No person, except the testator in person or a guardian of the testator's property, or except by order of the court, shall remove, copy or inspect a will or codicil on deposit during the testator's lifetime. O. Reg. 484/94, s. 12; O. Reg. 69/95, s. 10.

(6) After the death of the testator, any person may copy or inspect a will or codicil of the testator on deposit, on filing a written request stating the testator's date of birth and a death certificate issued by the Registrar General or a funeral director. O. Reg. 484/94, s. 12.

#### Delivery of Will or Codicil to Estate Trustee

(7) After the death of the testator, the registrar shall, on the filing of a written request stating the testator's date of birth and of a death certificate issued by the Registrar General or a funeral director, deliver the will or codicil of the testator that is on deposit to the estate trustee named in the will, or to such other person as the court directs, and the registrar shall,

(a) retain a copy of the will and any codicil, certified to be a true copy by the registrar, and the receipt of the person to whom the will or codicil is delivered; and

(b) send a notice of the withdrawal (Form 74.2) to the Estate Registrar for Ontario. O. Reg. 484/94, s. 12.

Archivist of Ontario

(8) The registrar shall deposit with the Archivist of Ontario wills and codicils that have been held for safekeeping for 125 years or more. O. Reg. 484/94, s. 12.<sup>1</sup>

### **Orders for Assistance and other Statutory Remedies**

#### **a. Estates Act - Production of Testamentary Documents**

- i. Pursuant to Section 9 of the *Estates Act*<sup>2</sup>, a person on motion or otherwise in a summary manner is entitled to obtain an Order compelling any person to produce and bring in any testamentary paper.

This is an important remedy available to estate litigants as in many circumstances the parties are not provided with fundamental testamentary and trust documents.

I note that when applying for probate, you must now serve everyone with a financial interest in the assets of the estate and therefore they receive a copy of the Will at that time.

---

<sup>1</sup> For a comprehensive review of steps, see Hull, I.M., Challenging the Validity of Wills, Carswell, 1996, pages 43-46.

<sup>2</sup> R.S.O., 1990, c.E.21.

However, circumstances where probate is not sought, such as situations where there are secondary Wills and no probate is required, Section 9 of the *Estates Act* is an important remedy to force a trustee to produce a copy of a primary and secondary Will.

Section 9 of the *Estates Act* provides as follows:

"9. (1) Whether a suit or other proceeding is or is not pending in the court with respect to a probate or administration, the Superior Court of Justice may, on motion or otherwise in a summary way, order any person to produce and bring before the registrar, or otherwise as the court may direct, any paper or writing being or purporting to be testamentary that is shown to be in the possession or under the control of such person. R.S.O. 1990, c. E.21, s. 9 (1); 2006, c. 19, Sched. C, s. 1 (1).

Examination of persons touching such instruments

(2) If it is not shown that such paper or writing is in the possession or under the control of such person, but it appears that there are reasonable grounds for believing that he or she has knowledge of such paper or writing, the court may direct such person to attend for the purpose of being examined in open court or before the registrar or such person as the court may direct, or upon interrogatories respecting the same, and to produce and bring in such paper or writing, and such person is subject to the like process in case of default in not attending or in not answering questions or interrogatories or not bringing in such paper or writing, as the person would have been subject to if he or she had been a party to a suit in the court and had made such

default, and the costs of such motion or other proceeding are in the discretion of the court. R.S.O. 1990, c. E.21, s. 9 (2).”

**ii. *Orders for assistance***

The kinds of Orders that are dealt with in Rule 74.15 of the *Rules of Civil Procedure* are:

- Order to accept or refuse appointment
- Order to consent or object to proposed appointment
- Order to file statement of assets of the estate
- Order for further particulars
- Order to beneficiary witness
- Order to former spouse
- Order to pass accounts
- Order in respect of further and other matters

**iii. *Order to accept or refuse appointment***

Careful consideration needs to be given to Rule 74.15 of the *Rules of Civil Procedure* as it sets out a variety of Orders that the Court may make. These are fundamental remedies available to beneficiaries.

In estate-related matters, sometimes the estate trustee(s) are reluctant to take active steps in respect to the administration of the assets.

In order to encourage a timely administration of the estate assets, an Order to accept or refuse appointment is a useful remedy.

Any person with a financial interest in the assets of the estate is entitled to seek an Order compelling an executor to accept or refuse the appointment pursuant to the provisions of the Will.

Rule 74.15(1)(a) and (b) provide as follows:

“In addition to a motion under section 9 of the Estates Act, any person who appears to have a financial interest in an estate may move,

**Order to Accept or Refuse Appointment**

(a) for an order (Form 74.36) requiring any person to accept or refuse an appointment as an estate trustee with a will;

(b) for an order (Form 74.37) requiring any person to accept or refuse an appointment as an estate trustee without a will”.

These provisions of the Rules and the ultimate obtaining of an Order for assistance of this nature is used when there is a lengthy and unnecessary delay in the time between the date of death and the application for probate.

**iv. *Order to consent or object to proposed appointment***

Rule 74.15(1)(c) provides as follows:

“for an order (Form 74.38) requiring any person to consent or object to a proposed appointment of an estate trustee with or without a will”.

This Rule and Order for assistance addresses circumstances where the Court may wish to order a person to consent to or object to a proposed appointment of an estate trustee with or without a Will.

Again, in circumstances where there is delay, this Order for assistance of this nature can be a useful remedy.

*v. Order to file statement of assets of the estate*

Rule 74.15(1)(d) provides as follows:

“for an order (Form 74.39) requiring an estate trustee to file with the court a statement of the nature and value, at the date of death, of each of the assets of the estate to be administered by the estate trustee”.

As is too often the case, estate trustees operate in a mode of secrecy where information with respect to an individual's entitlement under the estate is not fully disclosed.

Transparency is a vital aspect of any proper estate administration; it is not always the case that an executor is forthright in respect of the nature and extent of the assets of the estate.

This particular Order for assistance set out in the Rules assists the beneficiaries to an estate to obtain with certainty the actual value and nature and extent of the assets of the estate.

Obviously, early and determinative disclosure of the extent of the assets of the estate will be an important factor in any contentious or non-contentious estate matter and as such, this remedy can be of tremendous assistance.

**vi. *Order for further particulars***

Again, in the spirit of disclosure and easier access to information, Rule 74.15(1)(e) provides as follows:

“after receiving the statement described in clause (d), for an order for further particulars by supplementary affidavit or otherwise as the court directs”.

This particular Order for assistance is broadly worded so that if only general information is being provided to the beneficiaries, they have the remedy to seek out a more particularized summary of the assets of the estate.

**vii. *Order to beneficiary witness***

Rule 74.15(1)(f) provides as follows:

“for an order (Form 74.40) requiring a beneficiary or the spouse of a beneficiary who witnessed the will or codicil, or who signed the will or codicil for the testator, to satisfy the court that the beneficiary or spouse did not exercise improper or undue influence on the testator”.

Because of the strict requirements under the *Succession Law Reform Act* with respect to proper execution of a Will, this particular Order for assistance is an important administrative remedy.

The Rule allows one to obtain an Order requiring the beneficiary or spouse of a beneficiary who witnessed the Will or Codicil to satisfy the Court, in a summary fashion, that the beneficiary or spouse of the beneficiary did not exercise improper or undue influence on the testator.

Without such a determination, the gifts to the beneficiary witness are void pursuant to Section 12 of the *Succession Law Reform Act, R.S.O. 1990, c.S.26* which provides as follows:

"12. (1) 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. R.S.O. 1990, c. S.26, s. 12 (1).

Where will signed for testator by another person

(2) Where a will is signed for the testator by another person in accordance with section 4, 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 is void so far only as it concerns,

- (a) the person so signing;
- (b) the spouse; or
- (c) a person claiming under either of them,

but the will is not invalid for that reason. R.S.O. 1990, c. S.26, s. 12 (2).

#### Where no undue influence

(3) Despite anything in this section, where the Superior Court of Justice is satisfied that neither the person so attesting or signing for the testator nor the spouse exercised any improper or undue influence upon the testator, the devise, bequest or other disposition or appointment is not void. R.S.O. 1990, c. S.26, s. 12 (3); 2006, c. 19, Sched. C, s. 1 (1).

#### Exception

(4) 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. R.S.O. 1990, c. S.26, s. 12 (4)."

This remedy is a summary method upon which anyone with a financial interest in the estate may obtain the Order compelling the beneficiary applicant for a Certificate of Appointment to bring a motion before the Court to obtain a determination that no undue influence was exercised on the testator.

Circumstances upon which the beneficiary or spouse of a beneficiary witnesses a Will do arise from time to time and bringing a motion to obtain an Order that no undue influence was exercised to the testator can be done fairly easily, given this Order for assistance. For example, in circumstances where there is urgent need to have the Will signed, the witnesses may not fall strictly within the requirements of the *Succession Law Reform Act*.

If proper evidence is set out in Affidavit material in comprehensive detail, and an additional Affidavit is provided for the second witness in support of and confirming the lack of undue influence, an Order of this nature can usually be readily obtained.

Section 17(2) of the *Succession Law Reform Act* provides as follows:

“Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,

- (a) a devise or bequest of a beneficial interest in property to his or her former spouse;
- (b) an appointment of his or her former spouse as executor or trustee; and
- (c) the conferring of a general or special power of appointment on his or her former spouse,

are revoked and the will shall be construed as if the former spouse had predeceased the testator. R.S.O. 1990, c. S.26, s. 17.”

This provision allows that except when there is a contrary intention appearing in the Will, where, after the Will is made, the testator's marriage is terminated by divorce or declared a nullity, the provisions of the Will that bequeath property to the former spouse, appointed the former spouse as an executor, or confirm a power of appointment, are revoked. The Will is then interpreted as if the former spouse had predeceased the Will maker.

**viii. *Order to pass accounts***

One of the most contentious aspects of any estate administration relates to the organizing and distribution of the assets of the estate. An Order to pass accounts pursuant to Rule 74.15(1)(h) gives the beneficiaries of an estate a relatively summary and effective remedy against the trustees who are improperly administering an estate or trust.

Rule 74.15(1)(h) provides as follows:

“for an order (Form 74.42) requiring an estate trustee to pass accounts”.

**ix. *Order for other matters***

In the spirit of full disclosure and full access to estate asset information, the *Rules of Civil Procedure* also include a broadly worded Order for other matters and this gives the Court jurisdiction to make widely considered Orders in the context of an estate administration.

## **REVOCAION OR RETURN OF A CERTIFICATE OF APPOINTMENT**

### **Introduction**

Rule 75 deals with the practice and procedure for contentious proceedings. With respect to the title of proceeding, Rule 4 of the Rules of Civil Procedure regulates the form and content of court documents. This Rule has been amended to ensure that pursuant to Rule 14, the title of proceeding requirements under the Rules of Civil Procedure do not apply to estate proceedings under Rule 75.

Rule 38 of the Rules of Civil Procedure deals with the jurisdiction and procedures relating to applications. It has been amended to provide that the Application Record and other material requirements set out in Rule 38.09(1)-(6) apply to estate matters under Rule 75, with the exception that the applicant or the respondent is not required to serve a factum as required in Rule 38.09.

In addition, applications in estate proceedings *under* Rule 75 may not be ordered to trial by a Judge pursuant to Rule 38.10.

Like an order for assistance, the provisions set out in Rules 75.04 and 75.05 allow for the revocation of a Certificate of Appointment or the return of the Certificate by the Court.

Rule 75.04 allows any person having a financial interest in the estate, on application, to seek an *order* revoking the Certificate of Appointment of the Estate Trustee where the Certificate was issued in error, or as a result of fraud, where the appointment is no longer effective, or for any other reason. For example, the will which was propounded may not have been the last will of the deceased and a more recent will may surface after the certificate has been obtained.

Rule 75.04 provides as follows:

On the application of any person having a financial interest in an estate, the court may revoke the certificate of the appointment of the estate trustee where the court is satisfied that,

- (a) the certificate was issued in error or as a result of a fraud on the court;
- (b) the appointment is no longer effective; or
- (c) the certificate should be revoked for any other reason.

## **RETURN OF CERTIFICATE**

### **Motion for Return of Certificate**

A party may bring a motion without notice for the return of a Certificate and Rule 75.05 deals with circumstances similar to those under the Old Rules where the Court could compel the executor to bring in the grant of probate. In contentious proceedings it gives the challenger of the will some comfort that the Certificate is safely in the Court and can not be used by the executor to distribute any assets or administer the estate while the litigation is continuing. In theory the Notice of Objection should prevent this; however, the litigant is always happier to know that the original grant is in the hands of the Court.

Rule 75.05 provides:

**75.05(1)** The court may, on motion, order that a certificate of appointment be returned to the court where,

- (a) the moving party seeks a determination of the validity of the testamentary instrument for which the certificate was issued or of the entitlement of the estate trustee to the certificate; or
- (b) an application has been made under Rule 75.04.

Pursuant to Rule 75.05(2) the Motion for Return of Certificate may be made without notice unless the Court orders otherwise. This is as with many of the orders for assistance.

### **Effect of the Order - Return of Certificate**

Once the moving party has served the order to return the Certificate of Appointment upon the Estate Trustee, the Estate Trustee must deposit the original Certificate with the Registrar and his or her appointment has no further effect until the issues raised in the application are determined or the Court orders a release of the Certificate. It is important to note that at the end of the litigation or at the point of settlements, those persons propounding the will should get an order releasing the Certificate, or at least consent from all parties to obtain such an order.

Rule 75.05(3) sets out the effect of the order as follows:

(3) On service of the order to return the certificate of appointment, the Estate Trustee shall forthwith deposit the original certificate with the registrar, and the appointment has no further effect and shall not be acted on until,

- (a) the issues referred to in clause (1)(a) of the application referred to in clause (1)(b), as the case may be, have been determined by the court; or
- (b) the release of the certificate is ordered under subrule (6).

### **Motions for Directions**

If you succeed in your Motion for Return of Certificate *you* must move for directions within 30 days. At this stage in the proceedings carriage of the action is essentially with those who are challenging the will. This is the opposite of the usual situation where carriage is with those who are propounding the will. This shift can pose problems for the person who obtained the order to return the Certificate because he or she will not necessarily be in the best position to bring the motion.

For example, it is doubtful if that person will have all prior wills or will know all who take on an intestacy. The respondent will be the Estate Trustee and it is likely that he or she will have that kind of information.

The Estate Trustee can always file responding materials to fill in any gaps. However, a better practice is to get all counsel to agree to allow the person with all of the information required to bring the motion. It may still be the person who succeeded in the motion for the return, but it is unlikely. It is more common that the person propounding the will has the prior wills in his or her possession.

Rule 75.05(4) and (5) provides as follows:

(4) A party who obtains an order under clause (1)(a) shall move for directions under rules 75.06 within 30 *days* after the making of the order.

(5) The estate *trustee* may at any time move for directions under rule 75.06 for determination by the court of the matters referred to in clause (3)(a). (See Court Forms 75.5 and 75.6).

### **Release of Certificate**

Once a Certificate has been obtained under Rule 75.05, it is essential that the party who obtained the order or the Estate Trustee move for directions within 30 *days*, failing which Rule 75.05(6) allows the Court, on motion without notice, to release to the Estate Trustee the Certificate of Appointment.

Rule 75.05(6) provides:

(6) If a motion for directions referred to in subrule (4) or (5) is not made, the court may, on motion of the estate trustee without notice, order the release to the estate trustee of the certificate of appointment.

### **Claims Against the Estate Pursuant to the *Estates Act***

The *Estates Act*<sup>3</sup> 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 New Rules which prescribes the form (Form 75.14) to be utilized when making a claim. The form sets out the amount of the claim together with the grounds for the claim.

### **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, s. 44 applies and for unliquidated debts, s. 45 applies.

Under s. 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 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.

---

<sup>3</sup> R.S.O. 1990, c.E.21

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

### **APPLICATION FOR ORDER ALLOWING CLAIM**

The claimant has 30 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. Where an infant has an interest, notice must be served on the Children's Lawyer.

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 the 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.

Where 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 a claim is established under the provisions of the Estates Act.

### **Reasons for Judgment and Order**

Upon hearing the claim, the Judge of the Ontario Court (General Division) will make an order determining the claim, or he or she will reserve judgment and give his or her reasons for judgment at a later date.

The costs of the proceedings are in the discretion of the Judge of the Ontario Court (General Division). If the parties cannot agree on the costs, an appointment may be taken out with the Registrar of the Ontario Court (General Division) to settle the bill of costs.

## **SOLICITOR OF RECORD**

The New Rules specify that a solicitor who takes certain steps on a party's behalf becomes the party's solicitor of record. As solicitor of record, service of documents on the solicitor's client may be made by mailing or delivering a copy of the solicitor's office.

Rule 75.09 provides as follows:

75.09 (1) The solicitor who take any of the following steps on a party's behalf is the party's solicitor of record:

1. Filing a notice of objection under rule 75.03.
2. Moving for return of a certificate under rule 75.05.
3. Moving for directions under rule 75.06.

## **FORMS**

The following court forms are located in the Prescribed Forms:

75.13 Notice of Contestation

75.14 Claim against Estate

## **Notice of Objection/Caveat**

If the Estate Trustee's Certificate of Appointment has not been obtained, a person interested in challenging the will may, pursuant to s. 21 of the *Estates Act*<sup>4</sup>, lodge a caveat either with the Estate Registrar for Ontario or with the Local Registrar of the Ontario Court (General Division).

---

<sup>4</sup> R.S.O. 1990, c. E.21.

Rule 75.03 of the New Rules provides that one may file an objection to the issuing of a Certificate of Appointment by filing a Notice of Objection which is similar to the caveat. The *term* "caveat" is still used in the *Estates Act* and Rule 74.01 defines an "objection to issuing of certificate of appointment" to mean a caveat.

Rule 75.03 provides as follows:

**75.03(1)** At any time before a certificate of appointment of estate trustee has been issued, any person who has a financial interest in the estate may give notice of an objection by filing with the registrar or the Estate Registrar for Ontario a notice of objection (Form 75.1), signed by the person or the person's solicitor, stating the nature of the interest and of the objection.

A Notice of Objection or a caveat is a notice in writing usually filed with the Ontario Court (General Division) in the county or judicial district in which the deceased resided immediately prior to death. It is signed by the party filing it or his or her solicitor, requesting that nothing be done in the estate of the deceased without notice to the party lodging the caveat or filing the Notice of Objection or the person's solicitor, if the caveat is entered by a solicitor. It can, however, be filed in any office of the court.

Sections 21 and 22 of the *Estates Act* provide as follows:

S. 21, Caveats against the grant of probate or administration may be lodged with the Estate Registrar for Ontario or with the local registrar of the Ontario Court (General Division).

S. 22. Upon a caveat being lodged the registrar shall without delay send a copy thereof to the Estate Registrar for Ontario to be entered among the caveats lodged with him or her, and, upon notice of an application being received from the local registrar of The Ontario Court

(General Division} under section 16, the Estate Registrar for Ontario shall without delay forward to him *or her* notice of any caveat that has been so lodged touching such application, and the notice shall accompany or be embodied in the certificate mentioned in section 17.

## **NOTICE OF OBJECTION**

### **Interest of the Party**

The interest of the party in Rule 75.03 is that he or she has a financial interest in the estate or may have a financial interest under a previous will or as next *of kin on an* intestacy.

### **Notice of Objection - Grounds**

The grounds generally put forward for entering a Notice of Objection (Form 75.1) are similar to those of a caveat and are improper execution, lack of testamentary capacity, undue influence or fraud or simply that *as* next of kin the person filing the Notice of Objection is a person who has a financial interest in the estate and wishes proof of the testamentary instrument.

A Notice of Objection serves a number of useful purposes. It gives an objector time in *which* to *make* enquiries and *to* decide whether there are grounds for opposition to the grant. And it affords that person an opportunity to raise any question in respect of the testamentary instrument that he or she may wish to be determined by motion before the Judge.

### **Notice of Objection - Limitation Period**

Rule 44 of the Old Rules provided that a caveat expired six months after it was filed. In the case of the new Notice of Objection, it expires three years after it has been filed, and may be withdrawn by the objector any time before the hearing for directions.

Rule 75.03(2) provides as follows:

- (2) A notice of objection expires three years after it is filed and may be with-drawn by the person who filed it at any time before a hearing for directions under rule 75.06 in an application for the certificate or may be removed by order of the court.

### **Notice to Applicant and to Objector**

When the Notice of Objection has been filed and a Certificate of Appointment has been made, the Registrar, pursuant to Rule 75.03(3), sends a Notice of Filing to the person who entered the Notice of Objection.

The Warning to Caveator, set out in Rule 46 of the Old *Rules*, has been replaced by Rule 75.03(3), (4) and (5) which provide as follows:

### **Notice to Applicant**

- (3) Where an application *for a* certificate of appointment of estate trustee has been made and a notice of objection is filed, the registrar shall send notice of the filing (Form 75.2) by regular lettermail to the applicant or the applicant's solicitor at the mailing address shown in the application.

### **Notice to Objector**

- (4) An applicant who receives a notice under subrule (3) shall serve on the objector a notice to the objector (Form 75.3) and file a copy of the notice and proof of service with the court.

- (5) Where the objector does not serve and file a notice of appearance (Form 75.4) within twenty days of service of the notice to objector the application shall proceed as if the notice of objection had not been filed.

The Notice of Filing notifies the objector that unless that person enters an appearance within 20 days after the applicant has served his or her notice of objection (Form 75.3), the application will be dealt with without further notice to the objector. Presumably the Certificate of Appointment of the Estate Trustee would issue upon the failure of the objector to file an appearance.

The Notice of Objection is a simple and effective injunctive remedy available to someone who wants to stop the administration of the estate. The relief is immediate and you are not required to go through the lengthy injunctive application required in the normal civil litigation context.

As a practical matter if you are filing a Notice of Objection or a caveat you should immediately send a copy of it to the Estate Trustee or his or her counsel. There will be a short delay between the time the Notice of Objection or caveat is filed and the time the Registrar sends out the notice or the filing is sent to the applicant. If you have some concerns that an asset is going to be distributed immediately then you should make sure the applicant knows about your objection at the time of filing.

Another problem to consider is the delay that can be caused after the Registrar has sent the notice of filing of a Notice of Objection to the Estate Trustee. The Estate *Registrar* will most certainly send out the notice immediately. Pursuant to Rule 75.03(4), the applicant who receives such a notice shall serve on the objector a Notice to Objector (form 75.3).

A problem of delay may arise if the applicant does not serve this notice. Rule 75.03(6) only provides for the applicant to move for directions within 30 days after service of the Notice of Appearance. The Estate Registrar will not let the objector file an appearance until the applicant has served and filed the Notice to Objector. The result is that the applicant can unduly delay the proceedings. The only solution appears to be that in such

circumstances the objector should bring a Motion for Directions, set out the problem in affidavit form, and obtain an Order for Directions.

### **Expiry, Withdrawal and Removal of Notice of Objection**

As indicated above, pursuant to Rule 75.03(2) a Notice of Objection may be removed by court order. Once an estate litigation matter has been resolved you should get agreement from all parties to have the objection to the Certificate removed.

A caveat or a Notice of Objection has the effect of staying the administration of the testamentary instrument or administration until the caveat or Notice of Objection expires or until the caveator or objector fails to *enter* an appearance upon being given notice pursuant to *Rule 75.03(3)*.

### **Certificate of Appointment of Estate Trustee During Litigation or Litigation Guardian**

Where there is a court action touching upon the validity of the will of a deceased person, the authority of the appointed Estate Trustee is thereby called into question. If the assets of the estate require attention during the litigation then you must obtain a Certificate of Appointment of Estate Trustee During Litigation. This rule replaces the previous appointment of an Administrator/Administratrix *Pendente Lite*.

Section 28 of the *Estates Act*<sup>5</sup> authorizes the appointment of the Estate Trustee During Litigation and reads as follows:

S. 28. Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Ontario Court (General Division) has jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the

---

<sup>5</sup> R.S.O. 1990, c.E.21

administrator so appointed has all the rights and powers of a general administrator, other than the right of distributing the residue of the property, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper.

The application is made in the Ontario Court (General Division) pursuant to Rule 74.10(1):

74.10(1) An application for a certificate of appointment of an estate trustee during litigation (Form 74.30) shall be accompanied by,

- (a) a copy of the order appointing the applicant as estate trustee during litigation;
- (b) the security required by the *Estates Act*; and
- (c) such additional or other material as the court directs.

## **BOND REQUIREMENTS**

The Rules specifically describe the bond requirements in circumstances of appointing an Estate Trustee. Anyone who obtains a Certificate of Appointment of Estate Trustee, except for an Estate Trustee With a Will who is a resident in Ontario or elsewhere in the Commonwealth, must file a bond as security. This requirement is set out in s. 35 of the *Estates Act*.

Pursuant to Rule 74.11(1)(a) unless the Court orders otherwise, the bond required by s. 35 must be of an insurance or guarantee company licensed to carry on business in Ontario or of one or more personal sure-ties. The insurance and guarantee companies approved under the *Guarantee Company Security Act*<sup>6</sup> should be reviewed. The Registrar will also advise you as to what companies to use. Rule 74.11(1)(b) specifies that a Registrar of the Court or a solicitor is not to be used as a personal surety.

---

<sup>6</sup> R.S.O. 1990, c. G.11.

Rule 74.11(1)(e) sets out the security required for a succeeding Estate Trustee and Rule 74.11(1)(f) specifies the security required for confirmation by resealing of an appointment or ancillary appointment.

Pursuant to Rule 74.11(2) any person, including a creditor, who has a contingent or vested interest in an estate may at any time, on notice to the Estate Trustee, move for an order to have a bond filed or the amount of an existing bond increased or reduced.

Rule 74.11 provides as follows:

74.11(1) Unless the court orders otherwise,

(a) the bond required by section 35 or the *Estates Act* shall be the bond of an insurance or guarantee company licensed to carry on business in Ontario (Form 74.32) or of one or more personal sureties (Form 74.33);

(b) a registrar of the court or a solicitor shall not be a personal surety;

(c) a personal surety must be a resident of Ontario who is not a minor;

(d) one personal surety is sufficient where the value of the assets of the estate does not exceed \$100,000;

(e) the security required for a succeeding<sup>9</sup> estate trustee shall be based on the value of the assets of the estate remaining to be administered at the time the application for a certificate as succeeding estate trustee *is* made; and

(f) the security required for confirmation by resealing of the appointment of an estate trustee, or for an ancillary appointment of an estate trustee, shall be based on the value of the assets of the estate over *which* the estate trustee seeks jurisdiction in Ontario.

(2) Any person, including a creditor, *who has* a contingent or vested interest in an estate may at any Time, on notice to the estate trustee or applicant for appointment, move for an order to have a bond filed or the amount of an existing bond increased or reduced.

As soon as the litigation with respect to the question of validity of the will has been completed, the Estate Trustee during litigation loses authority to act on behalf of the estate. The Estate Trustee during litigation should no longer act once the Court has rendered its decision as to the validity of the will.

## **APPOINTMENT OF A LITIGATION GUARDIAN**

In contested estate proceedings you are often faced with the problem that one of the parties to the litigation is under disability. Careful attention then must be paid to Rule 7 of the Rules of Civil Procedure, which sets out the requirement for representation by a Litigation Guardian.

In circumstances where a party under disability needs to be represented in the litigation but there is no person available to act as Litigation Guardian and no one has been appointed guardian under the *Substitute Decisions Act, 1992*<sup>7</sup>, then the Public Guardian and Trustee shall act as Litigation Guardian in the proceeding.

On April 3, 1995 the *Substitute Decisions Act, 1992*, was proclaimed and it changed the name of the Public Trustee to the Public Guardian and Trustee. The *Courts of Justice Act*<sup>8</sup> was also amended to change the name of the Official Guardian to the Children's Lawyer.

Rule 7 was also amended to provide that an application under the *Substitute Decisions Act, 1992* to appoint a guardian of property or a guardian of the person for a mentally incapable person may proceed without the appointment of a Litigation Guardian.

Rule 9 of the Rules of Civil Procedure provides that a proceeding may be brought by or against an executor, an administrator, or trustee as representing an estate or trust and its

---

<sup>7</sup> S.O. 1992, c. 30.

<sup>8</sup> R.S.O. 1990, C.43.

beneficiaries without joining the beneficiaries as parties. However, that provision does not apply to a proceeding to establish or contest the validity of a will; for the intention of a will; or to *remove* or replace an executor, administrator or trustee. In those instances, it would be *inappropriate for the representatives* one to be parties, and the Court is empowered to *order any* beneficiary, creditor or other interested party to be made a party to the proceeding.

## **APPLICATION OR MOTION FOR DIRECTIONS**

### **Generally**

A person who has a financial interest in the estate may apply for directions to bring a matter before the Court. The Court may give directions regarding the issues to be decided, the parties and the procedures to be used. Challenges to the validity of a will, after the Certificate of Appointment of Estate Trustee has been issued, are instituted by applying without notice for an order for the return of the Certificate of Appointment. The applicant is then required to bring a motion for directions within 30 days of the Court making *the* order for the return of the Certificate. The grounds for challenging the will are constituted in the Order for Directions made by the Court directing the trial of the issues involved. These issues are usually, (1) the due execution of the will, (2) testamentary capacity and (3) undue influence or suspicious circumstances.

Rule 75.06 of the New Rules provides:

**75.06(1)** Any person *who has* a financial interest in an estate may apply for directions, or move for directions in another proceeding under this Rule, as to the procedure for bringing any matter before the court [Form 75.5 - Notice of Application for Directions, and Form 75.6 -- Order for Directions - Notice of Motion].

See Form No. 9, Order *For Directions* - Notice of Motion, in the Precedents section of Appendix 1

**Conclusion**

As noted above, there are unique remedies that are available in the context of estate litigation and they can provide useful and often effective tools in the course of your litigation file.

## Checklist

### Remedies and Estates

Last Will – can you find the original?

Notice of Commencement of Proceedings

Will deposit

Orders for Assistance

- Estates Act production of testamentary documents
- Order to accept or refuse appointment
- Order to consent or object to proposed appointment
- Order to file statement of assets of the estate
- Order for further particulars
- Order to beneficiary witness
- Order to pass accounts
- Order for other matters

Revocation or return of Certificate of Appointment

Motion for Directions

Claims against the estate pursuant to the Estates Act

COURT FILE NO.: E-564-05

DATE: 20080104

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:**           IN THE MATTER OF the Estate of George Garfield Hipel, late of the  
                  City of Cambridge, in the Regional Municipality of Waterloo, deceased

                  AND IN THE MATTER OF the Estate of Norman Otto Hipel, late of the  
                  City of Cambridge, in the Regional Municipality of Waterloo, deceased

                  AND IN THE MATTER OF the Estate of Olive Victoria Hipel, late of the  
                  City of Kitchener, in the Regional Municipality of Waterloo, deceased

                  AND IN THE MATTER OF the Estate of Mabel Helen Hipel, late of the  
                  City of Cambridge, in the Regional Municipality of Waterloo, deceased

**BETWEEN:**

**GEORGE GINGRICH, PELINO (PAUL) SCENNA and GARRY E.J. HAUSER,  
EXECUTORS AND TRUSTEES OF THE ESTATE OF GEORGE GARFIELD HIPEL,  
deceased, AND IN THEIR PERSONAL CAPACITIES**

Applicants

- and -

**TD CANADA TRUST (FORMERLY WATERLOO TRUST & SAVINGS COMPANY),  
EXECUTOR AND TRUSTEE OF THE ESTATE OF NORMAN OTTO HIPEL,  
deceased; VICTORIA SZERBANIUK; MICHAEL VIELLEUX; SARAH VIELLEUX;  
SARAH FRANCOIS; THOMAS FRANCOIS; ANTONIO SILVA; KIM RUDDY  
(ALSO KNOWN AS KIM VIELLEUX), ROBERT RICHARDSON, MARY MURPHY,  
NORMA IRENE JACQUES and THE CHILDREN'S LAWYER**

Respondents

**BEFORE:**    G. E. Taylor

**COUNSEL:**  R. Earnshaw, for the Defendant Canada Trust

                  D. Smith, for the Plaintiff, Norma Jacques

                  S. Finch for the Estate of George Hipel

**ENDORSEMENT**

### Introduction

[1] Canada Trust brings this motion, based on laches or acquiescence, to dismiss the claim of Norma Jacques against it.

[2] Canada Trust is the successor of Waterloo Trust and Savings Company.

[3] Norma Jacques and George Hipel were the only two children of Norman and Olive Hipel. Norman died on February 16, 1953. Waterloo Trust and Savings Company and Olive were named as co-executors of Norman's will. His will gave Olive a life interest in the residue of the estate with the remainder of the residue to be divided equally between Norma and George on Olive's death. Olive died on March 15, 1978. George died on December 21, 2004.

[4] Norma suffered a stroke in May 2004. Norma commenced the present action in July 2005 against Canada Trust claiming improper administration of Norman's estate which resulted in her not receiving her entitlement from her father's estate. Norma explains the delay in commencing this action by saying that she did not learn of her entitlement to half the residue of Norman's estate, or the assets that made up that residue, until June 2004. The first notice of Norma's claim to Canada Trust was given in February 2005.

[5] Although counsel for the estate of George Hipel appeared on the motion, his client had no direct interest in the outcome of the present motion and did not make submissions.

### Factual background

[6] Norman was born on March 21, 1890. George was born on January 12, 1914 and Norma was born on September 1, 1920. As indicated, Norman died on February 16, 1953. His will appointed Waterloo Trust and Olive as executors. His will provided for a life interest for Olive with the residue to be divided between Norma and George.

[7] Olive died on March 15, 1978. Her will appointed George and her solicitor, Patrick Flynn of Preston as executors. Flynn died before probate was obtained making George the only executor of Olive's estate.

[8] Norman was a successful businessman and politician in Preston Ontario. He was the founder and majority shareholder of N. O. Hipel Limited. At the time of Norman's death, George was a minority shareholder in N. O. Hipel Limited and was manager of the construction division of that company.

[9] In April 1965, all of Norman's shares in N. O. Hipel Limited were transferred to George. The share certificates indicate that the shares were transferred by Waterloo Trust and Olive as executors of Norman's estate.

[10] The minutes of the shareholders' meetings of N. O. Hipel Limited from the date of Norman's death until the shares were transferred to George indicate that a representative of

Waterloo Trust attended only the annual shareholders' meetings in 1962, 1963 and 1964. Olive attended all annual shareholders' meetings from the first meeting held following Norman's death until the annual meeting held in June in 1965. She attended no annual shareholders' meetings thereafter.

[11] Canada Trust is unable to locate a file for the estate of Norman. Harry Syer was the trust officer responsible for Norman's estate. When he was interviewed for the purpose of this proceeding, he was in his 90s and had no recollection of this estate. I was advised on the hearing of the motion that Syer is now deceased.

[12] Ross Lapointe is a Professional Practice Consultant with Canada Trust who gave evidence on this motion by way of affidavit and cross-examination. He said that Canada Trust would have maintained a file for Norman's estate until 1978. Although he testified that he had been unable to determine what Canada Trust's practice with respect to file retention was in 1978, based on current practices, copies of accounts presented to beneficiaries and the release documents signed by beneficiaries would be retained in storage. The current destruction policy is that some documents are destroyed after 10 years and others are retained for 50 years.

[13] Canada Trust first became aware of the claims of Norma when it received a letter from her counsel in February 2005 which is almost 52 years after the death of Norman and almost 27 years after the death of Olive.

[14] Norma suffered a stroke in May 2004. According to her daughter, Nancy Dasent, who holds her Power of Attorney, Norma is unable to participate in the current proceedings due to her health condition. Accordingly, there is no affidavit from Norma in response to this motion for summary judgment.

[15] Norma was a signatory to a deed dated January 25, 1955 containing a recital that she, Olive and George are the only persons having an interest in Norman's estate. Norma was also a signatory to a deed dated November 19, 1956 which contains a recital that Norman's estate was to be divided equally between Norma and George on the death of Olive.

### The Claim

[16] Norma's claim against Canada Trust is based on negligence and breach of fiduciary duty in relation to its administration of Norman's estate and the operation of N. O. Hipel Limited, one of the assets of the estate. Norma's claim is that she was unaware until June 2004 that she was a residual beneficiary of Norman's estate. She says she did not receive her beneficial entitlement to a share of her father's estate upon the death of her mother, Olive. She says she has not received a full accounting of the assets, administration and distribution of Norman's estate. Finally, Norma claims that Canada Trust permitted the improper distribution of the shares of N. O. Hipel Limited, an estate asset, to George.

### Analysis

[17] In accordance with Rule 20.04(2) of the Rules of Civil Procedure, Canada Trust must show that there is no genuine issue for trial in connection with any of the claims asserted by Norma.

[18] Canada Trust submits that by reason of the doctrines of laches or acquiescence Norma must fail in each of her claims against Canada Trust. I disagree. The Ontario Court of Appeal in cases such as *Aguonie v. Gallon Solid Waste Material Inc.* (1997), 156 D.L.R. (4th) 222 and *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 1, has made it clear that a judge hearing a motion for summary judgment has limited authority. The motion judge is not meant to try the facts of the case but only to determine whether there are genuinely contested issues of fact. A motion for summary judgment is not an adequate substitute for a trial. On a motion for summary judgment, the motion judge is not to assess credibility, weigh the evidence or find the facts including drawing factual inferences. These are all functions reserved for the trial judge.

[19] Because it would appear that the evidence before me on this motion for summary judgment will probably not be very different than the evidence that will be before the trial judge, it would be efficient to deal with this case on a summary basis. But I am reminded of the admonition of Borins J. A. in *Dawson* when he stated:

I conclude that with this observation. Although it may be tempting to do so, it is not for a motions judge hearing a Rule 20 motion to assess the strengths and weaknesses of the claim or defence. Where a plaintiff has moved for summary judgment on its claim, if there is evidence capable of supporting a defence, summary judgment cannot be granted as the motions judge must defer to a plenary trial as the accepted forum for resolution of disputed facts.... Similarly, where a defendant has moved for summary judgment dismissing the plaintiff's claim, if there is evidence capable of supporting the claim, summary judgment is precluded.

It seems to me that this admonition has direct application to the present case.

[20] Canada Trust wants me to conclude that Norma was aware of her interest as a residual beneficiary of Norman's estate by reason of the deeds that she signed in 1955 and 1956. One could reach that conclusion particularly arising out of the 1956 deed. But that is not the only conclusion that can be drawn. It is also possible to conclude that while Norma was aware that she was a residual beneficiary of Norman's estate, she was not aware of the estate assets in which she would eventually share.

[21] Although Canada Trust cannot locate a file with respect to Norman's estate, it points to sample estate files from the same era and says an inference should be drawn that Waterloo Trust, in all likelihood, notified Norma of her interest and the assets that made up the estate. Again, it seems to me that this is a conclusion or an inference that could be drawn but it is not the only conclusion. One could also conclude that for whatever reason, Waterloo Trust took a somewhat

casual approach to administering Norman's estate. This could then lead to a conclusion that Norma, in all likelihood, was not advised as to her entitlement or the assets in Norman's estate.

[22] Canada Trust is unable to produce any releases which it says would have been obtained after Olive's death in 1978 when Norman's estate was wound up. It would be open for one to conclude that Canada Trust in 1978 would not have simply closed its file with respect to Norman's estate and then destroyed that file. However, the absence of any signed releases or court approval of its accounts could also lead one to infer that in 1978 Canada Trust had already concluded its involvement in Norman's estate which could then lead to an inference that it breached its duty to Norma as one of the estate beneficiaries.

[23] In paragraph 19 of Lapointe's affidavit he states: "With respect, the events and transactions of which she [Norma] complains are equally capable of a benign interpretation suggestive not only of the proper administration of the Estate of Norman but also that the Estate was administered in a way designed to maximize the eventual benefit to the residual capital beneficiaries, including the Plaintiff". He then goes on to specifically respond to six allegations made by Norma against Waterloo Trust and George. Lapointe therefore recognizes that there are different possible interpretations or inferences to be drawn from available evidence. This is the function of the trial judge.

[24] At paragraph 50 of the Factum of Canada Trust with respect to the present motion the following is stated: "When coupled with strong and uncontradicted evidence that it is likely that Norma received accounting information and other communications from Canada Trust over the years that it administered the Estate of her father,..." [emphasis in original]. This is another example of Canada Trust wanting me, as the judge hearing the motion for summary judgment, to draw an inference and make a factual finding in its favour. This too is the role of the trial judge.

[25] In *Franklin v. University of Toronto* (2001), 56 O.R. (3d) 698, Justice Gans stated the principle that on a motion for summary judgment based on the doctrine of laches, it is incumbent upon the defendant to satisfy the court on the available evidence that the defence obtains and there is no genuine issue for trial. He further held that the applicability of the doctrine of laches can only be determined on the basis of clear, cogent and compelling evidence on a motion for summary judgment. In my opinion, it cannot be said that the evidence before me is clear, cogent and compelling in favour of a finding of laches or acquiescence. The evidence may support such conclusion but, as I have previously indicated, the evidence is also capable of a contrary interpretation.

[26] I have said very little about the extensive argument made by both counsel with respect to the legal doctrines of laches and acquiescence and their applicability to the facts of the present case. This is because I have concluded that before any finding can be made about whether laches or acquiescence apply in the present case, factual findings based on inferences must be made. In my view, it is not appropriate for me to express any opinion about the factual inferences that I would be inclined to draw and the resultant applicability of the legal principles to those facts.

[27] I will observe, however, that in my view, the facts of this case can be distinguished from the facts in *Egnatios v. Leon Estate* (1990), 73 D.L.R. (4th) 137. In *Egnatios*, there was an admission by the plaintiff that approximately 23 years before she commenced her action, she was

aware that her brothers denied her claim to an entitlement to a percentage of the shares in the family business, which had been owned by her father at the date of his death. Further, in 1968, the plaintiff wrote a letter to her brothers in which she acknowledged that "legally and technically" she was owed nothing but that "verbally and morally" she was. On the material in the present motion, there is no such direct evidence that Norma was aware of her rights, or claimed any rights, and chose not to act.

[28] Canada Trust also argues that an adverse inference should be drawn against Norma by reason of her failure to swear an affidavit in response to the present motion. Rule 20.02 of the Rules of Civil Procedure permits affidavits for use on a motion for summary judgment to be based on information and belief but it goes on to provide that an adverse inference may be drawn from the failure of a party to provide evidence of persons having personal knowledge of contested facts. There is some merit to this argument but the problem as I see it is there are no facts in relation to which I am to draw the adverse inference. There is no evidence that Norma received notification of her entitlement to share in Norman's estate. There is no evidence that Norma received her share of Norman's estate. Therefore, I do not think it appropriate to conclude that she did in fact receive notification of her entitlement and that she received her entitlement, based on her failure to provide an affidavit for use on the present motion. I also note that there is some explanation provided, albeit only through the affidavit of Nancy Dasent, that Norma is unable to participate in this lawsuit because of her poor health following her stroke.

#### Disposition

[29] For these reasons, the motion by Canada Trust to dismiss Norma's claim is dismissed.

[30] My present view is that Rule 20.06(1) would be applicable to the issue of costs of the motion and that Norma should be entitled to her costs on a substantial indemnity basis. If Canada Trust wishes me to make a different disposition, I will entertain written submissions on that point within seven days. Norma will then have seven days to respond. Submissions are to be limited to three pages.

[31] At present, my view is that the parties for whom Mr. Finch acts are not entitled to any costs on the motion because they did not participate. If Mr. Finch wishes me to make a different disposition, I will entertain written submissions on that point within seven days. Norma will then have seven days to respond. Submissions are to be limited to three pages.

[32] Lastly, if counsel for Canada Trust and Norma are unable to agree on the quantum of costs to be paid by Canada Trust to Norma, I will fix the costs of the motion based on written submissions. Norma is to deliver her written submissions, not to exceed three pages, exclusive of a Costs Outline and Bill of Costs, within fourteen days and Canada Trust is to submit its written response, not to exceed three pages, within seven days thereafter.

"G.E. Taylor"

---

G.E. Taylor J.

DATE: January 4, 2008

**COURT FILE NO.:** E-564-05  
**DATE:** 20080104

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** IN THE MATTER OF the Estate of  
George Garfield Hipel

**BETWEEN:** GEORGE GINGRICH et al v.  
TD CANADA TRUST et al

**BEFORE:** The Honourable Mr. Justice  
G.E. Taylor

**COUNSEL:** R. Earnshaw, for the Defendant  
Canada Trust

D. Smith, for the Plaintiff, Norma  
Jacques

S. Finch, for the Estate of George  
Hipel

---

**ENDORSEMENT**

---

The Honourable Mr. Justice G.E. Taylor

**DATE:** January 4, 2008