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Capacity Estate Litigation: Process and Procedure

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Table of Contents

Disclosure in Estates and Trusts – Who must disclose what and when

Disclosure in an estates and trust context, it means different things to different people at different times. The questions of who must disclose what to whom, at what time, and whether they are under an obligation to do so, often remains unclear for those involved in an estate or trust dispute. Questions like what may a drafting lawyer reveal, what information is a beneficiary of a trust entitled to receive from the trustee, and, conversely, what information must a trustee or estate trustee disclose to a beneficiary, are often unclear for many, and as a result can often lead to unnecessary conflict and expense.

The aim of this paper is to offer some clarification on the issue of disclosure in an estates and trust context, and is broken down into four basic subcategories: (i) What may the drafting lawyer disclose; (ii) As a beneficiary of a trust, what are you entitled to know from the trustee; (iii) As a trustee, is there a positive duty to inform beneficiaries of certain information; and (iv) As a beneficiary of a trust, are there circumstances under which you must disclose certain trust documents to third parties?

What may the drafting Lawyer disclose[1]

The Rules of Professional Conduct are clear as it regards the duty of confidentiality that is owed from a lawyer to their client. Rule 2.03(1) of the Rules of Professional Conduct provides:

> "*A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.*"[2]

Under most circumstances this rule is fairly straightforward. A lawyer may not divulge any information received from a client in the course of their professional relationship to any other individual unless authorized to do so by the client. The idea, in principle, seems simple enough.

The duty of confidentiality that is owed from the drafting lawyer to the client can become more complicated however in an estates context as, by its design, the estate plan that is created for the client will not take effect until after the client has died. As a result, the client would no longer be around to consent to the drafting lawyer disclosing any information to a third party should there be any issues or questions relating to the estate plan.

The "Wills Exception" – Releasing the Will

Strictly speaking, if one was to follow the rules regarding confidentiality to the letter of the law, a drafting lawyer would be unable to release the testator's will following their death. The will, being a document drawn by the solicitor on the client's instruction, could easily be classified as a document that was "*acquired in the course of the professional relationship*". As a result, the drafting lawyer, if adhering to the rules regarding confidentiality, would be unable to divulge the contents of the will to a third party.

To follow the rules regarding confidentiality in such a way would seem to be of little sense. Generally speaking, it seems self-evident that when a testator drafts a will they intend for that document to become public upon their eventual death.

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[1] For more information, see "Prior Wills and Testamentary Documents: Know When to Hold Them, Know When to Fold Them", Ian M. Hull, 16 E.T.R. (2d) 94

[2] Rules of Professional Conduct, Law Society of Upper Canada (Toronto: 2012), at Rule 2.03(1)

In order to overcome this potential problem, the common-law has developed what is known as the "wills exception" to the rules regarding confidentiality between a lawyer and their client. Generally speaking, the "wills exception" enables the drafting solicitor to divulge the existence of a will, and the contents thereof, to those individuals with an interest in the estate.

Under certain circumstances the courts have extended the wills exception beyond the mere disclosure of the existence of a will, allowing the drafting lawyer to discuss circumstances surrounding the drafting of the will. In *Re: Ott*[3] the court was faced with the question of whether the drafting lawyer could discuss the circumstances surrounding the drafting of a will, or whether to do so would be to violate the duty of confidentiality which the lawyer owed to the deceased. In ruling that the lawyer may discuss the circumstances surrounding the drafting of the will with the court, the court states:

> "*In any event, since it is of essence to the case to find out the intention of the testator… the whole issue turns on this question and it would seem to me that to invoke the privilege of the client, after the client is deceased, would make it impossible for the court to determine the intention of the testator… In the interest of justice; it is more important to find out the true intention of the testator.*"[4]

In *Hope v. Martin*[5], the Ontario Superior Court of Justice dealt with the question of whether the drafting lawyer could release the original will to a beneficiary of an estate who intended to apply to the court to be appointed as estate trustee after both named estate trustees had renounced their appointment. The beneficiary requested the release of the original will so that she could apply for probate and the drafting lawyer refused, citing that they could not release the will due to solicitor/client privilege.

In concluding that the drafting solicitor could release the will to the applicant, the court references *Stewart v. Walker*[6], a 1903 decision of the Court of Appeal, in which it was stated:

> "*One objection taken on behalf of the appellant was to the rejection of the evidence of Mr. Francis A. Hall, solicitor, with regard to certain communications said to have passed between him and the deceased during the existence between them of the relationship of solicitor and client, and which those opposed in interest to the Attorney-General claimed the right to exclude on the ground that they were privileged. The privilege is not the privilege of the solicitor, but of the client who may waive it or not as he pleases. In this case the client by whom the communications were made was dead, leaving no heirs or next of kin to stand in his place. No person survived him upon whom the benefit of the privilege devolved, unless it was the Attorney-General, who, in the event of intestacy, would be entitled to obtain letters of administration to the estate: R.S.O. 1897, ch. 70. The plaintiff claims the benefit of the privilege as executor of the will, but the existence or non-existence of the will is the question at issue*."[7]
>
> "*The mere fact of the death did not destroy the privilege, but the right of the Attorney-General to waive the benefit was at least equal to that of the plaintiff.* ***The nature of the case precludes the question of privilege from arising. The reason on which the rule is founded is the safeguarding of the interests of the client, or those claiming under him when they are in conflict with the***

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[3] [1972] 2 O.R. 5
[4] *Ibid* at para. 11
[5] 2011 ONSC 5447
[6] (1903), 6 O.L.R. 495 (C.A.)
[7] *Ibid* at para. 9

> ***claims of third persons not claiming, or assuming to claim, under him. And that is not this case, where the question is as to what testamentary dispositions, if any, were made by the client.*** *As said by Sir George Turner, Vice-Chancellor, in Russell v. Jackson (1851), 9 Ha. 387, at p. 392: "The disclosure in such cases can affect no right or interest of the client. The apprehension of it can present no impediment to the full statement of his case to his solicitor ... and the disclosure when made can expose the Court to no greater difficulty than presents itself in all cases where the Courts have to ascertain the views and intentions of parties, or the objects and purposes for which dispositions have been made.*"[8] (emphasis added)

In concluding that the drafting lawyer could release the original will to the applicant, the court cites the 1993 decision of the Supreme Court of Canada in *Goodman Estate v. Geffen*[9], in which the court states:

> *"In my view, the considerations which support the admissibility of communications between solicitor and client in the wills context apply with equal force to the present case. The general policy which supports privileging such communications is not violated.* ***The interests of the now deceased client are furthered in the sense that the purpose of allowing the evidence to be admitted is precisely to ascertain what her true intentions were."***[10] (emphasis added)

As cases such as *Re: Ott* and *Hope v. Martin* make clear, the "wills exception" enables a drafting lawyer to divulge certain information pertaining to the estate planning of the deceased that under normal circumstances would offend the duty of confidentiality which is owed to the client.

Who can Waive Privilege/Confidentiality

While the "wills exception" can offer a drafting lawyer some guidance and assistance in what they may disclose, it does not offer them the ability to divulge all information pertaining to the deceased's estate planning to any individual. In the course of an estate dispute many third parties may request a drafting lawyer to divulge certain information about the deceased's estate planning. When determining what information they may divulge to whom and when, the drafting lawyer must always have their mind turned to the duty of confidentiality which they owe to the deceased.

Under most circumstances, when a lawyer is faced with the dilemma of whether to divulge confidential information to a third party, the most straightforward solution is for the lawyer to seek their client's instructions and ascertain whether the client would like this information released to the third party. If the client consents to the release of the information, the lawyer may release it, and if the client refuses to give their consent, the lawyer must keep the information confidential. As already discussed, in an estates context this is often not possible, for the client is no longer around to give the lawyer their consent.

In *Hicks Estate v. Hicks*[11] ("***Hicks***"), the court held that an estate trustee may step into the place of the testator and waive privilege in the same fashion as if the testator was still alive and had waived privilege themselves. In *Hicks*, the estate trustee of an estate sought an order

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[8] *Ibid* at para. 10
[9] [1991] 2 S.C.R. 253 (SCC)
[10] *Ibid* at para. 65
[11] 25 E.T.R. 271

compelling the two former lawyers of the deceased to disclose to him all materials in their file regarding the production of the deceased's wills. The lawyers refused, citing solicitor/client privilege. In coming to its decision, the court clarified that solicitor/client privilege exists for the benefit of the client, not of the solicitor and that as a result, the estate trustee was deemed to have the ability to waive confidentiality in the same fashion as the deceased themselves. In coming to such a conclusion, the court states:

> "***The plaintiff can waive the privilege and call for disclosure of any material that the client, if living, would have been entitled to from the two solicitors.*** *The Rules of Practice enable the plaintiff to obtain disclosure of any other relevant material in the possession of the former solicitors of Mildred Hicks and to examine them prior to or at trial.*"[12] (emphasis added)

What cases such as *Hicks* make clear is that an estate trustee may step into the shoes of the deceased following their death, and waive privilege over a document, in the same fashion as if they had been the deceased themselves. As a result, should a drafting lawyer be faced with a situation in which an estate trustee seeks the release of a document or information, or seeks to waive privilege over the information or document, they may treat the request as if the request was coming from the deceased themselves.

While *Hicks* makes it clear that the estate trustee of a deceased's estate may waive confidentiality or privilege, the question remains of whether there are any other individuals who may waive confidentiality or privilege on behalf of the deceased. If a beneficiary of the deceased's will approaches the drafting solicitor with a question pertaining to the deceased's estate, may the drafting lawyer waive the duty of confidentiality which they owed to the deceased and discuss the matter with the beneficiary?

In *Hicks*, the court refers to the decision of *Langworthy v. McVicar*[13] ("***Langworthy***") when discussing who, in addition to the estate trustee, could waive privilege over a document, stating:

> "*… it would seem any one claiming to be a representative whether as heir or next of kin may waive it."*[14]

Arguably, as a result of the language used by the court in *Langworthy*, the group of individuals who may have the drafting lawyer waive privilege or confidentiality could be quite diverse, including beneficiaries, next of kin, and potentially even creditors of the deceased. As a result, and in light of the fact that it is unlikely that the collective group will speak with one mind in an estate dispute and collectively decide to waive privilege or confidentiality, a lawyer who is faced with the issue of releasing confidential information or documents should seek the consent of all interested parties with a financial interest in the estate before releasing such documents.

In view of the problems that may be associated with obtaining the consent to waive confidentiality or privilege, it has often been suggested that the most prudent route for a drafting lawyer to take when faced with the decision of whether to release confidential information to those individuals with a financial interest in the estate, is to seek an order of the court that would override any solicitor/client privilege as it regards the information that is being released.

Cases such as *Hicks* and *Langworthy* make clear that following the death of the deceased, certain individuals may be able to step into the shoes of the deceased and instruct the drafting lawyer regarding the release of confidential information much in the same capacity as the deceased themselves. Unfortunately, as a result of the often contentious nature of estates

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[12] *Ibid* at para. 15
[13] (1913) 25 O.W.R. 297
[14] *Ibid* at 298

disputes, even though the drafting lawyer may be entitled to release the information to the beneficiaries, it may still appear wisest from the drafting lawyer's point of view to seek the guidance of the court on the issue of what, if any, documents they should release.[15]

Beneficiaries' Request for Information[16]

As a general rule, the beneficiaries of a trust may, on reasonable notice, require the trustees to produce for their inspection any trust document that the beneficiaries wish to see.[17] While little debate exists concerning a beneficiary's right to access trust documents or information upon request, there has been much debate concerning upon what legal basis the right of the beneficiary to access such information exists.

The classic viewpoint as to why a beneficiary of a trust is entitled to view trust documents characterizes the right as a "proprietary right" in the documents themselves. As phrased by Lord Wrenbury in *O'Rourke v. Darbishire*[18]:

"*The beneficiary is entitled to see all trust documents because they are trust documents and because he is a beneficiary. They are in in this sense his own. Action or no action, he is entitled to access to them. This has nothing to do with discovery. The right to discovery is a right to see someone else's documents. The proprietary right is a right to access to documents which are your own*."[19]

Simply put, the classic view as to why a beneficiary may be entitled to view trust documents is that the beneficiary has an ownership interest in the documents themselves. As the beneficiary is in part an owner of the documents, they are entitled to view the documents upon request.

The characterization of a beneficiary's right to access documents from the trust as a "proprietary right" has been highly criticized over the years. In *Schmidt v. Rosewood Trust (Isle of Man)*[20], Lord Walker, in discussing Lord Wrenbury's "proprietary right" description in *O'Rourke v. Darbishire*, states that the characterization of the right as a proprietary right gives rise to far more problems than it solves.[21] In discussing the issue, Lord Walker agrees with the modern characterization of the problem as phrased in *Principles of the Law of Trusts*[22], writing:

> "*The legal title and rights to possession are in the trustees: all the beneficiary has are equitable rights against the trustees… **The beneficiary's rights to inspect trust documents are founded therefore not upon any equitable proprietary right which he or she may have in respect of those documents but upon the trustee's fiduciary duty to keep the beneficiary informed and to render accounts.** It is the extent of that duty that is in issue. The equation of the right to inspect trust documents with the beneficiary's equitable proprietary rights gives rise to unnecessary and undesirable consequences. It results in the drawing of virtually incomprehensible distinctions between documents which are trust*

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[15] Please see Appendix "A" for a precedent Order

[16] For more information see generally "Disclosure of Trust Documents Revisited", David A. Steele, (1996) 15 E.T.J. 218, & "The Beneficiaries Right to Know", David A. Steele, presented at the Fourth Annual Estates and Trusts Forum, November 2001.

[17] The Law of Trusts: A Contextual Approach, 2nd ed., Mark R. Gillen & Faye Woodman, eds., Emond Montgomery Publications Limited (Toronto: 2008), at 386

[18] [1920] A.C. 581 (H.L.)

[19] *Ibid* at 626 & 627

[20] [2003] UKPC 26

[21] *Ibid* at para. 52

[22] H.A.J. Ford, *Principles of Law of Trusts*, 2nd ed, Law Book Co. (Sydney: 1990) at 425

> *documents and those which are not; it casts doubts upon the rights of beneficiaries who cannot claim to have an equitable proprietary interest in the trust assets, such as the beneficiaries of discretionary trusts; and it may give trustees too great a degree of protection in the case of documents, artificially classified as not being trust documents, and beneficiaries too great a right to inspect the activities of trustees in the case of documents which are, equally artificially, classified as trust documents.*"[23] (emphasis added)

Simply put, in the more modern interpretation the beneficiary's right to view trust documents is founded upon the fiduciary duty which the trustee owes to the beneficiary, and not upon any proprietary interest that the beneficiary may have in the trust document itself.

Whether you accept the classic definition of why a beneficiary is entitled to access trust documents as a proprietary right, or accept the more modern characterization of the right being founded on the fiduciary duty which is owed by the trustee to the beneficiary, it is clear that upon a beneficiary making a request to view the trust documents, the trustee is under an obligation to provide the beneficiary access to the documents.

Discretionary Beneficiaries

There has been some debate over whether a discretionary beneficiary has the same right to view and inspect trust documents as a beneficiary under normal circumstances. The issue was considered in *Spellson v. George*[24] in which Justice Powell states:

> "*The question then is, whether person whose status is only that of a potential object of the exercise of a discretionary power can properly be regarded as one of the cestuis que trust of the relevant trustee. I do not doubt that he can, and should, properly be so regarded, for although it is true to say that, unless, and until, the trustee exercises his discretion in his favour, he has no right to receive, and enjoy, any part of the capital or income of the trust fund, it does not follow that, until that time arises, he has not rights against the trustee. On the contrary,* ***it is clear that the object of a discretionary trust, even before the exercise of the trustee's discretion in his favour, does have rights against the trustee… those rights, so it seems to me, are not restricted to have the trustee bona fide consider whether or not to exercise his (the trustee's) discretion in his (the object's) favour, but extend to the right to have the trust property properly managed and to have the trustee account for his management****…*"[25] (emphasis added)

While a discretionary beneficiary may be entitled to receive information pertaining to the trust in the same way as a beneficiary under normal circumstances, there are exceptions to what the trustee must disclose to a discretionary beneficiary. While a discretionary beneficiary is entitled to view trust documents, they are not entitled to see any documents or information pertaining to why the trustee did (or did not) exercise their discretion in the trust.

In *Re Londonderry's Settlement*[26], the trustee resisted disclosing correspondence amongst trustees pertaining to the exercise of their discretionary powers citing that it would lead to family disharmony. In agreeing with the trustee, the court states:

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[23] *Supra* note 20, at para. 52
[24] (1987) 11 NSWLR 300
[25] *Ibid* at 316
[26] [1965] Ch. 918

> "*Nothing would be more likely to embitter family feelings and the relationship between the trustees and members of the family, were trustees obliged to state their reasons for the exercise of the powers entrusted to them. It might indeed well be difficult to persuade any persons to act as trustees were a duty to disclose their reasons, with all the embarrassment, arguments and quarrels that might ensue, added to their present not inconsiderable burdens*."[27]

As cases such as *Spellson v. George* and *Re Londonderry's Settlement* make clear, discretionary beneficiaries may be afforded the same rights regarding access to trust information as all other beneficiaries. The right for a discretionary beneficiary (or indeed any beneficiary) is not absolute, as beneficiaries are not entitled to know the reasons behind why the trustees exercised the discretion afforded to them by the trust. As *Re Londonderry's Settlement* makes clear, even when the trustee's reasons for exercising their discretion have been reduced to writing, the beneficiaries are still not entitled to access such information.

Trustees Obligations to Inform

Generally speaking, there is no positive obligation on the part of a trustee to give unsolicited information to beneficiaries.[28] There are however exceptions to this rule. A trustee of a trust in which there are minor beneficiaries has a positive obligation to inform the minor beneficiary of the existence of the trust once they come of age. As phrased by Justice Collins in *Hamar and another v. Pensions Ombudsman and another*[29] ("***Hamar***"):

> *"(W)hen infant beneficiaries' come of age, it is necessary for them to be told that they are beneficiaries and that there exists a trust. Of course, in general, they have the right to be shown the Trust Deeds and any other relevant documentation which explains or sets out the basis of the trust."*[30]

In discussing what information the trustee must inform the beneficiary of, Justice Collins went on to state:

> "*What is suggested…is that there was a duty on the trustees not only to inform of rights, but also to inform as to how those rights could be properly exercised or, more importantly perhaps, that those rights were not being properly exercised. It seems to me that that is to extend, beyond anything that has hitherto been suggested, to supposed duties of trustees. It is certainly the case that there is an obligation to give information to a beneficiary of the existence of the trust and, by showing him documents, to give information.* ***What is, in my judgment, not supported by the authorities is a duty to go further and to give explanations. No doubt the trustees frequently will, but they do not have to. Still less are they obliged, in my judgment, to give information as to how a particular beneficiary may obtain his portion in a particular fund or may exercise his statutory rights*** *particularly where, as here, they form the view that it was not in the interests of the remaining beneficiaries."*[31] (emphasis added)

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[27] *Ibid* at para. 56
[28] *Supra* note 17
[29] [1996] OPLR 55
[30] *Ibid* at para. 44
[31] *Ibid* at para. 46

In *Tito v. Waddell (No. 2)*[32], the court further summarizes the law pertaining to what information the trustees must proffer to beneficiaries, stating:

> *"…trustee, and doubtless other persons in a fiduciary position, are under a duty to answer inquiries about the trust property… but that is a far remove from saying that trustees have a duty to proffer information and advice to their beneficiaries; and I think the courts should be very slow to advance along the road of imposing such a duty."*[33]

As authorities such as *Hamar* and *Tito v. Waddel (No. 2)* make clear, trustees are under a positive obligation to inform infant beneficiaries of the existence of a trust upon coming of age, however the positive obligation seems to end there. Once informed of the existence of the trust the trustee's positive duty seems to have concluded, and should the beneficiary wish any further information, the beneficiary may request access to such information from the trustee in the normal course.

Disclosure to Third Parties

A relatively recent development in the law surrounding disclosure in a trust context is what trust documents and information must a beneficiary disclose to third parties in litigation? As already demonstrated, a beneficiary of a trust is entitled to receive certain information from the trustee about the trust upon request. As the beneficiary's right to view trust documents is almost a certainty, could these documents be considered within a beneficiary's "possession control or power" when considering what documents they may have to disclose when involved in litigation?

In *Customs v. Parissis and Others*[34] ("***Parissis***"), the UK government sought the disclosure of certain trust documents and information from a beneficiary of a trust involved in a tax dispute. The beneficiary refused, stating that such documents were not under his "possession, custody, or power", and that as a result he did not have to disclose them.

In ruling that the taxpayer must in this case disclose to the government certain trust documents, the tribunal reasoned that these documents were within the taxpayer's practical power, for in the view of the tribunal the taxpayer would have been given these documents by the trustee had he requested them. As a result, the tribunal took the position that these documents were within the "*de facto*" control of the taxpayer, and as a result he must disclose such documents in the proceeding.[35]

While *Parissis* deals with the requirements of disclosure to the government in a tax proceeding, an interesting analogy could be drawn between the tribunal's reasoning in requiring the disclosure of trust documents in *Parissis*, and the disclosure requirements for parties involved in litigation in Ontario. Rule 30.02(1) of the *Rules of Civil Procedure* provides:

> "*Every document relevant to any matter in issue in an action in the possession, control or power of a party to the action shall be disclosed…*"[36]

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[32] [1977] Ch. 106
[33] *Ibid* at 242
[34] [2011] UKFTT 218 (TC)
[35] See "Rules of Disclosure: De Facto Power over Documents Sought for Disclosure", Fiona Poole, STEP (June 2012)
[36] *The Rules of Civil Procedure*, R.R.O. 1990, R. 194, as amended, at Rule 30.02(1)

The wording of rule 30.02(1) that a party must disclose all relevant documents within their "possession, control or power" is analogous to the wording of the disclosure requirements in *Parissis*, where the court required the taxpayer to disclose all documents in their "possession, custody or power". In light of the court's reasoning in *Parissis*, a strong argument could potentially be put forward that a beneficiary of a trust involved in litigation in which trust documents may be relevant has a duty to disclose such documents to the other parties involved in the litigation, for in the eyes of the court such documents are within the "possession, control or power" of the beneficiary.

Conclusion

Disclosure in estates and trusts must be considered in the context of the request made or the obligation owed. Whether it be what documents and information a drafting lawyer may release to the estate trustee or beneficiaries of an estate following the death of the deceased, what information a beneficiary is entitled to receive from a trustee upon request, when a trustee is under a positive obligation to inform a beneficiary of certain trust information, or whether there is ever a situation under which a beneficiary may have to disclose certain trust information to a third party, the rules regarding what must be disclosed when in an estate or trust context are fact specific, and can change depending on the context of the situation.

Costs in Estate Litigation

Costs in estate litigation matters used to be a relatively straight forward affair. Absent extraordinary circumstances, costs would more often than not be payable out of the assets of the estate for both parties (no matter the outcome). This approach had an obvious down side. Free from the worry that they could have a large costs award made against them, litigants could bring frivolous cases without much merit before the court, hoping for a windfall (or to simply seek revenge against an estranged relative). The result of this process was to deplete the assets of the estate that the other beneficiaries were rightfully entitled to. Litigants had nothing to fear, knowing that no matter the outcome, the costs of their challenge would be borne by the assets of the estate. The 2005 decision of the Ontario Court of Appeal in *McDougald Estate v. Gooderham*[37] changed this, confirming what had been the trend in estate litigation for quite some time. After *McDougald Estate*, absent specific public policy concerns delineated in the case, cost awards in estate litigation matters often treated no differently than they are in any other civil litigation. Simply put, the loser may pay.

McDougald Estate v. Gooderham – When should the estate pay costs?

In *McDougald Estate v. Gooderham*[38] the Ontario Court of Appeal re stated what had been a trend in estate litigation for quite some time. Frustrated by a system that appeared to encourage frivolous lawsuits against estates without much repercussion, the courts began to move away from the traditional approach. In discussing the issues surrounding who should bear the burden of costs in estate litigation matters, the court began by reviewing the historical development of costs in estate litigation matters in Canada. Like many things within estate law, costs awards in Canada were developed based on the practice of the English courts. Historically in England, the courts in estate litigation matters ordered that the costs of all of the parties should be paid out of the assets of the estate where the litigation arose as a result of the actions of the testator, by those who had an interest in the residue of the estate, or where the litigation was reasonably

[37] 2005 CanLII 21091 (ONCA)
[38] *Ibid*

necessary to ensure the proper administration of the estate. The court states that public policy considerations underline this approach, as it is important that the courts give effect to valid wills that reflect the intention of competent testators, and that where the difficulties or ambiguities that give rise to the litigation were caused in whole or in part by the testator, it seems only fair that the testator, through his or her estate, should bear the costs of the resolution. If there are reasonable grounds upon which to question the execution of the will, or the testator's capacity in executing the will, it is again in the public that these questions are resolved without costs being awarded against those questioning the will's validity.[39]

The English approach to costs in estate litigation was adopted by the Canadian courts, creating a system in which a large number of cases had the costs of both parties paid out of the assets of the estate no matter the result. In *McDougald Estate*, the Court of Appeal mentions that historically costs being paid out of the assets of the estate became "virtually automatic" if you could show that the litigation was a result of the actions of the testator, or if it was reasonably necessary to ensure the proper administration of the estate.[40] *McDougald Estate* makes one point very clear. The traditional approach that has been employed by the Canadian courts in estate litigation matters has been displaced by a more modern approach. In using the more modern approach, the court is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out in the review of the English tradition is found to apply, the court is to apply the same costs rules that apply in regular civil litigation.[41] As put by the Court of Appeal, "*gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation*".[42]

The reasoning behind the new approach envisioned by the Court of Appeal in *McDougald Estate* is perhaps best summarized by Justice Brown in the 2009 decision of *Salter v. Salter Estate*[43], when he famously states:

> *"A view persists that estates litigation stands separate and apart from the general civil litigation regime. It does not; estates litigation is a sub-set of civil litigation. Consequently, the general costs rules for civil litigation apply equally to estates litigation – the loser pays, subject to the court's consideration of all relevant factors under Rule 57, and subject to the limited exceptions described in McDougald Estate. Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation. The 'loser pays' principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion. There is no reason why such discipline should be absent from estate litigation. Quite the contrary. Given the charged emotional dynamics of most pieces of estate litigation, an even greater need exists to impose the discipline of the general costs principle of 'loser pays' in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes".*[44]

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[39] *Ibid* at para. 78
[40] *Ibis* at para. 79
[41] *Ibid* at para. 80
[42] *Ibid* at para. 85
[43] (2009) 50 E.T.R. (3d) 227 (ONSC)
[44] *Ibid* at para. 6

The new approach in action – How is the court applying it?

The courts have now had several years to consider the new approach to costs as described in *McDougald Estate*. Below is a summary of some of the cases where the courts have considered the new approach to costs, and hopefully by reading through them you will be able to better understand where the court stands in this regard, and how they are now approaching the awarding of costs in estate litigation.[45]

Binkley Estate v. Lang[46]

Binkley Estate v. Lang was a case which dealt with the rectification of a will. In *Binkley Estate*, the testatrix made a 2006 will which gave $2,500.00 legacies to 3 named individuals. The testatrix subsequently made small changes to her will in 2006. In the course making the changes to the will, the lawyer responsible accidently changed the $2,500.00 legacies to the three individuals to $25,000.00. This mistake was not discovered until after the testatrix died. An application was subsequently brought to rectify the will to change the $25,000.00 legacies back to $2,500.00. This application was served upon the three beneficiaries, and was eventually successful in rectifying the will.

The court next turned its mind to who should bear the costs of the application. On its face this seems like a case which may warrant costs being paid out of the assets of the estate for public policy considerations. The mistake in the will was not as a result of the actions of any of the named respondents, and the application can not be said to be frivolous. Indeed, one of the public policy grounds contemplated in *McDougald Estate* was that costs should be payable out of the assets of the estate when the difficulties or ambiguities are caused by the actions of the testator. In *Binkley Estate*, the difficulties were directly caused as a result of the mistake of the testatrix in not realizing the drafting error in the will. As such, it would only make sense that the costs of fixing this mistake would be borne by the assets of the estate. This, however, is not the conclusion that the court came to.

In coming to its decision regarding who should pay costs in the application, the court ruled that the respondents should have to pay the estate's costs fixed at the amount of $12,334.49. At first glance this seems odd. Why should the respondents be personally required to pay the estate's costs on the application when the mistake was caused as a result of the mistake of the testatrix? In coming to their decision, the court explains why. The application judge found that the evidence favouring rectification was strong, and that in fact there was no evidence ever presented to the contrary. Despite this, the respondents twice went to court to fight against rectification over what was a relatively modest sum of money, eventually losing. The court did not like the respondents' actions in this application, and ordered costs against them as a result.

Binkley Estate makes one thing very clear. You have to be very careful in deciding whether or not to challenge an application. Even when the facts are such that under normal circumstances costs may be paid out of the assets of the estate, if through your actions you decide to fight an application even though the facts are against you costs may be awarded against you. The principles of *McDougald Estate* are strong in *Binkley Estate*, as the case shows that if you choose to defend an application in which the evidence is overwhelmingly against you, you will have to pay the estate's costs for fighting you.

Zandersons Estate (Re)[47]

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[45] For more examples of the courts applying the new costs approach, see: *Kaptyn Estate, Re,* (2008) 43 E.T.R. (3d) 219 (ONSC), and *Smith Estate v. Rotstein*, [2010] O.J. No. 3266 (ONSC).

[46] 2009 CarswellOnt 3988

Zandersons Estate was a recent decision of the Ontario Superior Court of Justice. It too stands for the principle that you have to be very careful in deciding how to proceed in litigation, or risk having costs awarded against you.

In *Zandersons Estate*, the Applicant brought a motion for directions to have her appointed as Estate Trustee of her brother's estate. One of the respondent's to the application was the deceased's common law spouse, and another the deceased's grandmother. The deceased died intestate, and as a result the deceased's two siblings (including the applicant) would be the only beneficiaries of his estate. The deceased's common law spouse made it clear that she intended to bring a dependant's relief claim against the estate, and that she opposed the applicant being appointed as Estate Trustee, citing a conflict of interest.

The deceased's grandmother consented to be appointed as Estate Trustee in the applicant's place. The applicant refused, submitting that there was a perceived bias on the part of the grandmother to the deceased's common law spouse. The grandmother denied such bias, but proposed that if it prevented her from being appointed, that a neutral third party (a lawyer) be appointed.

In coming to their decision, the court found that it was clear that the applicant had a financial interest in the estate which would place her in a conflict in administering the estate fairly and impartially. While the motion for directions may have been properly brought, once the conflict became obvious and the alternatives were presented (either the grandmother or the lawyer), then the motion should have been resolved. Once a neutral third party had consented to act, this should have been the end of the opposition by the applicant. As the applicant chose to keep fighting the appointment of a neutral third party, and eventually lost, they should have costs awarded against them. The court ruled that the applicant had to pay the respondents costs personally in the amount of $2,800.00.

Zandersons Estate shows that you have to be careful in how you proceed before the court or risk having costs awarded against you. Even though the court found that the applicant was right to bring the motion for directions before the court, through their conduct throughout the reference the court found that she should have to pay the respondents costs. Once again, a party to a proceeding must be very careful in how the proceed in litigation, and if they take an unrealistic position in the eyes of the court they should be prepared to have the court award costs against them.

Does the estate pay all of the costs?

Like most things in the law, the answer is "it depends". The language in *McDougald Estate* and the cases which have followed it is clear. Absent public policy concerns, costs in estate litigation is to be treated no differently than costs in any other civil litigation context.[48] In civil litigation the default costs award is costs on a "partial indemnity scale".[49] Costs on a partial indemnity scale is generally equal to 60% of the total costs incurred by a party in litigation (although the court has discretion to change this number as no number is actually listed in the Rules). In exceptional cases the court may also award costs on a substantial indemnity scale (1.5 times the partial indemnity scale, and usually 90% of total costs), or the even rarer full indemnity scale (100%). In order to qualify for either of these elevated costs awards, the party having costs awarded against them must have done something through their conduct to warrant an elevated costs award, and the punishment of the court.

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[47] 2011 ONSC 6755
[48] *Supra* note 5
[49] *Rules of Civil Procedure*, R.R.O. 1990, R. 194, as amended, at rules 1.03(1) & 57.01(3)

In *Springer v. Aird & Berlis LLP*[50] the court states that costs on a substantial indemnity scale should not be awarded unless special grounds exist to justify a departure from the usual scale. The court states that costs on a substantial indemnity scale are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of a party. In coming to its decision in *Springer,* the court cites *Young v. Young*[51], a decision of the Supreme Court of Canada. In *Young* the court states that solicitor-client costs (the old term for substantial indemnity) are generally awarded only where there has been reprehensible, scandalous, or outrageous conduct on the part of one of the parties. Absent these factors, costs will be awarded on a partial indemnity scale.

If costs in estate litigation are to be treated no differently than costs in normal civil litigation, then the default costs award appears to be costs on a partial indemnity scale. As such, even though an estate may be successful in defending a frivolous will challenge, absent an order for costs on a full indemnity basis (which is exceptionally rare), the estate will inevitably have to pay some of the costs associated with the litigation. This may seem unfair, but it is no different than it is in normal civil litigation. In civil litigation, even should a party be successful in winning or defending a claim, they will inevitably have to pay some of the legal costs associated with their victory. Absent extraordinary circumstances, the "loser pays" approach does not mean that the loser has to pay everything.

In *Zandersons Estate*[52] the respondents tried to argue that the applicant should have to pay their costs on the substantial indemnity scale, arguing that as a result of her conduct and her refusal to consent to the appointment of a neutral third party as Estate Trustee, the applicant should have to pay costs on an elevated scale. The court rejected this argument. In coming to their decision, the court states that while the applicant must bear some responsibility for persisting with her unreasonable position, this alone does not justify having to pay costs on an elevated scale. The court ruled that the applicant had to pay costs to the respondent personally on a partial indemnity scale.[53]

Discretion of Court in Determining Costs

When fixing costs of parties to a proceeding, the Court is governed by s. 131(1) of the *Courts of Justice Act*[54], which provides:

> 131(1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

Rule 57.01 of the Ontario *Rules of Civil Procedure*[55], sets out the factors to be considered by the court in exercising its jurisdiction under s. 131(1) of the *Courts of Justice Act.* In exercising its discretion, under s. 131, the court may consider the amount claimed and the amount recovered in the proceeding, the apportionment of liability, the complexity of the proceeding, the

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[50] 2009 CanLII 26608 (ONSC)
[51] [1993] 4 S.C.R. 3
[52] *Supra* note 11
[53] *Supra* note 11 at paras. 8 & 13
[54] R.S.O. 1990, c. C.43, s. 131(1).
[55] *Rules of Civil Procedure*, R.R.O. 1990, R. 194, as amended, at rule 57.01

importance of the issues, the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding, whether the proceeding was improper, vexatious or unnecessary, and any other matter relevant to the question of costs.

Conclusion

Costs in estate litigation matters are no longer the simple "estate pays" scenario that it once was. As a result of the developments in the jurisprudence beginning with *McDougald Estate*, those considering bringing claims against an estate must be much more careful than they once were or risk having to pay not only their own costs, but those of the estate as well. Those with legitimate claims need not fear the new costs rules, for legitimate claims will ultimately be successful, and upon the successful completion of the litigation have the estate pay at least part of their costs (as they are by implication the "losers" of the litigation). The landscape surrounding costs in estate litigation has changed. So long as your claim has merit however, this should not scare you away from bringing your application.

Power of Attorney Litigation – Process and Procedure

Litigation involving an attorney or guardian is sometimes considered a subtopic of estate litigation matters generally. However, with the introduction of the *Substitute Decisions Act, 1992,* S.O. 1992, c.30, as amended, the focus on the role of the attorney or guardian has changed fairly dramatically. While the obligations and responsibilities have not significantly changed, there has been a change in the nature of the litigation. Given the rise in the number of Powers of Attorney for property and for personal care that have been executed in Ontario, the volume of complaints, problems and litigation arising from those Powers of Attorney has increased.

Statutory Considerations

(a) Definitions

The *Substitute Decisions Act* separates into two parts the statutory provisions surrounding a Continuing Power of Attorney for property under Part I, and a Power of Attorney for personal care under Part II. Section 7(1) defines a Power of Attorney for property as:

> 7.(1) **Continuing power of attorney for property.** – A power of attorney for property is a continuing power of attorney if,
>
> (a) it states that it is a continuing power of attorney; or
>
> (b) it expresses the intention that the authority given may be exercised during the grantor's incapacity to manage property.
>
> (2) **Same.** – The continuing power of attorney may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except to make a Will.
>
> (3) **P.G.T. may be attorney.** – The continuing power of attorney may name the Public Guardian and Trustee as attorney if his or her consent in writing is obtained before the power of attorney is executed.

(4) **Two or more attorneys.** – If the continuing power of attorney names two or more persons as attorneys, the attorneys shall act jointly, unless the power of attorney provides otherwise.

(5) **Death, etc., of joint attorney.** – If two or more attorneys act jointly under the continuing power of attorney and one of them dies, becomes incapable of managing property or resigns, the remaining attorney or attorneys are authorized to act, unless the power of attorney provides otherwise.

(6) **Conditions and restrictions.** – The continuing Power of Attorney is subject to this Part, and to the conditions and restrictions that are contained in the power of attorney and are consistent with this Act.

(7) **Postponed effectiveness.** – The continuing power of attorney may provide that it comes into effect on a specified date or when a specified contingency happens.

The *Substitute Decisions Act* sets out an extremely broad scope of powers which may be included in a Power of Attorney for property and, as such, the solicitor should ensure that the client has a full and complete understanding of the nature and effect of the document itself.

With respect to powers of attorney for personal care, section 46 of the *Substitute Decisions Act* provides as follows:

46. (1) **Power of Attorney for Personal Care -** A person may give a written power of attorney for personal care, authorizing the person or persons named as attorneys to make, on the grantor's behalf, decisions concerning the grantor's personal care.

(2) **P.G.T. may be attorney -** The power of attorney may name the Public Guardian and Trustee as attorney if his or her consent in writing is obtained before the power of attorney is executed.

(3) **Prohibition -** A person may not act as an attorney under a power of attorney for personal care, unless the person is the grantor's spouse, partner or relative, if the person,

(a) provides health care to the grantor for compensation; or

(b) provides residential, social, training, advocacy or support services to the grantor for compensation.

(4) **Two or More attorneys -** If the power of attorney names two or more persons as attorneys, the attorneys shall act jointly, unless the power of attorney provides otherwise.

(5) **Death, etc., of joint attorney -** If two or more attorneys act jointly under the power of attorney and one of them dies, becomes incapable of personal care or resigns, the remaining attorney or attorneys are authorized to act, unless the power of attorney provides otherwise.

(6) **Conditions and restrictions -** The power of attorney is subject to this Part, and to the conditions and restrictions that are contained in the power of attorney and are consistent with this Act.

(7) **Instructions -** The power of attorney may contain instructions with respect to the decisions the attorney is authorized to make.

(b) Capacity – Power of Attorney for Property

The capacity to give a Continuing Power of Attorney can be a difficult legal question for one to determine when challenging or defending an existing Power of Attorney for property.

Section 8 of the *Substitute Decisions Act* sets out a statutory framework for the court to consider. It provides as follows:

8. (1) **Capacity to give continuing power of attorney**. – A person is capable of giving a continuing power of attorney if he or she,

(a) knows what kind of property he or she has and its approximate value;

(b) is aware of obligations owed to his or her dependants;

(c) knows that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney;

(d) knows that the attorney must account for his or her dealings with the person's property;

(e) knows that he or she may, if capable, revoke the continuing power of attorney;

(f) appreciates that unless the attorney manages the property prudently its value may decline; and

(g) appreciates the possibility that the attorney could misuse the authority given to him or her.

(2) **Capacity to Revoke -** A person is capable of revoking a continuing power of attorney if he or she is capable of giving one.

A further statutory guideline with respect to capacity is set out in section 9 of the *Substitute Decisions Act,* which provides as follows:

9. (1) **Validity despite incapacity -** A continuing power of attorney is valid if the grantor, at the time of executing it, is capable of giving it, even if he or she is incapable of managing property.

(2) The continuing power of attorney remains valid even if, after executing it, the grantor becomes incapable of giving a continuing power of attorney.

> (3) **Determining Incapacity -** If the continuing power of attorney provides that it comes into effect when the grantor becomes incapable of managing property but does not provide a method for determining whether that situation has arisen, the power of attorney comes into effect when,
>
> (a) the attorney is notified in the prescribed form by an assessor that the assessor has performed an assessment of the grantor's capacity and has found that the grantor is incapable of managing property; or
>
> (b) the attorney is notified that a certificate of incapacity has been issued in respect of the grantor under the *Mental Health Act.*

Based on sections 8 and 9 of the *Substitute Decisions Act,* the test for capacity is very different to that of the test of testamentary capacity to make a Will.

In Will Challenge litigation, the propounder of the Will must show that the Will of which probate is sought is the true Will of the testator, and that the testator was a person of testamentary capacity.[56] A long recognized leading authority which described the degree of mental capacity necessary is the case of Banks v. Goodfellow.[57]

In circumstances where a Continuing Power of Attorney for property is being sought, the provisions of sections 8 and 9 of the *Substitute Decisions Act* make it clear that the level of enquiry and strength of mind is simply not as high as that expected when making a Will.

Having said this, the solicitor who draws the document must not think that a cursory review of the issue of capacity is sufficient.

In Re: Koch,[58] Quinn J. makes it clear that the court will expect anyone who is assessing capacity of someone for the purposes of making a Power of Attorney, to carefully explore the client's cognitive abilities. Furthermore, the assessor must do more than just record information and form an opinion.

(c) Capacity – Power Of Attorney For Personal Care

With respect to Powers of Attorney for personal care, the statutory provisions set out in section 47 of the *Substitute Decisions Act* make it clear that the capacity threshold is much lower for such a Power of Attorney.

Section 47 provides as follows:

> **47.** (1) **Capacity to Give Power of Attorney for Personal Care -** A person is capable of giving a power of attorney for personal care if the person,
>
> (a) has the ability to understand whether the proposed attorney has a genuine concern for the person's welfare; and

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56 Robins v. National Trust Co., [1927] A.C. 515 at 519, [1927] 1 W.W.R. 692, [1927] 2 D.L.R. 97, [1927] All E.R. Rep. 73 (P.C.).

57 (1870) L.R. 5 Q.B.549.

58 (1997) 33 O.R. (3rd) 485, Supplementary Reasons Re: Costs (1997), 35 O.R. (3rd) 71 (Ont. Crt. Gen. Div.) Quinn J. p 74-75.

> (b) appreciates that the person may need to have the proposed attorney make decisions for the person.
>
> (2) **Validity -** A power of attorney for personal care is valid if, at the time it was executed, the grantor was capable of giving it even if the grantor is incapable of personal care.
>
> (3) **Capacity to Revoke -** A person is capable of revoking a power of attorney for personal care if he or she is capable of giving one.
>
> (4) **Capacity to Give Instructions -** Instructions contained in a power of attorney for personal care with respect to a decision the attorney is authorized to make are valid if, at the time the power of attorney was executed, the grantor had the capacity to make the decision.

The language of section 47 of the *Substitute Decisions Act* makes it clear that, with respect to the issue of capacity for a Power of Attorney for personal care, the necessary threshold is below that of a Power of Attorney for property, which is, in turn, below the threshold expected of someone to make a Will.

As a precaution, if the circumstances are such that it is likely that the Power of Attorney for property and personal care will be challenged by a family member, some consideration should be given to having your client assessed by a medical practitioner.