Orders for Directions and Pleadings: Laying the Groundwork for Successful Will and POA Challenges[1]

Introduction

Will and Power of Attorney ("POA") challenges are becoming more common. Whether it is the result of the much-vaunted and long-heralded wealth transfer between generations, the aging of society, or an American inspired litigious approach to sorting out life's inevitable disputes, these court challenges will likely only increase in quantity and complexity.

Laying the groundwork for Will and POA challenges is obviously crucial. The proper footing will (1) provide certainty to the process; (2) give confidence to the client that a secured "game plan" is in place; (3) organize the professional life of a busy advocate; and (4) promote a winning outcome.

In this paper, I will look at several factors that may impact on Will or POA challenges. However, this paper will largely focus on orders for directions and how they can, and should, be used in Will or POA challenges. Sample orders for directions for Will and POA challenges are appended to this paper. I will also consider when pleadings should be used instead of (or in addition to) orders for directions.

Will Challenges – An Overview

Slighted beneficiaries or disinherited family members quickly come to realize that they may have a legitimate right to challenge a Will or Codicil. They often believe that the purported last Will and testament of the deceased does not represent his/her true intentions and feel they have "little choice" but to challenge the impugned Will.

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It is trite law that a last Will and testament will be set aside by the court where:

1. The testator lacked testamentary capacity;

2. The testator was unduly influenced (i.e. coerced);

3. The Will failed to comply with the requirements of due execution (i.e. signed by the testator in the presence of two witnesses);

4. The testator lacked knowledge of the contents of the Will and did not approve its contents;

5. There was outright fraud or forgery (much less common).

It is important to remember that "suspicious circumstances" surrounding the preparation and execution of the Will are not separate grounds to challenge a Will. Rather, the effect of such suspicious circumstances is to rebut a presumption that the Will was duly executed, that the testator knew and approved of the contents of the Will, or that the testator had the necessary testamentary capacity to make the Will. It is likely fair to say that the more suspicious the circumstances, the more arduous the task of proving the challenged Will (though the standard of proof remains the same, namely proof on a balance of probabilities).

Finally, before commencing a Will challenge, a client must be made aware that a Will need not be "fair," "just" or "equitable" to be upheld. Ultimately, a testator is given wide latitude to do as he/she wishes with their estate. While it is constantly under attack, Canadian courts have long upheld, based on British common law principles, the notion of testamentary freedom. Testamentary freedom may be curtailed as a result of a dependant support claim under the *Succession Law Reform Act*,[2] a spousal election under the *Family Law* Act,[3] or such claims as

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[2] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, as amended, Part V. ("**SLRA**")

proprietary estoppel or *quantum meruit* (among others), but testamentary freedom is still recognized by the courts and should not be disregarded.

POA Challenges – An Overview

While fully capable, a person has the right to grant powers of attorney to another. Very often, this power will be provided to a family member or close personal friend. Once a person becomes incapable of managing their property or making personal care decisions, their appointed attorney(s) can act in their place. Attorneys for property or personal care are governed by the *Substitute Decisions Act*.[4]

Attorneys for property and personal care have wide-ranging powers and are required to act in the best interests of the incapable.[5] Attorneys are considered to be in a position of trust and are therefore regarded by the court as fiduciaries and held to a higher standard.

In certain situations, a family member or a close friend may feel compelled to challenge the validity of powers of attorney and may apply to the court to be appointed as guardian.[6] An attorney for property and/or personal care can be removed by the court for dereliction of duty, including breach of fiduciary duty. A party can also apply to the court for an order mandating the attorney to take certain actions such as fostering relationships with family, or consulting with supportive family members.[7]

Orders for Directions

Rule 14 of the Ontario *Rules of Civil Procedure* governs the commencement of proceedings by way of application.

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[3] R.S.O. 1990, c. F.3, as amended.
[4] *Substitute Decisions Act*, S.O. 1992, c. 30, as amended. ("**SDA**")
[5] SDA sections 31 and 66.
[6] SDA sections 22 and 55.
[7] SDA sections 32, 39 and 68.

Rule 14.05(3) states that a proceeding may be brought by application where the rules authorize the commencement of a proceeding by application or where the relief claimed is, among other things:

- the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of an estate;
- an order directing executors, administrators or trustees to do or abstain from doing any particular act;
- the removal or replacement of one of more executors; and
- the determination of rights that depend on the interpretation of a [trust] deed or Will.

Rule 75 of the *Rules of Civil Procedure* is the governing rule when it comes to contentious estates. A person who appears to have a financial interest in the estate may apply for directions to bring a matter before the court.[8] An application or motion for directions must be served on all persons appearing to have a financial interest in the estate, or as the court directs.[9] Under Rule 75.06(3), the court may direct the issues to be decided, the procedures for bringing the matter before the court in a summary fashion, etc. through an order for directions.

Orders for directions can be sought at any time where appropriate. However, parties typically seek such an order at the outset of the litigation. Moreover, it usually becomes apparent to the parties early on that many Will or POA challenges, which are commenced by way of notice of application, should be converted into a trial of an issue(s). Obviously, this is an opportune time to seek directions from the court.

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[8] Rule 75.06(1).
[9] Rule 75.06(2).

It is important to note that in the recent decisions of *Re Estate of Ireni Traitses*[10] and *Estate of Lorraine Coombs*,[11] Justice Brown held that the principle of proportionality as set out by the Supreme Court of Canada in *Hyrniak v. Mauldin*[12] applied to orders for directions. In light of this principle, counsel should attempt to tailor their proposed order for directions in relation to the needs of their case, including the size of the Estate. For example, according to Justice Brown, in will challenges involving modest estates which require a judge to make findings of credibility, the optimal procedure will be to limit pre-hearing discovery. Justice Brown has held in such cases that written interrogatories and a short hybrid trial (with evidence in chief given by way of affidavit, with time-limited cross-examinations), is the preferable procedure.

Whether these kinds of orders for directions will become prevalent in future remains to be seen. Regardless, counsel should be alert to crafting their orders for directions with the proportionality principle in mind.

The Discretion of the Court

In *Abrams v. Abrams,*[13] a decision of Justice Strathy of the Ontario Superior Court of Justice, the Court contemplated the purpose of an order for directions in a POA challenge:

> First, I accept the submission that the purpose of Rule 75.06 of the *Rules of Civil Procedure* is to permit the court to design a procedural regime that will suit the nature of the dispute and that will, in the words of Rule 1.04, promote "the just, most expeditious and least expensive determination" of the proceedings. I agree with the submissions that the proceeding has gone on too long. An aggressive schedule is necessary in order to move it to a conclusion in the interests of Ida Abram and her entire family.[14]

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[10] 2014 ONSC 2102 (CanLII)
[11] 2014 ONSC 2154 (CanLII)
[12] 2014 SCC 7 (CanLII), 2014 SCC 7
[13] *Abrams v. Abrams*, 2008 CarswellOnt 7786, 173 A.C.W.S. (3d) 410
[14] *Ibid*, paragraph 5.

After noting that the focus of the proceeding had to be the protection of the incapable, Justice Strathy stated as follows:

> The matters at issue, and the protection of Ida, call for some limits on the normal scope of adversarial proceedings. I am not prepared, for example, to order an examination for discovery of the person who is the focus of this proceeding: an 85-year-old woman, with early Alzheimer's disease and word-finding difficulty, for whom these events are a source of anxiety and heartbreak.[15]

It is apparent from the foregoing that orders for directions provide the court with wide latitude to design the procedure by which a Will or POA challenge will come to court and can even trump the normal procedure as set out in the *Rules of Civil Procedure*. As was noted by Mr. Justice Cullity in *Ettore Estate*:[16]

> … orders for directions carries over into the *Rules of Civil Procedure* the former surrogate court practice under which the court had a wide discretion to determine the appropriate procedures in contested wills cases. Under this practice, pleadings were, for example, often dispensed with and replaced by the order of the court directing the issues to be tried and who were to be the parties. Cross-examinations previously conducted on affidavits were sometimes ordered to replace examinations for discovery. The same practices sometimes have been followed in orders made under rule 75.06 and, in the absence of authority to the contrary, there appears to be no reason to infer that discretionary control of the court with respect to the appropriate procedures in contested will matters is less extensive than it was previously.

Specific Directions

On an application or motion for directions, the court may direct:[17]

1. A proceeding commenced by application be converted to a trial of an issue(s);

2. The issues to be tried, with or without a jury;

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[15] *Ibid*, paragraph 6.
[16] *Ettore Estate, Re*, (2004), 11 E.T.R. (3d) 208 (Ont. S.C.J.), paragraph 40.
[17] Rule 75.06(3).

3. Who are the parties, who is the plaintiff and defendant, and who is submitting their rights to the court;[18]

4. Who shall be served with the order for directions, and the method and times of service;

5. Procedures for bringing the matter before the court in a summary fashion, where appropriate;

6. The plaintiff to file and serve a statement of claim (i.e. pleadings ordered);

7. An estate trustee to be appointed during litigation, and file such security as the court directs;[19]

8. A mediation session to be conducted under Rule 75.1;

9. Such other procedures as are just.

Questions to be Considered

Given the laundry list of directions set out in Rule 75.06(3), it becomes clear that an order for directions is a powerful tool in the arsenal of an estate litigator and should not be underestimated or overlooked.

A party must firmly turn his/her mind to the directions needed in a Will or POA challenge early on and start negotiating such directions with opposing counsel. Questions to be considered include whether pleadings are preferable to a mere recitation of the issues in the order for directions. Pleadings, with their ability to crystallize the issues that divide the parties, together with the stating of material and supporting facts, can be a commanding tool and estate litigators are often too quick to dismiss the need for pleadings. Pleadings are also governed by Rule 25

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[18] See Rule 75.07.
[19] See *Estates Act*, R.S.O. 1990, C. E.21, as amended, section 28.

of the *Rules of Civil Procedure,* thereby providing certainty and discipline to the exercise of drafting.

There is an important caveat when it comes to fixing the "issues to be tried" in an order for directions. The parties must allow themselves sufficient leeway to refine and contour the issues as the proceeding unfolds. No litigation is static and the issues may ripen or drop off as the parties exchange documents and conduct examinations. As such, the order giving directions should specifically allow the parties to add or amend the issues and/or apply to the court for further directions. These subtleties should not be overlooked when drafting and/or negotiating an order for directions.

In addition, the parties should be careful not to limit their procedural rights through an order for directions. A motion for directions should therefore state that nothing in the order takes away or diminishes the parties' procedural rights under the *Rules of Civil Procedure* unless the order for direction specifically states otherwise.

In terms of mediation, a party must not only decide whether to mediate, but when mediation should take place. Pursuant to Rule 75.1.02, mediation is mandatory in Will and POA challenges commenced in the City of Toronto, the City of Ottawa, and the County of Essex.[20] Not surprisingly, the court is generally reluctant to fix when the mediation will take place, but prefers to leave the timing of mediation to the parties. Sufficient regard should also be given to what steps, if any, should be completed before the mediation (i.e. production of documents by the parties and non-parties).

The appointment of an estate trustee during litigation also bears considerable thought. An estate trustee during litigation can ease the administration of the estate in the near term and protect and hold the estate's assets until the litigation is completed. An estate trustee during

[20] See Rule 75.1.02.

litigation has wide-ranging powers[21] and can be a powerful ally in advancing settlement or a party's cause of action. A party must therefore determine whether a trust company or an individual can best manage the job.

Finally, the parties can also agree to limit the role of an estate trustee during litigation in the order for directions or require the estate trustee during litigation to take certain steps in the administration of the estate, such as selling real property or disposing of household items, all of which is subject to the approval of the court.

Production of Documents & Examinations for Discovery

Orders for directions may not only suspend or limit the normal scope of adversarial proceedings, but they may also go well beyond the normal discovery process. Orders for directions often mandate documentary production from non-parties and permit non-parties to be examined, including *de bene esse* examinations (i.e. a provisional examination of a witness whose testimony is important and might otherwise be lost).

Non-parties can include: (1) the solicitor who drafted the challenged Will or POA, as well as his/her file, including notes; (2) medical practitioners and the medical records in their possession; and (3) accountants or financial advisors who provided estate planning advice or who might have some insight into or knowledge of the "true intentions" of the incapable in a POA challenge.

Production of documentation can include:

1. Any paper or writing being, or purporting to be, a testamentary document;

2. Medical records or files relating to the testator or the incapable;

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[21] Section 28 of the *Estates Act* reads in part: "and the administrator so appointed has all the rights and powers of a general administrator other than the right of distributing the residue of the property…"

3. Financial records from any bank or institution relating to the testator's or incapable's assets whether held jointly or solely;

4. Any document relating to any matter in issue in the proceeding that is, or has been, in the possession, control or power of a party to the proceeding.[22] Such documents may be required to be listed in an affidavit of documents.

The costs of producing such records should also be addressed in the order for directions.

While it is important to tailor the order for directions to the current proceeding, a party should be careful not to go too far or anticipate every procedural aspect of the proceeding. For example, in a Will or POA challenge, a better approach may be to simply require the parties to abide by the *Rules of Civil Procedure* when it comes to documentary production and examinations for discovery (the one exception may be documentary production by and examinations of non-parties). In enforcing any demands for document production and/or examinations of the parties, the court will take comfort from the fact that it can simply rely on the well-trodden rules of documentary production and examinations for discovery as set out in *Rules of Civil Procedure*. Additional procedural provisions (and issues) can be added at a later date by applying to the court for further directions.

Solicitor/Client Privilege

Many orders for directions in Will challenges specifically address this important privilege. Orders for directions often state as follows:

> No such privilege attaches to any notes, records, or examinations of any solicitor or to any documents in the power, possession or control of any party in

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[22] See Rule 30.02.

connection with the deceased's instructions, estate planning, and/or the preparation of any Will.

The duty of confidentiality is also waived in the orders for directions. Some courts have required that the solicitor who drafted the challenged Will or POA be put on notice with respect to the waiving of solicitor/client privilege (and attend at court, if necessary), but it is for the estate trustee or the court to waive the privilege, not the drafting solicitor.

Deemed Undertaking Rule

For many years, the courts in Ontario recognized that the common law imposed an "implied undertaking" on the parties involved in litigation. In 1995, the Ontario Court of Appeal affirmed as much and recommended that the implied undertaking be codified.[23] Rule 30.1 was drafted and the implied undertaking was rechristened "deemed undertaking." In a nutshell, the deemed undertaking rule requires that parties and their counsel will not use the evidence or information obtained in discovery for any purposes other than those of the proceeding in which it was obtained.[24] However, a court can order that the deemed undertaking rule does not apply. It may do so where it is "satisfied that the interests of justice outweigh any prejudice that would result to a party who disclosed evidence" and it may impose such terms and give such directions as are just.[25]

A party often seeks to waive the deemed undertaking rule where the solicitor who drafted the Will may have been negligent. It is unusual for the court to require that solicitor be put on notice, but it is not unheard of. Waiving the deemed undertaking rule in POA challenges seems less compelling.

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[23] *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.).
[24] Rule 30.1(3).
[25] Rule 30.1(8).

Sundry and Miscellaneous Directions

Section 3 of the *Substitute Decisions Act* reads as follows:

> If the capacity of a person who does not have legal representation is in issue in a proceedings under this Act,
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> (a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person;
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> (b) the person shall be deemed to have capacity to retain and instruct counsel.

In a POA challenge, section 3 counsel is often provided for in an order for directions. The role of section 3 counsel is significant and challenging. It is generally accepted as a principle established by the caselaw and supported by the PGT that section 3 counsel must attempt to determine the instructions and wishes of the client directly from the client. Obtaining instructions can be difficult when the client's capacity to instruct counsel (but for the "deemed " provision of section 3 (b)) is diminished or lacking. As well, the client's instructions may not appear to be in the client's best interests.

Regardless, section 3 counsel are not supposed to be substitute decision makers or litigation guardians. For this reason, the role of section 3 counsel is often challenging – and challenging for the other parties (who are often close family members of the incapable) to understand. I would suggest that the role that section 3 has to play in capacity litigation may still be developing. Nevertheless, section 3 counsel can often play a useful role in settling a POA challenge.

Non-Dissipation of Assets

In the usual course, an order for directions should freeze or tie-up the estate or the incapable's assets. In other words, the property of the estate or incapable should not be invested, expended, disbursed, or otherwise dealt with unless all parties agree in writing or by further

court order. Certain routine expenses can by carved out of any freeze order, but generally a wide ranging blanket prohibition is preferred. A certificate of pending litigation may also be ordered by the court where the estate holds real property (it is less common in a POA challenge, but may be appropriate where circumstances warrant).

Furthermore, the party that controls the estate or incapable's assets may be required to deliver an inventory of property, pass his/her accounts, or provide an informal accounting. The parties may also agree as to how the assets are to be invested while the litigation plays out. Conservative investments, such as GICs, are usually preferred as being the safest bet. Finally, if there is any doubt, the order for directions should state that the parties to the litigation will be funding their own costs unless and until the court decides otherwise.

Evidence in Will and POA Challenges

Marshalling the necessary evidence to prosecute or defend a Will or POA challenge is obviously critical and should be addressed early on. Section 13 of the *Ontario Evidence Act*[26] affects actions by or against the heirs, next of kin, executors, administrators or assigns of a deceased. Section 13 states:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect to any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

Without the deceased's evidence, any judgment or verdict would be suspect and open to attack as an opposite or interested party could essentially tender self-serving evidence in support of or defence of a claim. The section is therefore designed to avoid a miscarriage of justice by prohibiting a judgment or verdict based solely on self-serving evidence; evidence must be

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[26] R.S.O. 1990, c. E.23, as amended.

corroborated. The Ontario Court of Appeal held that the corroborating evidence required by section 13 must be in addition to and independent of oral evidence of the adverse party, but could be either direct or circumstantial.[27]

While section 13 will not figure in an order for directions *per se*, an order for directions is an opportunity to use the court to sanction the gathering of relevant and corroborating evidence to ultimately satisfy the requirements of section 13. Counsel should carefully consider how to include evidence-gathering provisions in an order for directions to ensure that the section 13 requirements are met.

Limitation Periods & Will Challenges

Limitation periods generally aim to strike the appropriate balance between an aggrieved party's right to seek redress and a potential defendant's right not to remain under the cloud of litigation indefinitely. Limitation periods also address the concern that it would be unfair for a person to defend him or herself against allegations, when the passage of time would make it difficult, if not impossible, to gather the required evidence to support a defence.

In the estates context, there was a dirge of case law with respect to limitation periods under the former *Limitation Act*; as well, there is relatively recent *Limitations Act*[28] to consider, and exceptions for certain types of estate litigation proceedings. Whether a Will challenge is subject to a limitation period under the new *Limitations Act* has been the subject of some debate, although the recent case of *Leibel v. Leibel*[29] (discussed below) may have finally settled this issue.

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[27] *Burns Estate v. Mellon* (2000), 48 O.R. (3d) 641 (C.A.); *Orfus Estate v. The Samuel and Bessie Orfus Family Foundation*, 2013 ONCA 225 (CanLII).
[28] *Limitations Act*, S.O. 2002, Chapter 24, as amended.
[29] 2014 ONSC 4516, 2014 CarswellOnt 11102

Previously, several learned authors were of the view that no limitation period applied to Will challenges.[30] Not even the absolute 15-year limitation period set out in the new *Limitations Act* were said to apply. This startling proposition seemed to fly in the face of the stated purpose of the new *Limitations Act* and the public policy underpinning it. The purpose of the new *Limitations Act* was to bring under one roof the myriad of limitation periods and impose an almost universal two-year limitation period (subject only to reasonable discoverability).

Thus, it wasn't altogether unexpected that Justice Greer held in *Leibel* that the two-year limitation period begins running from the testator's death for will challenges, subject to the discoverability principle. Contrary to previous cases based on the old limitations act, Justice Greer found that the new Act's purpose was to protect situations where an estate trustees could be sued many years after the death of the testator when assets remained undistributed or could still be traced.

It seems unlikely that other courts will disagree with Justice Greer as to whether the two-year limitation period applies, subject only to certain well-known statutory exceptions such as fraudulent concealment.[31] Courts will likely continue to use the principle of reasonable discoverability to saddle a potential beneficiary with the knowledge that he or she has two years from the triggering event in which to challenge a Will. As with all limitation periods, the prudent course of action is to commence a Will challenge sooner rather than later.

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[30] See for example Anne Werker's article "Limitation Periods in Ontario and Claims by Beneficiaries," (2008) 34 Advocates' Q. 1; Schnurr's *Estate Litigation*, 2nd ed., vol. 2, at section 22.4.

[31] Two decisions from 2010 also suggested that the two-year limitation period to bring forward Will challenges begins to run as soon as a certificate of appointment of estate trustee has been issued, but not before that time. See *Kenzie v. Kenzie* (2010), 2010 ONSC 4360, 65 ETR (3d) 148, 2010 CarswellOnt 10219, and *Sawdon Estate v. Watch Tower Bible & Tract Society of Canada* (2010), 2010 ONSC 4066, 61 ETR (3d) 132, 2010 CarswellOnt 5922.

Listing the Triable Issues

Any person who appears to have an interest in the estate may file a notice of objection challenging an impugned Will. The notice must state the nature of the person's interest and their objection to the issuance of the certificate of appointment of an estate trustee. The grounds for challenging a Will as set out in a notice of objection are often simply cut and pasted into an order for directions and list the standard issues to be litigated.

However, a word to the wise: in *Smith Estate v. Rotstein*[32], Justice Brown criticized the use of boilerplate notices of objection as an "unhealthy practice." Parties should instead properly flesh out their reasons for objecting, so far as they are able (for instance, Justice Brown commented that where undue influence was alleged, the objector should indicate who was unduly influencing the deceased, when did this occur, and what was the conduct complained of). Failure to do so, wrote Justice Brown, may "operate as a factor in a court's assessment" as to whether a genuine issue for trial exists, in the event that a summary judgment motion is later brought against the will challenge (as was the case in *Rotstein*).

Pleadings vs. Orders for Direction

The vast majority of Will and POA challenges proceed, at least initially, by way of application. Many of the remedies in estates and capacity litigation find their genesis in statute or through declaratory relief (as opposed to damages) and are mandated to be commenced by notice of application (proceedings commenced under Rule 14.05, dependant's relief under s. 58 of the SLRA, and spousal elections under s. 7 of the FLA are prime examples). However, in certain instances, such as complex Will challenges, the proceeding is better commenced by way of a statement of claim (though a notice of objection should be filed in order to stop a certificate of appointment of estate trustee from being issued). Pleadings properly frame the issues and

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[32] 2010 ONSC 2117, 2010 CarswellOnt 2282 at para 42

force the parties to plead material facts to support their claim (or defence) rather than relying on broad issues listed in a generic order for directions.

Rule 25 of the *Rules of Civil Procedure* sets out the applicable rules to all pleadings (claim, defence, reply). For example, Rule 25.06(1) states: "every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved." Law can be pleaded, but conclusions of law can only pleaded if the material facts supporting those conclusions are pleaded as well. So while a Will challenge may be commenced by a notice of application, the parties can ultimately agree to or be ordered to exchange pleadings (the order for directions may mandate pleadings, while the order itself is silent on the issues in dispute).

It is also true that an application can be converted to an action (not uncommon in estate and capacity litigation). Rule 38.10 of the *Rules of Civil Procedure* states: "... the presiding judge may order that the whole application or any issue proceed to trial and give such directions as are just."

"The case law is clear that where findings of credibility are necessary, or when *viva voce* evidence is required, a matter should proceed as an action."[33] This statement was made in *Notarfonzo Estate*,[34] a 2013 decision of the Ontario Superior Court of Justice. In that case, the applicant Carmen Daudinot, the 9 year old-daughter of the deceased, Joseph Notarfonzo, brought a motion for directions through her litigation guardian, The Children's Lawyer, regarding her father's estate.

Carmen lived with her mother, Maryorkis Beuno, in Guantanamo, Cuba. Maryorkis and Joseph had met in Cuba prior to 2003 and married on March 18, 2010. Carmen was born on July 8,

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[33] *Notarfonzo Estate*, 2013 ONSC 2496 (CanLII).
[34] *Ibid*.

2003. Joseph died February 2, 2012 leaving behind what was thought to be a single Will dated January 19, 2012 appointing his brother and respondent, Nazareno Notarfonzo, as the estate trustee. The Will made no provisions for Carmen.

After The Children's Lawyer commenced an application for dependant's relief on behalf of Carmen, two other Wills belonging to Joseph came to light, the first dated September 29, 2010 and the second December 21, 2011. The 2010 Will divided Joseph's estate equally between Maryorkis and Carmen, with both shares to be held in trust by Nazareno. The 2011 Will provided maintenance for Maryokris with the residue to be held in trust for Carmen by Nazareno.

Nazareno filed an affidavit claiming that Joseph willingly transferred to him $747,599.58 cash, a $255,000.00 mortgage, Joseph's $104,000.00 home, and a 2004 Chevrolet van (valued at $2,000.00) all in the year before Joseph's death. It was unclear whether Nazareno had used his Power of Attorney to transfer the property.

Justice Tzimas found that this disclosure from Nazareno raised "more questions than it answers." The court then considered whether it would be appropriate to continue the proceeding as an application or convert it into an action. The court turned to the issues to be considered: (a) the validity of Joseph's 2012 and 2011 Wills; (b) the nature of the *inter vivos* transfers from Joseph to Nazareno; and (c) Carmen's claim for dependent's relief. Based on the issues and the complex nature of the evidence to be obtained from third parties (evidence needed to prove Joseph's testamentary capacity and knowledge of the property transfers), the court ordered that the application be converted into an action as proper pleadings would help frame the issues. The court wrote that "[t]he case law is clear that where findings of credibility

are necessary, or when *viva voce* evidence is required, a matter should proceeds as an action."[35]

[35] Ontario

- *Smith v. Pecoraro*, [2009] O.J. No. 1545, 176 A.C.W.S. (3d) 971 – a contested motion (among other motions) to change an application into action was allowed because there were several issues of credibility that would require live witness testimony
- *Higgs v. Higgs*, [1996] O.J. No. 4679, 21 O.T.C. 136 – an order for directions can convert an application into an action (although an application for trial by jury was denied in this case)

Other Jurisdictions

- *Clock Holdings Ltd. v. Braich Estate*, 2007 BCSC 806, 157 A.C.W.S. (3d) 933 – an application to convert an application into an action was denied because no issue of facts were raised that would cause the court to use its discretion to convert, and doing so would cause a delay in the already long delayed proceeding
- *Canada Trust Co. v. Ringrose*, 2008 BCSC 1268 – a motion to convert a petition into an action was denied
- *Lodge v. Royal Trust Corp. of Canada*, 2003 BCSC 1416, 2003 CarswellBC 2269 – in this case, the judge ordered an application be converted into an action because of the complexity of the case, the factual issue of capacity, and a lack of filing of affidavits from important players in the case