Recent Estate Cases that made a Difference and Why you Should Care

1. *Spence v. BMO Trust Company*[1]

This case concerns the issue of when a court may invoke public policy to interfere with testamentary freedom. Eric Spence (the "Deceased") died on January 25, 2013 in Ontario. He was survived by two adult children, Verolin and Donna, from a previous marriage which ended in separation in or around 1965. Verolin and Donna were born in England and after their parents separated, Verolin lived with the Deceased in Canada and Donna lived with their mother in the United Kingdom. Verolin's evidence was that she and her father maintained a close relationship until approximately 2002. At that time, Verolin advised her father that she was pregnant and the father of her child was white. The Deceased, who was black, subsequently distanced himself from his daughter, Verolin.

On May 12, 2010, the the Deceased executed his last will and testament (the "Will"). The Will made no provision for Verolin or her daughter and bequeathed the residue of his estate to Donna and her sons. The Will also contained the following clause: "*I specifically bequeath nothing to my daughter [Verolin], as she has had no communication with me for several years and has shown no interest in me as her father."*

Verolin's affidavit evidence was that the Deceased cut off contact from her because she was having a child with a white man, and that was why she was disinherited. A caregiver, who was also a close family friend, also swore an affidavit supporting Verolin's contention. However, there was nothing on the face of the Will to indicate as such. Nevertheless, the application judge admitted the extrinsic evidence (i.e. Verolin's affidavit) and held that the Will be set aside as it

[1] 2016 ONCA 196.

violated public policy (because it was based upon a racist principle). The executor of the Will, BMO Trust ("BMO"), appealed the decision.

The Ontario Court of Appeal, (the "ONCA") reviewed the law regarding testamentary freedom and wills which have been found to violate public policy. The ONCA discussed the case of *Canada Trust Co. v. Ontario (Human Rights Commission)* (1990), 74 O.R. (2d) 281 ("*Canada Trust*"), which is often cited for the proposition that a will can be overturned on the basis of public policy. In *Canada Trust,* the court amended the terms of a charitable purpose trust which initially stipulated, among other things, that academic scholarships were only available to white, Protestant, British individuals. The ONCA found that the fact the will in issue was in the nature of a public charitable trust was central to its decision to intervene. However, the ONCA held that the principles set out in *Canada Trust* do not affect private, family trusts. Moreover, the Will before the ONCA did not require the executor to carry out his duties in a manner contrary to public policy, while the will in Canada Trust did.

Verolin also relied upon the New Brunswick case of *McCorkill v. McKorkill Estate*, 2014 NBQB 148, affirmed 2015 NBCA. In that case, the testator left the residue of his estate to a neo-Nazi organization. The ONCA distinguished this case as well, and held that the court does not have free reign to dispute the validity of a will when there are no discriminatory conditions on the fact of the will (notwithstanding that evidence may be presented regarding the testator's purported motives).

The court concluded that the exercise of a testator's testamentary freedom is paramount. Accordingly, even if the testator in this case would have provided for express discriminatory reasons to disinherit his daughter, the bequest would remain valid as it reflects the testator's intention and private disposition of his property. The ONCA boldly stated at paragraph 75:

"*Absent valid legislative provision to the contrary, the common law principle of testamentary freedom thus protects a testator's right to unconditionally dispose of her property and to choose her beneficiaries as she wishes, even on discriminatory grounds. To conclude otherwise would undermine the vitality of testamentary freedom and run contrary to established judicial restraint in setting aside private testamentary gifts on public policy grounds.*"

2. *Peters v. Peters Estate*[2]

This case emphasizes the importance of prudent estate planning. In this case, the issue was the entitlement of stepchildren to the estate of their late stepmother, Ilene Peters. Ms. Peters was predeceased by her husband, Lester Peters. Together, they had one biological child and Mr. Peters had four daughters from a previous marriage. For all intents and purposes, the children lived together as one family. Ms. Peters died without a will and one of her stepdaughters sought an equal division of the net proceeds of the estate among the four other stepdaughters and Ms. Peters' biological son.

The lower court in Alberta reviewed the relevant legislation and determined that a stepchild was not a "descendant" for the purposes of the *Wills and Succession Act*, SA 2010, c W-122. Accordingly, the stepchildren were not entitled to an equal division of the estate of their stepmother. In Ontario, the corresponding legislation is the *Succession Law Reform Act,* R.S.O. 1990, c. S.26 (the "*SLRA*"). The terminology used in the *SLRA* is "issue", which is defined as, "a descendant conceived before and born alive after the person's death". The term "descendant" is not defined. Had the stepchildren been considered "descendants" for the purposes of the relevant legislation, they would have shared in Ms. Peters' estate equally with her biological sun. The stepdaughter appealed.

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[2] 2015 ABCA 30.

The appellate court upheld the lower court's decision and found that there was nothing in the statute which treated stepchildren as biological children. At paragraph 26, the court stated: "*In conclusion, we can do no better than to repeat the words of the chambers judge: this case is an example of the personal difficulties and harm to relationships that can occur when an individual does not have a will.*"

3. *Anspor Construction Ltd. v. Neuberger Estate (Trustee of)*[3]

Who is entitled to Toronto Maple Leaf season tickets? This was the question the court had to determine in the case of *Anspor Construction Ltd. v. Neuberger Estate (Trustee of)*. In this case, the court provided a good summary of the requirements to establish a bare trust and a purchase money resulting trust against a background of interesting facts.

The applicant partnership, Nuspor Investments ("Nuspor") sought a declaration that Toronto Maple Leaf season tickets (the "Tickets") were held in trust for Nuspor. At all material times, the Tickets were held in the name of the deceased, Chaim Neuberger, and then, in the name of his estate. Nuspor argued that despite the fact that the Tickets were in Mr. Neuberger's name, they belonged to the applicant as they were paid for and controlled by it. The respondent, Edie Neuberger, who is one of Mr. Neuberger's daughters and one of the estate trustees, submitted that the Tickets belonged to her late father and as such formed part of the estate.

The court reviewed the law with respect to bare trusts and restated the rule in *Byers v. Foley*, [1993] O.J. No. 3140 (Ont. Gen. Div.) ("*Byers*"), which interestingly concerned the ownership of two field level seats in the Skydome for the Toronto Blue Jays. Specifically, there are three

[3] 2016 ONSC 75.

requirements to establish a bare trust: certainty of intention; certainty of subject matter; and certainty of object.

A purchase money resulting trust can arise when one person pays for something but title is recorded in the name of a different person. The court noted, as set out in *A.M.K. Investments Ltd. v. Kraus*, [1996] O.J. No. 3215 (Ont. Bktcy.), that there are three requirements to establish such a trust: (1) the trustee must have title to the property; (2) the claimant must have supplied the whole or a part of the purchase price at the time the property was being bought; and (3) the claimant must prove throughout that he acted as purchaser.

The court concluded that the Tickets were held in trust by Mr. Neuberger for Nuspor and that Nuspor was the beneficial owner of the Tickets. The court accepted evidence from, among others, Harry Sporer ("Sporer"). Sporer has long-standing control of Nuspor and was a partner of the late Mr. Neuberger. Sporer's evidence provided, among other things, that he and Mr. Neuberger purchased the Tickets in Mr. Neuberger's name, but always considered the Tickets to be Nuspor's. Nuspor also paid for the Tickets every year. Sporer further deposed that the Tickets were used by both him and Mr. Neuberger, for business purposes. Evidence was also presented that in 2004, Mr. Neuberger signed an account information form updating the contact information for the Tickets from him personally at his home address to Nuspor at its office address.

It was found that Mr. Neuberger's control of the Tickets was not on behalf of himself personally but on behalf of Nuspor and that the evidence established the essential elements for both a bare trust and a purchase money resulting trust. Sporer's evidence of the initial acquisition of the Tickets, the reason why the Tickets were put in the Deceased's name, coupled with the way in which their partnership operated together with the control of the Tickets over the years, all

established a certainty of intention to create a trust in favour of Nuspor. The evidence also established that from the outset, Nuspor acted throughout as purchaser.

This case provides a helpful summary of the law of bare trusts and purchase money resulting trusts and demonstrates that courts will examine the history of the treatment of specific assets, from date of acquisition to present day, to draw its conclusions.

4. *Taylor-Reid v. Taylor*[4]

This case is noteworthy as it demonstrates the use of summary judgment motions in the context of an estate dispute. The facts are as follows: In September, 2013, two years after the death of her father, Charles Fullerton Taylor, the plaintiff commenced a claim on the grounds that Mr. Taylor's last will and testament, as well as various beneficiary designations on his TD bank accounts, should be set aside on the basis of undue influence. Specifically, the plaintiff claimed that her late father was unduly influenced by his second wife, the defendant, Shirley Cecilia Taylor. The specificity of the plaintiff's claim ended there.

The plaintiff's claim was based solely on whether the defendant had, "expressly or implicitly", threatened to leave or divorce Mr. Taylor if he did not execute a will leaving her his assets. In August, 2014, the plaintiff amended her claim to seek compensation for damages related to services she purportedly rendered to her father following his loss of leg function in the summer of 2010.

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[4] 2016 ONSC 4751.

The defendant, Ms. Taylor, brought a motion for summary judgment on the grounds that the plaintiff's claim failed to disclose a genuine issue requiring trial. Ms. Taylor's position was supported by Mr. Taylor's long-time solicitor, Michael Reed.

Mr. Taylor had executed a number of wills prior to his death in September, 2011. All of the previous wills had been prepared by Mr. Reed:

1. A will executed in 2004, which left the residue of the estate to the defendant;
2. A will executed in 2010, which distributed the residue of the estate equally between the plaintiff and defendant; and
3. A will executed in 2011, which left the residue of the estate to the defendant only.

In addition to bequeathing the residue of the estate to the defendant, who Mr. Taylor described to be "the perfect mate", he also transferred his beneficial interests in his TD bank accounts to her. Notwithstanding that Mr. Taylor previously named the plaintiff as beneficiary of the TD accounts in 2010, he assigned the defendant as beneficiary in 2011.

The court considered the evidence of the plaintiff, the defendant and Mr. Reed to determine Mr. Taylor's relationship with the respective parties, and whether he was the subject of Ms. Taylor's undue influence. The court found that Ms. Taylor and Mr. Taylor had been in a long-term and loving relationship since 1999, but that the plaintiff and her father had a strained relationship. The court further found that the plaintiff had made false allegations of sexual abuse against her father in 2004 and false allegations that Ms. Taylor was committing elder abuse, as well as efforts to alienate her father from Ms. Taylor. The totality of these circumstances all pointed to substantiated reasons why Mr. Taylor would have executed his last will and testament as he did.

Moreover, not only did the evidence weigh heavily in favor of Ms. Taylor, but it demonstrated that the plaintiff may have influenced her father to execute his prior will in 2010, as well as new power of attorney documents and beneficiary designation forms with respect to the TD bank accounts in her favour.

The court confirmed that it is very difficult to establish undue influence. Not only must the party alleging undue influence prove that the influence amounted to coercion, forcing the testator to execute a last will and testament that he or she would otherwise not make, but the party must also prove that the undue influence caused the testator to execute such a will.

The court accepted Ms. Taylor's evidence and found that the plaintiff's evidence was not corroborated by "other material evidence" to establish undue influence that amounted to coercion that caused Mr. Taylor to execute his last will and testament.

With respect to the plaintiff's claim for compensation, the court found no evidence of the existence of an agreement for compensation or that the plaintiff actually provided services to her late father. The court stated that even if she had provided services to him, the plaintiff could not seek compensation for same, as she acknowledged receiving $2,000.00 per month and several additional cheques from Mr. Taylor while he resided with her for a brief period in 2010.

As a result, the court found that there was no genuine issue requiring trial, and that the evidence submitted was sufficient for the court to fairly and justly adjudicate the dispute pursuant to rule 20.04 of the *Rules of Civil Procedure*. This case highlights that the importance of evidence to corroborate a will challenge cannot be understated and that summary judgment motions have proven to be an effective tool to stopping meritless will challenges in their tracks.

5. *McLaughlin v. McLaughlin*[5]

This case concerns several interesting issues; however, this review will focus upon the function of the term “financial interest”, which is often used in estate and trust matters, and particularly by persons filing notices of objections to the issuing of a certificate of appointment of estate trustee with or without a will (probate). This case is noteworthy as it summarizes prior interpretations of “financial interest” and the practical implications of the definition of the term.

The facts of the case are interesting. Ann McLaughlin (“Ann”) was survived by five children, Thomas McLaughlin (“Tom”), Judith Corrado (“Judith”), Daniel McLaughlin (“Daniel”), Wayne McLaughlin (“Wayne”) and Laurie McLaughlin (“Laurie”). Her son, James McLaughlin (“James”), predeceased her, as is further detailed below. In or around 1992, Tom confronted his mother, Ann, regarding the discord between her and her husband/Tom’s father during Tom’s childhood. Tom’s probing provoked his mother and ultimately led to 20 years of estrangement between them. Ann died on April 23, 2012 and she and her son did not reconcile prior to her demise. In 1991 (prior to the confrontation in 1992 referred to above), Ann executed a will which provided that the residue of her estate was equally amongst all of her six children (the “1991 Will”).

On October 27, 1994 (three years after the confrontation referred to above), Ann again executed a new will removing Tom and Ann’s daughter, Judith (the “1994 Will”). Ann advised her solicitor that she had no relationship with either Tom or Judith. The 1994 Will left the residue of the estate to Ann’s three remaining children equally, and also made bequests to Ann’s grandchildren and Daniel’s wife (Ann’s daughter in law).

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[5] 2015 ONSC 3491.

James, Ann’s son referred to above, took his own life in 2001. Following James’ death, Ann made a further will in 2002. The will similarly did not provide for Tom or Judith and specifically named 15 named grandchildren who were to receive $2,000 each, if alive at the date of Ann’s death, and added another $5,000 bequest to Wayne’s wife, her other daughter in law (the “2002 Will”).

On the advice of her lawyer that multiple wills could reduce probate taxes payable at death, Ann executed further wills in 2010. The first will dealt with the disposition of her home and the other disposed of the remainder of her estate. When Ann’s lawyer drafted the will disposing of Ann’s home, he inadvertently repeated the bequests to her grandchildren and daughters in law and omitted the residue clause (the “Secondary Will”). The other will, disposing of the residue of the estate, revoked all previous wills, except the will disposing of her home, (the “Primary Will”).

Following Ann’s death, Tom challenged the Primary Will and the Secondary Will (collectively referred to as the “2010 Wills”) and filed a notice of objection to the issuance of a certificate of appointment of estate trustee to Daniel.[6] Among other issues, the court queried whether Tom had standing to maintain his notice of objection.

At the time Tom filed his notice of objection, Tom was challenging the 2010 Wills, as referred to above. In the event of Ann’s intestacy, all of Ann’s children would be entitled to a share in the estate. Rule 75.03(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, states:

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[6] Daniel also applied to the court for rectification of the Secondary Will by “importing” into it the clause of the Primary Will, which disposes of the residue, by distributing it to Daniel, Wayne and Laurie (and excluding Tom and Judith). Justice Lemon granted the request to rectify the Secondary Will. He stated: “*There is no authority in Ontario "for the proposition that a competent testator's autonomous distribution of his or her property as reflected in a properly executed will may be displaced or set aside by the courts in the exercise of their discretion pursuant to some alleged overarching concept of a parent's moral obligation to provide on death for his or her independent, adult children...*”

> 75.03 (1) At any time before a certificate of appointment of estate trustee has been issued, **any person who appears to have a financial interest in the estate** may give notice of an objection by filing with the registrar or the Estate Registrar for Ontario a notice of objection (Form 75.1), signed by the person or the person's lawyer, stating the nature of the interest and of the objection. O. Reg. 484/94, s. 12; O. Reg. 24/00, s. 16; O. Reg. 575/07, s. 1 [**Emphasis added**].

Section 23 of the *Estates Act*, R.S.O. 1990, c. E.21, similarly states:

> Where a proceeding is commenced for proving a will in solemn form or for revoking the probate of a will on the ground of the invalidity thereof or where in any other contentious cause or matter the validity of a will is disputed, **all persons having or pretending to have an interest** in the property affected by the will may, subject to this Act and to the rules of court, be summoned to see the proceeding and may be permitted to become parties, subject to such rules and to the discretion of the court [**Emphasis added**].

The court relied upon *Smith v. Vance,* 1997 CarswellOnt 1554, wherein the Divisional Court stated:

> Financial interest is not defined in the Rules of Civil Procedure. In the absence of any limiting definition, those words must be taken in their natural meaning of an interest by way of money or property or other assets having monetary value. Black's Law Dictionary (5th Edition) defines financial interest as:
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> An interest equated with money or its equivalent.
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> With respect to both Rule 75.03(1) and s. 23 of the Estates Act, where the stated interest is clear and obvious (for example, the claimant is a named beneficiary), there should be no difficulty recognizing the status of that person as a party. Different considerations apply where the claimant is one who pretends to have an interest. The word pretend is not to be interpreted as claiming or professing falsely or deceptively but rather as alleging or laying claim to an interest in law. One who pretends to have an interest is not required to prove that he or she has a financial interest before being permitted to become a party under s. 23 of the Estates Act…
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> However, claimants must do more than simply assert an interest. **They must present sufficient evidence of a genuine interest and meet a threshold test to justify inclusion as a party**. It need not be conclusive evidence at that stage but must be evidence **capable of supporting an inference that the claim is one that should be heard**. [**Emphasis added**].
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> If the evidence offered by an objector is capable of supporting an inference that the claim raises a genuine issue and thus is one that

> should be heard, the objector is entitled to standing and should be granted permission to be added as a party. Claimants passing that threshold test should not be denied status simply because they cannot produce a copy of the will under which they claim to be a beneficiary or because of the perceived difficulty of setting aside a will or series of wills on grounds of incapacity…

The court also cited the case of *Jafari v. Attar-Jafari*, 2008 CarswellOnt 4488, where the court held that being the child of a testator on its own was insufficient to meet the threshold of bearing a "financial interest". However, as stated in *Korsten v. Lovett*, 2002 CarswellOnt 3665, a "financial interest" includes an interest derived from an intestacy.

The court held that Tom had standing to file the notice of objection. Notwithstanding that Tom derived no financial interest under the 1994 Will, the 2002 Will or the 2010 Wills, the court stated: "…*it is premature, at this stage of the proceeding, to disqualify him on the basis that he does not have standing. Such a finding should await a determination as to which of the Wills is the last Will of Ann McLaughlin*." The case lends insight into the treatment of the term "financial interest" within the context of a notice of objection and the implications of a will challenge in such circumstances.

6. *Poitras Estate v. Poitras*[7]

A very common fact pattern in estate cases is one where a second wife or common-law spouse of a deceased person becomes involved in litigation with the adult children of the person who has died. This case provides an interesting analysis on issues of capacity and undue influence in that context.

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[7] 2016 ONSC 5049.

The application was brought by a stepmother against four or her five stepchildren in relation to the estate of her late husband, Gilles Poitras ("Gilles"). The applicant, Pamella Poitras ("Pamella") alleged that the respondent stepchildren unduly influenced Gilles to change his last will and testament to her disadvantage, to delete her as a joint owner of two savings certificates and to amend the beneficiary designation of his RIF from the applicant to Gilles' estate (the "Estate"). Pamella sough dependant's relief under Part V of the *SLRA.*

By way of background, Pamella was 82 years old when she commenced her application and was married to Gilles for over 26 years. It was the second marriage for both of them and they both had children from prior marriages. Gilles died on September 5, 2013 at 77 years of age.

Gilles executed a will in 2010 which named Pamella as his estate trustee and gave her a life estate in the matrimonial home (the "2010 Will"). The household expenses, taxes and utilities were to be paid out of either the income or capital of the Estate. After payment of the house expenses, Pamella was entitled to receive the income of the Estate during her lifetime as well. The household furniture and Gilles' personal effects were to go to Pamella. Upon Pamella's death, the real estate would become part of the residue of the Estate and would be distributed to his children.

Gilles executed a subsequent will in 2013, less than two months before he died. In this will, two of Gilles' children were named as the estate trustees (the "2013 Will"). Pamella's expense-free life estate in the matrimonial home was maintained. Pamella's right to the income of the Estate during her lifetime was deleted. The possibility of rolling the life estate over into a new home was removed. The 2013 Will provided that when Pamella was no longer able to live in the matrimonial home, it was to be sold and Pamella was to receive a bequest of $50,000, following which the residue was to be distributed.

Pamella's evidence was that one of the stepchildren, Chantale Davey ("Chantale"), called in mid-July and said that Gilles needed to get a note from his doctor so he could make a new will. Pamella and Gilles had not discussed the possibility of his making a new will. Conversely, Chantale's evidence was that she received a call from Pamella indicating that Gilles had recently reviewed his will and noticed that there was something wrong with it (i.e. that it contained some sort of error). Chantale suggested that they might want to go to someone other than the previous drafting lawyer. Pamella asked her to make an appointment with someone else and Chantale asked her brother Dany to set something up. He made an appointment at Mr. Conroy's office for July 24, 2013.

It was not disputed that Dr. Rainville, Gilles' family doctor, prepared a note on July 18, 2013 stating that Gilles was competent to change his will. Mr. Conroy swore an affidavit setting out his recollection of the visit and of the letter from Dr. Rainville. It was also not disputed that Gilles, Pamella and Chantale attended the appointment at Mr. Conroy's office on July 24, 2013. Chantale waited outside in the reception area while Pamella and Gilles met with Mr. Conroy. Mr .Conroy was satisfied that Gilles was able to give instructions and he was clear in his communications, did not hesitate, and was not confused.

Very soon after the 2013 Will was executed, Pamella and Gilles attended at the bank and Gilles gave instructions to change his accounts from joint ownership into his name, solely, and to change the beneficiary designation on his RIF account from Pamella to the Estate. Pamella signed all necessary documentation to effect these changes and did not question or object to same.

The court reviewed the law regarding suspicious circumstances and the necessity of the testator's approval and knowledge of the contents of his or her will. The court noted that the person propounding the will has the burden of proof with respect to due execution, knowledge and approval and testamentary capacity and the person opposing the validity of the will has the burden of proving undue influence.

The court held that Pamella was successful in invoking the doctrine of suspicious circumstances regarding her claim of undue influence but not on the question of whether the testator had testamentary capacity. James, J. found that there was insufficient evidence that the husband suffered from mental confusion, delusions or disorientation and there was no evidence that he was unable to understand the nature and extent of his assets or obligations, among other things. Moreover, the doctor's note and the lawyer's evidence that they were satisfied as to Gilles' capacity was given considerable weight.

With respect to the question of undue influence and the execution of the 2013 Will, the court went on to state at paragraphs 41-42:

With respect to Pamella's dependant's relief claim, the court held that her presents needs are adequately protected, but her future and unascertained needs were not. Accordingly, it was ordered that Pamella be paid *the sum of $85,000* as a lump sum pursuant to section 58 of the *SLRA.*

This case lends insight into a typical case of stepmother vs. stepchildren and the significant burden borne by a claimant who is seeking to prove undue influence. Moreover, it also demonstrates that even though a will may not be set aside, relief may still be granted via a dependant's support claim.

7. ***Dagg v. Cameron Estate***[8]

This case provides an interesting example of the application and impact of section 72 of the *SLRA* and provides practical suggestions for ways to avoid assets unintentionally forming part of a deceased's estate. Section 72 provides that the capital value of certain transactions form part of a deceased's person estate, notwithstanding that they may benefit his or her dependant or any other person. These assets include but are not limited to, a disposition of property made by a deceased where the property is held at the date of his/her death by the deceased and another as joint tenants; gifts made by the deceased in contemplation of death; and any life insurance policy owned by the deceased. The present case deals with a life insurance policy of a deceased person.

The facts of the case are straightforward. The appellant, Anastasia Cameron ("Anastasia"), married Stephen Cameron ("Stephen") and they had two children who were born in 2005 and 2007, respectively. In 2010, Stephen took out a life insurance policy (the "Policy") which named Anastasia as the beneficiary. The couple separated in January, 2012 and Anastasia took custody of their two minor children. Stephen ultimately moved to B.C. and established a new relationship with the respondent, Evangeline Dagg ("Evangeline").

Anastasia commenced matrimonial proceedings in Ontario in September, 2012. A consent order was made which provided that "Stephen shall maintain Anastasia as irrevocable beneficiary on any life insurance policy" (the "Rowsell Order"). A further consent order for support and access was made on July 5, 2013. A section of the order specifically provided that all other terms of the

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[8] 2016 ONSC 1892.

Rowsell Order were to remain in full force and effect (the "McCarthy Order"). By the time of the McCarthy Order, Evangeline had told Stephen that she was pregnant.

Stephen became ill in or around November, 2013 and amended the Policy to divide its proceeds between Anastasia, their two children and Evangeline.

After Stephen's death, Evangeline commenced an application for dependant's relief on her behalf and on behalf of her newborn child. Evangeline sought an order that the Policy be deemed part of the estate pursuant to section 72 of the *SLRA* and available to satisfy the dependant's relief claim.

The lower court held that the proceeds of the Policy formed part of the estate pursuant to section 72 and the decision was appealed by Anastasia.

The lower court's decision was upheld by the Divisional Court. The court noted that section 72 was added to the *SLRA* in order to prevent the depletion of an estate through direct transfers of assets outside a will. Notably, the court stated at paragraph 19 of its decision:

> There is no evidence in this case of any intention to change the ownership of the Policy. Spouses who wish to exclude life insurance proceeds from the reach of the SLRA can do so by transferring ownership to the dependent spouse **or to a trustee**. They can also transfer the ownership into their joint names with a right of survivorship. On the death of one of them, the ownership would then either revert to the life insured or vest in the survivor beneficiary. In the latter circumstance, the policy proceeds would be excluded from SLRA claims because the policy would be owned by the beneficiary, not the deceased [**Emphasis added**].

The court's suggestion that such a policy be transferred to a trustee so as to avoid the proceeds being brought back into the estate is an interesting one. As noted by Ed Edposto in *STEP Canada's 18th National Conference, June 9-10, 2016: Practitioner's Update – Trust & Estate Law*, at p. 31:

> In a planning device that is probably not considered frequently enough, it would be possible for the owner of an insurance policy to transfer the ownership of the policy to a trustee. The trustee could be bound, by the terms of the trust, to hold the policy as required by the separation agreement…While the income tax consequences…must be considered, it is probably the case that the use of a trust to hold the ownership of the insurance policy…in such instances is not considered or implemented in all cases where it could be possible and beneficial.

This analysis lends insight into unique ways in which individuals can ensure that their wishes are fulfilled after they die, notwithstanding the operation of statutory provisions such as section 72 of the *SLRA*.

8. *Bunn v. Gordon*[9]

While tension between estate trustees and beneficiaries are very common in estate litigation, a key issue often is determining when the relationship become so strained so as to warrant the removal of an estate trustee. This issue was dealt with in *Bunn v. Gordon.*

In this case, the applicants, Kirsten Bunn ("Kirsten") and William Simpson-Bunn ("William") sought, among other things, to remove Carrie Gordon ("Carrie") as estate trustee for the estate of Hazen Allan Simpson (the "Deceased"). The Deceased's will named his girlfriend of 3.5 years, Carrie, as estate trustee and bequeathed his principal residence to Carrie and a property in Burlington equally to his daughter, Kristen, and son, William, to be held in trust until they attained the age of 21. In addition, the residue of the estate was left one third to each of Carrie, Kristen and William, with the children's shares to be held in trust until they turned 21.

The court reviewed the law with respect to the removal of an estate trustee, and cited *Olfield v. Hewson*, [2005] O.J. No. 375 (Ont. S.C.J.), which held:

[9] 2015 ONSC 4768.

> …Pursuant to s. 37(1) of the Trustee Act, a Court may remove a personal representative upon any ground on which the Court may remove any other trustee and may appoint some other person or persons to act in the place of the executor or administrator so removed. The Courts, however, are reluctant to exercise its discretion to interfere with the discretion exercised by a testator in choosing his or her trustee or executors and thus only in rare circumstances will the Courts intervene to remove a trustee.
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> …The governing principle on which the Courts have relied to determine whether or not a trustee should be removed is the welfare of the beneficiaries. This principle was established in the case of *Letterstedt v. Broers* (1884) 9 APP. CAS. 371 at 385 - 389 (P.C.), where Lord Blackburn stated that the "main guide must be the welfare of the beneficiaries"….
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> The law of trust in Canada, in reference to Lord Blackburn's guidelines, states:
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> If it is clear that the continuance of the trustee would be detrimental to the execution of the trust, and on request he refuses to retire without any reasonable ground for his refusal, the court might then consider it proper to remove him…the acts or omissions must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.
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> …In each case, it seems to be necessary to convince the court that continuance in office of a particular executor, trustee or administrator would be likely to prevent the trust being properly carried out…

The court reviewed the terms of the Deceased’s will, some of which would require that the estate trustee have an ongoing relationship with the other beneficiaries (i.e. the will requires the estate trustee to hold Kirsten’s and William’s shares, invest in them, and use the income and capital, to or for the maintenance, education and other benefit of such beneficiary).

The applicants raised four issues which they said should lead to the removal of the estate trustee: (1) the estate trustee’s failure to provide the funeral director’s proof of death certificate; (2) a trailer was removed from the Burlington property by Carrie, who asserted it had no value, and moved to Carrie’s property; (3) The Deceased’s will provided the children the right of first refusal for the contents of both properties and the applicants wanted a desk and cupboard. Carrie asserted that those items were gifted to her by the Deceased, and she ultimately sold the items at an auction; and (4) Carrie’s failure to report on the sale of the Burlington property.

The court found that Carrie’s failure to provide the death certificate to the family increased tensions between the applicants and the respondent and no explanation was given for the refusal to provide the document. This conduct, alone, was not sufficient to remove Carries as estate trustee.

With respect to the trailer, the court found that Carrie should have accounted for the trailer and she had no right to simply take it. The judge commented that the trailer issue shows that Carrie was not being careful with the estate assets, but did not warrant her removal as estate trustee.

Moreover, it was held that the circumstances regarding the desk and cupboard added to the animosity between the applicants and the respondent. In regards to the desk and cupboard, the court found that given that these items had some sentimental value (they belonged to Kristen's and William's grandmother), one would have thought an attempt would be made to preserve them rather than sell them. Carrie’s conduct, the court held, evidences hostility toward the beneficiaries which is problematic for the continued administration of the estate. Carrie’s conduct with respect to the desk and cupboard were found to show a disregard for the interests and wellbeing of the other beneficiaries. Again, this issue, taken alone, could not form the basis for Carrie’s removal.

Finally, in regards to the sale of the Property, the court found that there is no obligation to account at every moment on every transaction and the failure to report on the sale is not, in and of itself, sufficient to call for the removal of the estate trustee.

In conclusion, the court stated at paragraphs 16-17:

> The trustee has a duty to account and to care for the assets and to administer the trust properly. In this case, the trustee was challenged at the outset and was under intense scrutiny. Demands for constant information and questioning are disruptive. However, the reality is that a trustee has a duty and an obligation to account and communicate…In all the circumstances of this case, I find that the relationship between the applicants and the trustee has broken down such that the trustee can no longer act…

This case demonstrates that the court will review all of the circumstances regarding the administration of an estate and an estate trustee's conduct in order to determine whether an estate trustee may be removed. While each of the issues on their own did not warrant Carrie's removal, the totality of the issues and their corresponding effect on the beneficiaries, was sufficient for the court to grant the relief sought.

9. *Mroz v. Mroz*[10]

This ONCA decision re-emphasizes that evidence of a testator's intentions is key to rebut the presumption of a resulting trust. In this case, an aging mother, Kay Mroz ("Kay") transferred title to the family home to herself and her daughter, Helen Mroz ("Helen") as joint tenants. At the same time as she directed that the transfer be made, Kay executed a will in which she referred to the family home and made bequests to a number of family members. Some of the bequests were charged against the family home. Among the questions before the court were how the property was to be dealt with on Kay's death. Specifically, did the property form part of the mother's estate and devolve in accordance with her will, did the daughter receive it outright by right of survivorship, or did the daughter take the property as a trustee, with an obligation to sell it and distribute the proceeds in accordance with the wishes that her mother had expressed during her lifetime.

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[10] 2015 ONCA 171.

The trial judge referred to *Pecore v. Pecore,* [2007] 1. S.C.R. 795 (S.C.C.) (“*Pecore*”), which establishes: (1) the presumption of resulting trust applies to gratuitous transfers of property from a parent to an adult child; and (2) the trial judge must begin his or her inquiry with that presumption and then weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention at the time of transfer. In particular, when a parent gratuitously transfers property to his or her adult child, the law presumes that the child holds the property on resulting trust for the parent. The evidence relevant to determining the transferor’s actual intention at the time of transfer depends on the facts of the case and a court may consider evidence of the transferor's conduct after the transfer, so long as it is relevant to the transferor's intention at the time of the transfer.

Kay executed a will in 2004 (the “Will”) which named Helen and Kay’s nephew, Richard Paramonczyk (“Richard”), as estate trustees. Paragraph 5(c) of the Will provided:

> …**I BEQUEATH** my share of the property at 31 Rivercrest Road in Toronto, to my daughter, **HELEN MROZ**, provided that she pay within one (1) year of the date of my death the following legacies:
>
> i) The sum of seventy thousand dollars ($70,000.00) to **ADRIANNA MROZ**, born on April 4th, 1993, for her own use absolutely, subject to provisions set out in this will;
>
> ii) The sum of seventy thousand dollars ($70,000) to **MARTIN MROZ**, born on July 29th, 1990, for his own use absolutely, subject to provisions set out in this will.
>
> These legacies shall constitute a first charge on my property in favour of **ADRIANNA MROZ** and **MARTIN MROZ**, until the legacies are paid.

The trial judge found that Kay wished to gift Helen full title to the house upon her death, with the understanding that the house was to be sold within a year of [Kay's] death and specific bequests, including monies for Kay’s grandchildren, were to be paid from the proceeds of the sale. In other words, the gift of Kay’s share of the house to Helen was not for Helen's personal use entirely, but for her to distribute proceeds of the sale in accordance with Kay's wishes.

Accordingly, the trial judge held that Helen rebutted the presumption of a resulting trust. The decision was appealed

The ONCA found that Helen held the property on resulting trust, that the presumption was not rebutted, and consequently, when Kay died, the property formed part of Kay's estate and was to be dealt with in accordance with the Will. The ONCA found that the trial judge erred in principle when it found that Helen had rebutted the presumption of resulting trust, stating that when Kay transferred the property into joint tenancy with Helen, Kay "*wished to gift Helen full title to the house upon Kay's death and specific bequests, including the monies for the grandchildren were to be paid from the proceeds of sale*". The ONCA noted that since *Pecore,* it is clear that once the trial judge found that the sale of the property after Kay's death was to be the source of funds for bequests under the Will, she could not find that the presumption had been rebutted.

The ONCA held stated paragraphs 76-78:

> If the presumption was rebutted, then the transfer of the property was an *inter vivos* gift and Helen became solely entitled to the property on Kay's death by virtue of the right of survivorship. In that case, the property would not have formed part of Kay's estate and Helen would have no legal obligations in relation to the Property or the proceeds of its sale. These legal consequences, however, are inconsistent with the trial judge's findings that Kay's actual intention at the time of the transfer was to provide for Helen after her (Kay's) death and that Helen was to use the Property to make the bequests to Richard and his family, and to her two grandchildren….
>
> Moreover, the legal consequences of finding that the presumption had been rebutted are inconsistent with the terms of the 2004 Will. Kay executed the Direction and the 2004 Will on the same day, in the same meeting with her lawyer. Kay was an intelligent, financially astute woman. On the evidence, there can be no doubt that Kay knew that if the Property did not form part of her estate, there would be insufficient assets in the estate to satisfy the bequests for Richard and his family and her two grandchildren. Why would she have made those bequests in her 2004 Will, if she knew that they could not be realised? Why would she have stated in the 2004 Will that she was dealing with "her share" of the Property, if she had intended to already give away the Property to Helen?

> …As an intelligent, knowledgeable, financially astute person with only one asset of any significant value — the Property — Kay must have intended that the Property would be used as the source of funds for the bequests that she made in the 2004 Will.

Kay's actual intention at the time of transfer was to place an obligation on Helen, after Kay died, to sell the Property and pay specific bequests from the sale proceeds. In other words, the situation in this case is a testamentary one in that the trust obligations did not arise until after Kay's death, and accordingly, the presumption of resulting trust was not rebutted.

10. *Dueck v. Chaplin*[11]

This case reminds estate trustees that once they have begun to carry out their duties, the court may find that they have "intermeddled" in the estate and there are obligations which flow from that. In cases such as this, estate trustees cannot simply renounce their position and they maintain their obligations to, among other things, propound a will which is being challenged.

In this case, Mark Fretwurst (the "Deceased") executed a last will and testament which named the applicants, Theodore Dueck ("Ted") and Erin Fretwurst ("Erin") as his estate trustees (the "2003 Will"). Ted was the Deceased's lawyer, and Erin was the Deceased's sister. The respondent, Jan Fretwurst Chaplin ("Jan") sought an order requiring the applicants to propound the 2013 Will and other directions. Jan and the Deceased had been living separate for 6 years at the time of the Deceased's death and they were in the midst of contentious family law litigation.

[11] 2015 ONSC 4604.

The 2013 Will divides the residue of the Deceased’s estate (the "Estate") in equal shares between the three daughters of Jan and the Deceased and Erin's two children, both minors, who were each were entitled to a one-fifth share with each share to be held in trust until the child reaches the age of twenty-five (25) years, with a gift over to the issue of the children then alive in equal shares *per stirpes*, and a further gift over to the siblings of that child then alive in equal shares *per capita*.

After the Deceased’s death, Ted and Erin applied for a certificate of appointment of estate trustee with a will and Jan filed a notice of objection. Jan disputed the validity of the 2013 Will. Ted and Erin launched the proceeding to obtain the court's directions. Erin purported to renounce her right to a certificate of appointment as estate trustee under the 2013 Will on April 8, 2014. Ted purported to renounce his right to a certificate of appointment as estate trustee under the 2013 Will on June 12, 2014. The fundamental issue on the motion was the identification of the proper party required to propound the 2013 Will.

The court cited section 5 of the *Trustee Act*, which provides that the court may make an order for the appointment of a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees. The power of the court is discretionary.

The court accepted that Ted and Erin assisted in the preparation and execution of the 2013 Will. The applicants arranged for the Deceased to attend at Ted’s office in order to have the 2013 Will drafted and signed. Both Ted and Erin were witnesses to the events that occurred on January 17, 2013 when the 2013 Will was prepared and executed. The judge found that the applicants undertook several meaningful actions in their capacity as estate trustees including but not limited to applying for a certificate of appointment of estate trustee with a will; realizing the assets of the Deceased; paying some expenses of the Deceased; and commencing the present application for an order giving directions.

The court also cited the case of *Chambers v. Chambers*, 2013 ONCA 511 (Ont. C.A.). In discussing the principle of an estate trustee renunciating his/her position, Gillese J.A. stated at para 66:

> Renunciation is generally not available if a party has already "intermeddled" with the estate. Intermeddling is the term used to describe the acts of a person who deals with an estate without having been formally recognized as the estate trustee. As Kennedy J. explained, "while executors may renounce at any time, (a right which is usually exercised before applying to probate) the courts have been reluctant to allow an executor to renounce after having intermeddled in the estate, or after having applied for probate": *Stordy v. McGregor* (1986), 42 Man. R. (2d) 237 (Q.B.), at para. 9. Even a slight act of intermeddling with a deceased's assets may preclude an executor from afterwards renouncing: see *Cummins v. Cummins* (1845), 8 I. Eq. R. 723 (Ch.), at pp. 737-38. However, this rule has been applied with some flexibility: see e.g. *Holder v. Holder*, [1968] Ch. 353 (C.A.).

As such, the court was satisfied that Ted's and Erin's "intermeddling" precluded them from renouncing their positions as estate trustees and that they were obliged to propound the 2013 Will. This case reminds its readers that estate trustees who undertake to deal with an estate in the ordinary course may be found to have "intermeddled" in that estate, which may ultimately lead a court to impose obligations upon them, such as propounding a challenged will.