Estate Litigation – Reigning In Frivolous Will Challenges

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"The court should be very reluctant to consign estates and beneficiaries to intrusive, expansive, expensive, slow, standard form fishing expeditions that do not seem to be planned to achieve the goals of civil justice for the parties. But processes that show some thought to customize a process to the evidence so as to promote efficiency, affordability, and especially, proportionality, with use of a scalpel rather than a mallet…are to be greatly encouraged.[2]"

In *Seepa v. Seepa*, Justice Myers called for a "culture shift" away from boiler plate, consent orders for directions, which are routinely granted in will challenges on the Toronto Estates List (and, no doubt, in other jurisdictions). Instead, Justice Myers indicated that the court will assess the quality of the allegations made by the applicant will challenger to make out "a minimal evidentiary basis to support the order for directions sought". Estate litigators, not only in Toronto but throughout the province, would be wise to sharpen their skills and revisit what it means to launch a will challenge when confronted with only the flimsiest of evidence.

Inspired and persuaded by the legal principles set out in the Ontario Court of Appeal's "seminal" decision in *Neuberger v. York*[3] and his clear frustration with an endless parade of questionable will challenges, Justice Myers held that before a court requires the will defender to undertake the full, formal litigation process to prove a will in solemn form (i.e. to prove that the challenged will is indeed the deceased's true last will and testament), the challenger must meet "some minimal evidentiary threshold". In other words, they cannot run amuck, giddy on the mere possibility of challenging a will. According to Justice Myers, without some minimal evidentiary requirement, any disappointed beneficiary can challenge a will and conduct a fishing expedition or deep dive through the deceased's privileged legal files and private medical records. Such scorched earth litigation, while satisfying the dark imaginings of the challenger, may well turn up nothing and end up depleting an estate. As Justice Myers rightly notes, the deceased would likely be horrified that his/her most personal secrets had become part of the public record and subject to scrutiny by the courts and disgruntled family members.

Following Neuberger, Justice Myers held that a challenger must "adduce, or point to, some evidence which, if accepted, would call into question the validity" of the will. The will defender then has the opportunity to answer the challenger's evidence. If the proponent does so successfully, the will challenge application should be dismissed; where the will defender cannot successfully answer the challenging evidence, the court will give directions under Rule 75.06(3).

Justice Myers was quick to state that such a process was not akin to a motion for summary judgment, but something less. However, in estate cases, something more was required than a litigant simply pleading the material facts in support of a cause of action, as was the case in other civil litigation cases. What was required was measuring the evidence adduced by the challenger against the evidence put forward by the proponent of the will in answer. The court could

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[2] *Seepa v. Seepa*, 2017 ONSC 5368, para 49

[3] 2016 ONCA 191

then decide what, if any, processes were required to resolve the conflict between the parties that the court could not fairly resolve on the record before it.

In the case at bar, Justice Myers found that the will defender had successfully answered the allegations of incapacity, undue influence and breach of fiduciary duty levelled by the challenger. However, but for the fact that the proponent had consented to the relief sought, Justice Myers would have dismissed the motion for directions, or perhaps ordered an abbreviated process, seemingly stick-handled by the court, to enable the parties to reach a swift resolution. In the case before Justice Myers, the consent of the will defender was the deciding factor, as the defender preferred "to allow sunlight to shine on the evidence", believing that it would more than adequately answer the will challenge.

But have the courts now gone too far? Justice Myers certainly recognized that a will challenger is often disadvantaged, as he/she is unable, at the outset, to marshal compelling evidence beyond mere suspicions. A challenger will be quick to tell you that what they need is access to the deceased's medical and personal records, as well as the drafting solicitor's file, to make their case. As such, is the burden placed on the challenger now too great and potentially expensive such that it will have a chilling effect on will challenges?

Most estate litigators work collaboratively. With a broad order for directions, the parties are able to uncover the facts. Early disclosure and discovery rights obtained through consent orders for directions can have the benefit of permitting will challengers to assess the merits of their case, and lead to earlier settlements before or at mediation. Have the courts become too intrusive, thereby hampering the adversarial process and the work of counsel? It is far from clear if Justice Myers' call for a "cultural shift" will lead to the promised savings and greater proportionality in will challenge cases. In fact, it might just lead to the front loading of costs and bitterly contested orders for directions – only time will tell.