ESTATES, TRUSTS AND CAPACITY CASE LAW UPDATE

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1. *Re Pearce Estate* – can a will outline be admitted to probate?

In Ontario, in order for a will to be valid, it must be in writing, signed by the testator, and in the presence of two attesting witnesses who watched the signing. This statutory requirement is prescribed by Sections 3 and 4 of the *Succession Law Reform Act*, R.S.O. 1990, c S.26 (the "**SLRA**").

However, can the mere outline of a will be valid if it meets these requirements?

In this case, the Ontario Superior Court considered an application for a certificate of appointment of estate trustee with a will for a document entitled "Outline of Will of Diane Frances Pearce." The document was in point form but was signed by the testator and two witnesses. One of the witnesses even swore an affidavit of execution attesting to having been present with the deceased and the other witness, both of whom saw the deceased sign in the outline their presence.

In its decision, the Court confirmed there was no particular format required to make a valid Will, as long as statutory requirements are met. However, the testator's intention to make a valid Will must be discernable from the document.

In this case, there was too much ambiguity on intention for the court to determine the outline's validity as a will. The witness' affidavit did not describe the circumstances or what knowledge the witness had concerning the intentions of the deceased. The solicitor witness did not state the basis for his belief that the testator wished to appoint the applicant as executor. There was no explanation as to why the outline was signed and what information there was to show that the deceased intended the outline to serve as her will. Lastly, the outlined referred to the deceased's prior will but did not contain a revocation clause.

Therefore, the Court adjourned this matter to receive additional evidence demonstrating that the outline was intended to be a Will and was intended to revoke the earlier Will signed by the deceased.

Instructive on future cases, the Court provided a list of information it required to properly adjudicate the issue:

1. Is the other subscribing witness still available and is he prepared to swear an affidavit?

2. What were the circumstances surrounding the preparation of the outline and the decision to sign it in front of witnesses? Is there any additional evidence that this point form document was intended to be given effect as a new will?
3. Are the previous testamentary instruments named in the outline still available and how do they differ from the new outline will?
4. Are all of the beneficiaries content that the document be treated as the last will of the deceased and to take the gifts provided in the outline?
5. Are there other beneficiaries who would be entitled to a share of the estate on an intestacy or were named in the previous will (s) so that they should be entitled to notice?

The takeaway is that an outline of a will can in theory be a valid will. However, to prove such a document in solemn form, the Court will require more robust evidence than simply an affidavit of subscribing witness. Evidence regarding the testator's intention to treat the document as a will is key.

2. *Re Lacroix Estate* – can a handwritten note incorporate by reference an unsigned will?

Can a testator's handwritten note incorporate by reference an unsigned (but initialled) typewritten will?

The circumstances of this case are unique.

On May 19, 2020, during the height of the COVID-19 lockdown, Rebecca Stephanie Lacroix contacted a solicitor, Margaret Opatovsky. Ms. Lacroix advised that she was in the St. Catharines General Hospital in the final stages of cancer. On May 25, 2020, Ms. Opatovsky spoke with Ms. Lacroix, and received instructions to prepare a Will that would ensure that her youngest child was provided for as Ms. Lacroix was in the process of a divorce.

The hospital denied Ms. Opatovsky's request to attend the hospital with her assistant to have the Will executed, due to COVID-19 restrictions. Ms. Opatovsky delivered the Will to the hospital on May 26, 2020, and instructed Ms. Lacroix to create a holographic Will which incorporated the draft Will she had prepared by reference. The handwritten note stated as follows:

"I, Rebecca Stephanie Lacroix, declare that this holographic Will shall constitute my last will and testament and I hereby incorporate into this Will the attached draft Will, that I have initialed on each page for identification purposes."

Attached to that handwritten note was a draft Will, initialed on each page, which had been drafted by Ms. Opatovsky.

Ms. Lacroix died on June 6, 2021. The estate trustee named in the Will applied for a certificate of appointment of estate trustee. Unfortunately, this application was denied.

While the handwritten document satisfied section 6 of the SLRA, as it was entirely in Ms. Lacroix's handwriting, and the signature which immediately followed complied with section 7 of the SLRA, it did not stand alone as a valid testamentary document. The note itself did not independently make any disposition of property. Moreover, a holograph Will cannot incorporate by reference a typewritten document, and the holograph Will must be wholly in the deceased's handwriting. As such, the handwritten note and attached Will could not be admitted to probate.

This case stands in contrast to a recent British Columbia Supreme Court decision in which an unsigned Will was admitted to probate where the testator had been unable to sign it due to COVID-19 restrictions, and shows the contrasting technical approach of Ontario courts, which may lead to unfortunate outcomes (such as a testator unintentionally dying intestate). It will be interesting to see whether the substantial compliance amendments to s. 21.1 of the SLRA that came into force on January 1, 2022 will change the result in similar fact patterns.

3. *Labatte v. Labatte* – when is an RESP held in trust?

A Registered Education Savings Plan ("**RESP**") is a cost-effective way of saving money for a child's future post-secondary education. The concept of the RESP raises the question of who actually owns the funds therein. Is it the parent who contributes to the RESP (the "**subscriber**") or the child for whom the RESP was created in the first place (the "**beneficiary**")? According to Labatte v. Labatte, the answer is that the assets in an RESP may belong to the subscriber, except where the RESP is being held in trust for the beneficiary.

This, however, begs another question: when might an RESP be held in trust?

In this case, the parties are parents to two children. After divorcing, both parties continued to make contributions to the RESP. When the eldest child decided to enroll in studies at McGill University, she requested a disbursement from the RESP account to pay for her tuition. The father refused to consent to a release of the funds on the basis that he owned them. The mother took the opposite position and maintained that the RESP funds were held in trust for the two children. The mother sought to have the RESP account transferred solely into her name as administrator of the trust.

The court noted that the mere creation of an RESP does not, in and of itself, establish a valid trust, as RESPs often allow subscribers to change the designated beneficiary of the RESP at any time. Further, subscribers are often entitled to obtain refunds for their contributions. These factors run contrary to the essential elements of a valid trust: a clear intention to create a trust, a clear description of what property is to be held in trust, and a clear description of who ultimately is to receive the trust property (also known as the three certainties).

However, in the absence of a written trust agreement, the Court looks to the surrounding circumstances, such as evidence as to what the parties intended and what was agreed to.

In this case, the parties had previously signed a Partial Separation Agreement, which stated, in part, the following: “The RESPs maintained by the parties shall be used for the children’s postsecondary education.” In addition to describing the trust property and intended trust beneficiaries, this term evidenced a clear intention by both parties to create a legal obligation that the RESP ultimately be used for the benefit of their children.

As a result, the Court held that the RESP was held in trust for the parties’ two children, and allowed the transfer of this RESP into the mother’s name as administrator of this trust.

When it comes to RESP and trusts, circumstances evidencing an intention to benefit one’s children in setting up the RESP is an important consideration.

4. *Winkworth v. Murray* – discretionary factors in awarding estate trustee compensation

Section 61(1) of the Trustee Act, RSO 1990, c T.23, gives the court the authority to award an estate trustee compensation. However, unlike compensation for attorneys for property and guardians of property, the guidelines for determining the amount of estate trustee compensation have developed exclusively in the common law. One of the foundational cases is Toronto General Trusts Corp v Central Ontario Railway, which sets out five factors to take into consideration when determining the appropriate amount of compensation:

- the size of the trust;
- the care and responsibility involved;
- the time occupied in performing the duties of the trustee;
- the skill and ability shown by the trustee; and
- the success resulting from the administration of the estate by the trustee.

Recently, the courts have adopted a tariff approach to determining the amount of compensation: compensation is calculated at 2.5% of transactions into and out of the estate (leading to compensation roughly equal to 5% of the value of the estate). Where estate administration spans multiple years, a yearly management fee of 2/5 of 1% of the value of the estate may also be charged. Nevertheless, the tariff calculations are used as a first step and the resulting amount is adjusted, either higher or lower, based on a review of the five factors listed above.

While the development of tariff guidelines has introduced a greater degree of predictability into the determination of estate trustee compensation, the final determination of the amount remains discretionary. This case provides an example of the role of more intangible factors.

In this case, Anne, Robert, and James were the equal beneficiaries of their mother's estate. Anne and Robert were appointed as co-estate trustees. They divided their tasks: Anne managed the administration of their mother's house and Robert managed the administration of their mother's liquid assets.

The estate administration was highly acrimonious and Anne was often pitted against her brothers in the litigation. However, after seven years, the estate administration was nearing completion.

Anne and Robert sought compensation in the amount of 5% of the gross value of the estate, with Anne seeking the lion's share of the 5%.

While the Court held that compensation was justified, the quantum is subject to discretion. Because a detailed accounting of the estate administration had not been provided, the tariff calculations were of little use. Instead, the judge looked primarily at the five factors and held:

- The estate (valued at between $850,500 and $987,201) was "significant."
- Anne's job administering the real estate was more complex than managing the liquid assets, as tenants were involved. However, Anne did not manage the administration of the real estate efficiently or effectively.
- Robert was a co-estate trustee, so he bears some of the responsibility for the overall lack of skill that was shown in managing and selling the properties.
- Time spent was difficult to assess, as Anne inflated her time and, conversely, Robert claimed he was "prevented" from performing his duties. However, the court held that Robert's arguments rang hollow: "Laying back and complaining later will not suffice."
- Lastly, the court held that this was not a "successful" administration given the length of time and number of disputes between the parties.

In particular, the court criticized the inability of Anne and Robert to work together. As a result, each Anne and Robert received only half of what they sought.

5. *Maghdoori v. Sanjari* – motion to strike trust claims regarding donation proceeds

GoFundMe is arguably the most recognized crowd funding platform used by many who seek to raise funds from the public domain to support a defined goal. What happens when there are unused donation proceeds as a result of the death of the recipient of donation funds?

In this case, Sara Maghdoori suffered from cancer. Money was raised through GoFundMe with family members donating directly to help fund her expensive treatments. While she was alive, Sara opened a bank account into which both sets of funds were deposited and co-mingled. While a significant portion of the donated funds were used for the cancer treatment, the applicants alleged that not all donated money was used for this purpose.

In this application, the parents of Sara alleged that Sara's husband controlled the use of the funds, before and after Sara's death and used the remaining proceeds for his own benefit. Sara's parents sought the return of those funds, the imposition of a constructive trust on the same, or for those funds to be donated to charitable causes. Sara's parents stated they are motivated out of moral, ethical and social obligations to ensure that the donated funds are used for its intended purpose and not for the respondent's personal benefit.

While many issues in the application remain outstanding, the court was asked to consider a motion brought by the respondent to strike the application pursuant to r. 21.01(1)(b) of the Rules of Civil Procedure. The rule permits a motion to strike out a pleading on the ground that it discloses no reasonable cause of action or defense.

The respondent husband argued that Sara's parents lacked standing to bring the estate related claims and the trust related claims.

The court noted that to succeed on the r. 21 motion the respondent had to convince the court that "it is plain and obvious" that the applicants do not have standing and that their estate related claims and trust related claims are "doomed to fail." Evidence is not admissible on a r. 21 motion and the pleadings are "taken as true." The court reviewed the test for determining private interest standing on a r. 21 motion:

1. The party must have either a public interest or a private interest standing; and
2. In cases where private interest standing is asserted (such as this one), the party must have a personal and direct interest in the issues to be litigated. It is not enough that they have a sense of grievance or will gain the satisfaction of righting a wrong or are upholding a principle. To have private interest standing, a person must have a personal legal interest in the outcome.

On the trust related claims (there are separate estate related claims not addressed in this paper), the Court did not strike these claims as having no reasonable cause of action. Even though Sara's parents did not seek the return of funds they donated, this was not necessary to establish they had some direct interest in the donated funds.

This litigation has been allowed to continue. For now, the takeaway appears to be that any donor to a charitable fund may be found to have a private interest standing on a motion to strike.

6. Statutory Update – what is a "separated" spouse on intestacy?

It is not only case law which is constantly evolving. On January 1, 2022, section 43.1 of the SLRA was amended to add that there is no application of the intestacy rules to separated spouses, and further, the definition of a "separated" spouse was added.

Part II of the SLRA deals with division of assets where a person dies intestate. Previously, where a person dies intestate and leaves behind a spouse (regardless of whether that spouse is separated, as long as they are not divorced), that spouse stands to inherit a preferential share of $350,000.00 as of February of 2021, plus differing percentages of the remainder of the estate depending on how many surviving issues there are.

In effect, the new Section 43.1(1) changes the treatment of a separate spouse to that of a divorced or common law spouse. Section 43.1(2) clarifies what is a "separated" spouse for the purposes of the SLRA. Specifically, a spouse is considered to be separated if:

(a) before the intestate person's death,
   i. they lived separate and apart as a result of the breakdown of their marriage for a period of three years, if the period immediately preceded the death;
   ii. they entered into an agreement that is a valid separation agreement under Part IV of the *Family Law Act*;
   iii. a court made an order with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage;
   iv. a family arbitration award was made under the *Arbitration Act, 1991* with respect to their rights and obligations in the settlement of their affairs arising from the breakdown of their marriage; and

(b) at the time of the person's death, they were living separate and apart as a result of the breakdown of their marriage.

Prior to this update, if an intestate person had separated from their married spouse and did not wish to benefit them any longer, even if they had entered into a new common law relationship with a

new partner they wished to benefit, it would be the separated spouse who would inherit the lion's share of the estate.

Undoubtedly, this statutory update targets scenarios like these. For litigators, it is important to keep abreast of statutory developments as they impact the rights and types of claims available for clients. For solicitors, the ever-evolving laws of intestacy are yet another reason clients should make wills if they truly want to control the flow of their testamentary assets.

7. Can Pets Inherit Million Dollar Trusts?

Last December, a German shepherd named Gunther VI made headlines worldwide by purportedly inheriting and selling a $31.7 million dollar Miami mansion that used to belong to Madonna. As the story goes, Gunther VI's great-grandfather, Gunther III, was gifted a multi-million-dollar trust from late owner German countess Karlotta Liebenstein when she passed in 1992. The fund was well managed, and led to acquisitions of mansions such as the one in Miami.

Of course, this was later shown to be a publicity stunt by realtors working to sell that house. Regardless, the idea of the wealthy leaving extravagant trusts to care for their pets is not a new one. Billionaire Leona purportedly left $12 million to her dog, Trouble, through her last will. Similarly, Oprah Winfrey is purportedly leaving $30 million to her dogs.

This raises two questions: (1) can pets be the beneficiary of trusts like humans can? (2) if not, what are some estate planning methods which may allow for the provision of testamentary assets to our furry loved ones?

First, under Canadian law, a testamentary gift can be made to persons, including a corporation, but cannot be made to an object or a purpose. The only exception lies in charity law, where such gifts can be made to one of four recognized charitable law classifications: the relief of poverty, the advancement of education, the advancement of religion, or any other purpose beneficial to the community which do not fall under the previous three headings. None of these purposes would include provision for your specific pets, although it may be possible to leave money to a charity for animal welfare in general.

Testamentary gifts also cannot be made to objects. Unfortunately, in the eyes of the law, Fido is an object. Specifically, it is the personal property of owners. As such, just as you cannot leave behind a trust to take care of a chair, you cannot leave behind a trust to care for your cat or dog.

Secondly, there are better options to provide for your pets than leaving behind trusts. One option is to gift your pet to a trusted family member or friend, along with a cash legacy to that person. Choose a friend who will honour your wishes to use that cash legacy to care for that pet, as there are likely no enforcement options available.

Another option is to use a pet foster program. While living, the owner will sign a contract with the program provider which provides that on death, the animal is gifted to that program provider, alongside an estate transfer of funds. Using these funds, the animal is cared for by a foster family for its life time.

8. Other cases of note

(a) *Blacklock v. Tkacz,* 2021 ONCA 630 – When does an existing spousal support order bind the estate on death? The answer is complex and fact-dependant.

The Divorce Act is federal legislation, and pursuant to sections 91 and 92 of the Constitution Act, this legislation cannot apply to civil rights and property (the domain of provincial legislation). However, an order under the Divorce Act may be able to bind an estate if there is express language in the order to make that intention clear.

If the couple was common law, they were never married and cannot be divorced, so instead Ontario's Family Law Act would apply.

A well drafted separation agreement will address the issue of support against the estate, and where it exists, the agreement rule.

(b) Best v. Hendry, 2021 NLCA 43 – A Newfoundland case that deals with a new carveout for the doctrine of ademption. The facts are as follows: the will left the house to beneficiary A (niece Marie), and the residue to beneficiary B (niece Kathy). The house was sold prior to the

testator's passing. Proceeds of that sale went to beneficiary B, even though proceeds can be traced to the sale of the house which A was entitled to. Under the doctrine of ademption, if a property which is gifted under the will no longer exists at the time of the testator's death, the gift "adeems" or fails. However, there exists statutory carve-outs to protect the testator's wish, such as s. 31(1) of Ontario's *Substitute Decisions Act* which provides that this doctrine does not apply to a property that is subject to a specific testamentary gift which a guardian of property disposes of. In this case, while the lower court judge held that the doctrine of ademption did not apply, as the testator meant for beneficiary A to have the house and therefore the sale of the proceeds, this decision was overturned by the court of appeal. In concurring reasons, Butler J.A. agreed with the disposition of the appeal but not the reasons. Instead, she believed a narrow carve out should apply to cases like these: where the testator is incapable, cannot assent to the sale of a specific property, and cannot make a new gift to a beneficiary, a carve out ought to be made to prevent unfairness and the defeat of the testator's intention.

(c) *Guardian Law Group v. LS,* 2021 ABQB 591 – What are the requirements that must be met by counsel to be validly retained to represent an individual, in that individual's own capacity hearing? First, determinations of capacity are fact-specific and task-specific. A finding of incapacity in one area, such as property management, does not automatically translate to a finding of incapacity to another, such as to instruct counsel. Second, the test for capacity to instruct counsel is in three parts: (a) the client must understand what they have asked the lawyer to do for them and why, (b) be able to understand and process the information, advice, and options the lawyer presents, and (c) appreciate the advantages and drawbacks and potential consequences associated with the options they are presented with. Additionally, it was noted that the capacity to enter into a retainer agreement is evaluated at the time of the contractual agreement, while the capacity to retain counsel is evaluated on an ongoing basis.