

## **Brave New World!**

### **The Cost of Proportionality in Will Challenges and Guardianship Disputes: Discovery, Summary Judgment and the Courts' Discretion in Fixing Costs**

**By Justin W. de Vries and Angélique Moss<sup>1</sup>**

Recent amendments to Ontario's *Rules of Civil Procedure* ("**Rules**") have introduced sweeping changes meant to make the civil justice system more affordable and accessible. The changes are the most significant in a generation; litigation in Ontario will not be the same. Among the changes is the addition of the proportionality rule as an overarching principle of interpretation. There are also significant revisions to the discovery and summary judgment rules.

This paper discusses how these changes are likely to affect will challenges and guardianship litigation under the *Substitute Decisions Act, 1992* ("**SDA**").<sup>2</sup> In particular, this paper considers the difficulties inherent in applying the principle of proportionality to estate and guardianship litigation where monetary concerns are rarely, if ever, the only interests driving the litigation. This paper argues that the courts and counsel need to be alert to these concerns when determining the scope of discovery, bringing motions for summary judgment, and the exercise of judicial discretion in fixing costs.

Given the recent rule changes, the current "hot button" issue in both will challenges and attacking powers of attorney is the impact the principle of proportionality will have on estate and guardianship disputes. Put another, albeit more sceptical way: will the principle of proportionality have a chilling effect on estate and guardianship disputes to the detriment of *bona fide* issues that can bedevil even the best families?

#### **The Proportionality Rule: Its Origins and Use as an Overarching Principle**

The recent revisions to the *Rules*, in effect as of January 1, 2010, are based on Justice Coulter A. Osborne's recommendations in the Civil Justice Reform Project.<sup>3</sup> Justice Osborne was commissioned by Ontario's Attorney General in 2006 to recommend reforms to the civil justice

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<sup>2</sup> S.O. 1992, c. 30, as amended

<sup>3</sup> Justice Coulter A. Osborne's report, "Civil Justice Reform Project: Summary of Findings and Recommendations", (November 2007) is found at: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>. ("Civil Justice Reform Project")

system so it would be more accessible and affordable to Ontarians. This concern for accessibility and affordability is most obviously reflected in Rule 1.04(1.1), the proportionality rule. The proportionality rule stemmed from one of the most significant reforms recommended by Justice Osborne.

As Justice Osborne described it in his report, proportionality means that “the time and expense devoted to a proceeding ought to be proportionate to what is at stake.”<sup>4</sup> Consequently, Justice Osborne’s leading recommendation to the Rules Committee, which was charged with revising and drafting the *Rules*, was the following:

The *Rules of Civil Procedure* should include, as an overarching principle of interpretation, that the court and the parties must deal with the case in the manner that is proportionate to what is involved, the jurisprudential importance of the case and the complexity of the proceeding.

The Rules Committee adopted Justice Osborne’s recommendation. Rule 1.04 now provides as follows:

**General Principles**

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

Proportionality hinges on the assumption that less procedure will make legal services more affordable, and consequently the justice system will be more accessible. The concept is, in fact, a recurring theme in civil justice reform literature, and it has been adopted in many common law jurisdictions, both within<sup>5</sup> and outside of Canada.<sup>6</sup>

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<sup>4</sup> Civil Justice Reform Project, at page 134.

<sup>5</sup> See the civil procedure rules of Quebec, Nova Scotia, and Alberta. Most recently, the province of British Columbia undertook, through its “B.C. Justice Review Task Force”, reform of the province’s civil justice system. The task force sought to identify a wide range of reform ideas and initiatives to “make the justice system more responsive, accessible and cost effective.” The object of the new rules is that of “securing the just, speedy and inexpensive determination of a proceeding on its merits, including, so far as is practicable, conducting the proceeding in ways that are proportionate to the amount involved in the proceeding, the importance of the issues in dispute and the complexity of the proceeding”. The new revised and updated B.C. rules come into effect July 1, 2010. See [http://www.bcjusticereview.org/working\\_groups/civil\\_justice/civil\\_justice.asp](http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp)

<sup>6</sup> The proportionality principle is found in the U.K. civil justice legislation (discussed later in the paper), as well as Australia’s civil procedure legislation: [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/cpa2005167/s60.html](http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa2005167/s60.html). Scotland also has considered the use of a proportionality principle in its legislation: the report “Modern Laws for a

The seminal example of civil justice reforms, which incorporates proportionality, were those made to the civil justice system in the United Kingdom following recommendations made by Lord Woolf in 1995.<sup>7</sup> One key feature of Lord Woolf's recommendations was the importance he gave to the principle of proportionality: as noted in Lord Woolf's *Final Report*, "the achievement of the right result needs to be balanced against the expenditure of time and money needed to achieve that result."<sup>8</sup> The Woolf Reforms in fact enshrined "proportionality" as an "Overriding Objective" in the U.K. civil justice rules in 1999. Although ten years have passed since the Woolf Reforms were implemented, legal commentators in the U.K. continue to debate the success of the reforms.<sup>9</sup> The cynic would opine that "hope springs eternal" in the legal profession by somehow believing that legal costs can be curtailed and justice made affordable.

How will Ontario courts make orders and directions which "are proportionate to the importance and complexity of the issues"? How will courts define what issues are important and therefore deserving of more extensive procedure and the attendant costs? Only six months after the amendments came into force, certain challenges in the application of the proportionality principle to will challenges and guardianship disputes are already becoming evident.

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Modern Scotland: A Report on Civil Justice in Scotland" (February, 2007) discusses the concept of proportionality: <http://www.scotland.gov.uk/Publications/2007/02/09110006/0>

<sup>7</sup> *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Lord Chancellor's Department, June 1995); *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (London: HMSO, 1996) ("*Final Report*"). See also

<http://www.dca.gov.uk/civil/final/contents.htm>

<sup>8</sup> *Final Report*, chapter 1, section II, para. 19 "Proportionality", found at

<http://www.dca.gov.uk/civil/final/sec2a.htm#c1>

<sup>9</sup> A review of the commentary 10 years after the implementation of the Woolf reforms suggests mixed reviews: see, for example, "Woolf Reforms: Lawyers Continue to Wrangle with the Merits a Decade On," *The Lawyer* (June 8, 2009), at <http://www.thelawyer.com/woolf-reforms-lawyers-continue-to-wrangle-over-merits-a-decade-on/1000991.article>. For a more critical review, see the article by Lawrence West, Q.C., "Have the Woolf Reforms Worked?: The Changes Made Ten Years Ago Have Been a Disaster for the Civil Justice System and Need a Radical Re-Think", *Times Online* (April 9, 2009), at: <http://business.timesonline.co.uk/tol/business/law/article6060325.ece>

## **The New Discovery Rule and Proportionality**

In brief, the new discovery rules require a discovery plan (Rule 29.1) and refine the scope of discovery such that the test is now whether a document or question is “relevant to any matter in issue” (Rules 30 and 31), as opposed to the former “relating to any matter in issue in the action”.

A limit on the number of hours for oral discovery is also provided for regardless of the number of parties (Rule 31.05), unless the parties agree or leave is granted by the court. Most importantly, the principle of proportionality is *specifically* referred to in Rule 29.2 and a requirement of proportionality in discovery is imposed. Rule 29.2 directs the court, in making a determination as to whether a party or other person must answer a question or produce a document, to consider a variety of factors, including: whether the time and expense required to do so would be unreasonable or unjustified; would unduly interfere with the progress of the action; or is readily available to the party requesting it.

Finally, a subsection to the discovery rules entitled “Principles re Electronic Discovery” provides that when preparing a discovery plan, “the parties shall consult and have regard to the document titled ‘The Sedona Canada Principles Addressing Electronic Discovery’.” The concept of proportionality is then referenced in Sedona Canada Principle 2, which directs that discovery steps should be *proportionate* and that parties should consider the nature of litigation; relevance of electronic evidence; importance to adjudication; and the cost and delay that may be imposed in dealing with electronic documents. The Sedona Canada Principles, which were first articulated in 2008,<sup>10</sup> likely provide some insight and guidance into how the Ontario courts will approach and apply the principles of proportionality to civil litigation generally.

The new discovery rules were summed up by Justice Colin Campbell, writing in the Advocates’ Society Journal about proportionality and legal culture, as being contrary to the prevailing legal culture, in which the ‘potential relevance’ of documents is given priority. By contrast, the new discovery rules will require a significant shift in attitude not only by counsel, but also by clients and the judiciary. They will require us to accept and incorporate into the practice of law what may be a novel concept for many: the fact that, at some point in a case, the relevance or ‘semblance’ of relevance of evidence cannot be pursued without regard to all other considerations, including the

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<sup>10</sup> “The Sedona Canada Principles Addressing Electronic Discovery” (January 2008)  
[http://www.thesedonaconference.org/publications\\_html](http://www.thesedonaconference.org/publications_html)

cost and delay associated with its pursuit. In the appropriate circumstances, we must, as Justice Campbell puts it, acknowledge the possibility of missing the ‘smoking gun’.”<sup>11</sup>

### **The Discovery Rule in Will Challenges and Guardianship Disputes**

Even prior to the amendments, litigants in will challenges and guardianship disputes had the ability to craft a procedure which was appropriate to the case at hand through an order for directions. Rule 75.06, the application or motion for directions, already gives the parties and the presiding judge the ability to customize the procedure to suit the particularities of each case. Justice Pardu held that the purpose of Rule 75.06(3) was:

to enable a Judge at the outset to design a procedural regime most appropriate for the nature of the dispute and [it] contemplates the possibility that the proceeding may not be encumbered by all of the procedural steps that may accompany other civil proceedings, and may in that sense proceed in a “summary fashion”.<sup>12</sup>

As such, proportionality is not necessarily new in estate and guardianship litigation (it may just be applied with renewed vigour). In fact, the nature of the appropriate procedure was suggested by the old Rule 1.04, which called for “the just, most expeditious and least expensive determination of the proceeding on its merits”.

That said, the proportionality rule may change what relief a court is prepared to order on an application or motion for directions. In the past, orders for directions were broad in their scope sweeping up third party documentary production and oral examinations into the litigation. Certainly, the waiving of the deemed undertaking rule, which was often inserted as a matter of course in an order for directions, so that the evidence of the drafting solicitor could be used in a subsequent disappointed beneficiary claim, is likely a thing of the past. It is simply too broad in its scope and invites future litigation.

Furthermore, when hearing motions or applications for orders giving directions about documentary discovery, courts may be reluctant to order production from third parties and even the parties themselves if the production of such documents may only have tangential relevance to the case or

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<sup>11</sup> Colin C. Campbell, “Reflections on Proportionality and Legal Culture”, *The Advocates’ Society Journal*, (March, 2010) at page 5.

<sup>12</sup> *Knox v. Trudeau* (2001), 38 E.T.R. (2d) 67, (2001) CarswellOnt 313, at para. 9.

their relevance is not yet apparent. A court may be alert to the need to limit production of documents to certain relevant time periods. This is particularly likely if the estate's assets are modest.

With respect to oral discovery of third parties, the amendments may have an impact on the ability to examine non-parties. For instance, where the lawyer who drafted the challenged will has not yet produced his or her file, the court may question whether an order requiring the lawyer to attend at an examination is in keeping with the proportionality rule. Instead, the court may only be prepared, on an initial application or motion for directions, to order production of the lawyer's file. However, doing so may merely lead to future motions for leave to examine the drafting lawyer pursuant to Rule 31.10. If these motions are routinely granted, then the requirement to bring the motion after an initial order giving directions only adds unnecessary costs to the litigation.

The better procedure appears to be for the court to allow for a preliminary order giving directions which encompasses proposed oral or even written examinations of third parties. Counsel will need to bear in mind the proportionality principle in determining whether such an examination is ultimately required, given the potential cost consequences to their clients if they fail to do so. In general, perhaps it is better for counsel to keep the principle of proportionality in mind and apply available procedural steps as required, instead of the courts micro-managing the conduct of documentary and oral discovery from the outset. Our legal tradition has held steady to the belief that judicial activism does not always lead to the best, or even the most cost effective, result.

It is trite to say that the proportionality principle will mean that in most modest estates, the cost of examining third parties is no longer warranted. In such cases, there may be more cost effective ways to obtain the information sought such as seeking written answers to questions. Other options may be for counsel to obtain a "will say" statement,<sup>13</sup> to schedule a "without prejudice" conference call with the proposed third party,<sup>14</sup> or for all counsel to meet with the third party on a without prejudice basis. The proportionality rule will, hopefully, focus counsel and the courts on devising creative and cost-effective solutions for eliciting information that is usually obtained through costly oral examinations.

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<sup>13</sup> This suggestion was made by Justice D.M. Brown at the Ontario Bar Association's Conference "New Year's Resolution: Stay on Top of the New Rules of Court", (January 6, 2010 - Toronto).

<sup>14</sup> The "without prejudice" conference call is suggested in Archie Rabinowitz's paper, "Discovery Process: A Focus on Early Resolution of Estate Disputes", Law Society of Upper Canada's *10<sup>th</sup> Annual Estates and Trusts Summit*.

## **Proportionality in Discovery: Procedural Efficiency and Justice?**

While the goal of limiting unnecessary documentary and oral discovery in order to reduce costs is laudable, applying the proportionality principle will be difficult as it goes against our training as counsel to “leave no stone unturned”. Sandra A. Forbes, current president of The Advocates’ Society, identifies this as a challenge and sees discovery as a balancing exercise of sorts. Forbes argues that “the more clearly relevant the line of inquiry or the document, the higher the onus need be on the party seeking to prove that the burden of disclosure outweighs relevance” and she warns that the consequence of the amendments may be “increased concern about effective access to justice.”<sup>15</sup>

The quality of justice, as well as the costs of accessing it, needs to be borne in mind when applying the discovery rules. Put another way, the promise of procedural efficiency as a way of affording access to the civil justice system may be a hollow one if the relevant facts upon which a settlement is made, or a judgment is rendered, do not come to light.<sup>16</sup> The civil courts in other jurisdictions have grappled with these same challenges.<sup>17</sup>

Obviously, non-monetary interests are important and should not be summarily discounted as undeserving of extensive procedure. Chief Justice Warren K. Winkler has expressed his

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<sup>15</sup> Sandra A. Forbes, “The Dawn of a New Era of Civil Litigation in Ontario” *Canadian Lawyer* (January 25, 2010), located at: <http://www.canadianlawyermag.com/The-dawn-of-a-new-era-of-civil-litigation-in-Ontario.html>

<sup>16</sup> For an insightful critique of proportionality in civil justice reform and what impact reforms which seek to increase the efficiency of civil justice systems may have on accuracy of outcomes, see Colleen M. Hanycz’s article, “More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform,” *Civil Justice Quarterly*, Vol. 27, Issue 1, 2008.

<sup>17</sup> See, for instance, the discussion of the challenges caused by information stored electronically, and the disclosure that Master Whitaker was prepared to order in the U.K. decision, *Goodale & Ors. v. The Minister of Justice and Ors* [2009] EWHC B41 (QB). In that case, Master Whitaker found that disclosure “is a fundamental and necessary obligation in a case like this, particularly when important allegations about the mis-treatment of prisoners arise...Although the damages that are likely to be awarded in these cases on an individual basis are likely to be quite small, in my judgment that is not a factor to be given great weight when considering the proportionality of the disclosure to be given by the defendants. Neither is the size of the group. Whether it will be 250 or 500 prisoners it seems to me is not really the issue here. What is alleged in this case against a department of the government is a deliberate failure, against the background of alleged knowledge that the 'one size fits all' treatment was going to cause pain and suffering, to provide a humane regime for the maintenance of these opiate dependant prisoners. It may well be that there is a complete and proper defence, but it is a very serious allegation indeed. It seems to me that standard disclosure (as defined by CPR Rule 31.6) is appropriate in this case ...”

agreement with the principle of proportionality, but has also cautioned that we “must assess the social impact of the case.”<sup>18</sup> He writes that:

the issues that arise in a family breakdown or from the loss of an employee’s livelihood have tangible effects of great importance, even if the dollar amounts are modest. It is necessary to specifically identify and balance the social and personal impact of issues with the other criteria that govern any analysis of proportionality...the justice system must always be about much more than dollars and cents.<sup>19</sup>

If the proportionality rule means that modest estates never deserve extensive discovery, to what level of “justice” is access being granted? Estate and guardianship litigation involves important non-monetary interests. Families are complex and rarely fit a standard mold. Memories, or the strict adherence to family values or duties, often trigger strong emotional responses. Litigants often protest that they are fighting for the “principle of the matter”, such as upholding the validity of a power of attorney, following their parents’ wishes, or doing what they think is “right” in terms of family tradition and fairness. Rightly or wrongly, a power of attorney may be viewed as a parent’s expression of trust, faith and confidence in their child.<sup>20</sup>

Moreover, beyond the parties’ interests, the court has a duty in will challenges, stemming from its history as a surrogate court, to ensure that only valid testamentary documents are admitted to probate.<sup>21</sup> The court must also protect the interests of incapable individuals in accordance with its *parens patriae* jurisdiction and pursuant to the provisions of the *SDA*.<sup>22</sup>

It is axiomatic that an incapable person’s best interests cannot always be adequately captured or defined in monetary terms. For example, if family members have concerns that an attorney for property will abscond with the incapable person’s property, waiting until after the fact is obviously

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<sup>18</sup> Chief Justice Warren K. Winkler, “Professionalism and Proportionality”, *Advocates’ Society Journal*, (March, 2009), pages 6-7.

<sup>19</sup> *Ibid.*, at page 7.

<sup>20</sup> For a discussion of the family dynamics at play in capacity litigation, as well as suggestions for how to avoid a full-blow battle between family members, see Jordan M. Atin’s article, “Duelling Powers of Attorney: Resolving Capacity Law Issues Without Full-Blown Litigation”, *Grave Consequences: Traps and Pitfalls in Contemporary Estates Law*, Ontario Bar Association, (February 16, 2010 - Toronto).

<sup>21</sup> See, for instance, *Slater v. Slater Estate*, 2004 CanLII 32329 (Ont. S.C.) , at para. 30 regarding the court’s inquisitorial function as a surrogate court.

<sup>22</sup> See, for example, ss. 32(1) and 37 of the *SDA* regarding duties owed to an incapable person by the power of attorney. For the *parens patriae* jurisdiction of the court over the affairs of vulnerable adults, see *Re Eve* [1986] 2 S.C.R. 388, as suggested by Dermot C.G. Moore in “Recent Decisions in Guardianship Litigation”, presented at the Ontario Bar Association’s *Grave Consequences: Traps and Pitfalls in Contemporary Estates Law*, (February 16, 2010 -Toronto).



too late: consequently, the costs of a contested removal motion may be warranted and in the incapable person's best interests.

If we accept that these non-monetary issues are important, how and in what circumstances will discovery be limited? What about cases where the estate is small or the property of the incapable person is modest? There are no easy answers to these questions. The amendments will require counsel, the parties, and the court to engage in a careful weighing of the costs and benefits, monetary and otherwise, of documentary production and oral discovery. It might be suggested that in some cases, for justice to be accomplished, non-monetary interests may require discovery that is disproportionate to the size of the estate or the property of the incapable person. In other words, certain estates or guardianship disputes will require a disproportionate response to the monetary value at stake.

Justice D.M. Brown, who is currently head of the Estates List in Toronto, has been particularly proactive in applying the issue of proportionality to cost awards in estate and guardianship disputes. Justice Brown succinctly summed up the countervailing argument in *Bailey v. Bailey*, a decision released on December 29, 2009<sup>23</sup> (literally on the eve of the new *Rules* being implemented). In that decision, Justice Brown considered claims by both the daughter and son of Isabelle Bailey, an incapable individual, for costs from their mother's estate for several motions dating back two years. Justice Brown wrote:

While I am satisfied that Isabelle [the incapable] will benefit from the results of this motion, given the need to sell a house in which she no longer can live, and while the results of the [earlier] Preservation Orders were, in a general sense, for Isabelle's benefit, I have significant concerns about the Proportionality between the results obtained and the amounts of legal fees sought by brother and sister...

In most families the legal costs associated with such issues would be zero because brother and sister would agree, without resorting to lawyers, to putting in place arrangements to ensure that their mother's needs were met. The reality of his family is that the state of the relationship between brother and sister was such that they had to engage in litigation to make decisions which others do as a matter of ordinary course...

Justice Brown went on to conclude:

From my review of the Preservation Orders, the motion record, and the Bill of Costs, I conclude that much of the legal work for which recovery is sought provided little benefit to

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<sup>23</sup> *Bailey v. Bailey* 2007 CarswellOnt 3006, (Ont. S.C.J.) at paragraphs 17- 19 ("*Bailey v. Bailey*")

Isabelle and was a reflection of **the inability of brother and sister to arrange their mother's affairs in the informal way by which most families do.** [emphasis added]

As a result, I conclude that Beverley Bailey [the daughter] and Philip Bailey [the son] are not entitled to their substantial indemnity costs of the Preservation Orders and this motion. The costs sought are disproportionate to the routine nature of the issues at play [Isabelle's monthly living expenses] and the consent basis upon which the orders issued.

In an earlier 2009 decision, *Fiacco v. Lombardi*,<sup>24</sup> Justice Brown also considered the principle of proportionality in the context of a guardianship dispute:

[W]hen faced with a cost claim against the estate of an incapable person, a court must examine what, if any, benefit the incapable person derived from the legal work which generated those costs.

While *bona fide* disputes may exist amongst those interested in the well-being of the incapable person as to who should be appointed her guardian, a significant risk exists that a contested guardianship application may lose sight of its purpose – to benefit the incapable person – and degenerate into a battle amongst siblings or other family members, some of who may have only their own interest at heart. In such circumstances courts must scrutinize rigorously claims of costs made against the estate of an incapable person to ensure that they are justified by reference to the best interests of the incapable person.

Can Justice Brown be criticized for being overly zealous in his application of the principle of the proportionality? Some members of the estates bar have said as much. However, in view of Justice Brown's comments, counsel need to be alert to the possible cost consequences which may result from embarking on documentary and oral discovery – or other procedures – which are later found by a court not to have been of benefit to the incapable person.<sup>25</sup>

### **Efficiency of Process: The Amendments to the Summary Judgment Rule**

One of the key changes in the *Rules* was to the summary judgment rule. Briefly stated, the power of judges hearing summary judgment motions has expanded considerably and the weighing of credibility is no longer a bar in granting summary judgment.

Under the new summary judgment rule, in determining whether a genuine issue requiring a trial exists, a judge may weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence “unless it is in the interest of justice for such powers to be

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<sup>24</sup> *Fiacco v. Lombardi* [2009] O.J. No. 3670, 2009 CanLii 46170 (Ont. S.C.J.) at paragraphs 33 and 36 (“*Fiacco v. Lombardi*”)

<sup>25</sup> A detailed discussion and review of costs and proportionality is found later in this paper.

exercised only at a trial.”<sup>26</sup> Prior to this amendment to the rules, the existing Ontario jurisprudence held that a judge hearing a motion for summary judgment should not attempt to find facts, assess credibility, or decide questions of law, but should assess whether a genuine issue existed as to a material fact requiring a trial.<sup>27</sup> These changes with respect to summary judgment motions are truly ground-breaking.

The cost consequences of failing on a summary judgment motion were also changed. Under the former rules, there was a presumption of substantial indemnity costs payable by the unsuccessful moving party (a significant deterrent). This presumption has been eliminated under the new *Rules*, and has been replaced with a rule conferring authority on a judge to impose substantial indemnity costs where the court is of the opinion that any party has acted unreasonably in bringing or responding to a summary judgment motion, or where a party has acted in bad faith, or for the purpose of delay. Once again, the changes to the costs consequences for summary judgment motions are quite significant and are likely to encourage parties to bring motions for summary judgment in estate and guardianship disputes. Conversely, a responding party will likely want to settle quickly – some would say submit – if successfully responding to a motion for summary judgment appears to be an uphill and expensive battle.

One significant departure from the previous summary judgment rule is that, in the event that summary judgment is not granted, a judge hearing a summary judgment motion now has the same powers as a trial judge: the judge hearing summary judgment may order a “mini trial” (Rule 24.04(2.2)), which permits a judge to hear oral evidence presented by one or more of the parties. The judge may put time limits on the presentation of such evidence. This provision follows Justice Osborne’s recommendation as a way of remedying what he saw was a “binary” result of the former summary judgment rules, which required that either the motion was granted and the action ended, or the court dismissed the motion and the a full trial awaited the parties. Such a result was too rigid in Justice Osborne view. Instead, he recommended that:

there should be more flexibility in the system. Where the court is unable to determine the motion without hearing *viva voce* evidence on discrete issues, the rules should provide for a mini-trial where witnesses can testify on these issues in a summary fashion, without having

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<sup>26</sup> Rule 20.04(2.1)

<sup>27</sup> *Augonie v. Galion Solid Waste Material Inc.* (1998), 1998 CarswellOnt 417 (Ont. C.A.); *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 1998 CarswellOnt 3202 (Ont. C.A.)

to wait for a full trial. This can be done in British Columbia through rule 18A. It could be done in Ontario through a similar rule, i.e. by amending rule 20.

The legislative history of British Columbia's Rule 18A is interesting as it mirrors what has happened in Ontario: Rule 18A was introduced in British Columbia in 1983 in order to address the concern that British Columbia's Rule 18 (summary judgment) was ineffective in that motions for judgment could easily be defeated. Rule 18A was meant to expedite early resolution of cases by authorizing a judge (in chambers) to render judgment in any case, even where the judge was required to decide disputed questions of fact on affidavits. A variety of forms of evidence (for example by way of affidavit and cross-examination before the court) is permitted under the rule, unless it would be unjust to decide the issues in such a manner.<sup>28</sup> While Justice Osborne's recommendation of a separate "summary trial" procedure akin to British Columbia's Rule 18A (summary trial) was not implemented *per se*, the new rule regarding the "mini trial" – in allowing a judge to order the hearing of oral evidence on a motion for summary judgment – arguably would make a separate rule for summary trial redundant at any rate.<sup>29</sup>

### **Public Policy Concerns in Widespread Use of Summary Judgment and Will Challenges**

Summary judgment is not often used in the will challenge context. The reason for this may be due to three factors. First, most estate litigation proceeds by way of application, and not statement of claim. By its very nature, an application is supposed to be an expedited process as the evidence is presented by way of affidavit. Practically speaking, however, most will challenge cases involve credibility issues which will require a court to hear oral evidence, and many applications are therefore converted to trial of issues (where issues of credibility remain outstanding, motions for summary judgment were not an option under the old rule). As such, an application in the will challenge context would often not be a faster procedure than pleadings.

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<sup>28</sup> Canadian Forum on Civil Justice, "Inventory on Reforms – B.C. Summary Trial Rule (Rule 18A)", at <http://cfcj-fcjc.org/inventory/reform.php?id=108>

<sup>29</sup> According to Watson & McGowan, the Rules Committee was concerned about implementing the summary trial procedure as set out in the B.C. Rules because, it "effectively gives any party the right to force a paper trial, and this is not desirable." The new summary judgment powers, including the mini-trial power, according to some early commentary on this topic, "achieve much of the objectives of a summary trial but with court control over the process". Watson & McGowan, "Annual Survey of Recent Developments in Civil Procedure", *Ontario Civil Practice*, SURVEY – 64. (Toronto: Carswell), 2010 edition.

The other reality in estate and guardianship litigation that likely has an impact on the number of summary judgment motions is that mediation in estate and guardianship proceedings is now almost a matter of course, and in some jurisdictions mandatory.<sup>30</sup> As such, parties and their counsel often focus their efforts on getting a matter to mediation and crafting a mediated settlement, however imperfect. Mediated settlements of estate and guardianship litigation are a common occurrence. Motions for summary judgment are therefore a procedural luxury that most parties choose to ignore, given the risks and costs consequences involved.

The final reason why summary judgment motions have not been used with more frequency are two factors which are unique to the estates context: the right of a litigant to have a will proven in solemn form, along with the court's responsibility to ensure that only valid testamentary documents are admitted to probate. In fact, as recently as 2001, the Ontario courts have questioned their very jurisdiction to decide a summary judgment motion on contested estates matters.<sup>31</sup> It has taken since 2009 for the Ontario Court of Appeal to clarify the fact that the courts do have jurisdiction to award summary judgment in contested estates matters, including will challenges.<sup>32</sup>

Even where summary judgment motions have been heard and granted, the courts have expressed their hesitation in granting summary judgment. In *Slater v. Slater*, a case in which Justice Wilton-Siegel granted most of the relief sought by the moving party, His Honour nevertheless noted the need for caution in applying the summary judgment provisions:

I would acknowledge, however, as the applicants did, that a genuine issue for trial would exist if there is any evidence which suggests the lack of testamentary capacity or the presence of undue influence. **The subtleties of proof of such matters, as well as the inquisitorial function of a surrogate court, call for a cautious approach by the Court on such issues.** I believe, as well, that a Court should not grant summary judgment in circumstances in which it is not satisfied that a full evidentiary record has been placed

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<sup>30</sup> Under Rule 75.1, mediation is mandatory in the City of Toronto, the City of Ottawa and Essex County with respect to will challenges and guardianship applications, along with other proceedings enumerated under section 75.1.02(1)(b)

<sup>31</sup> *Knox v. Trudeau* (2001), 38 E.T.R. (2d) 67. In this case Pardu J. found that summary judgment was not appropriate in contested estates matters, notwithstanding the fact that a handful of Ontario decisions had granted or refused summary judgment, and that such a motion could not be brought after an order was given directing the trial of issues. In her decision, she considered the fact that there was no provision for such motions under Rule 75. In that particular case, she also held that the matter was not suitable for summary judgment at any rate. Interestingly, contrary to Pardu's J.'s decision, Cullity J. in *Ettore v. Ettore Estate* (2004), 11 E.T.R. (3d) 208 held that summary judgment was available in contested estate matters, although he declined to award it in that case.

<sup>32</sup> Sharpe J.A., writing for a unanimous Court of Appeal in *Travica v. Mailloux* 2009 CarswellOnt 1752 (Ont. C.A.), cited Rule 75.06 (3)(d) of the *Rules of Civil Procedure* which provides that, on a motion for directions, the court may direct "procedures for bringing the matter before the court in a summary fashion, where appropriate."

before it, even if the facts before the Court do not reveal a genuine issue for trial.<sup>33</sup>  
[emphasis added]

Justice Wilton-Siegel's comment sums up the hesitation a judge may have in granting summary judgment. Similarly, Justice Cullity has indicated that a judgment in a contested wills case affects more than the parties before the court: the court also has a responsibility to the testator and the outside world.<sup>34</sup> For these reasons, Justice Cullity recognized that summary judgment may be more limited than in civil litigation generally. This, combined with the rather punitive cost consequences which accompanied a failed summary judgment motion, may explain their rare use in will challenges.

Are the new summary judgment rules likely to increase the number of summary judgment motions brought in Ontario? As of the date of this paper's submission, no summary judgment motions have been determined in Ontario in the will challenge context.<sup>35</sup> Nevertheless, it is expected that we will see an increase in the number of summary judgment motions brought in the will challenge context. The availability of the "Mini – Trial" in summary judgment motions may also result in more will challenges being resolved in a summary fashion, as courts will likely be more comfortable disposing of weak challenges after hearing *viva voce* evidence. This should be viewed as a positive change: estate litigation is a subtext of civil litigation and while it has some unique aspects, many cases would, on the whole, benefit from a faster, and consequently less expensive, procedure, such as the "Mini – Trial".

The Ontario courts may be well-served by looking at the British Columbia summary judgment and summary trial decisions as a model for understanding the new Ontario summary judgment rule. The British Columbia courts have interpreted the summary judgment and summary trial legislation in a way which provides them with broad and generous powers, as has been stated by the British Columbia Court of Appeal in *Hamilton v. Sutherland*.<sup>36</sup> In that case, the Court of Appeal dismissed an appeal of a summary trial decision which upheld a will and codicil made by the testator, and rejected the appellant's contention that the testator lacked testamentary capacity and

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<sup>33</sup> *Slater v. Slater Estate*, 2004 CanLII 32329 (Ont. S.C.).

<sup>34</sup> *Ettore v. Ettore Estate* (2004), 11 E.T.R. (3d) 208

<sup>35</sup> As of May 28, 2010, the authors are unaware of any motions for summary judgment under the new rules having been heard in will challenges or guardianship disputes.

<sup>36</sup> *Hamilton v. Sutherland* 1992 CarswellBC 159 (B.C.C.A)

that undue influence was present. In the course of its decision, the Court of Appeal re-iterated the principles governing Rule 18A as set out previously by that court in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.*

The procedure prescribed by R. 18A may not furnish perfect justice in every case, but that elusive and unattainable goal cannot always be assured even after a conventional trial and I believe the safeguards furnished by the rule and the common sense of the chambers judge are sufficient for the attainment of justice in any case likely to be found suitable for this procedure. Chambers judges should be careful but not timid in using R. 18A for the purpose for which it was intended.<sup>37</sup>

The Court of Appeal in *Hamilton v. Sutherland* held that where the evidence set out in the affidavits is conflicting and credibility is an issue, the court will be reluctant to decide issues summarily. That was not the case before it, as the “essential features” of the testator’s condition which was relevant to the issues raised in the pleadings was not in dispute between the parties; the Court of Appeal noted that the evidence upon which the judge at first instance relied in finding that the testator had testamentary capacity when she signed her will and codicil was not directly challenged, and the lack of evidence to support the allegation of undue influence failed and was not challenged except in minor, irrelevant aspects.

Furthermore, the Court of Appeal held that “the suggestion that evidence might exist supporting the allegation of undue influence is speculative”. The court rejected the appellant’s argument that “something might turn up” at discovery, citing *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* for the following principle:

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.<sup>38</sup>

The authors suggest that the Court of Appeal’s interpretation of the summary judgment and trial powers in British Columbia may be a good example for the Ontario courts to follow, and doing so will likely result in a quicker resolution of many weak will challenges.

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<sup>37</sup> *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.).

<sup>38</sup> *Hamilton v. Sutherland* 1992 CarswellBC 159 (B.C.C.A), at para. 77, citing *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at p. 214.

A cursory review of the will challenges in British Columbia indicates that more will challenge cases have been adjudicated under British Columbia's summary judgment (Rule 18) and summary trial (Rule 18A) rules than under Ontario's former summary judgment rule.<sup>39</sup> Given the similarity of British Columbia legislation to the new Ontario summary judgment rule, it might be expected that we will see an increase in the number of will challenges decided in Ontario under the new summary judgment rule.

An increase in the number of summary judgment motions will probably be a good thing. In the authors' experience, will challenges often lack merit and can be frivolous. It is, after all, rather painless and often perfunctory to file a notice of objection and start the process of challenging a will with the hope of a quick settlement at mediation; "it cannot hurt" is oft-repeated by counsel and clients. Moreover, the evidence to challenge a will is often tangential or speculative. Such evidence does not withstand close and sustained scrutiny. A good example is where a challenger attempts to set aside multiple wills in order to achieve the desired result and receive their "rightful inheritance". Clients will often challenge a will for emotional reasons and there is certainly a tradition in estate litigation, whether honourable or not, of family members challenging a will where an outsider, such as a caregiver or a recent, younger companion to the testator, is the beneficiary under a new will.

### **Summary Judgment and Guardianship Litigation**

Motions for summary judgment in guardianship disputes are likely more problematic. Guardianship disputes are notoriously fierce and often spiteful. They are, to say the least, unpredictable and guardianship disputes can best be described as a "mugs game". Guardianship disputes are often highly emotional and hard-fought, with allegations of wrongdoing and neglect flying fast and furious. The authors would be surprised if the courts would willingly delve into such a toxic mix on a motion for summary judgment, or even by way of a "mini-trial", unless the dispute was straightforward, for instance, where there is clear evidence of wrongdoing or property mismanagement by an attorney for property on a removal application. Ironically, guardianship disputes that are most likely to benefit from the new summary judgment rules – where the

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<sup>39</sup> Rule 18A will be incorporated as of July 1, 2010 into the new British Columbia civil procedure rules as Rule 9-8. See *Supra*, footnote 4 regarding British Columbia's civil justice reforms.



summary judgment would bring a quick end to a nasty family fight – are unlikely to be the kinds of disputes where summary judgment will be granted even under the new rules.

Is this a problem without a solution? Perhaps not. Guardianship applications are just that – applications. As stated above, applications are, by their very nature, supposed to be an expedited process. Rather than focusing on bringing a motion for summary judgment in a guardianship dispute, counsel should turn their attention to exploiting the benefits of this expedited process. In the authors’ opinion, the courts are more likely to limit the scope of cross-examinations on affidavits given the time restrictions imposed on oral examinations in an action. Regard should be had to Rule 75.06(d) which can be used to design “procedures for bringing the matter before the court in a summary fashion, where appropriate”.

### **Proportionality in Fixing Costs in Will Challenges**

Early assessments of the reported case law support the view that proportionality will arise most frequently in cost decisions.<sup>40</sup> Judicial focus on whether costs are proportionate may be particularly apparent in the estate context. This may be due to the prevailing view among members of the Ontario judiciary that litigants and counsel continue to treat the assets of an estate “as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation.”<sup>41</sup>

Of course, the view that parties can always expect the estate to pay their costs is incorrect. As has been clarified by the Ontario Court of Appeal in *McDougald v. Gooderham*, parties to a will challenge can only expect their costs to be paid out of the estate in narrow circumstances, where public policy interests are engaged.<sup>42</sup> Even prior to the enactment of the new rules, judges have

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<sup>40</sup> Dan Michaluk, partner at Toronto firm Hicks Morley and a blogger on Slaw.ca, a “cooperative Canadian weblog on things legal” notes in a blog titled “Ontario Courts Ease Into the Era of Proportionality” (February 17, 2010) that from a review of the decisions located on Quicklaw, between January 1 – February 15, 2010 the Ontario courts mentioned proportionality 15 times in civil procedure cases. 9 of those cases involving costs, with “3 of those decisions limiting costs awards to prevent recovery that would have been disproportionate to the amounts at stake.” Not unsurprisingly Mr. Michaluk only located 8 cases citing proportionality during the same time period the previous year when the rule was not yet in force, Mr. Michaluk does note that his research is inconclusive as he is not certain how Quicklaw selects cases for publication and its coverage is not comprehensive: <http://www.slaw.ca>

<sup>41</sup> *Salter v. Salter Estate* 2009 CarswellOnt 3175 (Ont. S.C.) at para. 6.

<sup>42</sup> *McDougald Estate v. Gooderham* [2005] O.J. No. 2432 (Ont. C.A.)

been keen to impose “discipline” on estate litigation, to bring it in line with other civil litigation. A recent cost decision of Justice L.B. Roberts in *Vincent v. Vincent*<sup>43</sup> provides such an example.

In *Vincent v. Vincent*, a brother and sister were the main beneficiaries under the estate of their late mother. A dispute arose between them concerning their respective entitlements under their mother’s estate. The sister’s application to set aside portions of an arbitration award was ultimately successful. In arguing costs, the court held that there was no reason why costs should not follow the event. Justice L.B. Roberts stated:

there is no reason why costs should be deferred to the Estate Trustee in the course of the administration of the Estate of Orlie Vincent. The respondent [the brother] had the opportunity to agree with the applicant’s [sister] position and leave the estate issues for the determination of the Estate Trustee, thus avoiding the costs of this application. While the respondent was entitled to oppose the applicant’s motion, if unsuccessful, the respondent must also bear the costs consequences of having his day in court.

... I do not agree with the submission that costs of this application should be paid from the Estate. As noted by the Court of Appeal in *McDougald Estate v. Gooderham* [cite omitted] in the following excerpt from para. 85 of that decision:

The modern approach to awarding costs, at first instance, in estate litigation... recognizes the need to restrict unwarranted litigation and protect estates from being depleted by litigation. Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.

With respect to the correct approach to be followed in the assessment of costs in estate proceedings, Justice Roberts noted that the court should take into account the usual factors and principles applied to other civil proceedings, including those factors set out in Rule 57.01, as well as the principles of fairness, reasonableness and **proportionality** enunciated by the Court of Appeal in *Boucher v. Public Accountants Counsel (Ontario)*.<sup>44</sup>

Justice Roberts’ analysis is but one example of the courts’ increasing reluctance to allow costs to be paid out of the estate except if the case falls within the narrow exceptions articulated in *McDougald Estate v. Gooderham*, and much has been written on this topic. We are likely to see more of this type of analysis by courts in the future as the principle of proportionality will only add

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<sup>43</sup> *Vincent v. Vincent* 2009 CanLII 26930 (Ont. S.C.)

<sup>44</sup> *Boucher v. Public Accountants Counsel (Ontario)*, 2004 CanLII 14579 (Ont. C.A.)

to the courts' resolve to not award the parties their costs out of the estate and to apply the traditional civil costs principle – “loser pays” – to estate litigation.

### **Proportionality in Fixing Costs in Guardianship Disputes**

What has not been the subject of as much commentary – although this is rapidly changing – is the subject of costs in guardianship proceedings under the *SDA*.<sup>45</sup> As stated above, the general principle in fixing costs in such litigation appears to be that before the court makes a costs award against the estate of an incapable person, the court must examine “what, if any, benefit the incapable person derived from the legal work which generated those costs.”<sup>46</sup>

Such an analysis reflects the basic purpose of the *SDA*: the protection of incapable individuals, and insuring that their property is managed wisely and available for their support. The concern is that guardianship litigation remains focused on the best interests of the incapable and that the courts hearing *SDA* proceedings are not “twisted”, as Justice D.M. Brown put it in a recent case, “into arenas in which [family factions] can throw darts at each other and squabble over irrelevant side issues.”<sup>47</sup> As such, the costs of continuing litigation amongst an incapable parent’s “disputatious children” which is of no benefit to the parent, will be borne by the children and not the parent.<sup>48</sup>

Even when some of the litigation is generally found to be to the incapable person’s benefit, costs may be reduced by a court, as was held in *Bailey v. Bailey*, referenced above. This case involved an application by a sister for an accounting of her brother’s management of their mother’s financial and personal affairs and along with a guardianship application. Several orders had been made over the course of the proceeding, most of which were on consent, and the motion heard by Justice Brown was a consent motion in which the parties agreed to an order under which their mother’s home would be sold and other related provisions dealing with the property. Most importantly for the purposes of this paper, the siblings **agreed** to an order that they would both be paid their substantial indemnity costs of the various orders previously made, as well as the motion before Justice Brown.

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<sup>45</sup> Two recent articles include, as noted above, Dermot C.G. Moore’s paper, “Recent Decisions in Guardianship Litigation”, supra, note 19, and Kimberly A. Whaley, “Costs: Who Pays the Costs in Estate Litigation, Update on Costs”, Ontario Bar Association, *Joint Trust and Estate and Young Lawyers Division Primer on Estate Litigation*, (December 9, 2009 - Toronto).

<sup>46</sup> *Fiacco v. Lombardi*, at para. 33.

<sup>47</sup> *Abrams v. Abrams* 2010 CarswellOnt 1135, at para 35.

<sup>48</sup> *Fiacco v. Lombardi*, at para. 1.

Unfortunately for the litigants, Justice Brown took issue with the costs sought by the siblings' counsel: the sister sought costs of the motion before Justice Brown and the previous motions of \$26,854.36 and the brother's counsel sought costs of \$26,483.64, both on a substantial indemnity basis. Justice Brown noted that most of the fees sought related to negotiations between counsel for brother and sister, and that the costs being claimed all related to motions that were on consent.

While Justice Brown said he was satisfied that the mother would benefit from the result of the motion "given the need to sell a house in which she can no longer live" and the previously-made orders were for the mother's benefit "in a general sense", he had "significant concerns about the proportionality between the results obtained and the amounts of legal fees sought by brother and sister."<sup>49</sup> He concluded that in fact most of the legal costs provided little benefit to the mother and reflected instead on the siblings' inability "to arrange their mother's affairs in the informal way by which most families do."<sup>50</sup> Justice Brown reduced the costs being claimed by the brother to \$11,000 and the costs of the sister to \$7,500, which included the costs of the motion before him and four of the previously-made motions.

*Bailey v. Bailey* may be rather exceptional in terms of the court's dramatic reduction of costs sought by the parties, but there have been many other guardianship costs decisions in which either the parties were ordered to bear all or a portion of their own costs.<sup>51</sup>

### **A "Proportionate" Approach to Guardianship Litigation?**

If there is any lesson to be learned from the guardianship costs decisions, it may be that because of the court's willingness to reduce costs claims on the grounds of "proportionality", less draconian measures should always be considered before launching, for example, a guardianship application to remove an attorney for property or personal care.

A good case in point is where an incapable person is being legally cared for by a family member pursuant to a valid power of attorney. However, the attorney, for whatever reason, is no longer liked or trusted by other family members. A common client complaint in such situations is that

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<sup>49</sup> *Bailey v. Bailey*, at para. 17.

<sup>50</sup> *Bailey v. Bailey*, at para. 18.

<sup>51</sup> See, for example *Fiacco v. Lombardi*, *Ziskos v. Miksche* [2007] O.J. No. 4276 (Ont. S.C.), *Woolner v. D'Abreau* 2009 CarswellOnt 664, *Raphael v. Young* [2008] O.J. No. 5245 (Ont. S.C.), *Futerman v. Futerman* [2009] O.J. No. 1529 (Ont. S.C.), *Chu v. Chang* 2010 CanLII 294 (Ont. S.C.), *Dinglasan v. Cabiles* [2009] O. J. No. 2339, *D'Urzo v. D'Urzo* [2007] O.J. No. 594.

family members or friends feel excluded from participating in or influencing decisions regarding the incapable person, particularly when it comes to personal care. However, under the *SDA*, any person, with leave, can seek directions from the court on any question arising under a power of attorney (the same is true regarding a court appointed guardian).

Pursuant to sections 39 and 68 of the *SDA*, the court may give such directions as it considers to be for the benefit of the incapable person and consistent with the *SDA*:

39. (1) If an incapable person has a guardian of property or an attorney under a continuing power of attorney, the court may give directions on any question arising in connection with the guardianship or power of attorney.

68. (1) If an incapable person has a guardian of the person or an attorney under a power of attorney for personal care, the court may give directions on any question arising in the guardianship or under the power of attorney.

Moreover, section 66(6) of the *SDA* states that an attorney must foster regular personal contact between the incapable person and supportive family members and friends. Section 66(7) directs that the attorney shall consult with supportive family members and friends who are in regular contact with the incapable person, as well as the incapable person's caregivers.

66. (6) The guardian shall seek to foster regular personal contact between the incapable person and supportive family members and friends of the incapable person.

66. (7) The guardian shall consult from time to time with,

- (a) supportive family members and friends of the incapable person who are in regular personal contact with the incapable person; and
- (b) the persons from whom the incapable person receives personal care.

The requirements of section 66 of the *SDA*, coupled with the ability to seek directions from the court, offer family members and friends the means to ensure that they remain involved with their loved ones and are not simply sidelined. In most cases, these measures should be considered first before engaging in full-blown litigation to remove an attorney.

### **The Courts' Oversight of Costs in Guardianship Applications: Access to Justice?**

Notwithstanding the above, where there is genuine concern and frustration that the incapable person is not being properly cared for and/or his or her finances are being squandered, it may be

necessary to launch a removal application. In such situations, even when an application is successful, clients should be aware that their legal fees may ultimately be coming out of their own pocket and not the assets of the incapable individual.

This was precisely what occurred in *Teffer v. Schaefers*.<sup>52</sup> The attorney for property of Ms. Schaefers was subject to a number of orders, including an order requiring him to pass his accounts, and his overall performance was questioned by Ms. Schaefers' nieces. Counsel was appointed pursuant to section 3 of the *SDA*. After much obfuscation and delay by the attorney for property, he was eventually removed by Justice Fragomeni, who described his conduct in harsh terms. Moreover, the attorney was ordered to pay costs personally on a substantial indemnity basis. Quantum, however, was an issue.

In determining costs, Justice Fragomeni refused to order costs payable out of the property of Ms. Schaefers as suggested by the removed attorney. Given the attorney's conduct, and his finding that the attorney had failed to comply with court orders and counsels' numerous requests for information, Justice Fragomeni ordered that the attorney was responsible for costs incurred by the nieces and Section 3 counsel, as well as the Public Guardian and Trustee ("PGT"). The PGT maintained that its involvement was necessary as the attorney threatened to terminate Section 3 counsel's involvement due to an alleged conflict of interest (unfounded as it turns out).

However, Justice Fragomeni refused to order that the attorney pay all of the costs sought by the parties on the grounds that such an award would be too punitive. The total costs sought by the applicants were \$187,321.40, the costs submitted by section 3 counsel was \$59,433.90, the PGT's costs were \$14,429.62. Justice Fragomeni found that some of the costs were disproportionate and excessive, and surprisingly that the lawyer's materials were "overworked". He was not satisfied that the amounts submitted were reasonable in light of the nature of the issues before the court. Instead, Justice Fragomeni ordered that it was appropriate to order costs on a substantial indemnity basis for the applicants, the PGT, and section 3 counsel. Justice Fragomeni ordered that \$125,000 of costs were payable to the parties, but only \$64,429.62 was to be paid by the attorney personally. The remainder was payable from Ms. Schaefers' property.

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<sup>52</sup> *Teffer v. Schaefers (Trustee of)* [2009] O.J. No. 1762 (Ont.S.C.J.). Justin de Vries represented Ms. Schaefers' nieces.

At the end of the day and despite Justice Fragomeni's harsh words for the removed attorney for property, the result was that the two nieces were not indemnified for their costs and in fact had to pay \$117,000 of their legal costs. Moreover, Section 3 counsel, who had been appointed to represent Ms. Schaefer, was \$19,000.00 short in that the removed attorney was not required to full reimburse all of Section 3 counsel's legal costs (the difference would have come out of Mrs. Schaefer's pocket). It is not clear why the remainder of the costs were not properly payable out of Schaefer's estate, when the litigation clearly benefited her by removing a rogue attorney for property.

The courts are, of course, entitled to reduce costs where they are excessive. However, some judges have recognized that restraint should be exercised when doing so. As Justice Hill stated in *Gebreselassie v. VCR Active Media Ltd.*,<sup>53</sup> in fixing the legal costs, subject to proportionality concerns, the court should not "second-guess" successful counsel unless the number of compensable hours submitted is "grossly excessive".

Similarly, Justice Feldman (as she then was) in *Tri-S Investments v. Vong* held that it is not the court's function when fixing costs to "second guess successful counsel on the amount of time that should or should not have been spent to achieve the same result, unless the time is so grossly excessive as to be obvious overkill."<sup>54</sup> In the authors' view, the principle of proportionality can easily become a convenient pretext for the court to engage in judicial hindsight by playing armchair general and questioning decisions made by counsel during the course of a litigious proceeding. Simply put, courts should be loath to become **overly** interventionist, even on the issue of costs.

What constitutes costs which are disproportionate when the interests at stake is the welfare of an incapable individual? In *Teffer v. Schaefer*, Ms. Schaefer was an elderly woman suffering from Alzheimer's disease, whose financial affairs were not, as the court found, properly handled by her attorney for property. Kimberly A. Whaley, in a thorough and considered article reviewing this and other costs decisions in the estate and guardianship context, questions whether there was, as she puts it, "Access to Justice" for those trying to protect Ms. Schaefer:

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<sup>53</sup> *Gebreselassie v. VCR Active Media Ltd.*, [2007] O.J. No. 4739 (S.C.J.)

<sup>54</sup> *Tri-S Investments v. Vong*, [1991] O.J. No. 2292 (Ont. Gen. Div.)

If an appropriate individual intervenes for protective purposes concerning an elderly incapacitated person and is successful in that intervention - doesn't 'access to justice' also then mean access to their costs based on success? 'Proportionality' must also mean certainty of treatment in the outcome and consistency of treatment. 'Access to Justice' and 'Proportionality' requires at a minimum certainty of treatment from the Court so that counsel and litigants are informed as to whether they want to act or embark on such proceedings, knowing the costs consequences and the factors taken into account in the determination.<sup>55</sup>

Is it enough for the courts to say that parties will be awarded their legal costs, so long as they are not disproportionate to the issues before the parties? Should the nieces have waited longer, for better or more extensive evidence of the attorney's financial mismanagement of Ms. Schaefer's property prior to bringing a removal application? Obviously, the court did not think so or else Justice Fragomeni would not have granted their removal application. And yet, nevertheless, costs were reduced, without a clear analysis of why the costs were deemed "excessive" and what amount of litigation, or level of procedure, would have been appropriate to obtain the substantive result (only general comments were made).

### **A Principled Approach to the Application of Proportionality**

What are the ramifications of courts exercising a broad discretion in reducing costs? One effect may be that potential litigants will be dissuaded from bringing a will challenge or guardianship claim entirely. The second effect may be that litigants commence a proceeding, but later determine mid-stream that the risks of proceeding in light of a spirited and strong defence (whether wide of the mark or not) and the attendant adverse cost consequences are simply too great. Instead, litigants quite rationally may decide that it is better to devise their own resolution through privately-held mediation or other dispute resolution methods whereby they may determine for themselves how legal costs might be paid.

Is this troubling? Much has been written about the benefits of ADR, including cost advantages, and the value of "self-determination". However, there are some well-noted concerns which accompany their use as well. A long-term effect is the stagnation of the common law: if cases are not litigated, the common law will not develop. Perhaps more immediately, the opportunity to

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<sup>55</sup> Kimberly A. Whaley, "Costs: Who Pays the Costs in Estate Litigation, Update on Costs", supra, note 45, at pgs. 22 - 23.



have a claim heard in open court should be available to a party who desires it. As Master Short commented in his recent decision which discusses the concept of proportionality in the context of security for costs, *Moosa v. Hill Property Management Group*, the fact that alternative dispute resolution is available, “ought not to deprive any citizen of a right of access to a trial before the courts of this province if that is what is desired or necessary.”<sup>56</sup> Ironically, one of the goals of Justice Osborne’s recommendations – to increase the accessibility of the civil justice system – may be undercut if litigants have no assurance of how and when courts will exercise their discretion in fixing costs.

## **Conclusion**

The principle of proportionality is not necessarily a new concept. In some ways, the courts have been applying the principle for centuries and devising sensible rules. What is new is that it has now been codified in the *Rules* and proportionality has certainly become more fashionable or notorious, depending on your perspective, of late. While proportionality as a concept is to be applauded, as always the devil is in the details (of implementation).

The potential impact of proportionality on cost awards is clear and the courts must proceed cautiously. It is easy for the courts to overreact to what the court considers, at first blush, an expansive or excessive request for costs. This is particularly true if a court fails to take the time to carefully consider what is disproportionate in the proceeding and what procedures and time spent were, in fact, required in the particular circumstances of the case.

In a guardianship disputes, the authors submit that the courts must truly pause and consider the interests of an incapable person, and recognize that those interests cannot also be described in monetary terms. From a public policy point of view, the courts need to be alert to the consequences of family members simply deciding they cannot afford the legal fees of protecting an incapable person from a rogue or misguided attorney. Surely, society will want vulnerable individuals to be protected, no matter the cost. Relying on the PGT is not the answer. The PGT is an office of last resort and cannot, in any event, fill the breach if family members decide they simply cannot afford to litigate.

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<sup>56</sup> *Moosa v. Hill Property Management Group* 2010 ONSC 13 (CanLII), at para. 112.

Finally, when it comes to motions for summary judgment, the changes which have been implemented and their impact on estate and guardianship disputes are likely positive ones. However, the courts again need to proceed with caution. Summary judgment motions are designed to weed out meritless claims, and their availability in estate and guardianship disputes is a very positive step towards an accessible and efficient civil justice system. However, quick, easy justice is often justice denied. Again, the courts will have to take a measured approach to implementing the new rules regarding summary judgment motions.

In the end, the implications of proportionality can be quite severe. Despite a stated desire to enhance access to justice, the principle of proportionality can, if misapplied, restrict access to justice and result in an inequitable result or the legitimate rights of a party being swept aside. Procedure should not always trump substance. Estate and guardianship litigation is unique, but not so unique that it should stand apart from the general principles that apply to all civil litigation. The courts must nevertheless recognize that one size does not necessarily fit all.