DEAD RINGERS AND DOWN PAYMENTS (The Art of Asking)

SUMMARY JUDGMENT IN ESTATE LITIGATION

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Introduction

Motions for summary judgment are powerful tools in the arsenal of any litigator. However, until relatively recently such motions were generally regarded as beyond the reach of, or not available to, the estate litigator. That reality has changed and there are now "new facts on the ground".

This paper will address summary judgment motions. After a general introduction, recent case law will be canvassed and considered so that the reader can better understand in what circumstances such motions are appropriate and likely to succeed. As the title of this paper suggests, much depends, as with any motion, on the art of asking or, at least, asking for the right relief at the right time in the right set of circumstances. A final section will therefore provide helpful tips as well as pitfalls to avoid.

Summary Judgment Motions - Rule 20

The procedure on a summary judgment motion is as follows:

Where Available

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim.

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just.

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim.

Affidavits

20.02 An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01(4), but on the hearing of the motion an adverse inference may be drawn, if appropriate, from the failure of a party to provide the evidence of persons having personal knowledge of contested facts.

Disposition of Motion

20.04 (1) In response to affidavit material or other evidence supporting a motion for summary judgment, **a responding party may not rest on the mere allegations or denials of the party's pleadings**, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial. [emphasis added]

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

Costs Sanctions for Improper Use of Rule

20.06 (1) Where, on a motion for summary judgment, the moving party obtains no relief, **the court shall fix the opposite party's costs of the motion on a substantial indemnity basis and order the moving party to pay them forthwith** unless the court is satisfied that the making of the motion, although unsuccessful, was nevertheless reasonable. [emphasis added]

(2) Where it appears to the court that a party to a motion for summary judgment has acted in bad faith or primarily for the purpose of delay, the court may fix the costs of the motion on a substantial indemnity basis and order the party to pay them forthwith.

Stay of Execution

20.08 Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just.

General Principles

As noted by Morden J.A. in *Irving Ungerman Ltd v. Galanis (1991)*, 4 O.R. (3d) 545 (C.A.) ("*Ungerman*"), Rule 20 "…substantially expanded the potential scope of a litigants' right to move for summary judgment…". Simply put, defendants did not have the right to move for summary judgment before Rule 20 was adopted. The procedure is now equally available to plaintiffs and defendants and a summary judgment motion may be brought on all or part of the claim.

The general principles in respect of obtaining relief under Rule 20 are now well known and trite in their application. The trial and appellate courts have canvassed those principles on any number of occasions.

On all summary judgment motions, the core question is - has the moving party established that there is not a genuine issue for trial. Rule 20.04(1) makes it clear that the party responding to a summary judgment motion may not rest on the pleadings, but must provide evidence from which the motions judge can conclude that there is a genuine issue for trial. [see *Transamerica Occidental Life Insurance Company et al. v. Toronto-Dominion Bank (199?)*, 44 O.R. (3d) 97 (C.A.)]

In the oft-quoted Ontario Court of Appeal case, *1061590 Ontario Ltd. v. Ontario Jockey Club (1995),* 21 O.R. (3d) 547, Osborne J.A. stated as follows:

> The purpose of Rule 20 is clear. The rule is intended to remove from the trial system, through the vehicle of a summary judgment proceeding, those matters in which there is no genuine issue for trial [citations omitted]. The motions judge hearing a motion for summary judgment is required to take a

> hard look at the evidence in determining whether there is, or is not, a genuine issue for trial. The onus of establishing that there is no triable issue is on the moving party.... However, a respondent on a motion for summary judgment must lead trump or risk losing: see Rule 20.04(1). Generally, if there is an issue of credibility which is material, a trial will be required [citation omitted]. [see page 557]

In *Ungerman*, the court commented on what was a "genuine issue for trial":

> If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to satisfy the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists. [see page 551]

As a result, the motions judge cannot assess credibility, weigh the evidence or find facts. In *Aguonie et al. v. Galion Solid Waste Material Inc. et al. (1998),* 38 O.R. (3d) 161, (C.A.), Borins J.A. stated:

> In ruling on a motion for summary judgment, the court will never assess credibility, weight the evidence, or find facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved to the trier of fact. [see page 169]

However, a responding party, in turn, cannot simply rely on the bald assertions contained in the pleadings and must put its best foot forward. Critically, the responding party must demonstrate that there is evidence from which the motion judge can conclude that there is a genuine issue for trial.

Summary Judgment Motions in Estate Litigation

There are several cases that have dealt with the issue of motions for summary judgment in contentious estate proceedings, the most prominent (or notorious) of which are: *Straus v. Bainbridge (1999)*, 38 E.T.R. (2d) 110 (Ont. Gen. Div.); affirmed 38 E.T.R. (2d) 119 (Ont.

C.A.), ("*Straus*"), a decision of Hoilett J. at first instance and upheld on appeal. *Oestreich v. Brunnhuber (2001)*, 38 E.T.R. (2d) 82 ("*Oestreich*"), a decision of Haley J. granting summary judgment. *Knox v. Trudeau (2001)*, 38 E.T.R. (2d) 67 ("*Knox*"), a decision of Pardu J. denying a motion for summary judgment on the ground that such motions were not available in contentious estate proceedings.

Adding to the uncertainty at the time was the fact that the decisions of Haley J. and Pardu J. were released one day apart and neither decision apparently considered *Straus*. It was not until the decision of Cullity J. in *Ettorre Estate, Re (2004)*, 11 E.TR. (3d) 208 (Ont. S.C.J.) ("*Ettorre*") was released some three years and a half years later, that a degree of certainty was brought to the situation with *Straus* being effectively recognized as the prevailing decision. Finally, *Slater v. Slater* (2004), 12 E.T.R. (3d) 246 (Ont. S.C.J.) ("*Slater*") will also be considered as it is a decision that follows and endorses *Ettorre*.

Straus

Ms. Straus was a neighbour and close friend of the deceased, Robert Bainbridge, and his wife. In his last will and testament, dated March 20, 1992, the deceased left his entire estate to Ms. Straus "in recognition and in gratitude for her kindness in assisting me and my late wife". [see page 113 at para. 5] Ms. Straus was the executrix and sole beneficiary under the deceased's estate. In challenging the will, the estranged son of the deceased alleged lack of testamentary capacity and undue influence.

Ms. Straus brought a motion for summary judgment that the deceased had testamentary capacity and that the will was not procured by undue influence. Hoilett J. granted summary judgment. Hoilett J. held that the deceased had the benefit of experienced and competent counsel in the making of his will. The deceased's counsel and doctor filed affidavit evidence stating that they believed that the deceased was of sound mind and fully capable of managing his affairs. It was clear to Hoilett J. that the deceased was well aware of the nature of the act in which he was engaged when he instructed his solicitor in the preparation of his will. Hoilett J. also held that the responding affidavit was "replete with

speculation, innuendo, hearsay, gossip and rumour." [see page 116 at para. 14]

Finally, Hoilett J. concluded his decision granting summary judgment as follows

> With the greatest respect to counsel for the responding party, Rule 20 is not one requiring a responding party to satisfy some vague duty of disclosure, as he has argued. Indeed, even if that were the minimum threshold to be met by the responding party, that threshold has not been met. Properly characterized, not only has the responding party failed to play trump but, at the risk of over-extending the metaphor, I am afraid the responding party has played a joker. [see page 119 at para. 24]

The Court of Appeal simply dismissed the responding party's appeal with short reasons.

Oestreich

The deceased, Berta Rokenbauch ("Berta"), left the whole of her estate to her husband, Erwin Rokenbauch ("Erwin"), and appointed her daughter as sole executrix pursuant to a last will and testament dated March 28, 1984. Berta died in March 1985. Erwin then entered into a 12-year common law relationship with Hedwig Oestreich ("Hedwig") that lasted until Erwin's death in February 1997.

In his last will and testament dated February 21, 1996, Erwin appointed Hedwig as his sole executrix. Under the terms of Erwin's will, Hedwig was to receive real property - a house. The respondents were all children of Erwin and the residue beneficiaries under his will. The dispute was in respect of the disposition of the real property.

Hedwig brought a motion for summary judgment declaring that the children were estopped from attacking Berta's will. Haley J. dismissed Hedwig's motion. The children brought a motion for summary judgment for a declaration that their mother's will was invalid because Hedwig would be unable, on the evidence adduced on the motion, to satisfy the onus on her to prove due execution of the will, knowledge and approval of the contents of the will, and testamentary capacity. If Berta's will was invalid, Erwin would only receive his widower's preferential share and 1/3 of the residue of the estate under the *Succession*

Law Reform Act. Haley J. dismissed the children's motion. A genuine issue existed as to due execution which could not be resolved without giving weight to the evidence of the witnesses, some of which was inconsistent. However, it is important to note that Haley J. did not find that summary judgment motions were not available in contentious estate proceedings.

Knox

The defendants moved for summary dismissal of the plaintiff's allegation that Julia Trudeau lacked testamentary capacity and was subject to under influence when she executed a document dated June 8, 1994 purporting to be her last will. The defendants argued that there was no evidence of incapacity and coercion. A November 18, 1997 order directed the trial of those two issues. Examinations for discovery had been completed prior to the defendants bringing the summary judgment motion.

Pardu J. first considered whether or not the court had jurisdiction to grant summary judgment in contentious estate proceedings. Pardu J. ultimately decided that summary judgment motions were not available. As stated above, Pardu J. did not consider *Straus* and was not aware that Haley J. was considering the same issue at virtually the same time in *Oestreich*. As we now know, Haley J. was of the view that summary judgment motions were, in fact, available in contentious estate proceedings.

In *Knox*, Pardu J. wrote as follows:

> Rule 20 is not part of the rules applicable to contentious estate matters. Neither party has referred the court to any case which has applied Rule 20 in that context… [*Straus* was apparently missed] A comprehensive procedural order was made in these proceedings on November 18, 1999… Once an order is made directing a trial, this rule [Rule 75.06(3)] does not provide a basis to come back and argue that the matter should not proceed to trial because of insufficiency of evidence…
>
> Disputes about testamentary capacity and undue influence do not lend themselves to resolution by a court by means other than a trial, with oral evidence. The state of mind of a testator is an amorphous thing, and

> subtleties in the behavior and condition of the testator in light of all of the surrounding circumstances can swing the balance one way or the other. [see page 69 at para. 7, page 70 at paras. 8, 9 10 and 11]

In the end, Pardu J. clearly held that where an order for the trial of issues had been made pursuant to Rule 75.06(3), there was no authority in the "contentious estate proceedings rules permitting a litigant to seek summary judgment based on the insufficiency of the plaintiff's case, as revealed under oath". [see page 71 at para. 13]

What Pardu J. did not address was whether a summary judgment motion was available where an order for directions was not in place and/or an order for directions was in place, but examinations for discovery had not yet been conducted. It is obviously difficult to determine what Pardu J. might have concluded if no directions had been sought or the action was still relatively nascent. However, it is fair to conclude that the decision relied heavily on the fact that an order for directions was, in fact, in place. Pardu J. clearly placed great stock in the procedural requirements of Rule 75.06(3).

In any event, Pardu J. held:

> Even if there were jurisdiction to grant summary dismissal of the Plaintiff's claims, this is not an appropriate case for that remedy, if the principles developed in relation to Rule 20 are applied… A trial judge who has the advantage of hearing the witnesses and cross-examination of witnesses will be in the best position to determine which document is the valid last will of Julia Trudeau. It is not appropriate to assess the credibility and reliability of evidence and the inferences to be drawn on this motion. [see page 71 at para. 14 and page 73 at para. 28]

Ettorre

Maria Ettorre ("Mrs. Ettorre") died in 2002 - she was 75 years old. Two sons, Vito and Enzo, and two daughters, Rose and Brigitte, survived their mother.

Vito challenged the validity of his mother's 2001 will and sought a declaration that an earlier 1997 will governed. The terms of the 1997 will directed that, should Mrs. Ettorre's

husband predecease her, her estate should be distributed among her issue in equal shares per stirpes. Vito was named estate trustee. Vito's brother Enzo supported Vito's position. Rose and Brigitte opposed Vito's challenge.

While she was still alive, litigation arose between Vito and his mother. Mrs. Ettorre sought a declaration that she was the owner of real property in Ontario and in Florida that had been owned by her, but transferred to Vito in late 1999 and early 2000. Mrs. Ettorre claimed that at the time she had not understood the transfer documents she had signed and had not received independent legal advice.

In 2001, Mrs. Ettorre executed a new will appointing her two daughters as estates trustees and directing that the residue of her estate be transferred equally among her four children, but only if Vito had settled the litigation that was on going between them and had transferred to her the disputed properties. If the litigation was still outstanding at the date of her death, the residue was to be divided among her two daughters and one son (Vito was therefore excluded).

In his estate action, Vito sought an order that the 2001 will was invalid on the ground that is was not duly executed, that Mrs. Ettorre lacked testamentary capacity and knowledge and approval of its contents, and that it was procured by undue influence, duress and fraud.

Rose and Brigitte, as estate trustees, defended the action and counterclaimed for an accounting and damages regarding profits allegedly obtained by Vito. They also crossclaimed against Enzo for repayment of a loan that he had allegedly received from their parents in February 1988.

After the estate action and earlier action regarding the Ontario and Florida properties were set down and listed for trial, Vito moved for summary judgment in the estate action together with alternative relief.

Cullity J. noted that the "animosity among the parties, particularly Vito and Rose - has

affected the conduct, and the course, of the proceedings. [see page 214 at para. 20]. Cullity J. then considered Vito's motion for summary judgment.

Availability of Summary Judgment Motions

In his decision, Cullity J. turned his attention to whether summary judgment motions were available in estate cases. Cullity J. noted as follows:

> As I suggested in *Stern v. Stern*, [citation omitted], the question whether Rule 20 motions can be accommodated within the contentious estate practice governed by Rule 75 is one of some difficulty. The difficulty, in part, lies in determined the extent to which, after the abolition of surrogate courts, the practice has been assimilated to the adversarial procedure applicable to civil actions in general. [see page 218 at para. 38]

Cullity J. could see no reason why the considerable discretionary control that the former surrogate court exercised over estates, particularly with respect to contentious estate proceedings, was less extensive under Rule 75.06(3) than it had been previously. Rule 75.06(3) empowers the court, on a motion for directions, to direct the issues to be decided, who are parties, and the procedures for bringing the matter before the court, including what, if any, summary procedures, may be appropriate.

As pointed out by Pardu J. in *Knox* "[t]he purpose of Rule 75.06(3) is to enable the judge at the outset to design a procedural regime most appropriate for the nature of the dispute, and contemplates the possibility that the proceeding may not be encumbered by all of the procedural steps that may accompany other civil proceedings…". [see page 70 at para. 9]

In considering whether summary judgment motions were available in estate cases, Cullity J. noted the special responsibility of the court in probate practice:

> Its function is not merely to adjudicate upon a dispute between the parties. It has always had inquisitorial features. [see page 219 at para. 41]

That special responsibility arises because a judgment granting probate is good against the world and does not bind only the parties to the litigation. Moreover, that special responsibility arises as a result of what many believe is the court's responsibility to the deceased, who is obviously no longer present to advance their rights and wishes. In other words, wills contests have always stood apart from the world of civil actions.

However, as Cullity J. also recognized:

> [To suggest that] because motions for summary judgment were unknown in the surrogate courts, they should not now be permitted as a sort of half-way house between proof in common form – over the counter – and the more expensive procedure of proof in solemn form with *viva voce* evidence [is not correct]. If the special responsibility of the court is to be maintained, it is, however, essential that there be a full inquiry into the circumstances affecting the validity of a will and this may require the intervention of the court if selective evidence is led by the parties, or if, in the opinion of the court, cross-examination has been inadequate… As Haley J. stated in *Oestreich v. Brunnhuber*, [citation omitted], in which summary judgment was denied:
>
>> The procedure leading to a declaration by the court that a will is the last will of a person is more than a matter between the parties. It is a declaration which can be relied on by all the world, and, therefore, commands full evidence before the court when any issue of validity has been raised. [see page 220 at para. 42]

As a result of the foregoing, Cullity J. stated that if a summary judgment motion was available, such a motion might still be more limited than in other civil litigation. "Essentially, the question is whether the assumption required on a motion for summary judgment that the court has a full evidential record before it [and is therefore able to grant or deny summary judgment] is appropriate in the contested wills cases." [see page 220 at para. 43]

In *Knox*, Pardu J. held that summary judgment motions were not applicable to estate matters. Pardu J. placed considerable weight on the fact that a Rule 75.06(3) order was made in the proceedings and concluded that "…where an order for a trial of issues has

been made pursuant to Rule 75.06, there is no authority in the contentious estate proceedings rules permitting a litigant to seek summary judgment based on insufficiency of the plaintiff's case, as revealed by examinations under oath." [see page 71 at para. 13]

In considering *Knox*, Cullity J. was of the opinion that while Pardu J. had failed to consider *Straus*, a decision affirmed by the Court of Appeal, he could not. (By coincidence, Maurice Cullity, as he was then, was the "experienced and competent counsel" Hoilett J. referred to in *Straus*.) Cullity J. therefore stated: "… I am dismissing the motion for summary judgment specifically on the ground that there are triable issues and not on the ground that the procedure under Rule 20 is not available in contentious will proceedings after an order for a trial has been made". [at page 221 at para. 46] It is interesting to note that in *Straus* the motion for summary judgment was brought after the Sheard J. had directed the issues to be tried. [see page 112 at para. 1]

The Record before the Court

In his summary judgment motion, Vito had moved for judgment on his claims that the 2001 will was invalid for want of due execution and that 1997 will was his mother's last will and testament. Vito filed affidavits from the two individuals who signed as witnesses to Mrs. Ettorre's signature on the 2001 will. Vito submitted that based on this evidence, and the subsequent cross-examinations of Rose and Brigitte on their respective affidavits, it was impossible to hold that the will was executed in compliance with section 4 of the *Succession Law Reform Act*, namely, that the witnesses were present at the same time as Mrs. Ettorre signed the 2001 will. Vito's counsel argued that both witnesses were not present when Mrs. Ettorre signed the 2001 will.

Cullity J. stated that the court would not conduct a paper trial of the action on its merits. The only question was whether there was a genuine issue to be tried. Cullity J. further noted that despite the mandatory words of rule 20.04(1), there was no onus on a responding party to file evidence - the existence of a triable issue could be found in

"gaps, or other deficiencies, in the evidence of the moving party." [see page 216 at para. 27]

Cullity J. characterized the evidence of the two witnesses (Mrs. Ettorre's doctor and his receptionist) regarding the due execution of the 2001 will as diffuse. By contrast, Cullity J. stated that the evidence of Rose was clear in that the 2001 will (together with powers of attorney) were signed when Mrs. Ettorre and the two witnesses were all together in the examination room of Mrs. Ettorre's doctor. Vito's counsel could not attack Rose's credibility on the motion as such an attack would, by definition, warrant a trial and the dismissal of his client's summary judgment motion.

However, Cullity J. recognized that he could not grant summary judgment without weighing the evidence and ultimately rejecting Rose's evidence. Cullity J. therefore wrote as follows:

> This would, I believe, be to conduct a paper trial. I am satisfied that Rose's credibility, and the reliability of the recollections of the witnesses, are in issue and can only be determined at a trial. If Rose is found to be credible and reliable – and her evidence is accepted – I do not see how this particular challenge [due execution] to the validity of the will could succeed. Whether or not that is correct, I am satisfied that there is a genuine issue for trial on the question of due execution and, on that ground, I declined to grant summary judgment with respect to the 2001 will. [see page 217 at para. 33]

As indicated earlier, Cullity J. noted that a responding party did not have to file affidavit material to show that a genuine issue for trial arose in the context of a summary judgment motion, but a party could rely on the gaps, or other deficiencies, in the evidence of the moving party. Cullity J. relied on and cited the Court of Appeal's decision in *Hi-Tech Group Inc. v. Sears Canada Inc. (2001)*, 52 O.R. (3d) 97 (C.A.) in support of this proposition.

In the end, Cullity J. was asked to consider the evidence of the witnesses and weigh their credibility – he correctly declined to do so on a summary judgment motion. There was a

genuine issue of fact, due execution, that required a trial.

Two points are worthwhile highlighting in *Ettorre* given that Cullity J. held that summary judgment motions were available in wills contests: Firstly, Rule 20.04(1) does not cast a burden on those opposing a motion for summary judgment, and supporting a will, to satisfy the court that a will is valid. Presumably the converse is true - Rule 20.04(1) does not cast a burden on those opposing a summary motion, and challenging a will, that the will is invalid. Secondly, despite the mandatory language of Rule 20.04(1), a responding party need not file any evidence on a motion for summary judgment in an estate action to defeat such a motion. The responding party can simply rely on the gaps and inconsistencies in the moving party's evidence – i.e. the lack of evidence that there is no genuine issue for trial.

Slater

In *Slater*, an order had been issued directing the issues to be tried and examinations for discovery had been completed. As a preliminary matter, Siegel J. dealt with the issue of summary judgment motions in contentious estate proceedings and stated as follows:

> … I am of the view that a Court has authority under the *Rules of Civil Procedure* to grant summary judgment on a Rule 20 motion in a contentious estate proceeding. This intention is evidence in rule 75.06(3)(d)… 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 [emphasis added]. 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 before it, even if the facts before the court do not reveal a genuine issue for trial. [at page 248, paragraph 4]

In *Slater*, the respondent claimed, among other things, that one of the applicants had exercised undue influence over Mrs. Slater and that she lacked testamentary capacity. However, the court granted the applicants' summary judgment motion with respect to

undue influence holding that there was no evidence, other than unsupported allegations, to support undue influence as a cause of action.

Furthermore, where Mrs. Slater made two isolated mistakes in her will, but there was no evidence that such mistakes formed a pattern of mistakes or forgetfulness to suggest that Mrs. Slater lacked testamentary capacity, the court granted the applicants' summary judgment motion in this regard as well. Siegel J. noted that the respondent made unsubstantiated allegations in his affidavit regarding the possible onset of dementia or other incapacitating conditions. However, the respondent had not seen Mrs. Slater in six years, had provided no medical evidence in rebuttal, and had not cross-examined Mrs. Slater's doctor – all fatal mistakes as the respondent had failed to lead "trump". There was also no evidence of suspicious circumstances that would place a greater burden on the applicants, as propounders of the will, to prove testamentary capacity.

As to whether the will as executed was, in fact, the testatrix' will - the lawyer drafting the will had replaced the first page of the will after execution as a result of a phone call from the testatrix - the court declined to grant summary judgment.

Tips and Pitfalls

- Evidence in support of a summary judgment motion must be clear and concise. Legitimate, competing facts will be fatal to the motion.
- Rule 20 does more than require a responding party to satisfy some vague duty of disclosure – a responding party must lead trump or risk losing.
- It is not appropriate to assess the credibility and reliability of evidence and the inferences to be drawn on a summary judgment motion. A trial judge, who has the advantage of hearing the witnesses and the cross-examination of witnesses, will be in the best position to determine which document is the valid last will of the deceased.
- Credibility of a witness cannot be in doubt as there would otherwise be a genuine issue for trial.
- An order for directions does not prevent a party from bringing a summary judgment motion. The same is true whether or not examinations for discovery have been

completed. (N.B. At the hearing of a summary judgment motion, a party cannot rely on or use in evidence its own examination for discovery. [see Rule 37.04(2)])

- Where the recollections of a witness are vague, imprecise, uncertain, or weak - common enough themes in contentious estate proceedings where a witness is often asked to recall events of long ago - issues of credibility will be present such that a genuine issue for trial exists.

- Inconsistencies between witnesses will likely give rise to issues of credibility such that a genuine issue for trial exists.

- The court will reject an affidavit replete with speculation, innuendo, hearsay, gossip and rumor.

- Inconsistencies in a witness' own evidence (often between affidavit evidence and evidence elicited on cross-examination) will likely require the court to consider the credibility of a witness such that a genuine issue for trial exists.

- Unsupported allegations of undue influence or testamentary capacity will result in the court summarily dismissing such claims. A respondent must lead trump or risk losing.

- Findings of fact on critical issues which go to validity of a will and which invoke the court's inquisitorial function should be left to trial judge.

- A genuine issue for trial will exist if there is any evidence, which suggests a 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.

- Regardless of whether summary judgment motions are available in contentious estate proceedings, the court has authority to address questions of interpretation of a will on a summary judgment motion.

- A court will not likely grant summary judgment in circumstances in which it is not satisfied that a full evidentiary records has been placed before it, even if the facts before the court do not reveal a genuine issue for trial.

- A self-serving affidavit is not sufficient to create a triable issue in the absence of detailed facts supporting the allegations made.

- Even in the context of a summary judgment motion regarding testamentary capacity, evidence of suspicious circumstances will place a greater burden on the applicants, as propounders of a will, to prove testamentary capacity. However, if suspicious circumstances exist, the propounders of the will should think twice before proceeding

by way of summary judgment.

- Affidavit evidence based on information and belief is allowed, but a negative inference may be drawn.
- Rule 20.06 – Cost Sanctions for Improper Use of Rule.