Preserving, Holding, or Otherwise Dealing with Estate Assets during Litigation:

What are the Options in Troubled Times?[1]

Introduction

Will Challenges are becoming more common. Whether it is the result of the much-vaunted and long-heralded wealth transfer between generations, the aging of society, or an American inspired litigious approach to sorting out life's inevitable disputes, Will Challenges will likely only increase in quantity and complexity.

Laying the groundwork for a Will Challenge is obviously crucial. The proper footing will (1) provide certainty to the process; (2) give confidence to the client that a secured "game plan" is in place; (3) organize the professional life of a busy advocate; and (4) promote a winning outcome.

The other reality that confronts the parties to a Will Challenge early on is the need to preserve, hold, or otherwise deal with the assets of the estate while the parties duke it out. In a Will Challenge, suspicions run high on both sides and what happens to the estate assets, and who administers the estate in the interim, can consume a significant amount of oxygen and money.

Another reality is that the world has changed over the last 12 months and we now live in difficult and troubled economic times. Money no longer flows as freely as it once did. In this paper, I therefore hope to map out various options, strategies, tactics, and/or approaches that will assist parties embroiled in estate litigation to preserve, hold or otherwise deal with the estate assets in a cost effective and legally prudent manner.

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Will Challenges – An Overview

Slighted beneficiaries or disinherited family members quickly come to realize that they may have a legitimate right to challenge a will or codicil. They often believe that the purported last will and testament of the deceased does not represent his/her true intentions and feel they have "little choice" but to challenge the impugned will.

It is trite law that a Will will be set aside by the court where:

1. The testator lacked testamentary capacity;
2. The testator was unduly influence (i.e. coerced);
3. The will failed to comply with the requirements of due execution (i.e. signed by the testator in the presence of two witnesses);
4. The testator lacked knowledge of the contents of the will and did not approve its contents;
5. There was outright fraud or forgery (much less common).

It is important to remember that "suspicious circumstances" surrounding the preparation and execution of the will are <u>not</u> separate grounds to challenge a will. Rather, the effect of such suspicious circumstances is to rebut a presumption that with due execution, the testator knew and approved of the contents of the will and had the necessary testamentary capacity to make the will. It used to be widely accepted that the more suspicious the circumstances, the more onerous the task with respect to proving the will. However, that may no longer be good law.[2] The courts now seem to have confirmed that there is only one standard of proof and that is the civil standard of proof or the balance of probabilities.

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[2] *Re Henry* (2009) CanLII 12329 (ON S.C.) at paragraph 40

Orders For Directions

Rule 75 of the *Rules of Civil Procedure* is the governing rule when it comes to contentious estates. A person who appears to have a financial interest in the estate may apply for directions to bring a matter before the court.[3] An application or motion for direction must be served on all person appearing to have a financial interest in the estate, or as the court directs.[4]

Orders for directions can be sought at any time where appropriate. However, parties typically seek such an order at the outset of the litigation for obvious reasons. Moreover, it usually becomes readily apparent to the parties early on that many Will Challenges, which are commenced by way of notice of application, should be converted to a trial of an issue(s). Order for directions can and should address the need to preserve, hold and otherwise deal with the estate assets. The sweeping nature of the relief available under an order for directions, together with the impact an order of directions can have on the ebb and flow of the litigation, should not be casually overlooked.

The Discretion of the Court

The Ontario courts have now accepted that the purpose of Rule 75.06 of the *Rules of Civil Procedure* is to permit the court to design a procedural regime that will suit the nature of the dispute and that will, in the words of Rule 1.04, promote "the just, most expeditious and least expensive determination" of the proceedings.

It is apparent from the foregoing that orders for directions provide the court with wide latitude to design the procedure by which a Will Challenge will come to court and can even trump the normal *Rules of Civil Procedure*. As was noted by Mr. Justice Cullity in *Ettore Estate*[5]*:*

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[3] Rule 75.06(1).
[4] Rule 75.06(2).
[5] 11 E.T.R. (3d) 208 (Ont. S.C.J.) at paragraph 40

> … orders for directions carry over into the *Rules of Civil Procedure* the former surrogate court practice under which the court had a wide discretion to determine the appropriate procedures in contested wills cases. Under this practice, pleadings were, for example, often dispensed with and replaced by the order of the court directing the issues to be tried and who were to be the parties. Cross-examinations previously conducted on affidavits were sometimes ordered to replace examinations for discovery. The same practices sometimes have been followed in orders made under rule 75.06 and, in the absence of authority to the contrary, there appears to be no reason to infer that discretionary control of the court with respect to the appropriate procedures in contested will matters is less extensive than it was previously.

Parties should take note of the scope of the court's discretion which is extensive in estate litigation. In fact, by utilizing the discretion of the court, a party can "tailor-make" the procedure by which a Will Challenge wends its way to trial, as well as put into place the safeguards required to preserve, hold, or otherwise deal with the estate assets.

Specific Directions

On an application or motion for directions, the court may direct:[6]

1. A proceeding commenced by application be converted to a trial of an issue(s);
2. The issues to be tried, with or without a jury;
3. Who are the parties, who is the plaintiff and defendant, and who is submitting their rights to the court;[7]
4. Who shall be served with the order for directions, and the method and times of service;
5. Procedures for bringing the matter before the court in a summary fashion, where appropriate;
6. The plaintiff to file and serve a statement of claim;
7. **An estate trustee to be appointed during litigation, and file such security as the court directs**;[8] [emphasis added]

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[6] Rule 75.06(3).
[7] See Rule 75.07.
[8] See *Estates Act*, R.S.O. 1990, C. E.21, as amended, section 28.

8. A mediation session to be conducted under rule 75.1;

9. **Such other procedures as are just**. [emphasis added]

Non-Dissipation of Estate Assets

In the usual course, an order for directions should "freeze" or "tie-up" the estate assets. In other words, the property of the estate should not be expended, disbursed, or otherwise dealt with unless all parties agree in writing or by further court order.

Certain routine expenses can by carved out of any freeze order, but generally a wide ranging blanket prohibition is preferable. The court may also grant a certificate of pending litigation[9] where the estate holds real property or order that a specific fund be paid into court[10] (both remedies are discussed below).

Furthermore, the party that controls the estate assets can be required to deliver a detailed inventory of estate property, provide an informal accounting, and/or pass his/her accounts. The parties may also agree as to how the estate assets are to be invested while the litigation plays out with conservative investments, such as GICs, being the safest bet.

In the end, a well thought-out freezing order may reduce or remove the need to appoint an estate trustee during litigation with all of the attendant costs.

The Appointment of an Estate Trustee During Litigation

From the outset, it has to be recognized that an estate trustee during litigation ("**ETDL**") can ease the administration of the estate in the near term and protect and hold the estate's assets until the litigation is completed.

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[9] Section 103 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended, and Rule 42 of the *Rules of Civil Procedure*

[10] Rule 45.02 of the *Rules of Civil Procedure*

An ETDL is most often appointed in a Will Challenge where due execution, testamentary capacity, and/or undue influenced are pleaded. An ETDL is usually not required for *Family Law Act*[11] elections and/or dependant support claims pursuant to Part V of the *Succession Law Reform Act.*[12] In both cases, as the will has not been challenged, the executor named under the will can be appointed as estate trustee with a will (or without a will if the deceased died intestate).

However, the appointment of an ETDL should not be automatic and bears considerable thought in the context of estate litigation. As stated above, tough economic times often demand novel approaches. Whatever the economic times, the other reality is that appointing an ETDL can be simply too costly for the parties and the estate. It is self-evident that modest estate have modest means.

Therefore, in determining whether an ETDL should be appointed and/or identifying other viable alternatives, it is necessary to consider first principles governing the appointment of an ETDL by the court. This paper will consider those first principles. It will also consider how those first principles were applied by the courts and what lessons can be learned with respect to when an ETDL should be appointed.

Who Should Act as ETDL

An estate trustee during litigation has wide-ranging powers[13] and can be a powerful ally in advancing settlement or a party's cause of action. Preserving the assets of the estate is also paramount. A party must therefore determine whether a trust company or an individual, including a lawyer or an accountant, can best manage the job. Moreover, who should act may well be driven by cost considerations.

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[11] Section 5 *Family Law Act*, R.S.O. 1990, c. F.3, as amended
[12] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, as amended
[13] Section 28 of the *Estates Act* reads in part: "…and the administrator so appointed has all the rights and powers of a general administrator other than the right of distributing the residue of the property…"

Section 28 of the *Estates Act*[14] is the means by which an estate trustee during litigation. That section reads as follows:

> Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration, the Ontario Court (General Division) has jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the administrator so appointed has all the rights and powers of a general administrator, other than the right of distributing the residue of the property, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper.

It is clear from the wording of the section that the appointment of an ETDL is not automatic or assured, but is squarely within the court's discretion. Moreover, it is clear that an ETDL is an officer of the court and should be paid. While the section specifically states that "such reasonable remuneration" is subject to what the "court considers proper", remuneration of an estate trustee during litigation is rarely challenged or fought over.

It should be noted that trust companies may require that an estate be worth a threshold amount, a minimum of $500,000 for example, before they are prepared to act as an estate trustee or an ETDL. A trust company usually has a fee agreement that it requires to be approved by the court before it will agree to act as an ETDL.

Notwithstanding the constructive and productive role an ETDL can play in a contentious Will Challenge, difficult economic times allow for parties to try and reduce the fees charged by an corporate or institutional ETDL. Moreover, lawyers or accountants, who charge on a hourly basis, may be willing to reduce their hourly rates to act as an ETDL, cap their fees, or agree to accept a limited mandate, as defined by the parties and approved by the court.

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[14] *Estates Ac*t, R.S.O. c. E.21, as amended

For example, the parties can agree to limit the role of an ETDL in the order for directions or require the ETDL to take certain steps in the administration of the estate, such as selling real property, disposing of household items, or preparing and filing a terminal tax return.

However, to understand how to limit the role of an ETDL or avoid the appointment of an ETDL, it is important, as previously stated, to understand first principles regarding the appointment of an ETDL. The cases below (1) canvas first principles, (2) provide examples where the court refused to appoint and ETDL, and (3) discusses alternatives to appointing an ETDL.

Case Law – Reviewing First Principles

Re Bazos (1964)[15]

In this seminal case, the Court of Appeal ("**C.A.**"), using broad sweeping language, held that justice not only had to be done, but seen to be done (a maxim that has been oft-quoted in the context of appointing an ETDL). The C.A. went on to hold that a party challenging the validity of a will should not be appointed as ETDL. While the C.A. held that this was not an absolute rule, it was one which should only be departed from in a very strong case.

According to the C.A., a party unconnected with the proceeding was the "most proper person" to be appointed ETDL. Therefore, a party to a proceeding was not, as a rule, appointed unless the other parties consented. Where circumstances made it desirable, the court could appoint a party in the absence of such consent:

> It is well to remember that justice must not only be done but must also appear to be done, and we think it would be a very unusual situation where one of the parties to an issue such as was here ordered would be appointed administrator *pendente lite*. [now an ETDL] That it should not be done in this case is crystal clear; apparently one of the witnesses to the disputed Will was a director of the Guarantee Trust Co. [the proposed ETDL][16]

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[15] [1964] 2 O.R. 236 (C.A.)
[16] *Ibid.*, at paragraph 5

While the case articulates the rule governing the appointment of an ETDL, what is important to note for the purposes of this paper is the recognition by the court that there is not an absolute rule; there is flexibly depending on the parties involved and their approach to the dispute. In other words, even in a contested proceeding, the parties can consent to one of the parties acting as an ETDL. For example, where there a freezing order is put into place, the ETDL would simply manage the estate assets until such time as the parties agree on the disbursement of the estate assets or by further order of the court. Regular reporting by the ETDL to all parties should also be a matter of course.

***Re Groner Estate* (1994)[17]**

The parties appeared before Greer, J. on a contested motion to have TD Trust Company appointed as ETDL. One of the parties was concerned about the preservation of assets and how the estate had been administered to date with no one "legally in charge"[18]. The same party raised concerns about; (1) the investments and the rate of interest earned; (2) the fact that no one was professionally managing the estate; (3) it did not know what the assets of the estate really were; and (4) the litigation was not progressing. One of the parties to the proceeding opposed the appointment of the trust company.

The court ultimately appointed TD Trust Company as the ETDL. The court did so based on the magnitude of the trust assets, and given the fact that one of the solicitors in the firm of which the respondent's counsel was a member would be in a conflict of interest as the solicitor would be examined as a witness regarding the preparation of a 1990 will.

According to Greer. J., the estate required the immediate services of a neutral party with expertise in estate management that could take control of all assets so that each party would have a list of assets and values prepared from a party with no vested interest in the estate or

[17] 1994 Carswell Ont 2478 (Ont. Gen. Div.)
[18] *Ibid.*, at paragraph 4

the outcome of the litigation. The court noted that an ETDL was an officer of the court and not the mere nominee or agent of the party at whose insistence he/she was appointed. The appointment of a neutral party put that party in the legal position of being able to receive and hold assets, pay debts, preserve assets, make all proper inquiries into the assets, including tracing the assets.

The reasons the court appointed an ETDL in *Re Groner Estate* are worth examining. If the parties had anticipated and addressed the various concerns raised by the party who ultimately sought the appointment of the ETDL, it would have been possible to avoid the appointment of an ETDL or argue persuasively that the court should not appoint an ETDL.

The lessons to be gleaned from *Re Groner Estate*, is that if the assets are well managed or modest, appointing an ETDL may not be necessary. Furthermore, if the named executor is not in a conflict of interest as he/she is not a beneficiary, or only entitled to a minor bequest, or not otherwise involved in the litigation, there is no reason that the executor could not act. This is particularly true if the executor is (1) able to manage the estate assets competently, (2) provide a list of assets and value to all parties in a timely way, and (3) agree to report to the parties on a regular basis with full disclosure. Of course, the parties should agree to an order that the estate assets are not to be disbursed without the parties' consent or further order of the court.

I was recently involved in a will challenge where the parties agreed that the executor could administer the estate during the litigation, but not disburse the assets until the parties agreed or further court order. It was also agreed that the executor, who was not a beneficiary under the impugned will, would remain neutral in the will challenge and not propound the will as that task fell to the co-executor. The executor would report regularly to all parties and agreed to produce its relevant files regarding its pre-death dealings with the testator. While the executor would be paid a fee for managing the estate, the fee was modest and would be payable in any event as

interim administration was required. The court ultimately sanctioned the arrangement and the parties to the will challenge were able to get on with the business at hand.

***Re Lloyd* (1979)[19]**

An application was brought on behalf of the widow of the late William Donald Lloyd for an order appointing an ETDL. In considering the appointment, the court noted that the bulk of the estate of the deceased was composed of 99 common shares of Donald Lloyd Enterprises Ltd. and 399 common shares of Lloyd Bag Company Ltd. The shares were valued at well over $1,000,0000. One share in each corporation was held by a son of the deceased who was managing both businesses. From the evidence, it was clear that Donald Lloyd Enterprises Ltd. owned significant real estate holdings in the City of Windsor and that Lloyd Bag Company Ltd. was a highly specialized business that required considerable expertise to operate.

The court recognized that it had discretion to appoint an ETDL. However, the court's discretion also allowed the court to decline the appointment of an estate trustee where it was satisfied that it was necessary for the preservation of the estate's property even where both the will and the capacity of the named executor were questioned. According to the court, it was clear from the evidence presented that an ETDL was not necessary for the preservation of property, or to "prevent waste", or "mismanagement", or "malfeasance".[20] It was clear to the court that the reason the application was brought was due to the fact that the applicant was not being kept aware of the status of the assets and how they were being managed. Both companies were enjoying increased prosperity as a result of the son's stewardship. Rather than being dissipated or mismanaged, the estate was, in fact, being well managed and increasing in value.

The lesson to be drawn from *Re Lloyd* is clear: an executor or a party to the litigation should not provide a ready excuse for the appointment of an ETDL. If an executor has started

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[19] 24 O.R. (2d) 340 (Co. Ct.)
[20] *Ibid.,* at paragraph 22

administering the estate either before or after litigation has been commenced, full disclosure and transparency are a must and ready answers to potentially defeat an application to appoint an ETDL. If an estate, including its assets, are well managed and the beneficiaries receive regular reports, an ETDL may not be need to be appointed as was the case in *Re Lloyd*.

***Salisbury* v. *Dell* (1993)[21]**

The applicant, Leonard Salisbury ("**Leonard**"), sought directions regarding the trial of issues. The deceased's alleged will appointed the respondents, Elwin Dell ("**Elwin**"), and Norman Workman ("**Norman**"), as executors. The deceased's farm, which was the major asset of the estate worth approximately $200,000, was left to Leonard and his wife. However, a later will appointed the respondents as executors and left the farm to Elwin. Leonard challenged the validity of the later will. He further argued that neither Elwin nor Norman should act as executors.

The court refused to appoint Elwin as ETDL because of his obvious interest in the outcome of the litigation. However, the court appointed Norman as ETDL on the grounds that he had no such interest in the outcome and the fact that there were no allegations of impropriety leveled against him. The court reasoned that even if the later will were declared invalid, the previous will also appointed Norman as executor. It seems evident that the court was interested in ensuring the continuity of the estate administration. Finally, the court also found that the modest size of the estate did not warrant the expense of a trust company being appointed as an ETDL.

***Hansen* v. *Hurley* (1994)[22]**

The deceased named the applicants, Glen Hansen ("**Glen**") and William Peeling ("**William**"), as executors in his 1990 will. They were also named beneficiaries. Two years later, the deceased

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[21] 1993 CarswellOnt 565 (Ont. Gen. Div.)
[22] 1994 CarswellOnt 656 (Ont. Gen. Div.)

named them as executors under his holograph will. Glen and William applied to be appointed as ETDLs.

The respondents included Dennis Hurley ("**Dennis**"), who was the principal beneficiary under the holograph will, and Wayne Stump, who was a beneficiary under the earlier will. They objected to Glen and William's appointment as ETDLs, as Glen and William were beneficiaries under the first will and had an ongoing interest in the first will being declared valid. They also submitted that Glen and William had not been acting in an even-handed manner in relation to the respondents.

The case had a rather memorable set of facts: the deceased was in a common law relationship with Dennis prior to Dennis' death. The deceased and Dennis were in Mexico when the deceased died. Mexican police classified the deceased's death as a homicide and issued an arrest warrant for Dennis.

Despite the objections of the respondents, the court appointed Glen and William as ETDLs. The court noted that all of the family members and the beneficiaries, other than the two respondents, had either consented to or did not oppose the appointment of the applicants. Moreover, the applicants had not been guilty of any impropriety in their administration of the estate and they would remain executors of the estate whether the 1990 will or the holograph will was found to be valid, as they were named executors in both wills. The court also held that the appointment of a trust company would result in a "considerable expense to a comparatively modest estate."[23]

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[23] *Ibid.*, at paragraph 23

In coming to its decision, the court noted two additional factors which it found to be significant:

> (1) There was no other proposed administrator who had consented to act and the court was concerned that the estate "would have no one in control" which was "a most undesirable situation."[24]; and
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> (2) The severity of the accusation made against Dennis, the principal objector. The court held that it "is unlikely that any alternative administrator would not be obligated to view with some concern the position of the estate with regard to Mr. Hurley until the very serious allegations against him have been determined."[25] In other words, the court was concerned that no other party would be prepared to administer the estate during the interim.

In the end, the court recognized the productive role an executor could play if appointed as an ETDL. If nothing else, appointing an executor as ETDL would ensure the continuity of administration which would surely benefit all parties. It is also likely that the executor's compensation, even when acting as ETDL, would be less than an institutional trustee and there would be no duplicate of effort by the executor once the role of the ETDL came to an end.

***Re McArthur Estate* (1990)[26]**

The named executors, brothers Robert Franklin McArthur ("**Robert**") and Kenneth McArthur ("**Kenneth**"), brought an application under section 53 of the former *Surrogate Courts Act* to be appointed as ETDLs in their father's estate. Robert and Kenneth were also appointed executors under the deceased's earlier wills. The two McArthur sisters objected to the appointment of their brothers as ETDLs and claimed that the will was invalid due to undue influence and lack of testamentary capacity.

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[24] *Ibid.*, at paragraph 24
[25] *Ibid.,* at paragraph 25
[26] 1990 CarswellOnt 846 (Ont. Gen. Div.)

The court reviewed the evidence submitted by the two sisters and found that the allegations had nothing to do with the administration of the estate, save for issues regarding a valuation of inventory, and held that the allegations were "far less than what would be required to remove an executor."[27]

The court further noted that even if the impugned will was found to be invalid, the McArthur brothers were also appointed under previous wills. However, the court did consider the real concern that it "would not only be unusual but really anathema for a court to appoint somebody with a conflict of interest to assume the extensive powers of an administrator pendent lite [ETDL]."[28] However, the court found, "that is different than being asked to cast aside Executors who have existing powers without any grounds for setting them aside other than the complaints set forth in the affidavit supporting this application."[29] The court was prepared to see the McArthur brothers continue to act as executors as there were no ground to remove them and dismissed the brothers' motion to be appointment as ETDLs.

In dismissing the application, the court stated that the executors:

> ...are not yet subject to the control of the Court [as opposed to an ETDL] but are subject to the laws with respect to Executors which can [be] enforced by any beneficiary. In addition, no information has been provided in the material nor do I see any in the inventory of the Estate which would require the exercise of powers not now held by the existing Executors as a result of the appointment by the Will."[30]

Once again, the court put considerable weight on the issue of its discretion, which it applied liberally. In dismissing the McArthur brothers' application, the court noted that that the title of executor came from the will and not from any grant of probate. As such, appointed executors

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[27] *Ibid.*, at paragraph 5
[28] *Ibid.,* at paragraph 9
[29] *Ibid.*, at paragraph 9
[30] *Ibid.*, at paragraph 9

could do many things in the administration of the estate before any grant was made. In fact, the powers were widely accepted as being extensive.

With this in mind, the court, somewhat surprisingly, seemed to characterize the sisters' opposition to the appointment of their bothers as ETDL as an attempt to remove executors who had already taken up their office. As the sisters did not proffer the necessary evidence to remove their brothers as executors, the court permitted the brothers to continue to administer the estate in the interim. Rather than subjecting the MacArthur brothers to the control of the court by appointing them as ETDL, which may have been appropriate in the circumstances, the court dismissed their application on the apparent grounds that they had already begun to administer the estate and had done nothing wrong to warrant their removal.

The case seems to stand for the proposition that the sooner the executors named under a purported will begin to administer the estate, the less likely an application for the appointment of a neutral third party as EDTL will be granted. As can be seen from this case, discretion can be an unpredictable thing and even the best laid plans can go awry. If an executor starts to administer the estate and does his/her job well, the executor, together with any other party, may be to argue successfully that appointing an ETDL is unnecessary and merely a clandestine attempt to remove the executor without the proper evidentiary footing.

***Dempster* v. *Demster Estate* (2008)[31]**

This case is a wonderful example of creative thinking and avoiding the appointment of an ETDL albeit subject to moderately stringent conditions, albeit with the court imposing strict conditions on the executor continuing to act.

The application was brought for appointment of an independent lawyer as estate trustee (along with another application). The deceased, Frank Dempster ("**Frank**"), died after writing a series

[31] 2008 CarswellOnt 6878 (Ont. S.C.J.)

of wills. However, his last will left only $1,000 to his son, Bruce, but left the only significant asset of his estate, an island, to his grandson James. James was also named as the executor.

Prior to Frank's death, Bruce became aware that his interest in the island was diminishing and sued Frank and James, claiming a constructive trust in the island, and also alleging undue influence in James' dealings with Frank. After Frank died, the court was asked to determine whether James should be replaced as executor (there was also a motion to remove his counsel, which is not discussed for the purposes of this paper).

In considering the issue, the court stated:

> [there] is a significant concern as to the cost of an independent trustee. The island is the only significant asset of the estate. By the terms of the will, James Dempster stands to inherit the island entirely. Augmented estate and litigation costs could well have the effect of substantially reducing the value of what would otherwise be his. If the result of the dispute is vindication of Frank Dempster's sound and autonomous intention to benefit his grandson, there is potential that his gift will nevertheless be defeated by the cost of Bruce Dempster's sour grapes.[32]

The court considered whether James needed to be removed as trustee. In its deliberations, the court found that James had ample reason to attend to the upkeep of the island, even if he was not successful in the litigation, as he was still living on the island. The court had no allegations before it of James' mismanagement of the property.

The issue as characterized by the court was "... whether James Dempster may continue as trustee, curtailed in his [trustee] rights and responsibilities during the litigation, but thereby reducing the cost and complication of arm's length management by an independent trustee when James is able and has been doing so...".[33] In reaching its conclusion, the court decided to appoint a new estate trustee in addition to James. George Craig had consented to serve as estate trustee and had the requisite experience.

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[32] *Ibid.*, at paragraph 9
[33] *Ibid.*, at paragraph 23

The court was satisfied that it had the authority to appoint a new estate trustee in addition to the current estate trustee by virtue of sections 5(1) and 37(1) of the *Trustee Act*.[34] Moreover, the court was satisfied that it had the requisite authority to place limitations on the scope of a trustee's authority. As such, the court found that a combination "of suspension and limitation in the case at bar where the court wishes to create an even playing field for James Dempster and Bruce Dempster [the protagonists in the will challenge] to pursue their respective interests in the litigation without James Demspter in control of the Estate's position, will be useful."[35] The court gave directions, which included suspending James' rights as estate trustee during the litigation except in accordance with certain terms, including:

> (1) Preventing James from dealing with the estates assets in any manner whatsoever without the prior consent of the newly appointed other trustee, George Craig, or order of the court;
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> (2) Preventing James from directing the estate litigation without prior consent of George Craig or order of the court;
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> (3) Preventing James from creating any kind of liability on behalf of or against the estate without prior approval of the court;
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> (4) Preventing James from releasing or discharging any claim by the estate to monies due to it without a prior consent of George Craig or approval of the court;
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> (5) Indicating that no agreement which James entered into in his capacity as estate trustee in respect of the estate's assets would have any force or effect without the prior consent of George Craig or approval by the court;

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[34] *Trustee Act*, R.S.O. c. T.23, as amended
[35] *Supra,* note 33, at paragraph 23

(6) The Certificate of Appointment issued by the court to James should record on its face the conditions restricting James' appointment as shall any Status Certificate issued by the court.

***Dubuc* v. *Quenville* (2007)[36]**

This was a motion for directions pursuant to rules 75.06 and 75.01 and is another example of thinking outside of the "litigation box" (to use the vernacular). The only issue to be determined on the motion was the appointment of an ETDL. The moving party, Jean Dubuc ("**Jean**"), was the son of the deceased. The responding parties were the deceased's daughter and granddaughter.

The estate's value was comprised primarily of real estate known municipally as 292-294 Clarence Street, Ottawa, which was comprised of two rental units. The last known will of the deceased appointed Jean as trustee and transferred to him 292-294 Clarence Street, together with the contents. A previous will also appointed him as trustee and similarly transferred 292-294 Clarence to him.

The responding party, Remie Dubuc ("**Remie**"), objected to the will on the grounds that the deceased lacked testamentary capacity and that he was subject to undue influence exercised by Jean. The court noted that Remie provided almost no evidence of incapacity and no evidence of undue influence apart from attaching a copy of her notice of objection.

The court recognized that there are exceptions to the general rule against appointing one of the litigants as an ETDL. In this case, the court observed that there was no dispute that Jean was named as executor and trustee under the previous will and that the provisions of that will were very similar to the ones that were currently being disputed. The court reasoned that "[e]ven if Remie Dubuc is able to set aside this Will she would still have the challenge of setting aside the

[36] 2007 CarswellOnt 4048 (Ont. S.C.J.)(Master)

previous one."[37] There was no evidence before the court to suggest why the previous will would be considered to be invalid.

While the court recognized the "hostility and the tension between the parties" it also noted "that the value of the estate is modest". Moreover, Jean was willing to make a key concession: He was "willing to provide reasonable security as may be required in order to insure the estate is properly administered and that no assets are improperly removed from the estate."[38]

In the end, the court rejected Remie's proposal to have a lawyer act as ETDL. Instead, the court held that it was appropriate to allow the estate to be administered by Jean albeit subject to certain conditions, which included:

> (1) Providing appropriate security;
>
> (2) Depositing the estate's cash amounts and terms deposits in an interest bearing account held in trust by a law firm;
>
> (3) Depositing the rents collected from the two rental units to the same account; and
>
> (4) Not withdrawing any funds from the trust account without the approval of the respondents or court order.

***Sherbourne* v. *Shanks* (2005)[39]**

This was a motion for directions pursuant to Rule 75.06. The validity of the Jean Sherbourne's ("**Jean**") will was in question. That will directed that $50,000 each went to three of Jean's six children, and the residue to her other three children. The estate was worth approximately $1,694,000 on the date of Jean's death. The three children who only received $50,000 objected

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[37] *Ibid.*, at paragraph 11
[38] *Ibid.,* at paragraph 14
[39] 2005 CarswellOnt 2604 (Ont. S.C.J)

to the will on the grounds of lack of testamentary capacity, undue influence, and suspicious circumstances, as well as lack of knowledge and approval.

Two of the beneficiaries, Nicolas Sherbourne ("**Nicolas**") and Jonathan Sherbourne ("**Jonathan**"), who had inherited the residue of the estate were named executors, although Jonathan renounced as he lived in the United States. Reference was made to a prior will, but the court held it was not clear if this will was signed. The objectors also claimed to have similar concerns regarding the validity of the prior will.

The court found that the objectors made general allegations but had not presented any evidence in support of their allegations. Nicolas sought an order to be appointed ETDL, which, not surprisingly, was opposed by the objectors. The objectors proposed the appointment of a trust company.

Ultimately, the court refused to appoint Nicolas. The court noted the general rule that a party litigant is not to be appointed as ETDL, and such a request should only be considered where the moving party presents a strong case (citing *Re Bazos* as discussed above). The court went on to note that "although specific criteria for such a strong case has not yet developed, I am of the view the focus of **the exercise of the court's discretion is with the issue of <u>conflict</u>** [emphasis added]."[40] In this case, the court held that "undue influence is a serious allegation of impropriety and where, as here, the moving party has a significant interest in the outcome of the litigation, it would not be appropriate to grant his request [to be appointed ETDL]."[41] According to the court, the potential conflict necessitates the appointment of a neutral trustee."[42]

The court, however, rejected the trust company as ETDL. The interim administration of the estate was straightforward and included sale of a property, which needed to be done

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[40] *Ibid.*, at paragraph 23
[41] *Ibid*, at paragraph 23
[42] *Ibid.*, at paragraph 23

immediately, and a retirement savings plan which would be liquidated. The trust company's proposal would result in a fee upwards of $40,000, which the court deemed too high for the estate. The court, therefore, found that the appointment of an institutional trustee was a last resort in this case. The court believed that it was possible that an individual could act as ETDL and more reasonable compensation would be charged. The court suggested that each group of beneficiaries suggest a nominee and that inquiries be made of other local law firms. The parties were directed to inquire into suitable ETDLs within 30 days.

What is important to note is not only the court's concern regarding the ETDL's fees, in this case a trust company, but the court's clear focus on the conflict of appointing one of the parties as ETDL. Where the conflict is apparent and cannot be minimized or otherwise addressed to the satisfaction of the court, the court will almost always appoint a neutral third party ETDL. Circling back to *Re Bazos*, justice must not only be done, but be seen to be done.

***Forbes* v*. Gauthier Estate* (2008)[43]**

This was a motion to: (1) remove the executor of an estate and appoint an ETDL; and (2) for the executor to provide an up-to-date statement of accounts for the estate. The deceased, Dorothy Gauthier, died with a will that named her niece, Sandra Carroll ("**Sandra**"), as executor. Sandra was also a beneficiary.

The plaintiff, Marilyn Forbes ("**Marilyn**"), was the sister of the deceased. She sought a declaration that Sandra, as executor, held one-half of the residue of the estate by way of a constructive trust or resulting trust on her behalf. Marilyn's claim was disputed by Sandra and the other beneficiaries.

The court rejected Marilyn's motion to remove Sandra as estate trustee and appoint an ETDL. The court noted that no challenge had been made by anyone to the validity of the will. There

[43] 2008 CarswellOnt 4912 (Ont. S.C.J.)

was no compelling evidence concerning any mismanagement of the estate's administration. The court held that the rule in *Re Bazos* did not apply in the case before it. There was no issue as to the testamentary capacity of the deceased. Accordingly, the court held:

> ...in these circumstances, the "rule" is not applicable in the first place. I can see no good reason to pass on the defence to the plaintiff's claim to someone other than the person in whom the testator placed her trust to properly administer and carry out her wishes and to defend the estate against creditors that may be unwarranted.[44]

Not surprisingly, clear evidence is required to remove an estate trustee given that a testator would have carefully considered who to appoint as his/her executor. Moreover, the mere fact that a party does not like, or even trust, an executor matters little where no will challenge has been launched. All parties to a Will Challenge should keep in mind that the court will only appoint an ETDL where the circumstances warrant and not on a whim or for no good reason. Disliking or not trusting an executor outside the context of a Will Challenge where a real or potential conflict exists is not grounds to appoint an ETDL.

Not Appointing an ETDL – Other Options

Ontario no longer has a "Surrogate Court". Rather the functions of the Surrogate Court are now carried out by the Ontario Superior Court of Justice. In fact, the Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.[45]

As a result, the Superior Court of Justice is increasingly applying the sensibilities and traditional rules of civil litigation to estate litigation without necessarily paying homage to the conventions that developed over time in the estate courts (the awarding of costs is perhaps the most obvious, recent example).

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[44] *Ibid*, at paragraph 19
[45] Section 11 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

As such, many new tools and means beyond rules 74 and 75 are now available to the savvy estate litigator who knows how to use the *Rules of Civil Procedure* to his/her advantage. The *Rules of Civil Procedure* provide ample opportunity to "tie up" an estate and preserve, hold and otherwise deal with the estates assets. However, it should be noted that the type of motions discussed below are not without their cost, or risk, and may become particularly expensive if they are hotly contested. Nevertheless, the costs may well be less than the administrative costs charged by an ETDL and may lead to a quick settlement if the relief requested has an impact on a substantive, outstanding issue in the litigation.

Rule 41 – Appointment of a Receiver

This rule governs the appointment of a receiver under section 101 of the *Courts of Justice Act*[46], as well as directions and the discharge of a receiver. Section 101 states:

> (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.
>
> (2) An order under subsection (1) may include such terms as are considered just.

There is no reason that a party to an estate proceeding cannot apply to the court for the appointment of a receiver if, for example, the estate controls a valuable business which is being mismanaged or left to drift after the death of its owner. Interlocutory injunctive or mandatory relief can even be granted without notice, but cannot exceed 10 days. However, a party should always proceed with caution when applying without notice.

Finally, the moving party should be made well aware that injunctive or mandatory relief requires that party to provide an undertaking as to damages. Given the extraordinary nature of the relief

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[46] Section 101 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.

request, mandatory or injunctive relief can often be difficult to obtain and a party should proceed with due caution. A strong evidentiary record is a must.

Rule 42 – Certificate of Pending Litigation

The statutory basis for the registration of a certificate of pending litigation ("**CPL**") is found in section 103 of the *Courts of Justice Act*[47], which provides as follows:

> (1) The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2).

Rule 42.01, the companion rule to section 103, further provides:

> (1) A certificate of pending litigation under section 103 of the *Courts of Justice Act* may be issued by a registrar only under an order of the court.
>
> (2) A party who seeks a certificate of pending litigation shall include a claim for it in the originating process or pleading that commences the proceeding, together with a description of the land in question sufficient for registration.
>
> (3) A motion for an order under subrule (1) may be made without notice.
>
> (4) A party who obtains an order under subrule (1) shall forthwith serve it, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, on all parties against whom an interest in land is claimed in the proceeding.

Often the estate's interest in land may be unclear or uncertain. However, a CPL does not require that an interest in land in question be claimed directly by the moving party for itself. Rather, what is required is simply that an interest in land be in question in the proceeding, which is often the case in a Will Challenge.[48]

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[47] Section 103 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended.
[48] *Chilian v. Augdome Corp.*, 2 O.R. (3d) 696, [1991] O.J. No. 414 at p. 17. *Linsan Financial Inc. v. Tormo Intertrading Ltd. (c.o.b. Monolit Group)*, [1997] O.J. No. 4398

A certificate of pending litigation is an effective way for the estate to prevent the dissipation of the land that it claims an interest in whether directly or through disputed joint ownership. A beneficiary may also be able to argue that he/she has an interest in land albeit it one that flows through the estate when faced with an executor who refuses to act or where no one is legally in control of an estate.

Rule 44 - Interim Recovery of Personal Property

Pursuant to section 104 of the Courts of Justice Act[49] and rule 44 of the *Rules of Civil Procedure*, a party may seek an interim order for the recovery of personal property on a motion supported by an affidavit that: (1) sufficiently describes the property so as to make it readily identifiable; (2) the value of the property; (3) that the party is the owner or lawfully entitled to the possession of the property; (4) that the property was unlawfully take from the possession of the party or is being unlawfully detained; and (5) the facts and circumstances giving rise to the unlawful taking or detention.

The court can direct the sheriff to seize the property in question and turn it over to the moving party subject to the moving party posting the appropriate security with the court or allow the party in possession of the disputed property to continue to hold onto it subject to posting of security with the court.

The courts have set out a “substantial grounds” test for interim recovery of property. The test requires a “high degree of assurance” that the party seeking such an order will be successful at trial. Clear documentation will help a party meet the substantial grounds test. However, simple issues of credibility as to who owns the disputed property are best left to the trier of fact and are unlikely to assist a party in proving ownership.

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[49] Section 104 of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended

In the estate context, where a party challenges a will and claims entitlement to the deceased's personal property, which is of considerable value, that party, or the executor, may be able to avail him/herself of Rule 44 if they act quickly and recover the disputed property. The party or executor could then pledge not to dissipate the personal property in question until the parties agree or by further court order and also ask that the security posted be returned (which is unlikely to be consented to). Given that the estate's most significant asset is now preserved, appointing an ETDL may no longer be necessary.

Rule 45 - Interim Preservation of Property

Rule 45.01(1) states:

> The court may make an interim order for the custody or preservation of any property in question in a proceeding or relevant to an issue in a proceeding, and for that purpose may authorize entry on or into any property in the possession of a person or of a person not a party.

Rule 45.01 is a rather extraordinary remedy and can be utilized by a party in an estate proceeding to preserve and even seize property. Artwork, antiques, thoroughbreds or prized cattle (i.e. perishables) are good examples. Such an order could apply to medical or financial evidence if it was in the hands of a third party albeit using rule 45.01(1) for such a purpose may be considered somewhat unorthodox.

Rule 45.02 - Specific Fund Paid into Court

This rule can also be applied in the estate context. Nordheimer, J. succinctly laid out the legal principles underlying the rule in *News Canada Marketing Inc. v. TD Evergreen*[50]. Here, the plaintiff sought an order requiring certain escrow funds to be paid into court or otherwise secured in favour of the plaintiff pending the disposition of this, and of a companion, action.

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[50] 2000 CarswellOnt 3544 (Ont. S.C.J.)

According to the court, the appropriate test for relief under rule 45.02 required the moving party to establish that:

(1) the plaintiff claimed a right to a specific fund;

(2) there was a serious issue to be tried regarding the plaintiff's claim to that fund;

(3) the balance of convenience favoured granting the relief sought by the plaintiff.

In *Leung Estate* v*. Leung*[51], Greer, J. heard a motion for an order under rule 45.02. There, one of the defendants had a power of attorney from his father. He used this power of attorney to remove funds from his late father's account at a stockbroker firm and later deposited the funds in the account of one of the corporate defendants. By the time the motion was brought, the defendant son had spent some $1,200,000 of the funds. Greer, J. held the money in the corporate defendant's account to be a specific fund under rule 45.02. She ordered liquid assets of the corporate defendant to be cashed in and the proceeds paid into court.

However, as pointed out by Brown, J. in *Re Tarling Estate*[52], an order should only be granted under rule 45.02 in exceptional circumstances because it has the potential to injure one party before the other has proven its case at trial. It would operate, in a sense, like execution before judgment.

The plaintiff and the defendant were the sons of the late William Tarling. The plaintiff sought an order directing the real estate agents to pay him one-half of the net proceeds, including interest (the "**Proceeds**"), from the sale of 46 Beacon Road, Toronto (the "**Property**"). His brother, as the estate trustee, objected, arguing that all proceeds should remain frozen until trial. The brothers also disputed ownership of the funds of the deceased's investment account, which the defendant brother seemed to have unrestricted access to.

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[51] [2004] O.J. No. 1417 (Ont. S.C.J.)
[52] 2007 CarswellOnt 685 (Ont. S.C.J.)

The dispute between the brothers would seem like the perfect case to appoint an ETDL. However, in coming to his decision, Brown, J. wrote:

> On the facts of the present case I am not satisfied that it would be just and reasonable to require the Proceeds to remain frozen pending trial for several reasons. First, on the state of title, the plaintiff as tenant-in-common is *prima facie* entitled to one-half of the Proceeds.
>
> Second it is clear from the evidence before me that the plaintiff owns significant assets and intends to remain in the jurisdiction. There are no 'Mareva-like' features in this case.
>
> Finally, I do not understand how the Defendant can say, "Let me hold onto and use the disputed investments assets, but you, my brother, must forego receiving and using your share of the Proceeds. That is not a reasonable position to take.

In the end, Brown, J. provided the parties with an interesting choice demonstrating the inherent discretion of the court and the fact that parties are often only limited by their own imaginations (or that of the court). Brown, J. concluded as follows:

> As a result, I will give the Defendant a choice. If the Defendant pays into court by February 28, 2007 the current value of the disputed investments funds that were in the joint account with his father at the time of the deceased's death, the Proceeds will remain frozen in the hands of the [real estate agent] until the disposition of the action. If the Defendant does not pay such funds into court.... then I direct the [real estate agent] to pay to the Plaintiff... one-half of the Proceeds with the remaining half to be paid to the Defendant.[53]

Limited Grant of Probate or Administration

When and where necessary a grant of probate can be limited in duration in respect of property or to any special purpose. In general, it is not the practice to allow a person entitled to a general grant to take a limited grant except for strong reasons and, therefore, such grants are considered exceptional. In fact, the repeated criterion for making a limited grant was that strong

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[53] See also *Charlebois* v. *Denjon Construction Ltd*. (1997), 13 C.P.C. (4th) 150 and *American Axle & Manufacturing Inc.* v. *Durable Release Coasters Ltd.* (2006), 2006 CarswellOnt 8489 (Ont. Master); affirmed on other grounds at 2007 CarswellOnt 3480 (Ont. S.C.J.); leave to appeal refused at 2007 CarswellOnt 3378 (Ont. Div. Ct.)

reason be shown. An in-depth analysis of a limited grant is beyond the scope of his paper, but it is nevertheless another option that may be available to the astute litigator in the right context.

Conclusion

The first reaction of many counsel when confronted with a Will Challenge is to appoint an ETDL. However, the above cases demonstrate that the court has the discretion to decline the appointment of an estate trustee where it is not warranted. The court is obviously concerned about potential and real conflicts between the parties and, of course, justice must be seen to be done.

A messy Will Challenge where distrust and suspicions run high will likely result in an ETDL being appointed. However, the parties should pause and consider who should act as ETDL - whether it might be a trust company, an individual, or even the named executor who is not in conflict with the litigating parties. Fees can also be negotiated and a party should not be afraid to ask for a reduced fee based on the tough economic times or the limited value of the estate assets.

The other reality is that the toolkit of an effective estate litigator should not be limited to the appointment of an ETDL. Such an appointment should not be an automatic or a knee-jerk reaction. The court is open to creative thinking as long as the parties are not unduly prejudiced and the assets of the state are preserved or otherwise dealt with.

In the end, the *Rules of Civil Procedure* can be applied with equal vigour to a Will Challenge as they can to a commercial action. Counsel should be imaginative and, where appropriate, inventive. For example, executors can be proactive and even-handed in administering an estate such that any apparent mistrust is minimized. Furthermore, Rules 40 to 45 should be considered. In today's daunting economic client, all options should be on the table.