The Will to Challenge and the Power to Succeed:
Laying the Groundwork for Successful Will and POA Challenges[1]

Introduction

Will and Power of Attorney ("**POA**") 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, these court challenges will likely only increase in quantity and complexity.

Laying the groundwork for Will and POA challenges 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.

In this paper, I will look at several factors that may impact on Will or POA challenges such as limitation periods and evidentiary requirements. However, the paper's primary focus will be on orders for directions and how they can, and should, be used in Will or POA challenges. Sample orders for directions for Will and POA challenges are appended to this paper.

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.

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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 not 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 is fair to say that the more suspicious the circumstances, the more onerous the task with respect to proofing the Will.

Finally, before commencing a Will challenge, a client must be made aware that a Will need not be "fair", "just" or "equitable". Ultimately, a testator is given wide latitude to do as he/she wishes with their estate. While it is constantly under attack, Canadian courts have long upheld, based on British common law principles, the notion of testamentary freedom. Testamentary freedom may be curtailed as a result of a dependant support claim under the *Succession Law Reform Act*,[2] or a spousal election under the *Family Law* Ac*t*,[3] but testamentary freedom is still recognized by the courts and cannot be dismissed as a mere fantasy.

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[2] *Succession Law Reform Act*, R.S.O. 1990, c. S.26, as amended, Part V.
[3] R.S.O. 1990, c. F.3, as amended.

POA Challenges – An Overview

While fully capable, a person has the right to grant powers of attorney to a family member or close personal friend. Once a person becomes incapable of managing their property, or making personal care decisions, their appointed attorney(s) can act in their place. Attorneys for property or personal care are governed by the *Substitute Decisions Act*.[4]

Attorneys for property and personal care have wide ranging powers and are required to act in the best interests of the incapable.[5] Attorneys are considered to be in a position of trust and are therefore regarded by the court as fiduciaries and held to a higher standard.

In certain situations, a family member, or a close friend, may feel compelled to challenge the validity of powers of attorney and may apply to the court to be appointed as guardian.[6] An attorney for property and/or personal care can be removed by the court for dereliction of duty, including breach of fiduciary duty. A party can also apply to the court for an order mandating the attorney to take certain actions such as fostering family relationships or consulting with supportive family members.[7]

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 a financial interest in the estate may apply for directions to bring a matter before the court.[8] 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.[9]

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[4] *Substitute Decisions Act*, S.O. 1992, c. 30, as amended, ("**SDA**").
[5] SDA sections 31 and 66.
[6] SDA sections 22 and 55.
[7] SDA sections 32, 39 and 68.
[8] Rule 75.06(1).
[9] Rule 75.06(2).

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 or POA challenges, which are commenced by way of notice of application, should be converted to a trial of an issue(s). Obviously, this is an opportune time to seek directions from the court.

The Discretion of the Court

In *Abrams v. Abrams,*[10] a recent decision of Justice Strathy of the Ontario Superior Court of Justice, the court contemplated the purpose of an order for directions in a POA challenge:

> First, I accept the submission 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. I agree with the submissions that the proceeding has gone on too long. An aggressive schedule is necessary in order to move it to a conclusion in the interests of Ida Abram and her entire family.[11]

After noting that the focus of the proceeding had to be the protection of the incapable, Justice Strathy stated as follows:

> The matters at issue, and the protection of Ida, call for some limits on the normal scope of adversarial proceedings. I am not prepared, for example, to order an examination for discovery of the person who is the focus of this proceedings: an 85-year-old woman, with early Alzheimer's disease and word-finding difficulty, for whom these events are a source of anxiety and heartbreak.[12]

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[10] *Abrams v. Abrams*, Court File No: 03-003-08, December 19, 2008 (Ont. S.C.J.) (not yet reported)
[11] *Abrams v. Abrams*, paragraph 5.
[12] *Abrams v. Abrams*, paragraph 6.

It is apparent from the foregoing that orders for directions provide the court with wide latitude to design the procedure by which a Will or POA 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*:[13]

> … orders for directions carries 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.

Specific Directions

On an application or motion for directions, the court may direct:[14]

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;[15]
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;[16]
8. A mediation session to be conducted under rule 75.1;

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[13] *Ettore Estate, Re*, (2004), 11 E.T.R. (3d) 208 (Ont. S.C.J.), paragraph 40.
[14] Rule 75.06(3).
[15] See Rule 75.07.
[16] See *Estates Act*, R.S.O. 1990, C. E.21, as amended, section 28.

9. Such other procedures as are just.

Questions to be Considered

Given the laundry list of directions set out in Rule 75.06(3), it becomes clear that an order for directions is a powerful tool in the arsenal of a litigator and should not be underestimated or overlooked. A party must firmly turn his/her mind to the directions needed in a Will or POA challenge early on and start negotiating such directions with opposing counsel. Questions to be considered include whether pleadings are preferable to a mere recitation of the issues in the order for directions. Pleadings, with their ability to crystallize the issues that divide the parties, together with the stating of material, supporting facts, can be a commanding tool and estate litigators are often too quick to dismiss the need for pleadings. Pleadings are also governed by Rule 25 of the *Rules of Civil Procedure* thereby providing certainty and discipline to the exercise of drafting.

There is an important caveat when it comes to fixing the “issues to be tried” in an order for directions. The parties must allow themselves sufficient leeway to refine and contour the issues as the proceeding unfolds. No litigation is static and the issues may ripen or drop off as the parties exchange documents and conduct examinations. As such, the order giving directions should specifically allow the parties to add or amend the issues and/or apply to the court for further directions. These subtleties should not be overlooked when drafting and/or negotiating an order for directions.

Moreover, the parties should be careful not to limit their procedural rights through an order for directions. For example, in *Knox v. Trudeau*,[17] the court held that a party was precluded from bringing a motion for summary judgment after an order had been made under rule 75.06

[17] 2001, 38 E.T.R. (2d) 67 (Ont. S.C.J.).

directing a trial of an issue. A motion for directions should therefore state that nothing in the order takes away or diminishes the parties' procedural rights under the *Rules of Civil Procedure* unless the order for direction specifically states otherwise.

In terms of mediation, a party must not only decide whether to mediate, but when mediation should take place. Pursuant to Rule 75.1.02, mediation is mandatory in Will and POA challenges commenced in the City of Toronto, the City of Ottawa, and the County of Essex.[18] Not surprisingly, the court is generally reluctant to fix when the mediation will take place, but prefers to leave the timing of mediation to the parties. Sufficient regard should also be given to what steps, if any, should be completed before the mediation (i.e. production of documents by the parties and non-parties).

The appointment of an estate trustee during litigation also bears considerable thought. An estate trustee during litigation can ease the administration of the estate in the near term and protect and hold the estate's assets until the litigation is completed. An estate trustee during litigation has wide-ranging powers[19] and can be a powerful ally in advancing settlement or a party's cause of action. A party must therefore determine whether a trust company or an individual can best manage the job.

Finally, the parties can also agree to limit the role of an estate trustee during litigation in the order for directions or require the estate trustee during litigation to take certain steps in the administration of the estate, such as selling real property or disposing of household items, all of which is subject to the approval of the court.

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[18] See Rule 75.1.02.

[19] 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…"

Production of Documents & Examinations for Discovery

Orders for directions may not only suspend or limit the normal scope of adversarial proceedings, but they may also go well beyond the normal discovery process. Orders for directions often mandate documentary production from non-parties and permit non-parties to be examined, including *de bene esse* examinations (i.e. a provisional examination of a witness whose testimony is important and might otherwise be lost).

Non-parties can include: (1) the solicitor who drafted the challenged Will or POA, as well as his/her file, including notes; (2) medical practitioners which possess medical records; and (3) accountants or financial advisors who provided estate planning advice or who might have some insight into or knowledge of the "true intentions" of the incapable in a POA challenge.

Production of documentation can include:

1. any paper or writing being or purporting to be a testamentary document;
2. medical records or files relating to the testator or the incapable;
3. financial records from any bank or institution relating to the testator's or incapable's assets whether held jointly or solely;
4. any document relating to any matter in issue in the proceeding that is, or has been, in the possession, control or power of a party to the proceeding.[20] Such documents may be required to be listed in an affidavit of documents.

The costs of producing such records should also be addressed in the order for directions.

While it is important to tailor the order for directions to the current proceeding, a party should be careful not to go too far or anticipate every procedural aspect of the proceeding. For example, in a Will or POA challenge, a better approach may be to simply require the parties to abide by the *Rules of Civil Procedure* when it comes to documentary production and examinations for

[20] See Rule 30.02.

discovery (the one exception may be documentary production by and examinations of non-parties). In enforcing any demands for document production and/or examinations of the parties, the court will take comfort from the fact that it can simply rely on the well trodden rules of documentary production and examinations for discovery as set out in *Rules of Civil Procedure*. Additional procedural provisions (and issues) can be added at a later date by applying to the court for further directions.

Solicitor/Client Privilege

Many orders for directions in Will Challenges specifically address this important privilege. Orders for directions often state as follows:

> No such privilege attaches to any notes, records, or examinations of any solicitor or to any documents in the power, possession or control of any party in connection with the deceased's instructions, estate planning, and/or the preparation of any Will.

The duty of confidentiality is also waived in the orders for directions. Some courts have required that the solicitor who drafted the challenged Will or POA be put on notice with respect to the waiving of solicitor/client privilege, but it is for the estate trustee or the court to waive the privilege not the solicitor.

Deemed Undertaking Rule

For many years, the courts in Ontario recognized that the common law imposed an "implied undertaking". In 1995, the Ontario Court of Appeal affirmed as much and recommended that the implied undertaking be codified.[21] Rule 30.1 was drafted and the implied undertaking was rechristened the "deemed undertaking". In a nutshell, the deemed undertaking requires that all parties and their counsel will not use the evidence or information for any purposes other than

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[21] *Goodman v. Rossi* (1995), 24 O.R. (3d) 359 (C.A.).

those of the proceeding in which it was obtained.[22] The court can order that the deemed undertaking rule does not apply. It may do so where it is "satisfied that the interests of justice outweigh any prejudice that would result to a party who disclosed evidence" and it may impose such terms and give such directions as are just.[23]

A party often seeks to waive the deemed undertaking rule where the solicitor who drafted the Will may have been negligent. It is unusual for the court to require that solicitor be put on notice, but not unheard of. Waiving the deemed undertaking rule in POA challenges seems less compelling.

Sundry and Miscellaneous Directions

Section 3 of the *Substitute Decisions Act* reads as follows:

> If the capacity of a person who does not have legal representation is in issue in a proceedings under this Act,
>
> (a) the court may direct that the Public Guardian and Trustee arrange for legal representation to be provided for the person;
>
> (b) the person shall be deemed to have capacity to retain and instruct counsel.

In a POA challenge, section 3 counsel is often appointed in an order for directions. The role of section 3 counsel is significant and should not be underestimated or overlooked. Section 3 counsel must act in the best interests of the incapable, not necessarily take sides between the warring parties, and can often play a useful role in settling a POA challenge.

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[22] Rule 30.1(3).
[23] Rule 30.1(8).

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 invested, 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 preferred. A certificate of pending litigation may also be ordered by the court where the estate holds real property.

Furthermore, the party that controls the estate assets may be required to deliver an inventory of estate property and/or pass his/her accounts or provide an informal accounting. 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. Finally, if there is any doubt, the order for directions should state that the parties to the litigation will be funding their own costs unless and until the court decides otherwise.

Evidence of Will and POA Challenges

Marshalling the necessary evidence to prosecute or defend a Will or POA challenge is obviously critical and should be addressed early on. Section 13 of the *Ontario Evidence Act*[24] affects actions by or against the heirs, next of kin, executors, administrators or assigns of a deceased. Section 13 states:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect to any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

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[24] R.S.O. 1990, c. E.23, as amended.

Without the deceased's evidence, any judgment or verdict would be suspect and open to attack as an opposite or interested party could essentially tender self-serving evidence in support of or defence of a claim. The section is therefore designed to avoid a miscarriage of justice by prohibiting a judgment or verdict based solely on self-serving evidence; evidence must be corroborated. The Ontario Court of Appeal held that the corroborating evidence required by section 13 must be in addition to and independent of oral evidence of the adverse party, but could be either direct or circumstantial.[25]

While section 13 will not figure in an order for directions *per se*, an order for directions is an opportunity to use the sanction of the court to gather relevant and corroborating evidence to ultimately satisfy the requirements of section 13. A party should therefore think long and hard about including directions in an order for directions geared towards evidence gathering.

Limitation Periods & Will Challenges

Limitation periods generally aim to strike the appropriate balance between an aggrieved party's right to seek redress and a potential defendant's right not to remain under the cloud of litigation indefinitely, or to answer for a wrong where it has become difficult, if not impossible, to assemble the evidence.

In the estates context, there is a dirge of case law both old and new, a relatively recent *Limitations Act*[26] to consider, and exceptions for certain types of estate litigation proceedings. There has also been some controversy as to whether a Will challenge is subject to a limitation period under the new *Limitations Act*.

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[25] *Burns Estate v. Mellon* (2000), 48 O.R. (3d) 641 (C.A.)
[26] *Limitations Act*, S.O. 2002, Chapter 24, as amended

Several learned authors are of the view that no limitation period applies to will challenges. Not even the absolute 15-year limitation period set out in the new *Limitations Act* applies. This startling proposition seems to fly in the face of the stated purpose of the new *Limitations Act*, and the public policy underpinning it. The purpose of the new *Limitations Act* was to bring under one roof the myriad of limitation periods and impose an almost universal two-year limitation period (subject only to reasonable discoverability).

It is likely that the court will, and ultimately should, decide that the two-year limitation period does apply subject only to certain well known exceptions such as fraudulent concealment. The court will likely be able to use the principle of reasonable discoverability to saddle a potential beneficiary with the knowledge that he/she has two years from the triggering event in which to challenge a will. As with all limitation periods, the reality and prudent course of action is that a will challenge should be commenced sooner rather than later.