



Fleury, Comery LLP  
Barristers & Solicitors

## COMMON ISSUES IN ESTATE LITIGATION

One of the preferred areas of practice for our partner Greg McConnell is "estate litigation". This memo outlines the most common issues that he deals with in this part of his practice.

### Validity of Wills

Disappointed family members often allege that the deceased's Will from which they received little or no benefit was not valid. There are three common grounds on which Wills are attacked. Firstly, there is the issue of competence. To make a valid Will, the testator must have a certain degree of understanding what he or she is doing, must be of "sound and disposing mind". There is a customary list of tests that must be met to prove this fact. Secondly, there is the issue of undue influence. Did the testator exercise his own will, or did the major beneficiary directly or indirectly exercise a degree of influence that caused the testator to do what he or she would not otherwise have done? If there are suspicious circumstances surrounding the preparation and signing of the Will, then the person trying to uphold the validity of the Will has an onus to prove that there was indeed no undue influence exercised. Finally, a Will may be invalidated by insufficient formality in its execution. For example, there have to be two witnesses, both of whom should be non-beneficiaries.

### Interpretation of Wills

Quite often a Will is unclear, especially where it was not prepared with a lawyer's assistance. Can the true meaning be extracted from the context, or is there confusion as to all or some of the assets? Where a specific bequest no longer exists on the date of death, does the gift lapse, or can its proceeds be traced to another asset? The usual route to deal with these issues is a court application to obtain advice, opinion, and direction.

### Appointment and Removal of Trustees

Although the courts will not usually second-guess the testator's nomination of his or her Estate Trustee, there are sometimes grounds to do so. Usually, this occurs during the administration of the estate, where the trustee is not carrying out his duties properly. (See our memo #34 on Trustee Duties). In such circumstances, the court can and will appoint a more suitable Trustee. Sometimes, the appointed Trustee retires or dies, and a substitute must be appointed.

### Estate Accounting

Where any estate beneficiary is unhappy with the accounting received from the Trustee, the Trustee will ask the court to pass the accounts. Estate accounts need to be prepared in a special format and delivered to the beneficiaries. A complaining beneficiary must then deliver his or her specific objections to the court. A frequent issue is the amount of

trustee compensation claimed.

### Dependant Support Proceeding

Where the testator has not made adequate provision for the support of dependants, they can, within a limited time, apply to the court for support from the estate. Issues arise as to whether a person (e.g. a common law spouse, or adult disabled child) is a dependant or not; and of course, the amount of any such support is always hotly contested.

### Statutory Guardianship

Where a person becomes incompetent without continuing powers of attorney in place, someone has to be appointed Statutory Guardian (for Property and/or Personal Care) by a court, in order to deal with their property, and direct their personal care. These applications require quite a bit of documentation, and are on occasion contested by opposing family members. The paperwork includes medical/psychological reports, and detailed Management Plans. Whoever has the most attractive "Management Plans" often wins out.

### Mandatory Mediation

In Toronto, the estates section of the Superior Court now requires that all estate disputes be mediated before the dispute proceeds to a trial. This process has been a tremendous success, in our estimation. For mediation, as for trial, preparation and formulation of the issues are the keys to a successful outcome for our clients.

### Preventing Estate Litigation

ALL of the litigation outlined above can usually be avoided at minimal expense and effort. Where a Will and Powers of Attorney are prepared by a lawyer, these issues hardly ever arise. All the lawyers at our firm are experienced in the preparation of these documents.

### Summary

Greg McConnell of our firm has conducted estate litigation cases involving all the issues outlined above. If you or someone you know has problems in an estate context, please do not hesitate to contact or refer to us for a consultation.

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