TAB 6

Interpretation Applications

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Practice Gems: The Administration of Estates 2011: Avoiding the Pitfalls

September 14, 2011

The Law Society of Upper Canada | Barreau du Haut-Canada

CONTINUING PROFESSIONAL DEVELOPMENT

Interpretation Applications

by Archie J. Rabinowitz, B.A., J.D. *
Fraser Milner Casgrain LLP

I. Introduction

Applications for the opinion, advice, and direction of the court are commenced in order to resolve ambiguous provisions in a will or trust, or the administration of a will or trust. Although the substantive content of an interpretation application is factually driven, the *Rules of Civil Procedure*[1] (the "Rules") and the courts which apply them have provided lawyers with certain guidelines. In this paper, I will review the nature of interpretation applications and their procedural implications. I will begin by examining the statutory framework, following which, I will discuss noted case law on interpretations, including rectification applications. The material will be practical with an emphasis on how to structure appropriate questions for consideration by the court.

II. The Statutory Framework: Rule 14.05(3) of the *Rules of Civil Procedure*

Interpretation applications must start with a Notice of Application. Pursuant to Rule 14.05(3), a Notice of Application may be brought where the relief sought is:

> (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

* The author gratefully acknowledges the assistance of Ara Basmadjian, Law Student, in the preparation of this paper.

[1] *Rules of Civil Procedure*, RRO 1990, Reg 194.

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute.[2]

III. Court Documents

The Notice of Application must be commenced in accordance with Form 14E of the Rules.[3] As we shall see, it is particularly important to cast one's questions before the court so as to be determined in either the affirmative or negative. The Notice of Application should be accompanied by a principal affidavit setting out all necessary facts and supporting documents.

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[2] *Ibid*, r 14.05(3).
[3] See eg Garry D Watson & Michael McGowan, eds, *Ontario Civil Practice 2011 Forms and Other Materials* (Toronto: Carswell, 2010) at 25-26.

The originating process is outlined by Rule 14.07 and Rule 38.05. The Notice of Application must be served to all persons who have a potential interest in the court's decision. The notice period is no less than ten days before the application. Where notice is served outside of Ontario, it must be served twenty days before the hearing.[4]

The applicant must also serve upon the respondents an application record and a factum at least seven days before the hearing. The application record must contain:

> (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
>
> (b) a copy of the notice of application;
>
> (c) a copy of all affidavits and other material served by any party for use on the application;
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> (d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves [does not apply to estates applications under Rule 14.05(3)]; and
>
> (e) a copy of any other material in the court file that is necessary for the hearing of the application.[5]

Each respondent is required to serve similar material pursuant to Rule 38.09(3) no less than four days before the hearing.

IV. Interpretation Applications: What Kind of Questions are Appropriate? Select Case Law

Brian A. Schnurr and Sender B. Tator argue that "[t]here are at least two types of questions that should be not put to the court by way of Notice of Application. One type relates to matters of an academic or hypothetical nature . . . The other type of question that should not be

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[4] *Supra* note 1 at r 38.06(3).
[5] *Ibid* at r 38.09(1).

put to the court is one that may or may not be a problem depending upon the happening of future events."[6] The courts will also refuse to proceed with an application that would effectively relieve the executors or trustees of their discretion and responsibility.

In *Fulford (Re)*[7] ["*Fulford*"], the executors asked the Ontario Supreme Court to determine whether they were entitled to retain securities that had been replaced for the original investments of the estate. It was also suggested that the Court should authorize an advisory committee to approve of the stocks' realization. Justice Middleton held that:

> The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern.[8]

The Court's comments demonstrate that interpretation applications must consist of legal as opposed to administrative questions. The executors are not permitted to simply extinguish their personal judgment and other duties by passing them on to the court.

In *Re Dunn*[9] ["*Dunn*"], the Ontario Supreme Court was presented with questions about a widow's right to dower and the meaning of certain expressions used in the testator's will. In addition, the executors of the will inquired as to what became of the estate should the widow re-marry. The judge refused to answer the latter question on the basis that it was "purely hypothetical."[10] Indeed, "if the widow should marry, or even intend to marry, the question might

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[6] Brian A Schnurr, *Estate Litigation*, 2d ed, loose-leaf (Toronto: Carswell, 1994) at 12-4.
[7] *Fulford (Re)*, 29 OLR 375, 14 DLR 844, [1913] OJ no 139 [*Fulford*].
[8] *Ibid* at para 24.
[9] *Re Dunn*, 26 OWN 325, [1924] OJ no 560 [*Dunn*].
[10] *Ibid* at para 13.

become important – but nothing of that kind appeared."[11] The decision in *Dunn* demonstrates that the courts will not concern themselves with hypothetical issues. Applications for the direction of the court are limited to the practical concerns of the estate.

In the motion of *Bessette Estate (Re)*[12] ["*Bessette*"], the Ontario Supreme Court was asked to identify the legatees under the residuary terms of the deceased's will. Justice Hope claimed: "I am of the opinion that other than determining, by way of interpretation of the will, any class referred to in the will, it is not the province of this Court to determine, as a matter of fact, who the individuals are who benefit by reason of the terms of the will."[13] As *Bessette* suggests, questions of fact relating solely to the administration of an estate are not within the purview of the court.

Re Estate of Louis Banko[14] ["*Banko*"] involved an application for the interpretation of the testator's will with respect to the management of the estate and its winery business. According to the will of Louis Banko, the trustees had discretion to make payments to the testator's daughter so long as they managed the winery business. Over time, the trustees thought that the winery business should be transferred to the testator's daughter. The remaining trustee turned to the Ontario High Court of Justice for guidance. McRuer C.J.H.C. made the following comments:

> In the form that the argument took before me it appeared that I was being asked to give judicial approval of the transfer of the winery business to Julia Banko Cooper. I think that this is something I ought not to be asked to do. My function is to interpret the will, while the function of the trustee is to exercise the discretion vested in him. Whether the proposed transfer of the winery business is a

[11] *Ibid.*
[12] *Bessette Estate (Re)*, [1941] OJ no 60 [*Bessette*].
[13] *Ibid* at para 13.
[14] *Re Estate of Louis Banko*, [1958] OR 213-218 [*Banko*].

> proper exercise of the discretion vested in the trustee is not for me to say.[15]

Although the courts have the power to prevent the trustee from exercising his or her discretion improperly, judges will not grant approval of actions made within the trustee's rightful discretion. However, the trustee's conduct and decisions may be scrutinized at a subsequent passing of accounts.

In *Re Coulson*[16] ["*Coulson*"], the High Court of Justice considered whether the bookkeeping principle in *Allhusen v. Whittell*[17] ["*Whittell*"] applied in Ontario. While finding that the case did not apply to the circumstances at issue, Justice Wells commented on the nature of the question posed before the Court: "I have some difficulty in answering the questions as they are put. The trustees, of course, are not entitled to ask questions at large about the state of the law . . ."[18]

In *Re Skinner*[19] ["*Skinner*"], the testator instructed the applicant executor to invest the residue of her estate and pay the proceeds to her son, Dr. John Henry Burdett Skinner, as a life tenant. One of the issues before the Ontario High Court of Justice was whether the testator's son could disclaim his right to the income of the estate from 1967 to 1968. Justice Addy held that Dr. Skinner was not entitled to disclaim a portion of the undivided gift. Indeed, the legatee was only permitted to either accept the gift in its entirety or reject it outright.

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[15] *Ibid* at 4.
[16] *Re Coulson*, [1959] OR 156, 19 DLR (2d) 206, [1959] OJ no 654 [*Coulson*].
[17] *Allhusen v Whittel*, (1867) LR 4 Eq 295 [*Whittel*].
[18] *Coulson, supra* note 16 at para 25.
[19] *Re Skinner*, [1970] 3 OR 35-41 [*Skinner*].

Upon denying Dr. Skinner's one year disclaimer, the Court refused to determine who would be entitled to the income of the estate should he disclaim all interest in the estate. According to Justice Addy:

> Dealing with [this question], it is obvious that Dr. Skinner has not yet made any general disclaimer and the problem which arises is, of course, whether this matter should at the present time have been brought before the Court at all. The question, in my view, is at the present time, a purely academic and hypothetical one; the function of the Court is not to answer hypothetical questions, but only questions of law as they arise as a result of a certain state of facts which actually exist.[20]

Justice Addy cited the decision in *Dunn*, with approval, and reiterated its principle that the courts will not engage in academic or speculative commentary where a practical concern does not currently exist.

The recent decision of the Ontario Superior Court of Justice in *Kaptyn Estate v. Kaptyn Estate*[21] ["*Kaptyn Estate*"] serves as a warning to parties who bring unreasonable applications for the opinion, advice, or direction of the court. On the facts, Simon and Henry Kaptyn commenced separate applications for the Court's interpretation of their father's estate. At the time of his death, John Kaptyn had left both a primary and a secondary will. The testator's primary will made gifts to his wife and grandchildren as well as certain charitable donations. The secondary will sought to dispose of his amassed corporate structure. As the two estate trustees, Simon and Henry Kaptyn were expected to resolve the debts and liabilities of their father's estate in order to maximize the benefits of the assets bequeathed to the testator's grandchildren. The sons were incapable of working together and became mired in litigation.

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[20] *Ibid* at 3.
[21] *Kaptyn Estate v Kaptyn Estate*, 2011 ONSC 542, 64 ETR (3d) 269, [2011] OJ no 285 [*Kaptyn Estate*].

In the proceeding before Justice Brown, the parties sought full indemnity costs stemming from applications for the interpretation of the testator's two wills. Yet, Simon and Henry Kaptyn did not adequately consider the instructions delivered by the Superior Court of Justice on the litigants' previous applications. Justice Brown admonished the parties' recalcitrance:

> I find that the estate trustees have acted unreasonably as fiduciaries by advancing formal positions in the Interpretation Applications which failed to take into account a prior decision of this court. Litigious families like the Kaptyns cannot reasonably expect that unlimited judicial resources are available to devote to their internecine quarrels. Judicial resources in the Toronto Region are not infinite.[22]

Judges are clearly not receptive to parties who engage in wasteful and careless litigation. According to Justice Brown: "Because of this scarcity of judicial resources, courts must require litigants, including estate trustees, to reflect carefully on decisions issued by the court and to bring good faith and common sense to the implementation of those decisions."[23] Due to Simon and Henry Kaptyn's unreasonable applications, the Court imposed severe reductions and conditions to their cost awards. The decision in *Kaptyn Estate* suggests that inappropriate applications for the opinion, advice, or direction of the court are commenced at the risk of embarrassing setbacks.

V. Rectification

Rectification is the equitable power of the court to correct errors or omissions which compromise the testator's true intentions. In *Lipson (Re)*[24] ["*Lipson*"], Justice Pattillo summarized the circumstances in which a court will exercise its power to delete or insert words in order to rectify a will:

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[22] *Ibid* at para 33.
[23] *Ibid* at para 35.
[24] *Lipson (Re)*, (2009) 52 ETR (3d) 44, [2009] OJ no 5124, 2009 CarswellOnt 7474 [*Lipson* cited to OJ].

(i) Upon a reading of the will as a whole, it is clear on its face that a mistake has occurred in the drafting of the will;

(ii) The mistake does not accurately or completely express the testator's intentions as determined from the will as a whole;

(iii) The testator's intention must be revealed so strongly from the words of the will that no other contrary intention can be supposed; and

(iv) The proposed correction of the mistake, by the deletion of words, the addition of words or both must give effect to the testator's intention, as determined from a reading of the will as a whole and in light of the surrounding circumstances.[25]

However, in the decision in *Robinson Estate v. Robinson*[26] ["*Robinson*"], the Ontario Superior Court of Justice refused to rectify the impugned will where the testator simply misunderstood the legal implications of a revocation clause. In a carefully reasoned decision, Justice Belobaba commented on the courts limitations:

> The position being urged by the applicants would give the court the following power: Even where there is no ambiguity on the face of the will, and no drafting error of any sort, and the will has been reviewed and approved by the testator before it was executed, the court may nonetheless intervene and rectify simply on the basis of third party affidavit evidence that the testator was mistaken and did not mean what she said. This would be a significant change in the law.[27]

The decision in *Robinson* was recently affirmed by the Ontario Court of Appeal.[28]

VI. Summary

Applications for the opinion, advice, and direction of the court are effective procedures to clarify ambiguous provisions of a testator's will. Both the substance and form of the questions

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[25] *Ibid* at para 42.
[26] *Robinson Estate v Robinson*, 2010 ONSC 3484, [2010] OJ no 2771 leave to appeal to ONCA granted [*Robinson*].
[27] *Ibid* at para 45-46.
[28] *Rondel v Robinson Estate*, 2011 ONCA 493 [*Robinson Estate*].

brought before the court are crucial to a successful motion. The questions should only deal with practical problems rather than academic or future concerns. The questions should also be structured so as to receive a "yes" or "no" answer from the court. Finally, judges are not prepared to assume the role of the estate trustee. The courts are concerned with fundamentally legal matters and will not usurp the executor's responsibilities.

Court File No. [*number*]

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF JOHN DOE, deceased

B E T W E E N:

JANE DOE AS ESTATE TRUSTEE UNDER THE WILL OF JOHN DOE, DECEASED

Applicant

and

STEVE SMITH

Respondent

APPLICATION UNDER Rule 75.06 of the *Rules of Civil Procedure*

NOTICE OF APPLICATION

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following pages.

THIS APPLICATION will come on for a hearing before a Justice of the Superior Court of Justice at [*city*] on [*day*] the [*date*] day of [*month*], [*year*], at [*time*], at the Court House, [*full address and postal code*].

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGEMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: _____ Issued by: _____

Local Registrar
[*full address and postal code of court office*]

APPLICATION

1. THE APPLICANT MAKES APPLICATION FOR the following in relation to the Last Will and Testament of John Doe, deceased, dated January 1, 2008 (the "Last Will"):

   (a) A declaration that the bequest amount of ten thousand dollars ($10,000) in clauses II(d)(iii) of the Last Will made to the children of Susan Cartwright is a clerical error (the "Error");

   (b) An Order rectifying the Error by substituting one thousand dollars ($1,000) for ten thousand dollars ($10,000) in clause II(d)(iii) of the Last Will;

   (c) Costs of this Application on a substantial indemnity basis; and

   (d) Such other Order as this honourable Court may deem just.

2. THE GROUNDS FOR THE APPLICATION ARE:

   (a) This application relates to a clerical error in John Doe's Last Will.

   (b) John Doe had previously executed an earlier will on December 2, 2005 (the "Earlier Will").

   (c) John Doe's wife, Jane Doe, is a beneficiary and Estate Trustee under both the Earlier Will and the Last Will.

   (d) Jane Doe asked Scott Ross, a solicitor in Toronto, to re-do the Last Will for her husband, John Doe.

   (e) Scott Ross prepared the Last Will by deleting the bequest to Jane Doe's ex-husband and making some further minimal changes to the Last Will.

   (f) The Earlier Will contained a bequest to each child of Susan Cartwright, the Respondent herein, for one thousand dollars ($1,000). No request by Jane Doe and/or John Doe was made to change this bequest. However, in re-doing the Last Will, Scott Ross inadvertently typed the bequest amount as ten thousand dollars ($10,000) to each of the Respondents.

(g) This error was not discovered until after John Doe's death on September 15, 2010.

(h) Rule 75.06 of the *Rules of Civil Procedure.*

3. THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

(a) The Affidavit of Scott Ross sworn [*date*] and the exhibits attached thereto;

(b) The Affidavit of Jane Doe sworn [*date*] and the exhibits attached thereto; and

(c) The Affidavit of execution of Jim James sworn [*date*].

Court File No. [*number*]

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE JOHN DOE GRANDCHILDREN'S TRUST

B E T W E E N :

THE RICHMOND COUNTY TRUST COMPANY
Trustee of the John Doe Grandchildren's Trust

Applicant

- and -

STEVE SMITH, DEBORAH SCOTT, STEWART MITCHELL, JESSICA JAMES

Respondents

APPLICATION UNDER Rule 14.05 of the *Rules of Civil Procedure* and s. 60 of the *Trustee Act*, RSO 1990, c T 23.

NOTICE OF APPLICATION FOR DIRECTIONS

TO THE RESPONDENT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant. The claim made by the applicant appears on the following pages.

THIS APPLICATION will come on for a hearing before a Justice of the Superior Court of Justice at [*city*] on [*day*] the [*date*] day of [*month*], [*year*], at [*time*], at the Court House, [*full address and postal code*].

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: _____ Issued by: _____
Local Registrar
[*full address and postal code of court office*]

APPLICATION

1. THE APPLICANT, the Richmond County Trust Company, Trustee of the John Doe Grandchildren's Trust ("Richmond County Trust"), MAKES APPLICATION FOR:

(a) The opinion, advice or direction of the court on the following questions concerning the John Doe Grandchildren's Trust ("Trust"):

(i) having regard to the definition of "Yearly Income" in paragraph 2.0 (a) of the Trust and the definition of "Net Income" in paragraph 2.0 (c) and the terms of paragraph 2(d) which provide that all payments to income beneficiaries of the Trust, including "Yearly Income", shall not exceed "Net Income" and paragraph 7(ii) which gives the Trustees discretion to generate sufficient "Net Income" to meet the amount otherwise required to be distributed to an income beneficiary, is Richmond County Trust bound by the even hand rule in exercising its discretion to determine "Net Income"?;

(ii) such other question as Richmond County Trust may ask and this Honourable Court shall answer.

2. THE GROUNDS FOR THE APPLICATION ARE:

3. THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

Practice Gems: The Administration of Estates 2011: Avoiding the Pitfalls

Law Society of Upper Canada

Archie J. Rabinowitz, B.A., J.D.
Of the Ontario Bar
Fraser Milner Casgrain LLP (FMC)

Interpretation Applications

1. The Statutory Framework: Rule 14.05(3) of the *Rules of Civil Procedure*
2. Court Documents
3. Interpretation Applications: Select Case Law
4. Rectification
5. Closing Remarks

2

Rule 14.05(3) of the *Rules of Civil Procedure*

- (a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;
- (b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;
- (c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

3

Rule 14.05(3) of the *Rules of Civil Procedure*

- (d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;
- (e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;
- (f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

4

Rule 14.05(3) of the *Rules of Civil Procedure*

- (g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;
- (g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*; or
- (h) in respect of any matter where it is unlikely that there will be any material facts in dispute.

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Court Documents

- Form 14E of the *Rules of Civil Procedure*.
- Principal Affidavit.
- Rule 14.07 and Rule 38.05 of the *Rules of Civil Procedure*.
- Notice of Application.
- Application Record and Factum.

6

Court Documents

- The application record must contain:
- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
- (b) a copy of the notice of application;
- (c) a copy of all affidavits and other material served by any party for use on the application;
- (d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves [does not apply to estates applications under Rule 14.05(3)]; and
- (e) a copy of any other material in the court file that is necessary for the hearing of the application.

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Fulford (Re), 29 OLR 375, 14 DLR 844, [1913] OJ no 139

- Middleton J. of the Ontario Supreme Court – High Division:
  - "The executors cannot come to the Court and ask whether the present is a good time or a bad time to sell stock or anything else, or ask whether a price offered is sufficient or insufficient. The advice which the Court is authorised to give is not of that type or kind; it is advice as to legal matters or legal difficulties arising in the discharge of the duties of the executors, not advice with regard to matters concerning which the executors' judgment and discretion must govern."

8

Re Dunn, 26 OWN 325, [1924] OJ no 560

- Riddell J. of the Ontario Supreme Court – High Court Division:
  - "The next question was, what becomes of the estate if and when the widow marries? This the learned Judge declined to answer, saying that it was purely hypothetical. If the widow should marry, or even intend to marry, the question might become important – but nothing of that kind appeared."

9

Bessette Estate (Re), [1941] OJ no 60

- Hope J. of the Ontario Supreme Court – High Court of Justice:
  - "I am of the opinion that other than determining, by way of interpretation of the will, any class referred to in the will, it is not the province of this Court to determine, as a matter of fact, who the individuals are who benefit by reason of the terms of the will."

10

Re Estate of Louis Banko, [1958] OR 213-218.

- McRuer C.J.H.C. of the Ontario High Court of Justice:
  - "In the form that the argument took before me it appeared that I was being asked to give judicial approval of the transfer of the winery business to Julia Banko Cooper. I think that this is something I ought not to be asked to do. My function is to interpret the will, while the function of the trustee is to exercise the discretion vested in him. Whether the proposed transfer of the winery business is a proper exercise of the discretion vested in the trustee is not for me to say."

11

Re Coulson, [1959] OR 156, 19 DLR (2d) 206, [1959] OJ no 654

- Wells J. of the Ontario High Court of Justice:
  - "I have had some difficulty in answering the questions as they are put. The trustees, of course, are not entitled to ask questions at large about the state of the law . . . "

12

Re Skinner, [1970] 3 OR 35-41

- Addy J. of the Ontario High Court of Justice:
  - "The question, in my view, is at the present time, a purely academic and hypothetical one; the function of the Court is not to answer hypothetical questions, but only questions of law as they arise as a result of a certain state of facts which actually exist."

13

Kaptyn Estate v Kaptyn Estate, 2011 ONSC 542, 64 ETR (3d) 269, [2011] OJ no 285

- Brown J. of the Ontario Superior Court of Justice:
  - "I find that the estate trustees have acted unreasonably as fiduciaries by advancing formal positions in the Interpretation Applications which failed to take into account a prior decision of this court. Litigious families like the Kaptyns cannot reasonably expect that unlimited judicial resources are available to devote to their internecine quarrels. Judicial resources in the Toronto Region are not infinite."

14

Kaptyn Estate v Kaptyn Estate, 2011 ONSC 542, 64 ETR (3d) 269, [2011] OJ no 285

- Brown J. of the Ontario Superior Court of Justice:
  - "Because of this scarcity of judicial resources, courts must require litigants, including estate trustees, to reflect carefully on decisions issued by the court and to bring good faith and common sense to the implementation of those decisions."

15

Lipson (Re), 52 ETR (3d) 44, [2009] OJ no 5124

- Pattillo J. of the Ontario Superior Court of Justice:
  - (i) Upon a reading of the will as a whole, it is clear on its face that a mistake has occurred in the drafting of the will;
  - (ii) The mistake does not accurately or completely express the testator's intentions as determined from the will as a whole;
  - (iii) The testator's intention must be revealed so strongly from the words of the will that no other contrary intention can be supposed; and
  - (iv) The proposed correction of the mistake, by the deletion of words, the addition of words or both must give effect to the testator's intention, as determined from a reading of the will as a whole and in light of the surrounding circumstances.

16

Robinson Estate v Robinson, 2010 ONSC 3484, [2010] OJ no 2771 leave to appeal to ONCA granted

- Belobaba J. of the Ontario Superior Court of Justice:
  - "The position being urged by the applicants would give the court the following power: Even where there is no ambiguity on the face of the will, and no drafting error of any sort, and the will has been reviewed and approved by the testator before it was executed, the court may nonetheless intervene and rectify simply on the basis of third party affidavit evidence that the testator was mistaken and did not mean what she said. This would be a significant change in the law."

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Closing Remarks . . .

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