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TAB 1

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Caselaw Update and Other Developments

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Caselaw Updates and Other Developments

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***Rudin-Brown v. Brown*, 2023 ONCA 151- Capacity**

In 2009 Carolyn Brown, then age 79, updated her will and powers of attorney following the death of one of her daughters. She named her sister-in-law, Jeanne, as her attorney for property and her daughter and son as her powers of attorney for personal care, jointly and severally.

In 2016, at her son's suggestion and without legal advice, Ms. Brown executed new powers of attorney where she named her son as the only attorney for property and personal care. In July and August 2017, two assessors found Ms. Brown incapable of managing her property and personal care.

The issue before the court was which set of powers of attorney were valid. The trial judge found the 2016 powers of attorney invalid. The Appellant son's appeal was dismissed by the Ontario Court of Appeal.

The trial judge found the 2016 powers of attorney to be invalid because:

- Ms. Brown lacked the requisite capacity when she executed them; and
- They were a product of the son's undue influence over his mother.

This decision is a reminder to lawyers who draft powers of attorney to ensure a grantor meets the tests for both the power of attorney for property and personal care set out in the *Substitute Decisions Act*. Drafting solicitors need to ask a grantor the right questions and keep detailed notes.

***McKenzie v. Morgan*, 2023 ONSC 1457- Sale of property by attorney that is the subject of a testamentary gift**

Dawn McKenzie, attorney for property of her father, 85-year-old Raymond Morgan, brought this Application as she wanted to sell one of Raymond's properties, occupied by his common law spouse, Wendy Morgan.

Wendy resided in the property under a tenancy agreement she had made with Raymond, wherein she paid $800 in monthly rent. Further, Raymond's will provided for Wendy "to continue to reside at my home at 81 Springdale Drive, Barrie, Ontario, for the rest of her life, or until she chooses to move out, pursuant to the terms of a Residential Rental Agreement dated April 2, 2018. Upon Wendy Morgan moving out of the property, or dying, the house will form part of the reside (sic) of my estate and be dealt with as part thereof."

[1] The author would like to thank Latoya Brown, articling student at Fasken Martineau DuMoulin LLP for her assistance in preparing this paper.

Since the above provision was a specific testamentary gift in the form of a life leasehold interest to Wendy, the Court had to consider if Dawn could dispose of the property. The SDA prohibits an attorney for property disposing of property that is the subject of a specific testamentary gift of the alleged incapable unless the sale is required to permit the attorney to comply with their duties (i.e., if Dawn needed the funds to pay for her father's care).

First the court established that based on the evidence, Dawn had reasonable grounds to believe that her father was incapable both with respect to his personal care and with respect to his property. The court then turned to the question of whether the sale of the property was necessary. The court found the evidence was unreliable (estimates, exaggerated) and that there were other options available, enabling Dawn to keep the property and still afford her father's care. The court also expressed its concern that Dawn was in a financial conflict of interest and rejected Dawn's application to sell the property.

Fletcher's Fields Limited v. The Ontario Rugger Union*, 2023 ONCSC 373- Validity of non-charitable purpose trusts and the *Perpetuities Act

In the 1960s, the Ontario Rugger Union (ORU) purchased six rugby fields to be used by the six league rugby clubs. Pursuant to an agreement between the ORU and the clubs, the ORU owned the fields in trust for the Clubs.

Fletcher Fields Limited (FFL) was incorporated in 1970 with the ORU and the clubs becoming shareholders. Shortly after, the parties agreed to transfer the rugby fields from ORU to FFL. The agreement acknowledged that the ORU held the fields in trust for the rugby clubs and a declaration of trust was registered on title.

The FFL experienced financial difficulty and, in 2021, sold the Fields to the City of Markham for $21.5 million. A little more than half of the proceeds were donated to the Canadian Rugby Foundation and an application was brought to seek the court's opinion or direction on questions arising from the sale as well as how to distribute the remaining proceeds.

Were the Fields held in Trust?

The court noted that a non-charitable purpose trust is recognized where:

1. It meets the so-called "three certainties";

2. It does not violate the rule against perpetuities (s. 16 of the *Perpetuities Act*); and

3. There is a person with standing to enforce the trust.

The court found that FFL held the Fields as trustee for a specific, non-charitable purpose trust, with the trust's purpose being the promotion and playing of the sport of rugby in accordance with the 1971 conveyance agreement and the 1972 declaration of trust. In so doing, the court noted that a purpose trust can be charitable or non-charitable, with the common feature of the two being the advancement of a purpose, as opposed to benefiting specific people directly.

While noting that the promotion of sport itself (i.e., rugby) is not a charitable purpose, the court found that FFL held the Fields as trustee because the three-part trust test had been met, there was no violation of the rules against perpetuities and at least one person had standing to enforce the trust. On the last point, the court noted at paragraph 24:

Another historical objection to non-charitable purpose trusts is the lack of a beneficiary to enforce the obligation upon the trustee. However, the modern-day trend is to be flexible when deciding whether non-charitable purpose trusts are valid. Instead of prohibiting non-charitable purpose trusts, the legal rules try to ensure that the intention of the creator of the trust is carried out and that the trustee is able to perform in compliance with that intention. Here, there were parties with sufficient standing to enforce the trust – the members of the ORU and the shareholders of the FFL. They are identifiable in the agreements and, although they are not direct beneficiaries of the trust, they have a sufficient interest that they would have standing to enforce its objects.

Who was Entitled to Receive the Net Proceeds?

Section 16(2) of the *Perpetuities Act* requires that, after 21 years, the trust subject matter reverts to the person who would have been entitled to receive the trust property had the trust been invalid from the time of its creation.

The ORU held title to the Fields when the trust was first formed; so, under s. 16(2), after 21 years the Fields would have reverted to the ORU. However, the ORU conveyed its interest in the Fields to FFL in 1971 so the Fields reverted to FFL, as title holder at that time, entitling FFL to the proceeds of sale.

***Colbert v. Colbert et al*., 2023 ONSC 811- Vexatious Litigant**

Even though we often encounter ugly behaviour from estate litigation clients and/or their family members, it's uncommon for the courts to make a vexatious litigant order. This decision sets out what the court considered in finding one of the sibling parties to be a vexatious litigant.

The vexatious party brought several proceedings and threatened to bring others, all seeking to make some claim against the estate to enrich himself or set aside the will of his deceased father. He wrote to the opposing parties that he was challenging them to "obtain revenge" and that he intended to deplete the estate's value. He disregarded court orders and made multiple threats to the opposing party and their counsel.

Under s. 140(1) of the *Courts of Justice Act*, if a judge is satisfied that a person has "persistently and without reasonable grounds… instituted vexatious proceedings in any court" or "conducted a proceeding in any court in a vexatious manner", they may order that the person may not, without leave of the court, institute any further proceeding in any court or continue a proceeding previously instituted.

In this case, upon finding the party to be a vexatious litigant, the court ordered that he was not permitted to institute further proceedings related to the opposing party and, even then, only related to the estate, without leave from the court. The court also prohibited him from taking any additional steps in two other proceedings without leave from the court. However, the court did grant him

leave to present evidence and arguments on his notice of objection and to continue to represent himself in that proceeding.

***Jonas v. Jonas*, 2022 ONCA 845- Estate distribution/armchair rule**

The Ontario Court of Appeal considered the interpretation of the residue clause in a will and in particular the phrase "in equal shares per stirpes".

The deceased was survived by a common law spouse, four children and four grandchildren. The clause in question stated:

> "I DIRECT my trustees to divide the rest, residue and remainder of my estate as follows: forty per cent (40%) to be divided equally among my children who shall survive me and sixty per cent (60%) to be divided equally between my grandchildren and my great grandchildren (if any) who shall survive me or be born within ten years of my decease, in equal shares per stirpes. Provided that the share to my grandchildren shall be kept and invested by my trustee and used for the support of such grandchildren and for their education and then paid to each of them upon such grandchild attaining the age of 40."

There were two primary interpretations before the application judge, the first brought forth by the now appellant and the second by the Children's Lawyer:

1. 60% of the residue would be distributed equally among the children (in addition to 40% of the residue). If, at the time of the vesting period (10 years from date of death), a child of the testator had no children of their own then the child would receive an additional 15% share of the residue (or ¼ of the 60%). If, at the 10-year mark, a child of the testator had children of their own, then the 15% would be divided equally between or among those children. In other words, each child (and the "branch" of that child's family) would receive the same quantum amounting to ¼ of the residue.

2. The residue clause created two classes of beneficiaries: the first class was the children of the testator (to receive 40% of the residue); the second class was the grandchildren and great grandchildren of the testator alive at the death of the testator or born within 10 years of the testator's death. The 60% of the residue was for the second class of beneficiaries only, not to be distributed among those in the first class.

The application judge applied the "armchair rule" to determine the testator's intentions – i.e., the court sits in the place of the testator and assumes the same knowledge the testator had of their finances and family make-up based on the evidence presented to determine the testators' intentions. After doing so, the application judge agreed with the interpretation advanced by the Children's Lawyer.

The Court of Appeal found that the application judge had properly applied the armchair rule. When faced with different interpretations to consider, the application judge chose the one that most closely conformed to her assessment of the testator's intention, reading the Will as a whole at the time it was made.

***Alger v. Crumb*, 2023 ONCA 209 – Revoking beneficiary designations**

The Court of Appeal determined whether a general revocation clause that read:

> "I hereby revoke all Wills and Testamentary dispositions of every nature and kind whatsoever made by me heretofore made."

was effective under s. 52(1) of the *Succession Law Reform Act* to revoke the testator's existing beneficiary designations by instrument(s) for her Registered Retirement Income Fund ("RRIF") and Tax-Free Savings Account ("TFSA") plans.

S. 52(1) of the *Succession Law Reform Act* reads: "A revocation in a will is effective to revoke a designation made by instrument only if the revocation relates expressly to the designation, either generally or specifically."

The application judge found that because the general revocation clause did not relate expressly to the testator's existing designations by instrument(s) of her RRIF and TFSA plans, it was not effective to revoke those designations and they remained in effect. The Court of Appeal agreed.

***Lakhtakia v. Mehra*, 2023 ONCA 88 – lack of financial disclosure can be expensive**

This is a short decision dismissing the appeal of a lengthy trial judgement.

The appellant sought a reduction in the $950,000 costs awarded by the trial judge in the first instance family law proceedings. The trial judge found that the appellant had engaged in misconduct, with his most egregious misconduct being his withholding of key financial documents and his fraudulent misrepresentation of his income. The appellant had represented his annual income as being between $100,000 and $200,000 instead of the actual $5 - $7.5 million he earned on an annual basis.

The litigation was conducted over several years and involved 23 motions, multiple conferences, and over 40 judicial endorsements and orders. The trial judge awarded the respondent costs on a full indemnity basis because of the appellant's bad faith conduct throughout the lengthy litigation. The Court of Appeal upheld full indemnity costs as appropriate and did not accept that the award was "plainly wrong".

***D.L. v. E.C.*, 2023 ONCA 494 – Dependant's Relief**

Section 57 of the SLRA expands the definition of child for the purposes of dependants' support to include a person whom the deceased has demonstrated a "settled intention" to treat as a child of his or her family. In this decision, the court dismissed E.C.'s application for dependant support brought on behalf of her daughter, finding that the deceased did not demonstrate a settled intention to treat the daughter as his child.

E.C. and the deceased met in high school and had been involved in an on again off again romantic relationship for about 8 years before the deceased died of a drug overdose at the age of 26. They

were both dating other people when E.C. got pregnant. Towards the end of her pregnancy, E.C. asked the deceased for assistance and they were living together when E.C.'s daughter was born. The deceased was named as the child's father on her birth and baptismal certificates. He named E.C. and the child as beneficiaries of his life insurance.

The deceased had named his mother and sister as beneficiaries of his pension but had tried to change the designation to name E.C. and her daughter as his beneficiaries but used the incorrect form. E.C. then commenced an application for dependant support on behalf of her daughter, seeking payment of the pension.

The application judge concluded that:

(a) E.C. had not met her onus to demonstrate that the child was a dependant of the deceased;

(b) E.C. and B.L. were not common law spouses;

(c) The ordered DNA tests demonstrated the child was not the deceased's biological child;

(d) The deceased had not demonstrated "a settled intention" to treat the child as a child of his family in accordance with the expanded definition of "child";

(e) The deceased believed the child was his biological child and that E.C. knew that either the deceased was not or may not be the father and did not disabuse the deceased of his misunderstanding; and

(f) Had the deceased known the truth, the eight months may have been a sufficient time frame to have allowed for the settled intentions to be manifested.

On appeal, E.C. argued that the deceased's knowledge of whether the child was his biological daughter was irrelevant, particularly since there was evidence that he had suspicions he was not the father. She argued that the applications judge erred in considering that factor as part of the determination of settled intention.

The Court of Appeal held that determining whether a deceased has demonstrated a settled intention to treat a child as his own is a fact-driven exercise. The deceased's knowledge of parentage is one of many factors that can be considered.

***Bryton Capital Corp. GP Ltd. v. CIM Bayview Creek Inc.*, 2023 ONCA 363 – Declaratory Relief Defined**

On appeal, Bryton contended that the application judge erred in refusing to grant a declaration in its favour to preclude or to dismiss creditor claims and ss. 95 and 96 BIA claims. Bryton asserted that the application judge erred in failing to assess the full test for declaratory relief set out in Solosky v The Queen. This test requires: (a) that the question be real and not theoretical; (b) that the person raising it has a real interest in raising it; and (c) that there is an opposing party. Bryton argued that the test has been met in this case.

The Court of Appeal, setting out the relevant legal principles, delved into an explanation of declaratory judgements/declaratory relief, defining a declaratory judgement as "a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs." Declaratory relief, being restricted to a declaration of the parties' rights, is mainly sought in commercial matters to help parties define their rights and does not contain a provision ordering a party to do something or imposing any form of sanction.

The Court of Appeal held that the court's jurisdiction to make binding declarations of right does not allow a judge to do whatever seems fair; it allows the court to confirm legal rights that already exist. In the case at hand, Bryton was not simply seeking a declaration of its rights, but a dismissal of other claims/proceedings that were already underway. The Court of Appeal found that the appeal had no merit, because Bryton's application "was not a proper use of the application procedure, and … went beyond the proper scope of declaratory relief."

***White v. White*, 2023 ONSC 3740 – Substantial Compliance**

This case provides some clarity on the limitations of the substantial compliance regime pursuant to s. 21.1 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "SLRA"). In this case, the testator was in the process of updating her will, however she died before the new will was signed. The applicant, her son, sought production of the lawyer's file in accordance with s. 9 of the *Estates Act,* RSO 1990, c E.22, with the aim of producing the drafted will, so that he could submit a filing for substantial compliance to validate the draft will.

The court was wary of broadening the scope of s. 21.1 to include a draft will. The court noted that a will is a fixed an final expression of testamentary intention, and that a draft will is just a draft, with the potential for changes up until execution time. The court was concerned that setting such a precedent could open the flood gates for a fishing expedition, stating that if s.21.1 is expanded, "we go from looking for Wills – a fairly narrow search – to looking for things that creative people an try to get a court to accept as a Will. That search cuts a much wider swath."

Of note – this challenge was raised orally as a possible cause of action at a 15 minute uncontested case conference. The court was not willing to broaden the scope of definition of a "Will" in the circumstances but left the matter open for further review with additional arguments.

***Palichuk v. Palichuk*, 2023 ONCA 116 – Will challenge made during lifetime of testator**

The Court of Appeal upheld the decision of the application court dismissing a will challenge while the testatrix, Nina, was alive. Nina made changes to her will and power of attorney, and transferred property as a bare trust. The appellant, her daughter, claimed that Nina was unduly influenced and lacked capacity to make such changes, and also sought a guardianship application. A geriatric psychologist conducted two capacity tests and concluded that the testatrix had capacity.

The Court of Appeal also decided that there was no error in concluding that the testatrix had capacity. Although there were minor factual errors in the report, the Court accepted the psychologist's capacity tests as they aligned with that of the *Substitute Decisions Act,* 1992, S.O. 1992, C. 30 (the "SDA"). There were also no contravening expert opinion evidence put forward. Given that the testatrix had capacity to manage finances with assistance, manage her clothing, shelter and hygiene, and grant and revoke powers of attorney and a will, there was therefore no

basis for a guardianship claim. When addressing the issue of timing of the assessment, the Court concluded that the capacity assessment need not have been done at the time of the estate changes, but when the application was put forward. The Court also agreed with the application judge that there was no need to address the undue influence issue, reasoning that the testatrix was still alive and had the capacity to change her will at any time. Thus, the Court determined that questioning the validity of the Will before the testatrix's death would be premature, and a hypothetical contingent exercise that would result in a waste of judicial time and resources. The Court concluded that the application judge should not have provided their opinion, advice or direction on the testamentary documents since a will speaks from death, and the testatrix was still capable of making changes.

***Dors et al. v. The Public Guardian and Trustee*, 2023 ONSC 1503 – The Cy-Près Doctrine**

This case revisits the cy-près doctrine. Here, the deceased left 20% of the residue of her estate to a charity that no longer existed at the time of her death. There were also no instructions in the will directing how the executors should proceed in the circumstances. The court discussed two cases in making its decision. The first is *Re Jacobsen* (1977), 80 D.L.R. (3d) 122 ("*Jacobsen*") which sets out the principles to determine charitable intent. Using the test from *Jacobsen*, the court found that the testator had charitable intent as the gift "was a gift without limitation to a charitable institution, the gift is made from the residue of the estate, the other beneficiaries received cash legacies, there is no gift over in the event of a lapsed gift, and the remaining residual beneficiaries are all charities".[2]

The second case the court discussed was *La Fabrique de la Paroisse Sainte-Sophie et al*., 2020 ONSC 3534 to determine if the cy-près doctrine was applicable in the circumstances. This case quotes a test from *Conforti v Conforti* (1990), 39 E.T.R, which provides that the cy-près doctrine may be used by the court to direct a gift in a Will to an institution or organization other than the one named in the Will if: a) the gift in the Will is impractical or impossible; b) the testator manifested a general charitable intention in making the gift in the Will; and c) the gift to the alternative institution or organization would be a gift resembling the initial purpose of the gift in the Will. The court found that the cy-près doctrine was applicable for the following reasons: 1) the gift was impossible as the charity no longer existed; 2) the testatrix demonstrated a general charitable intent as 95% of her estate was gifted to charities; and 3) the Court was satisfied that the objectives of the charity was of particular importance to the testatrix as she continued to make gifts to the charity even though they had to be carried out through a power of attorney. In addition, the gift to this particular charity was the largest portion of the residue. Accordingly, the cy-près doctrine was utilized to benefit a charity with similar objectives.

***Gorgi v Ihnatowych*, 2023 ONSC 1803 – Rectification of Wills**

This case revisits the common law surrounding the rectification of wills. Here, the testator's will provided that his grandchildren were to receive 10% of the residue of his estate, and the testator's issue would receive the remainder of the residue in equal shares per stirpes. The Will did not specifically name the individuals; rather, it referred generally to "grandchildren" and "issue". The respondent, Alex, claimed to be a child of the deceased and that he and his children should be

[2] *Dors et al. v. The Public Guardian and Trustee*, 2023 ONSC 1503 at para 23

entitled to share in the residue. The Applicants, the deceased's daughter Ula and son Mark, sought to have the will rectified to exclude Alex and his children, on the basis that the testator did not know of Alex until after the Will had ben executed and as a result, did not intend to include him and his children as beneficiaries of his estate.

To determine if the will should be rectified, the court relied on *Re Estate of Blanca Esther Robinson*, [2010] O.J. No. 277, which provides three circumstances where the court will rectify an unambiguous will of unintended errors: (1) where there is an accidental slip or omission because of a typographical error or clerical error; (2) where the testator's intentions have been misunderstood; or (3) where the testator's instructions have not been carried out. The court concluded that there was no ambiguity on the face of the will, and no challenge of validity. However, the court relied on the drafting solicitor's evidence in deciding that the testator's instructions were not carried out. The solicitor's notes indicated the testator intended the residue to be left to his two children Ula and Mark. Therefore, Ula and Mark's names were read into the applicable provision of the will, thus excluding Alex and his children.

***Senthillmohan v. Senthillmohan*, 2023 ONCA 280 – Creditor's rights to assets held in joint tenancy**

The court dismissed this case, concluding that a creditor cannot seize the interest of a non-debtor joint tenant. In this case, a husband and wife were separating and held joint tenancy in the matrimonial home. In early 2020, the wife sought an equalization of net family property. In January 2021, the Court directed that the parties' matrimonial home be sold, and the proceeds held in trust. In September 2021, a third-party creditor obtained a default judgement against the husband. The parties entered into an agreement of purchase and sale for the home in October 2021, and in November 2021, before the sale was completed, the wife brought an urgent motion to sever the joint tenancy. In February 2022, after the sale the home was complete, the wife brought a motion to release her 50% interest in the proceeds of the sale. The third-party creditor sought to enforce against the wife's interest in the proceeds from the sale of the home on the basis that the parties were joint tenants at the time the default judgement was obtained.

The court concluded that it is not necessary to debate the date of severance as an execution creditor can only execute against the debtors' interest in jointly held property. The court relied on s. 9(1) of the *Execution Act,* R.S.O. 1990, c. E.24*,* which provides that *"*the sheriff to whom a writ of execution against lands is delivered for execution may seize and sell thereunder the lands of the execution debtor, including any lands whereof any other person is seized or possessed in trust for the execution debtor and including any interest of the execution debtor in lands held in joint tenancy" (Emphasis added). The court concluded that seizure and execution only refers to the debtor's interest. The court also referenced s. 10(6) of the *Execution Act,* in conjunction with s. 9 and concluded that the writ also extends to the death of the debtor. The court reasoned that the writ binds the land against which it is issued, thus when one joint tenant dies, the surviving tenancy acquires the whole of the property through right of survivorship. However, if the writ is filed before that joint tenant's death, it does not bind the surviving, non debtors complete interest. Therefore, a creditor can only execute on the debtor's interest in a joint tenancy. The wife was entitled to her unincumbered share of the proceeds of sale.

***Di Nunzio v Di Nunzio*, 2022 ONCA 889 – Costs of estate litigation**

This case upheld the decision in *McDougald Estate v. Gooderham*, 2005 CanLII 21091 (ON CA), in which the Court of Appeal moved away from the "traditional" approach to costs in estate litigation, where costs are paid out of the estate. Instead, the Court confirmed the modern approach that is aligned with civil cost rules, which provide that the unsuccessful party pays the costs. There remains, however, an exception this rule: where the proceeding raises a question of public policy, the costs are to be paid out of the estate. The modern approach to costs seeks to "restrict unwarranted litigation and protect estates from being depleted by litigation." Public policy considerations may arise where there is ambiguity or omission in the testator's will or other conduct.

In the case at hand, the appellant sought to set aside her mother's will, which disinherited her. Since her mother vocalized her intention and reasons for disinheriting the appellant before she died, the Court of Appeal upheld the application judges' findings that the case did not fit into the public policy exception of ambiguity in the testator's conduct. However, the court reasoned that on the face of it, the facts of the case could have given rise to suspicious circumstances. Thus, the court used its discretion to order the appellate to bear her own costs rather than the additional costs of the other party, which were to be born from the estate.

***Gefen v. Gefen et al.*, 2023 ONCA 406 – Capacity of Estate Trustee**

The history of this estate dispute is quite lengthy. The parties have been engaged in litigation since 2013. Of central importance in the current case's history is the capacity of the estate trustee, the testator's wife. The court referenced *Abrams v. Abrams*, 2008 CanLII 67884, when considering the factors to order a capacity assessment, and ultimately ordered a capacity assessment, relying on the following observed facts that indicated capacity was at issue: the testator's wife was 98 or 99 years old, deaf and blind; there were questions as to her capacity to manage an estate as she was unaware of basic estate issues, such as who was managing property and debts; she could no longer remember many facts; she was non-responsive, answering different questions than what was posed to her, or none at all. Her last capacity assessment was in 2014, and there was potential harm and urgency if an assessment was not completed. She relied heavily on her son to make decisions and there were concerns of undue influence. The formal assessment verified that the estate trustee did not have the capacity to mange property or instruct counsel. As a result a litigation guardian was appointed, power of attorney for property was set aside, and counsel of the estate trustee was removed.

In the current case, the Court of Appeal upheld the lack of capacity finding, as well as the decision to appoint a neutral litigation guardian and set aside the power of attorney for property. The Court of Appeal also rejected the submission that a guardian of property cannot be appointed by motion but only through application. As the underlying application sought a guardian for property, the motion judge was able to appoint such. *Rule* 1.04 instructs to "secure the just, most expeditious and least expensive determination". The appeal was dismissed.

***Shafman v Shafman*, 2023 ONSC 1391 – Dependants' support**

This case highlights the importance of providing adequate support for dependants. The testatrix died leaving behind three sons and an estate worth approximately $3M. The value of the estate was largely split between the two older sons, while also providing an income of $1730.29 per month to the youngest son, the applicant. The court concluded that the applicant, though 67 years old, was a dependant of the testatrix. The testatrix was found to have been providing support to the applicant immediately before her death for the purposes of s. 51 of the SLRA. The testatrix was providing an annuity payment of $1500 per month that the applicant relied on to meet his day to day needs. Outside of the annuity, the testatrix routinely provided the applicant money or money in-kind immediately before her death. In addition, the applicant also ate two meals every day with the testatrix and resided with the testatrix every weekend. This was sufficient for the court to concluded that the applicant was a child of the deceased, to whom the deceased was providing support immediately before her death and thus a dependant pursuant to s. 51 of the SLRA.

The next issue was whether the testatrix provided support to the applicant in her will that was adequate to afford him the lifestyle to which he was accustomed prior to the testatrix's death. The court conclude that the applicant required a monthly income of $4,182.00, which amount included rent and utilities, food, clothing, personal care, transportation and health and lifestyle expenses. The applicant receives $1,509.66 per month of income in government benefits. When combined with the $1730.29 per month provided by the estate, there was a shortfall of $942.05. The Court ordered the estate to pay this additional amount to the applicant each month. This provided a comparable standard of living that the testatrix was providing to the applicant before her death.

***Estate of Nordby*, 2023 ONSC 821 – Consequences of non-compliance with court order**

This case illustrates the importance of complying with court orders. Here, the testatrix died leaving behind two children, one of whom was a minor. She appointed her father, Mr. Nordby, as the estate trustee. Probate was obtained October 13, 2013, and subsequently the Children's Lawyer made multiple requests for an accounting of the estate. However, Mr. Nordby failed to comply. In 2017, the Children's lawyer was granted an order for the passing of accounts. Mr. Nordby still did not comply, thus the Children's lawyer filed a contempt motion in 2022 as it had been five years since the first request. Mr. Nordby was given 60 days to comply, at the expiry of this term he stated that he was seeking counsel. An additional 60 days was granted, however at the expiry his counsel requested an adjournment as he was retained just two days prior. Due to Mr. Nordby's longstanding non-compliance, the Children's Lawyer requested a penalty of imprisonment.

In assessing the appropriate penalty, the court relied on *Langston v. Landen*, 2010 ONSC 6993. The case outlined the principle that proper penalties make the public sit up and take notice, in addition that "the court will not take disobedience of its orders". The court also cited *Poulie v. Johnston*, 2922 ONSC 5186, that also outlined the principle that the rule of law is directly dependent on the ability of the court to enforce their process and maintain the dignity and respect of the court. In the current case, the court noted aggravating factors such as the long standing breach of the order, the fact that Mr. Nordby was warned by the court that contempt may include jail time, and that he was given multiple occasions to clear the contempt order but failed to do so. Furthermore, he was advised of his obligations as an estate trustee. The court decided that a fine was not appropriate in the circumstances, as the funds were to benefit his grandchildren and as of

date, the court was still unsure of the state of the estate assets. The court ordered imprisonment of five days for contempt of court, to make Mr. Nordby sit up and take notice.