TAB 6

Understanding When Probate is not Required for an Estate

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Corbin Estates Law Professional Corporation

Practice Gems: Probate Essentials 2009
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The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Legal Education

EXTRACT FROM THE *TRUSTEE ACT*

47. (1) Where a court of competent jurisdiction has admitted a will to probate, or has appointed an administrator, even though the grant of probate or the appointment may be subsequently revoked as having been erroneously made, all acts done under the authority of the probate or appointment, including all payments made in good faith to or by the personal representative, are as valid and effectual as if the same had been rightly granted or made, but upon revocation of the probate or appointment, in cases of an erroneous presumption of death, the supposed decedent, and in other cases the new personal representative may, subject to subsections (2) and (3), recover from the person who acted under the revoked grant or appointment any part of the estate remaining in the person's hands undistributed and, subject to the *Limitations Act, 2002*, from any person who erroneously received any part of the estate as a devisee, legatee or one of the next of kin, or as a spouse of the decedent or supposed decedent, the part so received or the value thereof.

EXTRACT FROM PART V OF *SUCCESSION LAW REFORM ACT*

61.(1)Subject to subsection (2), no application for an order under section 58 may be made after six months from the grant of letters probate of the will or of letters of administration.

EXTRACT FROM PART III OF *SUCCESSION LAW REFORM ACT*

53. Where a participant in a plan has designated a person to receive a benefit under the plan on the death of the participant,

(a) the person administering the plan is discharged on paying the benefit to the person designated under the latest designation made in accordance with the terms of the plan, in the absence of actual notice of a subsequent designation or revocation made under section 51 but not in accordance with the terms of the plan; and

(b) the person designated may enforce payment of the benefit payable to him under the plan but the person administering the plan may set up any defence that he could have set up against the participant or his or her personal representative.

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Ontario

Bulletin No. **2000-6**	*Land Titles Act*

Ministry of Consumer and Commercial Relations

Date: December 20, 2000	

Registration Division

To: All Land Registrars	**ESTATE DOCUMENTS**

The *Red Tape Reduction Act, 2000*, which was proclaimed December 6, 2000, amended sections 123 and 124 of the *Land Titles Act* which are the sections that deal with applications for survivorship and transmission applications. The amendment revokes the requirement to produce evidence in the prescribed manner and substitutes it with the requirement to register evidence specified by the Director of Titles. This will allow estate documents to be registered in a non-electronic format using statements made by a solicitor instead of filing evidence.

Pursuant to sections 123 and 124, it is hereby specified that evidence in the following manner must be registered:

I. SECTION 123 – SURVIVORSHIP APPLICATION

1) The current requirements for an application for survivorship i.e. completion of Forms 42 and 43 of Regulation 690.

OR

2) Use of the following statements:

i. The applicant(s) held the property as (a)joint tenant(s) with the deceased, or
ii. The applicant held the charge on joint account with right of survivorship with the deceased.
iii. By right of survivorship, the applicant(s) is(are) entitled to be the owner(s), as a surviving joint tenant(s).
iv. The date of death was (insert date).

Family Law Act Statements:

v. Section 26(1) of the *Family Law Act* provides that if a spouse dies owning an interest in a family residence as a joint tenant with a third party (and not their spouse), joint tenancy is deemed to have been severed immediately prior to the time of death. As a result, if the death occurred on or after March 1st, 1986, the application for survivorship must be supported by one of the following statements:

- The deceased and (insert name), a(the) surviving joint tenant, were spouses of each other when the deceased died.
- The deceased was not a spouse at the time of death.
- The property was not a matrimonial home within the meaning of the *Family Law Act* of the deceased at the time of death.

The above statements are consistent with those required for the electronic registration of an application for survivorship and can only be made by a solicitor. The solicitor must sign these statements.

II. SECTION 124 – TRANSMISSION APPLICATION

1) The current requirements for a transmission application pursuant to section 36(2) of Regulation 690 which provides for:

An application in Form 40 or Form 41 which is to include the required evidence pertaining to:

i. dower rights;
ii. spousal rights under the *Family Law Act*;
iii. the sex of the deceased;
iv. debts of the estate;
v. the heirs of the deceased; and
vi. such other matters as the Director of Titles may specify.

OR

2) Use of the following statements:

(a) Transmission by Personal Representative:

A transmission application by an estate trustee (with or without a will), executor or administrator must contain the following information in the form of a statement:

i. The applicant is entitled to be the owner by law, as estate trustee, executor or administrator of the estate of the deceased owner.
ii. Name and date of death of registered owner.

One of the following:

iii. The applicant is appointed as Estate Trustee with a will by (*enter name of Court),* under (*enter File number*), dated (*enter date*) which is still in full force and effect, or
iv. The applicant is appointed as Estate Trustee without a will by (*enter name of Court),* under *(enter File number),* dated (*enter date)* which is still in full force and effect, or
v. No application was made for a certificate of appointment of an Estate Trustee, as the total value of the estate of the deceased owner is not more than $50,000.
vi. Documentation regarding the death of (enter the deceased's name) which is sufficient to deal with this transaction, is attached to registration number (enter registration number).

Note: Statement (vi) is to be used where the documentation has been registered in the Registry Division of a land registry office and the property has subsequently been converted to Land Titles Converted Qualified. (See Section III below)

If no application for a certificate of appointment was made, a covenant to indemnify the Land Titles Assurance Fund is required to be filed with the office of the Director of Titles using the prescribed form 54 from Regulation 690.

AND

vii. The property is subject to the debts of the deceased, or
viii. The debts of the deceased are paid in full.

b) Transmission by Devisee/Heir at Law:

A transmission application by a devisee or heir-at-law must contain the following information in the form of a statement:

i. The name and date of death of the owner.
ii. The applicant(s) is entitled to be the owner, as Devisee or Heir-at-Law.
iii. The interest of the deceased is now vested in all the beneficiaries of the estate of the deceased owner under the provisions of the *Estates Administration Act*, the *Succession Law Reform Act* and the *Family Law Act.*
iv. The property is subject to the debts of the deceased, or
v. The debts of the deceased are paid in full.
vi. Title to the land is not subject to spousal rights under the *Family Law Act*, or
vii. Title to the land is subject to spousal rights of the spouse (enter applicable name)

c) Transfer by Personal Representative:

A transfer by an estate trustee (with or without a will), executor or administrator must contain the following information in the form of a statement:

i. A statement that the transferor is entitled to transfer the land affected by the document under the terms of the will, if any, the *Estates Administration Act* and the *Succession Law Reform Act*, or
ii. This transfer is authorized by (enter name of Court), under (enter File number) dated (enter date) which is still in full force and effect.

iii. Title to the land is not subject to spousal rights under the *Family Law Act* with respect to the deceased, or
iv. Title to the land is subject to spousal rights of the spouse of (enter applicable Name).

v. The transferor has obtained the consent of all required parties, or
vi. No consents are required for this transfer.

Solicitors are responsible for ensuring that the provisions of the *Estates Administration Act* and the *Succession Law Reform Act* have been met and therefore it is not necessary to state the purpose of the transfer, e.g. for the purpose of paying debts or distributing the estate.

If it is necessary to obtain consents of any beneficiaries, the name(s) of the beneficiaries must be set out in the application since a search for executions is required for any beneficiary. Spousal Status

The above statements are consistent with those required for the electronic registration of a transmission application or transfer by a personal representative or devisee/heir-at-law and can only be made by a solicitor. The solicitor must sign the statements.

III. FIRST DEALINGS AFTER PROPERTY CONVERTED TO LAND TITLES

The following procedures may be used for transmission applications for the first dealing after the property has been converted to the Land Titles system where no application for a certificate of appointment of estate trustee has been applied for. Land Registrars are authorized to exempt the requirement of a certificate of appointment of estate trustee and the following must be included in the supporting affidavit by the applicant, or by way of statements from a solicitor:

i. the property is a Ministry conversion from Registry to Land Titles;
ii. the transaction is the first dealing after the conversion of the property;
iii. the value of the estate is (enter value of estate);
iv. the same evidence as under the *Registry Act* with regard to the execution of the will and proof of death. If an affidavit of execution cannot be provided, a statement or affidavit made by someone who knew the deceased's handwriting may be used in lieu of the affidavit of execution. This should be someone of good standing within the community and must be someone who can state that they knew the handwriting of the testator. For example, a bank manager, an employer, or those individuals who can attest to an application for a passport. It cannot be a family member, a beneficiary or someone who can benefit from the estate;
v. that the will is the last will and that a certificate of appointment of estate trustee was not applied for; and,
vi. that the testator was of the age of majority at the time of the execution of the will, and that the will has not been revoked by the marriage of the testator or otherwise. (This is the current requirement in the Land Titles Procedural Guide (page 35,165) for situations where a certificate has not been applied for).

In all cases a covenant to indemnify the Land Titles Assurance Fund must be provided.

Katherine M. Murray
Director of Titles

Ontario

Ministry of Consumer and Commercial Relations

Registration Division

Real Property Registration Branch

BULLETIN NO. 93002	Waiver of Letters Probate
DATE: April 1, 1993	
TO: All Land Registrars	The Land Titles Act

A Transmission Application under section 120, 122 or 127 of the Land Titles Act (Form 41 of Reg. 690) is normally required to be supported by letters probate or a notarial or certified copy of the letters probate. Bulletin No. 78008 authorized Land Registrars to accept an application without letters probate if accompanied by affidavit evidence that the value of the estate does not exceed $15,000 and a covenant from the beneficiaries to indemnify the Land Titles Assurance Fund. (See also paragraph 33 120 of the Land Titles Procedural Guide). This amount was subsequently raised to $25,000.

Effective immediately, Land Registrars may accept a transmission application without letters probate if the following are included in the application:

1. The will or a notarial or certified copy of the will.

2. Certificate of death or a notarial or certified copy or a statement of death.

3. An affidavit or declaration that

   (a) the value of the estate does not exceed $50,000; and

   (b) the testator was of the age of majority at the time of execution of the will and that the will is the last will of testator and has not been revoked by marriage or otherwise.

4. A covenant to indemnify the Land Titles Assurance Fund from those beneficially entitled under the will.

The above applies as well to wills probated in other jurisdictions. The Land Registrar can therefore accept a foreign probate without requiring resealing if the above evidence is submitted. However, an application from an administrator appointed in another jurisdiction is **not** acceptable unless the administrator has been granted letters of administration by an Ontario court.

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Except as set out above, Land Registrars are not to accept transmission applications not supported by letters probate, unless the exemption is first approved by the Director of Titles. All enquiries are to be addressed to Mr. Arvind Damley (Senior Technical Advisor) together with a written justification for waiving probate and accepting a covenant.

Bulletin 78008 is hereby revoked and paragraph 33 120 of the Land Titles Procedural Guide is amended to the extent outlined above.

Despina H. Georgas
Director of Land Registration

Robbert Blomsma
Director of Titles (Acting)

21 E.T.R. 123, 38 R.P.R. 29

1985 CarswellOnt 709

Rumble v. Simmons
RE **RUMBLE** et al. AND SIMMONS
Ontario District Court, Kent County
Ross D.C.J.
Judgment: August 28, 1985
Docket: No. D.C.M. 147/85

Counsel: Scott Kerr, for applicant/vendors.

Lucy C. Glenn, for respondent/purchaser.

Subject: Estates and Trusts; Property; Contracts

Sale of Land --- Title -- Good and marketable title -- Deceased owner -- Terms of will.

Executors and administrators -- Grant of probate or letters of administration -- Effect of grant -- Title of executor -- Purchaser of land under contract made with deceased vendor entitled to require selling executors to obtain letters probate of will of deceased.

Sale of land -- Title -- Vendor and purchaser applications -- Purchaser of land under contract made with deceased vendor entitled to require selling executors to obtain letters probate of will of deceased.

The deceased had made a contract to sell certain land to the purchaser. The deceased died before the contract was completed. He left a will by which he appointed the vendors as his executors. The purchaser made a requisition to the effect that probate of the deceased's will be produced and registered after which an executor's deed would be made. The vendors took the position that probate of the will was unnecessary since they derived their authority from the will itself.

The vendors applied to the Court under the Vendors and Purchasers Act.

Held:

The purchaser's requisition was valid and she was entitled to insist on production of letters probate of the purported will.

Although executors derive their authority from the will and not from the grant of probate, purchasers are entitled to have the security provided by the will being admitted to probate. This act will clearly signify acceptance of the office by the executor. In addition, the purchaser is entitled to be protected against the possibility that the

purported will is not valid or the purported executor does not in fact have authority. This protection will be gained, pursuant to s. 47 of the Trustee Act, if the will is admitted to probate.

Statutes considered:

Trustee Act, R.S.O. 1980, c. 512, s. 47(1).

Vendors and Purchasers Act, R.S.O. 1980, c. 520.

APPLICATION by vendors under the Vendors and Purchasers Act.

***Ross D.C.J.* (orally):**

1 This is an application under the Vendors and Purchasers Act, R.S.O. 1980, c. 520, brought by the purchaser, Maureen Lenore Simmons and responded to by the vendors, Sondra K. Rumble and Arthur Smith.

2 The background to the application is that an Albert Smith who I assumed to have been a joint tenant with his deceased wife at the time of his death on the 9th of July, 1985 was the sole owner of the subject property for which an agreement of purchase and sale was entered into between the purchaser and Sondra Rumble and Arthur Smith as vendors. A requisition was submitted by the purchaser's solicitor which I do not propose to recite in detail other than to briefly describe the issue. The deceased has left what purports to be his last will and testament. The purchaser's solicitor requisitioned that probate of the last will and testament be produced and registered upon which then an executors deed would be made. The position of the vendors is that they are not obliged to go to the expense of obtaining letters probate by virtue of the executors having been named in the will and deriving their authority from the will and that with or without a grant of probate they are entitled to effect a sale and conveyance. From the will it is clear that the two vendors are the surviving executors, the other being the wife of the deceased having predeceased. It is trite law that executors derive their authority from the will and not from the grant of probate. However, an executor derives nothing until such time as he or she accepts the position of executor. That would require some overt act on the part of an executor. The obvious one being to apply for letters probate and to accept the letters probate. There is case law authority that an executor without probate who intermeddles in the estate may be stopped from later denying that he acted or was executor. Those are matters in my view with which the purchaser in a real estate transaction should not necessarily have to be concerned about. The position of the purchaser as submitted by counsel was not that the validity of the will is challenged, but that the purchaser would like some assurance that in relying upon the will and relying upon the vendors being executors under the will that the purchaser will have a good title which would be subsequently upheld, if questioned, by a Court if this issue should arise. Although the executor derives the authority from the will, if the will is valid then the executor can convey and the purchaser pay the money over to the executor. What concerns the purchaser is the issue of what if, notwithstanding acting in good faith by all parties, the will should be found not to have been the last will and testament or that through some codicil or subsequent will the executor is not in fact the executor who does have the authority. In my view those concerns are answered under s. 47 of the Trustee Act, R.S.O. 1980, c. 512, which reads as follows,

> Where a court of competent jurisdiction has admitted a will to probate, or has appointed an administrator, notwithstanding that the grant of probate or the appointment may be subsequently revoked as having been erroneously made, all acts done under the authority of the probate or appointment, including all

> payments made in good faith to or by the personal representative, are as valid and effectual as if the same had been rightly granted or made; but upon revocation of the probate or appointment, in cases of an erroneous presumption of death, the supposed decedent, and in other cases the new personal representative may, subject to subsections (2) and (3), recover from the person who acted under the revoked grant or appointment any part of the estate remaining in his hands undistributed and, subject to the Limitations Act, from any person who erroneously received any part of the estate as a devisee, legatee or one of the next of kin, or as a husband or wife of the decedent or supposed decedent, the part so received or the value thereof.

3 Although the probate does not enhance the authority of the executors, the probate constitutes so far as the purchaser and the executor are concerned, in effect, authority for the act or acts of the executor who acts in performance of the will and protects the purchaser who is the one who is to make the payment. Although good title could be conveyed under the will assuming the will is the last will and testament of the deceased and is valid and the executor is the executor named in the will, in my view a purchaser is entitled to insist upon the issue of letters probate so as to derive the protection which the purchaser would obtain under s. 47, subs. 1 of the Trustee Act. The purchaser then is purchasing property under a will which has been probated and until it was revoked the probate and will would stand under the saving provisions in s. 47, namely that all acts done under the authority of the probate or appointment including all payments made in good faith to or by the personal representative are as valid and effectual as if the same had been rightly granted or made. In my view the purchaser is not required to accept simply the registration of a will with affidavits of execution and an affidavit that the testator is dead.

4 I find on the material that the requisition is valid. The purchaser is entitled to insist on production of letters probate of the purported will and that the requisition has not been validly answered.

5 I have endorsed the record, requisition found to be valid and not satisfactorily answered.

Order accordingly.

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1999 WL 33202987 (Ont. Gen. Div.), 1999 CarswellOnt 4841

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1999 CarswellOnt 4841

Rozon v. Transamerica Life Insurance Co. of Canada
Shannon Elizabeth Rozon and Todd Rozon, Applicants and Transamerica Life Insurance Company of Canada, Respondent
Ontario Court of Justice (General Division)
Charbonneau J.
Judgment: May 26, 1999
Docket: Ottawa 98-CU-8449

Proceedings: additional reasons to (March 15, 1999), Doc. Ottawa 98-CU-8449 (Ont. Gen. Div.)

Counsel: *Paul A. Dancause*, for Applicants.

Subject: Insurance

Insurance --- Actions on policies -- Practice and procedure -- Costs -- General

Beneficiaries under will brought application pursuant to s. 208 of Insurance Act for declaration that they had provided "sufficient evidence" pursuant to s. 230 of Act to compel insurer to pay on life insurance policy payable to estate of deceased -- Application was allowed on basis that beneficiaries had provided sufficient evidence and insurer was directed to pay out proceeds under policy -- In additional reasons, issue of entitlement to costs was addressed -- Applicants were entitled to receive costs of application on party-and-party scale -- Although no reported case on point appeared to exist, issue was not sufficiently novel to warrant departure from usual rule that costs follow event -- Insurance Act, ss. 208, 230.

Insurance --- Actions on policies -- Practice and procedure -- Miscellaneous issues

Beneficiaries under will brought application pursuant to s. 208 of Insurance Act for declaration that they had provided "sufficient evidence" pursuant to s. 230 of Act to compel insurer to pay on life insurance policy payable to estate of deceased -- Application was allowed on basis that beneficiaries had provided sufficient evidence and insurer was directed to pay out proceeds under policy -- In additional reasons, issue of estate's entitlement to prejudgment interest was considered -- Prejudgment interest was to be paid at rate of 2.5 per cent from date of death, in accordance with usual practice of life insurers, to date of issuance of notice of application, and at 5 per cent thereafter -- Insurance Act, ss. 208, 230.

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

Generally -- referred to

ADDITIONAL REASONS to judgment dated (March 15, 1999), Doc. Ottawa 98-CU-8449 (Ont. Gen. Div.), concerning costs.

***Charbonneau J.*:**

Supplementary Endorsement

1 I have agreed to hear further submissions from both counsel via telephone conference on the following is- sues:

a) Clarifications of my previous decisions

The question posed by the applicants in the notice of application is answered in the negative. In other words there is no prerequisite for a "probated" will as a pre-condition to payment of life insurance proceeds to an estate claimant under the Insurance Act.

b) Costs

Although there appears to be no reported case on point, this is not such a novel case that a no costs order is warranted. Costs should follow the event. The applicants' position being fully supported by the provisions of the Act, they should have their party-party costs.

c) Pre-Judgment Interest

In view of the accepted practice of life insurance of the payment of interest at the rate of 2.5% from the date of death, while the claim is being processed, there will be pre-judgment interest at that rate until the issuance of the notice of application and interest at 5% thereafter.

d) Post-Judgment Interest

Both counsel have indicated the proper rate is 7% & same will apply.

Order accordingly.

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1999 WL 33199558 (Ont. C.A.), 1999 CarswellOnt 4391

1999 CarswellOnt 4391

Rozon Estate v. **Transamerica** Life Insurance Co. of Canada
Shannon Elizabeth **Rozon** and Todd **Rozon,** Personal Representatives of the Estate of Joseph Henry Lloyd **Rozon,** Deceased, Applicants Counter-Respondents (Respondents) and **Transamerica** Life Insurance Company of Canada, Respondent Counter-Applicant (Appellant)
Ontario Court of Appeal
Feldman J.A., MacPherson J.A., Rosenberg J.A.
Judgment: November 30, 1999
Docket: CA C31938

Counsel: Paul J. Bates and Valerie S. Greifenberger, for Respondent/Counter-Applicant/Appellant.

Subject: Insurance

Insurance --- Principles of interpretation and construction -- Miscellaneous issues.

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

Generally -- considered

s. 203 -- considered

APPEAL by insurer.

Per Curiam:

1 In our view this appeal must be dismissed. We agree with Charbonneau J. that there is nothing in the *Insurance Act* that should lead the court to interpret "sufficient evidence" in s. 203 to mean necessarily a probated will.

2 Accordingly, the appeal is dismissed with costs.

Appeal dismissed.

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31 E.T.R. (2d) 256, [1999] O.J. No. 5026

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1999 CarswellOnt 4217

Silver Estate, Re
In the Matter of the **Estate** of Avrom Aubie **Silver,** deceased
Ontario Superior Court of Justice
Haley J.
Heard: November 4, 1999
Judgment: December 22, 1999
Docket: 02-060/99, 02-061/99

Counsel: A. Rabinowitz, for Applicant.

Priti Sachdeva, for Children's Lawyer.

N. Hedley, for Public Guardian and Trustee.

Subject: Estates and Trusts

Estates --- Jurisdiction of courts -- Surrogate or Probate Court -- Passing accounts

Executors appointed under two separate wills applied to pass estate accounts -- Wills appointed same executors but dealt with different assets and had different dispositive provisions -- Primary will was probated while secondary will was not -- Chambers judge refused to grant either application and directed that applications be placed on Estates list for hearing of whether Superior Court of Justice had jurisdiction and should exercise it to give judgment to trustees who have not received probate -- Order was issued directing that court does have jurisdiction and ought to exercise it to supervise executors without probate as well as those with probate -- Ontario courts have recognized multiple wills as acceptable way of avoiding probate fees -- Power of executors derives from will and probate only confirms validity of will -- All jurisdiction, power and authority formerly exercised by courts of both equity and common law in matters relating to personalty and real estate are vested in Superior Court of Justice -- No requirement exists that executor acting under unprobated will and wishing to pass accounts should have to obtain probate before being permitted to do so -- Court's jurisdiction should be exercised for the supervision of executors without probate as well as with probate and of all those persons standing in a fiduciary relationship to others in the administration of estates, trusts or guardianships. -- Courts of Justice Act, R.S.O. 1990, c. C.43, s. 11(2).

Cases considered by Haley J.:

Granovsky Estate v. Ontario (1998), 156 D.L.R. (4th) 557, 21 E.T.R. (2d) 25 (Ont. Gen. Div.) -- applied

Hollwey v. Adams, 58 O.L.R. 507, [1926] 2 D.L.R. 960 (Ont. H.C.) -- applied

National Trust Co. v. Mendelson, [1941] O.W.N. 435, [1942] 1 D.L.R. 438 (Ont. H.C.) -- applied

Rumble v. Simmons (1985), 38 R.P.R. 29, 21 E.T.R. 123 (Ont. Dist. Ct.) -- not followed

Statutes considered:

Children's Law Act, R.S.O. 1990, c. C.12

s. 52 -- considered

Estates Act, R.S.O. 1990, c. E.21

s. 39 -- considered

Estates Administration Act, R.S.O. 1990, c. E.22

Generally -- considered

s. 1 "personal representative" -- considered

s. 2(1) -- considered

s. 3 -- considered

s. 19 -- considered

s. 21 -- considered

Evidence Act, R.S.O. 1914, c. 76

s. 42 -- considered

Evidence Act, R.S.O. 1990, c. E.23

s. 49 -- considered

Registry Act, R.S.O. 1990, c. R.20

Generally -- referred to

s. 49 -- considered

Substitute Decisions Act, 1992, S.O. 1992, c. 30

Generally -- considered

s. 42(6) -- considered

Surrogate Courts Act, 1858, S.U.C. 1858, c. 93

Generally -- considered

Trustee Act, R.S.O. 1914, c. 121

s. 50 -- referred to

Trustee Act, R.S.O. 1990, c. T.23

Generally -- considered

s. 23(1) -- considered

s. 47 -- referred to

s. 47(1) -- referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 9.02(1) -- considered

R. 9.03(1) -- considered

R. 74 [en. O. Reg. 484/94, s. 12] -- referred to

R. 74.16 [en. O. Reg. 484/94, s. 12] -- referred to

R. 74.17 [en. O. Reg. 484/94, s. 12] -- referred to

R. 74.18 [en. O. Reg. 484/94, s. 12] -- referred to

R. 74.18(1)(b) [en. O. Reg. 484/94, s. 12] -- considered

R. 74.18(1)(c) [en. O. Reg. 484/94, s. 12] -- considered

R. 74.18(9) [en. O. Reg. 484/94, s. 12] -- pursuant to

R. 75 [en. O. Reg. 484/94, s. 12] -- referred to

Forms considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Form 74.5 [en. O. Reg. 484/94, s. 13] -- considered

REFERENCE by chambers judge regarding question as to whether will must be probated preliminary to applica-

tion to pass accounts of estate.

***Haley J.*:**

1 Avrom Aubie Silver died October 26, 1997 having made two wills on June 27, 1997 designated "Primary Will" and "Secondary Will". Each of these was altered by separate codicils both dated September 8, 1997. The same executors were appointed under each of the wills though the dispositive provisions of the wills were not the same. The wills dealt with different assets.

2 A Certificate of Appointment of Estate Trustees with a Will was issued by this court on April 14, 1998 for the Primary Will. No application for a certificate of appointment for the Secondary Will has been filed, nor is it the intention of the executors to make such application.

3 In June, 1999 the applicants filed two separate records and issued two separate Notices of Application to Pass Accounts, one for an accounting under the Primary Will and one for an accounting under the Secondary Will. Each of the Notices was duly served on the respective beneficiaries and on the Children's Lawyer and on the Public Guardian and Trustee. No Notices of the Objection were filed. The Children's Lawyer and the Public Guardian and Trustee both filed Notices of No Objection to Accounts.

4 There being no objections the executors applied to pass the accounts under both wills on an uncontested basis under rule 74.18(9). The applications were placed before Cullity J. in chambers. He refused to grant either application and directed that the applications be placed on the Estates list for hearing. He endorsed the records in part as follows:

> This application appears to raise an issue of the jurisdiction and/or the propriety of the Court giving Judgement in favour of Estate Trustees who have not received a grant of probate. If that is correct, I would want to hear argument on the question as I incline to the view that quite apart from the issue of probate fees, there is a question of principle involved.

5 The issue now before me on these applications is whether the court has jurisdiction to pass accounts under a will for which a Certificate of Appointment has not been granted. In this matter the will designated as the Secondary Will has not been probated and therefore has not been declared by the court to be a valid last Will of the deceased.

6 In *Granovsky Estate v. Ontario* (1998), 156 D.L.R. (4th) 557 (Ont. Gen. Div.) Greer J. confirmed the power of the court under the *Estates Act* R.S.O.1990 C. E22, as amended, to make limited grants for property. She also confirmed the acceptability of multiple wills as a way of avoiding probate fees. She says at p. 567:

> The estate planning of having multiple Wills in the form of a Primary and a Secondary will which take effect on death is, in my view, simply another example of how a careful testator plans to have her or his estate pay the least possible probate fees on death. There is no legal obligation to obtain probate and, as I have noted above, limited grants are permissible. If the directors of the private companies in which the deceased owns shares or has an interest at death do not require the formal grant from the Court to deal with the transmission of the assets and are prepared to deal with the estate trustees named in the Secondary will, why then should the estate have to pay probate fees on those assets?

7 In the course of her reasons she also states at p. 563, after discussing the use of multiple wills,

> The Court can only have jurisdiction over those assets governed by the Will submitted to the Court and cannot have jurisdiction over any other assets.

8 I am satisfied that Greer J. made this statement in the context of probate fees and was not making a general statement which would apply in this case. At best it would be obiter and I do not consider myself constrained by it in dealing with the question before me.

9 The long standing principle governing the powers of the executor named in the will is stated in *Williams' Law Relating to Wills*, 5th edition, 1980, at p. 160:

> Since the executor derives his title from the will and all the estate and interest in the testator's property vests in him on the testator's death, he can do any act before probate, which is a mere authentication of his title. The only legal limitation upon this is that the court will not allow him to prove his title as executor otherwise than by the production of a grant of probate, but in practice no one will deal with an executor as such unless he produces a grant and the matter is of little more than theoretical interest except as to matters which must be done before probate, when, in any proper case, acts may be done and agreements entered into upon an undertaking to obtain a grant without delay.

10 Ontario law has not derogated from the principle that the power of the executor arises from the will at the death of the testator and that the effect of a grant of probate serves only to confirm the validity of the probated will as the last will of the deceased. The *Estates Administration Act*, R.S.O. 1990, C.E.22, section 2. vests all real and personal property of a deceased:

> **S.2**. All real and personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of.

11 Personal representative as defined in section 1 of that act "means an executor, an administrator, or an administrator with the will annexed". There is no reference to an executor acting under a probated will in the definition but it should be noted that an administrator or an administrator with the will annexed comes into existence only by a grant from the court and that the power of an administrator only takes effect as of the date of the grant (except for special circumstances when it may relate back to the date of death).

12 Section 3 of the act confirms that the law relating to personalty applies equally to real property and refers to the existing law for dealing with personal property before probate:

> **S.3** The enactments and rules of law relating to the effect of probate or letters of administration as respects the dealing with personal property before probate or administration and as respects the payment of costs of administration and other matters in relation to the administration of personal estate and the powers, rights, duties and liabilities of personal representatives in respect of personal estate apply to

> real property vesting in them, so far as the same are applicable as if that real property were personal property, save that it is not lawful for some or one only of several joint personal representatives without the authority of a judge to sell or transfer real property.

13 The history of the law prior to the enactment of the precursor of the *Estates Administration Act*, R.S.O. 1990 C.E.22 (Devolution of Estates Act) sheds some light on why probate of a will was required before the civil court would entertain suit by an executor. Middleton J.A. sitting in Weekly Court, in *Hollwey v. Adams* (1926), 58 O.L.R. 507 (Ont. H.C.) on a Vendor and Purchaser application in which the purchaser was requiring the production of a probate by the Vendor said at p. 508:

> This objection is, in my opinion, unfounded, and based upon a fundamental misunderstanding of the law. Until the passing of the statute of 1858, about to be mentioned, and of a somewhat similar statute in England in 1857, the probate of a will was not admissible as evidence of the will where real estate was concerned. The Ecclesiastical Court which granted probate had jurisdiction only with reference to personal property, and probate was necessary as the only admissible method of proving a will, in so far as it related to personalty, in civil courts. The title of the executor did not depend upon the probate but upon the will, and the title to those whom personal property was bequeathed also depended upon the will and the will alone. The Ecclesiastical Courts alone could entertain an inquiry as to whether a testamentary document was in truth a will, or the last will, of the testator, and the pronouncement of the Ecclesiastical Courts was the sole admissible evidence when the executors resorted to the courts to assert their rights, although an action might be maintained against executors without probate, the plaintiff then making his prima facie case by shewing an intermeddling with the assets of the deceased person.
>
> *Doe dem. Ash v. Calvert* (1810), 2 Camp. 387, will shew how jealous the Common Law Courts were of the Ecclesiastical Courts where land was concerned. A will had been lost by the officers of the Probate Court, and it was sought to prove the will by the probate, which, of course, quoted the will in extenso. Lord Ellenborough ruled that this was inadmissible, saying (p.389): "I cannot attach any authority to the probate as far as the will relates to real estate. A will of lands does not require to be proved at all, and the Ecclesiastical Court has no control over it. Therefore, to shew that this is a true copy, we have only the seal of a court without jurisdiction upon the subject".

14 Vestiges of this conflict are reflected in the *Evidence Act*, R.S.O. 1990 s. 49 which is similar to the section of the *Evidence Act*, R.S.O. 1914, ch. 76, section 42, referred to by Middleton J.A. who observed, "This [the section] it will be observed, only makes probate an admissible method of proving the will and does not make it obligatory. The original section from which this is derived is confined to the proof of a will in an action at law or a suit in equity, where it would have been necessary to produce an original will to establish a devise affecting real estate."

15 Section 49 of the *Evidence Act*, R.S.O. 1990 reads:

> In order to establish a devise or other testamentary disposition of or affecting real Estate, probate of the will or letters of administration with the will annexed containing such disposition, or a copy thereof, under the seal of the court that granted it or under the seal of the Ontario Court (General Division) [now Superior Court of Justice], are proof, in the absence of evidence to the contrary, of the will and of its validity and contents.

16 Middleton J.A. held that the objection requiring the probate was not valid and went on to note the sections in the *Registry Act* in which provision is made for the conveying of real estate on the registration of the original will with an affidavit as to execution and death and protection against any other unregistered will. He also noted that section 50 of the *Trustee Act*, R.S.O. 1914, ch. 121, almost identical to section 47 of the *Trustee Act*, R.S.O. 1990 C. T.23 "did not operate to afford any protection to those claiming under the devisee, so that the purchaser would not receive any adequate protection from its provisions.".

17 *Hollwey v. Adams* was followed in another Vendor and Purchaser application dealing with a foreign executor who had not probated the will in Ontario in order to sell lands in Ontario, *National Trust Co. v. Mendelson* (1941), [1942] 1 D.L.R. 438 (Ont. H.C.) (Hogg J.).

18 In the more recent case of *Rumble v. Simmons* (1985), 21 E.T.R. 123 (Ont. Dist. Ct.) the same requisition on title had been made requiring the production of a probate but the opposite result was reached by the learned County Court judge. He was of the opinion that the purchaser was entitled to the protection offered by the probate. He said at page 125:

> Although good title could be conveyed under the will assuming the will is the last will and testament of the deceased and is valid and the executor is the executor named in the will, in my view a purchaser is entitled to insist upon the issue of letters probate so as to derive the protection which the purchaser would obtain under s. 47, subs. 1 of the Trustee Act.

19 He referred to the protective part of that section but made no reference to the right conferred on the new personal representative appointed if the probate was revoked to recover from the devisee and hence through him from the purchaser. Neither *Hollwey v. Adams* nor *National Trust Co. v. Mendelson* was referred to the judge. Had they been he would have been bound to follow Middleton J.A., a very well respected judge in estate mat- ters.

20 The history outlined by Middleton J.A. in *Hollwey v. Adams* explains the requirement for a probate to issue before the executor can obtain judgment on behalf of an estate in a civil action. The principle continues to be recognized in England, as noted in Williams referred to above and also in Ontario in subrule 9.03(1):

> **9.03(1)** Where a proceeding if commenced by or against a person as executor or administrator before a grant of probate or administration has been made and the person subsequently receives a grant of probate or administration, the proceeding shall be deemed to have been properly constituted from its commencement.

21 Reference should also be made to sub-rule 9.02(1) which empowers the court to appoint a litigation guardian to represent the estate where there is no executor or administrator. The rule does not say that there is no executor where there is an executor who is prepared to act or has acted in that capacity but who has not taken out probate. There are provisions under the rules which may be used to oblige a executor named in the will to apply or renounce the executorship. Must a plaintiff take these extra steps before he can sue? It would appear that in England the plaintiff may sue an executor who has intermeddled in the estate but who has not taken out probate. It may then become an issue at trial if the executor denies his executorship or the validity of the will.

22 Requirement of probate for an action brought by an estate appear to me to arise out of evidentiary issues

and not out of entitlement. The *Evidence Act* section 49 confers no entitlement on the executor but merely says that a devise or other testamentary disposition of real estate may be established by probate "in the absence of evidence to the contrary". It is therefore *prima facie* evidence only and confers no absolute entitlement which can be relied upon by third parties dealing with the executor should the will later turn out to be invalid or not the last will or the executor not the person named in the will.

23 The foregoing discussion traces the development of the attitude of the civil courts when dealing with real estate. However the administration of estates came within the jurisdiction of the Ecclesiastical Court which passed ultimately to the Chancery courts in England. These courts were concerned primarily with control of personalty and were in a position to require probate of the will as a procedure it also controlled. Real estate passed under heirship law and was under the jurisdiction of the Common Law court in which actions for an accounting were available. The Law of England was accepted into Ontario until the *Surrogate Courts Act* of 1858 (22 Vict. C. 93; C.S.U.C.c. 16) vested all of the jurisdiction of the former Court of Probate in the Surrogate Courts. (See *Widdifield* on Surrogate Court Practice and Procedure, 2nd edition, 1930, Chapter 1, for the details of the historical development.). Then followed a period of split jurisdiction between the Surrogate Court as the court dealing with matters of probate and administration and the High Court which had some concurrent jurisdiction in most probate and administrative matters. However all of that was swept away by the merger of the courts and the repeal of the Surrogate Courts Act in 1989. See also Macdonell, Sheard and Hull on Probate Practice, 4th edition, 1996 at page 28 where the learned author states:

> ...as the General Division is a Court of common law and equity, the testamentary jurisdiction so conferred upon the General Division in Ontario arguably became a jurisdiction historically (i.e., as of 1989) exercised by a Court of common law and equity in Ontario within the meaning, and for the purposes of s.11(2) of the Courts of Justice Act in the Revised Statutes of 1990.
>
> Reflecting the change in the Court's name that section now vests in the Superior Court of Justice all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario.

24 New rules for estate matters came into force on January 1, 1995. These rules, while not affecting the substantive law, consolidated in *Rules of Civil Procedure* 74 and 75 the practice of the Court. Specific rules were made concerning the passing of accounts of executors and trustees of testamentary trusts, trustees under *inter vivos* trusts, persons acting under a power of attorney, guardians of property of mentally incapable persons, guardians of property of minors and persons having similar duties. (rule 74.16). The rule states that rule 74.17 (format of accounts) and rule 74.18 (procedure on passing of accounts) apply with "necessary modifications" to the accounts of the persons other than executors and trustees (estate trustees).

25 Rule 74.18(1)(c) requires an estate trustee to file with the application to pass accounts a copy of the certificate of appointment of the applicant as estate trustee. The term certificate of appointment in the rules encompasses probate, administration with will annexed and administration, and any other such grant, as the case may be.

26 If there is no such grant has the court jurisdiction to pass the accounts of an executor who has not probated the will under which he has dealt with the estate and if it has such jurisdiction should the court do so? These are the questions raised by Cullity J. in his endorsement.

27 Counsel for the applicant executors under both the primary and secondary wills argues that:

> 1. An Estate Trustee derives his or her authority to act from the will and not from the probate.
>
> 2. The Court has approved the use of multiple wills as a legitimate method of avoiding the payment of tax under the *Estates Administration Tax Act* and it would be inconsistent for the Court to decline to pass the accounts of an executor who has not obtained probate of one of the wills.
>
> 3. The Court's jurisdiction extends to the passing of accounts of any person who is acting in a fiduciary capacity not just of estate trustees.
>
> 4. There are strong policy reasons for the Court maintaining its jurisdiction over all estate trustees as part of its inherent jurisdiction to monitor persons acting in fiduciary capacities.

28 Counsel for the Children's Lawyer and for the Public Guardian and Trustee both supported the position taken by the applicants. The Children's Lawyer pointed to the requirement to serve all persons interested in the passing of accounts which provided an opportunity for any of them to take exception to the unprobated will as invalid in the proceedings. The Public Guardian and Trustee was concerned that an executor who had not probated a will might be able to raise that lack as a defence in refusing to pass his accounts.

29 I am satisfied that it is time to put the history of the courts behind us and to deal with the current realities of those persons who act in a fiduciary capacity and who may either wish to pass their accounts voluntarily or who may be compelled to do so. Of all the various persons who may be in such a fiduciary capacity only the executor who has acted in an estate without obtaining probate would be precluded from passing his or her accounts. If such an executor acting legitimately under what he asserts is the last and valid will, or an executor de son tort, is to be compelled to pass his accounts it would be counterproductive indeed for the Court to refuse to conduct a passing of accounts until a probate was obtained where no person having an interest in the estate, including those with a contingent interest, had raised the validity of the will as an issue.

30 The Superior Court's jurisdiction is now complete and secure from attack by other courts. It has the inherent powers of the old Chancery court for the supervision of administration of estates and trusts. The procedure for a passing of accounts of trustees generally, under the supervision of the court, is a salutary process and one which it should be the court's policy to encourage.

31 An executor is under not statutory duty to pass his accounts. Section 39 of the Estates Act, R.S.O. 1990, c. E.21 makes this clear:

> The oaths and affirmations to be taken by executors, administrators and guardians, and the bonds or other security to be given by administrators and guardians, and probates, letters of administration and letters of guardianship shall require the executor, administrator or guardian to render a just and full account of their executorship, administration or guardianship only when thereunto lawfully required.

The affidavit made by an executor in applying for a Certificate of Appointment as Estate Trustee with a Will in Form 74.5 of the rules is in conformity with this section:

> I will faithfully administer the deceased person's property according to law and render a complete and

true account of my administration when lawfully required.

32 Where no application to probate the will is made there is, of course, no such oath taken but that does not protect the executor who has intermeddled with the estate from being called to account. Any person appearing to have a financial interest in the deceased person's estate may apply to the court for an Order for Assistance (Citation) requiring an estate trustee to pass accounts. Estate trustee, the term used under the rules for procedural purposes, "means an executor, administrator or administrator with the will annexed" as in substantive law. In my view "executor" in this context should not be limited to an executor under a probated will but should include an executor who has intermeddled with the estate under an unprobated will and an executor de son tort.

33 An executor is able voluntarily to bring his accounts to the court for passing. It has been considered good practice to do so to keep the state of the accounting current vis à vis the beneficiaries and, no doubt, to have the compensation fixed by the court to avoid the consequences of pre-taking compensation.

34 Section 23 of the *Trustee Act*, R.S.O. 1990 C. T.23 permits a trustee to pass accounts voluntarily:

> **s. 23(1)** A trustee desiring to pass the accounts of dealings with the trust estate may file the accounts in the office of the Ontario Court (General Division) (Superior Court of Justice), and the proceedings and practice upon the passing of such accounts shall be the same and have the like effect as the passing of executors' or administrators' accounts in the court.

35 Trustee is not defined in the *Trustee Act* although an executor and trustee under an unprobated will, acting with regard to a testamentary trust might fall under this section as a trustee even if the use of "executor" in the section is confined to an executor acting under a probated will.

36 The *Substitute Decisions Act*, 1992, S.O. 1992, Chap. 30 has a similar provision permitting a guardian of property to pass his accounts voluntarily with the same effect as on the passing of executors' and administrators' accounts in the court. (s.42(6))

> **S.42(6)** The accounts shall be filed in the court office and the procedure in the passing of the accounts, is the same and has the same effect as in the passing of executors' and administrators' accounts.

37 The *Children's Law Reform Act*, R.S.O. 1990 C. 12, section 52 has a similar provision:

> A guardian of the property of a child may be required to account or may voluntarily pass the accounts in respect of the care and management of the property of the child in the same manner as a trustee under a will may be required to account or may pass the accounts in respect of the trusteeship.

It may be that an executor who chooses not to probate a will will forego whatever protection is afforded by section 47 of the *Trustee Act* to an executor who acts under a probated will which is later revoked. Those dealing with the executor who has not probated the will may also lose that protection. The section provides in part:

> **s. 47(1)** Where a court of competent jurisdiction has admitted a will to probate, or has appointed an administrator, even though the grant of probate or the appointment may be subsequently revoked as having been erroneously made, all acts done under the authority of the probate or appointment, including all payments made in good faith to or by the personal representative, are as valid and effectual as if the

same had been rightly granted or made,...

The balance of the section provides for recovery from the replaced personal representative as well as for the tracing of estate assets into the hands of the recipient.

38 In contrast the protections afforded to innocent purchasers in good faith and for value in sections 19 and 21 of the *Estates Administration Act*, speak of dealings with "personal representatives" with no reference to pro- bate.

39 The reference to the filing of a copy of the probate in rule 74.18(1)(b) on the application to pass accounts is a reference to a document that informs the court of the status of the applicant and the terms under which that applicant has carried out his fiduciary obligation and has prepared the accounts to be passed. The "necessary modification" referred to in rule 74.16 for passing of accounts of other types of trustees applies to the constating document which will give the court the same kind of information. Those constating documents may be a trust agreement, an order appointing a guardian of property for a mentally incapable person or a minor, a continuing power of attorney. None of these require any particular evidence of their validity before the accounting procedures can be engaged in by the court though they may be subject to attack on the passing of accounts by an interested party. If I am correct in my view of this matter rule 74.18(1)(b) should be amended to refer to an unprobated will as a constating document accepted in the same way as the others mentioned.

40 I am satisfied that there is no requirement that an executor acting under an unprobated will wishing to pass his accounts before the court should have to apply for and obtain probate before being permitted to do so. He can be compelled to pass his accounts without probate. On a passing of accounts all interested parties must be served and each of them has an opportunity to call the unprobated will into question. Any beneficiary, creditor or debtor may require a probate before dealing with the executor to obtain the protection of section 47 of the *Trustee Act*, except in cases involving real estate. To find that probate is required would defeat the use of multiple wills, which this court has approved as an acceptable method of estate planning, and to require the payment of the Estate Administration Tax on assets over which there is no need for the court to assume jurisdiction to permit their transfer.

41 In my opinion the court's inherent jurisdiction inherited from the Chancery court of old should be exercised for the supervision of executors without probate as well as with probate and of all those persons standing in a fiduciary relationship to others in the administration of estates, trusts or guardianships.

42 The costs of the Children's Lawyer and of the Public Guardian and Trustee, if requested, should be paid out of the estate of the deceased. If the parties cannot agree on the amounts or there is a question of which estate, primary or secondary, should bear those costs I may be spoken to.

Order accordingly.

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46 O.R. (3d) 630, 184 D.L.R. (4th) 175, 31 E.T.R. (2d) 33

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Carmichael v. **Carmichael Estate**
In the Matter of the **Estate** of John Bernard Woods **Carmichael,** Deceased
John Bernard Woods **Carmichael,** Jr., Patricia Ellen **Carmichael** Pilon, Julie Ann **Carmichael** Norton and Colleen Fitzpatrick **Carmichael,** Applicants and Douglas Andrew Sharpley and Gaylanne Phelan, two of the Executors of the **Estate** of John Bernard Woods **Carmichael,** Catherine Jill Adolphe, The Children's Lawyer, Christin Kerry **Carmichael** and Michael John **Carmichael,** Respondents
Ontario Superior Court of Justice
Haley J.
Heard: December 20, 1999
Judgment: January 14, 2000
Docket: 05-47/99

Counsel: Karon C. Bales and Andrew Lewis , for Applicants.

Brian A. Schnurr and Wendy L. Griesdorf , for Respondents.

Marian Jacko , for Children's Lawyer.

Subject: Estates and Trusts; Civil Practice and Procedure

Estates --- Personal representatives -- Supervision of personal representatives by court -- Removal -- Practice and procedure

Executors took steps to administer estate without probating will -- Widow had life interest with residue to go to testator's issue on widow's death -- Difficulties arose in administration of estate -- Validity of will was not attacked, nor was identity of executors -- Testator's children brought application to remove executors and trustees -- Court raised preliminary issue of jurisdiction to remove executors and trustees who administered estate but did not obtain letters of probate -- Court had jurisdiction -- Children could bring application under Trustee Act whether or not will was probated, as executors had already acted in estate's administration -- Situation was not one in which title in executors was required to be authenticated -- Public would not be misled without probate -- Beneficiaries and third parties had already accepted transactions in estate without requiring probate -- No policy reasons existed to require probate -- Trustee Act, R.S.O. 1990, c. T.23, s. 37.

Cases considered by Haley J. :

Allen v. Parke (1866), 17 U.C.C.P. 105 -- considered

Booty v. Hutton (1999), [2000] 1 W.W.R. 81, 140 Man. R. (2d) 186 (Man. Q.B.) -- distinguished

Bowerman, Re (1978), 20 O.R. (2d) 374, 87 D.L.R. (3d) 597 (Ont. Surr. Ct.) -- referred to

Deutsch, Re (1976), 18 O.R. (2d) 357, 82 D.L.R. (3d) 567 (Ont. H.C.) -- considered

Falk v. Dick (April 21, 1994), Doc. Winnipeg Centre PR 93-01-31835 (Man. Q.B.) -- distinguished

Grant v. Great Western Railway (1858), 7 U.C.C.P. 438 -- considered

Ingalls v. Reid (1865), 15 U.C.C.P. 490 (U.C. C.P.) -- considered

Silver Estate, Re (December 22, 1999), Doc. 02-060/99, 02-061/99 (Ont. S.C.J.) -- referred to

Stadelmier v. Hoffman (1986), (sub nom. Becker, Re) 57 O.R. (2d) 495, 25 E.T.R. 174 (Ont. Surr. Ct.) -- considered

Weil, Re, [1961] O.R. 751, 29 D.L.R. (2d) 308 (Ont. H.C.) -- considered

Weil, Re, [1961] O.R. 888, 30 D.L.R. (2d) 91 (Ont. C.A.) -- considered

Statutes considered:

Devolution of Estates Act, 1886, S.O. 1886, c. 22

Generally -- considered

Estates Act, R.S.O. 1990, c. E.21

s. 29(3) -- considered

Evidence Act, R.S.O. 1990, c. E.23

s. 49 -- considered

Land Titles Act, R.S.O. 1990, c. L.5

s. 120 et seq. -- considered

Probate and Surrogate Courts Act, S.U.C. 1793, c. 8

Generally -- referred to

Registry Act, R.S.O. 1990, c. R.20

s. 53 -- considered

Surrogate Courts Act, C.S.U.C. 1859, c. 16

s. 1 -- considered

Surrogate Courts Act, R.S.O. 1970, c. 451

s. 21 -- considered

s. 53(3) -- considered

Trustee Act, R.S.O. 1970, c. 470

s. 37(1) -- referred to

Trustee Act, R.S.O. 1990, c. T.23

s. 1 "personal representative" -- considered

s. 37 -- referred to

s. 37(1) [am. 1996, c. 25, s. 8] -- considered

s. 37(6) [am. 1996, c. 25, s. 8] -- considered

s. 37(7) -- considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.03 "proceeding" -- considered

R. 9.03 -- considered

R. 10.02 -- considered

R. 11.01 -- considered

R. 74.06 [en. O. Reg. 484/94, s. 12] -- considered

R. 74.15(1)(a) [en. O. Reg. 484/94, s. 12] -- referred to

R. 74.18 [en. O. Reg. 484/94, s. 12] -- considered

RULING on preliminary issue of court's jurisdiction to hear application to remove executors and trustees.

***Haley J.*:**

1 The applicants seek the removal of two of the executors and trustees under the will of the late John Bernard Woods Carmichael who died on September 19, 1992. The deceased left a will dated November 17, 1988 and two codicils dated March 11, 1992 and August 27, 1992 in which he appointed his wife, Colleen Carmichael, his

lawyer Gaylanne Phelan, and his accountant Douglas Sharpley to be his executors. The will provided a life interest to the widow with the residue on her death to go to his issue. Since the death these named executors and trustees have administered the estate without probating the will. The bulk of the estate is made up of shares in privately held corporations. There has been no attack on the validity of the will or the codicils. Difficulties have now arisen regarding the administration and the children seek to remove and replace Gaylanne Phelan and Douglas Sharpley as executors and trustees.

2 On the return of the application I raised a preliminary issue with counsel for the applicants and the respondents. The Children's Lawyer representing minor and unborn issue was served and appeared on the argument of the preliminary issue. Catherine Jill Adolphe did not appear but through her counsel advised that she supported the position of the applicants on this issue.

3 The issue before me is this: Does the Superior Court of Justice have jurisdiction to remove executors and trustees who have taken steps to administer the estate but who have not obtained letters probate of the will and codicils from the Court?

4 Section 37 of the *Trustee Act* , R.S.O. 1990 C. T.23 as amended to reflect the change in the name of the court from the Ontario Court, (General Division) to the Superior Court of Justice authorizes the court to remove executors:

> **S. 37 (1)** The Superior Court of Justice may remove a personal representative upon any ground upon which the court may remove any other trustee, and may appoint some other proper person or persons to act in the place of the executor or administrator so removed.
>
> "personal representative" is defined in the act as "...an executor, an administrator, and an administrator with the will annexed"
>
> **S. 37 (6)** A certified copy of the order of removal shall be filed with the Estate Registrar for Ontario and another copy with the local registrar of the Superior Court of Justice, and such officers shall, at or upon the entry of the grant in the registers of their respective offices, make in red ink a short note giving the date and effect of the order, and shall also make a reference thereto in the index of the register at the place where the grant is indexed.
>
> **S. 37 (7)** The date of the grant shall be endorsed on the copy of the order filed with the Estate Registrar for Ontario.
>
> "grant" is not defined in the Act.

History of the Jurisdiction of the Court

5 Mr. Lewis provided the court with a detailed outline of the jurisdiction of civil and English common law courts over matters relating to probate and estates from the 11th century on and the transfer of that jurisdiction to the Ecclesiastical courts and eventually to the Court of Chancery. The Ontario history is also important for the analysis of the cases relating to this issue. In 1793 the *Probate and Surrogate Courts Act* , S.U.C. 1793 c. 8, established the first Court of Probate in Upper Canada. This Act imported into Upper Canada the testamentary jur-

isdiction of the Ecclesiastical Courts in England.

6 Draper C.J. said in *Grant v. Great Western Railway* (1858), 7 U.C.C.P. 438 at 445 :

> I have arrived at the conclusion, upon a full consideration of [the Probate and Surrogate Courts Act] that the legislature of Upper Canada intended that the law of England relative to the grant of probate, and the committing of letters of administration, should be the law administered in the courts created by the act of 1793, with the same process, pleadings and practice, unless where our statutes express to the contrary, as were in use in the ecclesiastical courts in England in relation to probates and letters of administration.

7 In 1858 the *Surrogate Courts Act* , S.U.C. 1859, c. 16, s.1 was enacted in Upper Canada, providing:

> Nothing in this act shall extend or be construed to extend to make the Surrogate Courts, held under the provisions of this Act, new Courts ... but they shall be taken to be to all intents and purposes the same courts as if they had continued to be held under the provisions of the Surrogate Courts Act 1858, or of the Act [Probate and Surrogate Courts Act] thereby repealed....

8 The *Surrogate Courts Act* 1970 R.S.O. section 21 confirmed that jurisdiction:

> Subject to The Judicature Act , all jurisdiction and authority in relation to matters and causes testamentary, and in relation to the granting or revoking of probate of wills and letters of administration of the property of deceased persons, and all matters arising out of or connected with the grant or revocation of grant of probate or administration are vested in the several Surrogate courts.

9 At the same time the Supreme Court of Ontario had jurisdiction which it inherited from the English Chancery court to deal with estate matters except where matters were in the jurisdiction of the Surrogate Court. This was the situation at the time of the decision in *Re Deutsch* (1976), 18 O.R. (2d) 357 (Ont. H.C.) , which is discussed below.

10 In 1989 with the repeal of the *Surrogate Courts Act* and the merger of the District Court and the Supreme Court into the Ontario Court (General Division) the respective jurisdictions were melded into that of the new court. With the name change in 1999 that jurisdiction is now exercised by the Superior Court of Ontario.

11 In *Re Silver Estate* (unreported reasons for judgment released December 22, 1999) [Doc. 02-060/99, 02-061/99 (Ont. S.C.J.)] there is a further review of the legislative history and in particular an examination of the differences in treatment for passing title in an estate relating to personalty and to real property. These differences were resolved in Ontario with the passing of the *Devolution of Estates Act* in 1886 by which both personalty and real property devolved in the same fashion.

12 *Re Deutsch* (1976), 18 O.R. (2d) 357 (Ont. H.C.) was an application under s. 37(1) of the *Trustee Act* (identical in wording with that quoted above) for the removal of executors named in the will and the appointment of an administrator with the will annexed in their place before any application for probate had been made by the executors. In his decision Reid J., after setting out s. 37(1), observed at p. 359:

> I have come to the conclusion that the section does not confer on this Court jurisdiction to make the or-

> der sought. No application has yet been made for probate. To grant this application would be to appoint a personal representative before a will is proven. This would by-pass the normal function of the Surrogate Court, which must consider and pass upon the fitness of persons nominated by testators to be their personal representatives....
>
> The legislative scheme shown by the Trustee Act and the Surrogate Courts Act , R.S.O. 1970, c. 451, confers general probate and surrogate jurisdiction on the Surrogate Court and only limited authority in probate and surrogate matters on the Supreme Court.
>
> The Supreme Court has no general probate or surrogate jurisdiction.

13 Reid J. then referred to *Re Weil*, [1961] O.R. 751 (Ont. H.C.) (motion) and [1961] O.R. 888 (Ont. C.A.) in which application had been made to the High Court to appoint a trust company to replace a company which had renounced. No application for probate had yet been filed at the time the application was heard. The Court of Appeal agreed with the motions judge that the Supreme Court did not have power to remove a personal representative before an application for probate had been dealt with by the Surrogate Court.

14 Mr. Schnurr argues that the effect of the *Deutsch* and *Weil* decisions is to require that section 37(1) of the *Trustee Act* be construed strictly and that the court may only act to remove an executor after probate of the will has been granted. This requirement, he argues, is not removed by the merger of the courts.

15 Miss Bales, for her part, argues that the requirement for probate before the application of s. 37(1) of the *Trustee Act* disappeared with the merger of jurisdiction in testamentary matters in this one court and that the ratio of the decision of Reid J. was based solely on a split in jurisdiction between the Surrogate Court and the High Court.

16 Section 53(3) of the *Surrogate Courts Act* R.S.O. 1970 gave power to the court to refuse a grant of letters of administration with the will annexed or administration to those persons having the first right to administration if the court in its discretion decided to pass over such persons and appoint some other person instead. The same provision is to be found today in the *Estates Act* R.S.O. 1990, c. E27 s.29(3).

17 This passing over may occur where no executor has been appointed in the will or where the executor named is under some legal disability, e.g., is bankrupt or under age. Generally, however, the wishes of the testator will be honoured even if the person chosen is of bad character. In *Stadelmier v. Hoffman* (1986), (sub nom. *Becker, Re)* 57 O.R. (2d) 495 (Ont. Surr. Ct.) the Surrogate Court judge passed over an executor who was in an actual conflict with the beneficiaries under the will. He did not consider the application to remove the executor for conflict was premature (i.e., required probate to issue first, as in *Re Weil*) but exercised his general discretion to pass over that executor and gave probate to the other named executors. Normally the discretion referred to in s.29(3) applies to administration only and not to probate.

18 If a testator's chosen executor does nothing to assume his duties as executor the rules provide for an order requiring that person to accept or refuse probate with a view to having some other person appointed to act as administrator with the will annexed. This was the procedure, available only in the Surrogate Court, which prevented the High Court from removing an executor before the grant of probate in *Deutsch, Re* . If it had done so it would have interferred with the testamentary discretion vested in the Surrogate Court in "all matters arising out

of or connected with the grant or revocation of grant of probate or administration". (*Surrogate Courts Act* R.S.O. 1970 s.21).

19 Now that the Superior Court has the consolidated jurisdiction of both the High Court and the Surrogate Court, it is my view that the same procedural differences continue. If an application were brought now pursuant to s.37(1) of the *Trustee Act* for the removal of an executor *who has not assumed the administration of the estate* such application would be premature as in *Weil, Re* because no steps had been taken under rule 74.15(1)(a) for an Order for Assistance (formerly Citation) requiring that executor to accept or refuse probate. If such an Order for Assistance were made and if the executor declined probate or did nothing the way would then be clear for the court to grant administration with the will annexed to some other person. If that executor in response to the Order for Assistance accepted the office he would have to take some step to assume those duties or apply for a Certificate of Appointment as Estate Trustee with a Will. On the application for a Certificate those having a financial interest in the estate would be entitled to file a Notice of Objection (caveat) and to attack the executor's right to a certificate. If, on the other hand, the executor chose to assume the duties of executor by administering the estate but without applying for a certificate I am satisfied that persons having a financial interest in the estate would then have the right to apply for his removal under s.37(1) without the will having been probated.

20 It is the latter case which is before me. No one is attacking the validity of Mr. Carmichael's will. The executors have been administering the estate since his death in 1992. They have been able to do so without a Certificate of Appointment. There are, however, other principles that counsel has argued which must be considered before a final determination can be made.

21 The principle that an executor's power springs from the will and not from Letters Probate (Certificate of Appointment) has long been accepted in the English jurisprudence and in Ontario. There are three exceptions to the exercise of that power:

> 1. Third parties dealing with the executor may refuse to accept the authority of the will and demand production of letters probate as authentication of that power. These situations arise on a practical basis, e.g., transfer agents before transferring of publicly traded shares; a debtor who wishes to be sure he is paying the correct person to ensure a proper discharge of the debt.
>
> 2. Proceedings involving the executor representing the estate as plaintiff or as defendant. It would seem that in such circumstances the court requires probate as an evidentiary matter. The *Evidence Act* R.S.O. 1990 c. E23 s. 49 provides that probate "in the absence of proof to the contrary" is proof of the validity and contents of the will. Rule 9.03, which contemplates a proceeding by or against an estate through its executor before a grant of probate, implicitly acknowledges this requirement and operates to prevent a nullity in the proceeding if the probate is subsequently obtained. The proceeding is then deemed to have been properly constituted from its commencement. It should be noted that "proceeding" as defined in rule 1.03 "means an action or application".
>
> 3. Where a foreign executor wishes to establish title to estate assets in Ontario he must have his Letters Probate resealed in Ontario or obtain Ancillary Letters Probate. This requires that he first obtain probate in the primary jurisdiction.

22 Mr. Schnurr would have me add a fourth exception, i.e., that before the court will entertain the removal of

an executor under s.37(1) of the *Trustee Act* the executor must have applied for and obtained a Certificate of Appointment of Estate Trustee with a Will. He says first that the statutes require it and makes reference to s.s. 37(6) and (7) (of the *Trustee Act*) quoted above which require the Estate Registrar for Ontario and the local registrar to make certain notations in their registers recording the order removing a personal representative and appointing a new one, if applicable. Though it is not entirely clear what grant is being referred to, the implication is that it is to a previous grant so that by cross-referencing the current status is clear. If there were no grant the registrar could only enter into the register the order removing a personal representative and appointing a new one (if applicable). Without a prior subsisting grant to an executor the administrative procedures have no meaning. However I am not persuaded that the existence of this administrative duty under the statute is the governing principle for determining whether there must be an existing probate when s. 37(1) of the *Trustee Act* does not specifically require one.

23 Mr. Schnurr also makes reference to the *Land Titles Act* R.S.O. 1990 c. L5 but section 120 and following sections dealing with transmission of interests following the death of an owner makes no specific reference to requiring probate to support a transmission. It would appear that this is required by regulation only. This is to be contrasted with the *Registry Act* R.S.O. 1990 c. R20 s. 53 which permits the registration of the original will to pass title to real estate without the necessity of probate. (See *Re Silver Estate* , *supra* , for the possible historical reason for this.)

24 Mr. Schnurr also argues that the rules require the existence of a probate before an application to remove an executor can be heard. I have already referred to rule 9.03 and the definition of "proceeding" which includes an application as well as an action. Rule 10.02 which appoints a representative to bind an estate where there is no executor or administrator contains no suggestion that an executor to be acknowledged an executor for the purpose of that rule must be one who has obtained probate. Rule 11.01 which provides for an Order to Continue where a party has died during a proceeding makes no requirement of a probate before such an order will be made in favour of the executor of the estate. Rule 74.18 requires the filing of a Certificate of Appointment on the passing of accounts of the executor. In this last case I have found that the existence of this requirement in the rule did not result in the executor's having to obtain such a certificate before his accounts could placed before the court for passing. (*Re Silver Estate* , *supra*) The rules show a lack of consistency when making reference to executors and, in my view, like the administrative duties in section 37(6) and (7), cannot be taken to determine the issue.

25 Reference was also made to devolution of executorship which requires probate of the will before it can take effect. The principle is stated in Macdonnel, Sheard and Hull, 4th edition at p. 160:

> It is only an executor who has proved the will who can transmit the executorship, and, therefore, if the executor named predeceases the testator or dies without having taken probate there must be an administration.
>
> The administrator of an executor does not succeed to the executorship nor does the executor of someone appointed executor by the Court under the Trustee Act .

26 Thus if X is appointed sole executor of A's estate in A's will and dies before completing the administration of A's estate and X appoints Y to be his sole executor Y will succeed to the executorship of A's estate only if X has probated A's will. If he has not done so then A's estate can be completed only by a person appointed as ad-

ministrator of A's estate *de bonis non administravit* .

27 Neither of the cases given as authority for this principle: *Allen v. Parke* (1866), 17 U.C.C.P. 105 and *Ingalls v. Reid* (1865), 15 U.C.C.P. 490 (U.C. C.P.) makes reference to whether the succeeding executor had taken probate of the will of the original executor. Rule 74.06 requires the applicant for a Certificate of Appointment of Succeeding Estate Trustee with a Will (Letters Double Probate) to file with the court the original certificate of appointment, i.e., of the certificate issued to the original executor. There is no requirement for production of a certificate appointing the applicant as executor of the original executor. This would appear to be a gap in the requirements under the rule.

28 The respondents rely on the Manitoba case of *Booty v. Hutton* , an unreported decision of the Manitoba Queen's Bench [reported at(1999), 140 Man. R. (2d) 186 (Man. Q.B.)]. The case dealt with two related estates but the issues raised were not the same as the issue before me. The judgment discusses a number of the general principles already discussed above but it is not pertinent to this issue.

29 *Falk v. Dick* [(April 21, 1994), Doc. Winnipeg Centre PR 93-01-31835 (Man. Q.B.)], also an unreported decision of the Manitoba Queen's Bench similarly was not on all fours with the case before me. It concerned an application to remove an executor whom the court found to be in actual conflict with the beneficiaries of the estate but before that executor had applied for probate or had taken any steps to administer the estate. The court treated the *Re Deutsch* decision as being based solely on the split jurisdiction which existed at the time. It chose to follow *Stadelmier v. Hoffman* (supra), and *Re Bowerman* (1978), 20 O.R. (2d) 374 (Ont. Surr. Ct.) and to pass over the executor whom the parties wished removed based on actual conflict of interest.

30 But *Falk v. Dick* is not a case where the executors have actually administered the estate without benefit of probate. I have already commented on what I perceive to be the correct procedure under the rules in Ontario for bringing a matter such as the one in the *Falk* case before the court by way of an order to accept or refuse probate and a Notice of Objection and not by an application for removal under the *Trustee Act* .

31 I now return to the issue before me. Does an applicant for the removal of an executor under s.37(1) of the *Trustee Act* in circumstances where that executor has intermeddled with the estate (i.e., taken steps in its administration without benefit of proving the will) have to take steps to oblige that executor to accept or refuse probate before the court can hear the application?

32 I am satisfied that the applicant does not and is free to bring such an application for removal under s.37(1) whether or not that executor has taken out probate of the will once he has assumed the duties of executor and acted in the administration. To find otherwise would require the applicant to take an unnecessary proceeding to validate the status of the executor who has not seen fit to do so himself. Such a requirement merely puts an impediment in the path of a person with a financial interest in the estate who wishes to call a fiduciary to account. There is no issue here as to the validity of the will or the identity of the executor. The beneficiaries wish to place before the court complaints about the administration by the executor.

33 This is not a situation where the title in the executor must be authenticated, which is usually done by letters probate though not necessarily so. The *Evidence Act* R.S.O. 1990 s.49 provides that the probate is evidence of the validity of the will and its contents in the absence of evidence to the contrary. It makes no mention of confirming the identity of the executor.

34 S.37(6) and (7) of the *Trustee Act* refer to notations by the registrars on the grants where there is a change in executors for the protection of the public who may rely on the grant as it stands without knowledge of the change. In the circumstances of this case the public would not be misled. All of the persons dealing with the executors of the estate are either the beneficiaries or third parties who have already accepted transactions in the estate without requiring probate as they could have done. There are no policy reasons here for requiring probate with notation of the order removing the executor.

35 The application for removal of the executor may proceed without the applicants' first obtaining probate of the will for the executor whom they wish to remove.

36 As this is a novel issue and one which is important for estates practice costs of both parties shall be paid out of the estate on a solicitor and client basis. The costs of the Children's Lawyer will also be paid out of the estate in the amount agreed by the parties. If this amount cannot be agreed I can be spoken to.

Order accordingly.

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35 E.T.R. (2d) 287

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Silver Estate v. **Silver**

Bonny Fern **Silver,** Kenneth Kirsh, and Ronald Faust, Executors and Trustees of the Secondary **Estate** of Avrom Aubie **Silver,** Deceased, Applicants and Bonny Fern **Silver,** Eitz Chaim Schools, Torah Emeth Jewish Centre, The Reena Foundation et al., Respondents

Ontario Superior Court of Justice

Cullity J.

Heard: August 22, 2000

Judgment: September 13, 2000[FN*]

Docket: 05-30/00

Counsel: Archie Rabinowitz and Clare A. Sullivan, for Applicants.

Subject: Estates and Trusts

Trusts and trustees --- Express trust -- Variation -- General

After testator's death, executors of will, who were also trustees under trusts established by will, applied to court to vary trusts pursuant to Variation of Trusts Act -- Variation requested was to enable administration of trusts in more tax-effective manner -- Each of beneficiaries under will, which included testator's wife and children, consented to variation and court's approval was sought on behalf of minor, unborn and unascertained beneficiaries -- In order to avoid payment of probate fees, will had not been admitted to probate -- Issue arose as to whether court could approve variation where no grant of probate had been obtained -- Application granted; grant of probate not required in circumstances -- Rule that requires probate to be produced before executors can proceed with action to enforce rights acquired by deceased prior to death should not be extended to summary proceedings between trustees of testamentary trust and beneficiaries where, as in case at bar, validity of will was not at issue between parties -- None of parties was expressly relying as against others on right or title of executors to deal with property of deceased -- Approval of variation by court would bind no one else -- In circumstances it was not case where court should intrude and insist that title of executors or validity of will be proved -- If court was obligated to determine validity of will before addressing merits of proposed variation, court had full jurisdiction to do so and there was more than sufficient evidence to find will was valid -- Having determined that will was valid, court was not compelled to issue grant of probate as necessary consequence of such finding, against wishes of executors -- There was no reason to believe that there would be any detriment to beneficiaries who were not sui juris and nothing to suggest that creditors might be prejudiced by absence of probate -- Variation of Trusts Act, R.S.O. 1990, c. V.1.

Cases considered by Cullity J.:

Aikins, Re, 62 O.L.R. 33, [1928] 2 D.L.R. 415 (Ont. C.A.) -- applied

Dickson v. Monteith (1887), 14 O.R. 719 (Ont. H.C.) -- considered

Druce's Settlement Trusts, Re, [1962] 1 W.L.R. 363, [1962] 1 All E.R. 563 (Eng. Ch. Div.) -- applied

Eurig Estate, Re (1997), 31 O.R. (3d) 777, (sub nom. Eurig Estate v. Ontario Court (General Division), Registrar) 96 O.A.C. 354 (Ont. C.A.) -- applied

Eurig Estate, Re, 40 O.R. (3d) 160 (headnote only), (sub nom. Eurig Estate v. Ontario Court (General Division), Registrar) 231 N.R. 55, 23 E.T.R. (2d) 1, 165 D.L.R. (4th) 1, (sub nom. Eurig Estate v. Ontario Court (General Division), Registrar) 114 O.A.C. 55, [1998] 2 S.C.R. 565, [2000] 1 C.T.C. 284 (S.C.C.) -- referred to

Giffin v. Simonton (1920), 47 O.L.R. 49 (Ont. C.A.) -- considered

Granovsky Estate v. Ontario (1998), 156 D.L.R. (4th) 557, 21 E.T.R. (2d) 25 (Ont. Gen. Div.) -- applied

Hensloe's Case (1600), 9 Co. Rep. 36, 77 E.R. 784 (Eng. K.B.) -- applied

Hollwey v. Adams, 58 O.L.R. 507, [1926] 2 D.L.R. 960 (Ont. H.C.) -- applied

Holt's Settlement, Re (1968), [1969] 1 Ch. 100, [1968] 1 All E.R. 470 (Eng. Ch. Div.) -- applied

Johnson v. Warwick (1856), 17 C.B. 516, 139 E.R. 1176, 25 L.J.C.P. 102, 26 L.T.O.S. 220 (Eng. C.P.) -- applied

McGill v. Bell (1835), 3 U.C.Q.B. (O.S.) 618 (U.C. K.B.) -- applied

Mordaunt v. Clarke (1868), L.R. 1 P. & D. 592 (Eng. Patents Ct.) -- applied

Mutrie v. Alexander (1911), 23 O.L.R. 396 (Ont. H.C.) -- considered

Newton v. Metropolitan Railway Co. (1861), 1 Drew. & Sm. 583, 5 L.T. 542, 8 Jur. (N.S.) 738, 10 W.R. 102, 62 E.R. 501 (Eng. V.-C.) -- considered

Perrin v. Perrin (1872), 19 Gr. 259 (Ont. Ch.) -- considered

R. v. Netherseal (Inhabitants) (1791), 4 T.R. 258, 100 E.R. 1006 (Eng. K.B.) -- referred to

Silver Estate, Re (1999), 31 E.T.R. (2d) 256 (Ont. S.C.J.) -- applied

Sims-Hilditch v. Simmons (1973), [1974] 1 W.L.R. 583, [1974] 1 All E.R. 991, 28 P. & C.R. 14, (sub nom. Crowhurst Park, Re) 222 E.G. 1173 (Eng. Ch. Div.) -- applied

Smith v. Milles (1786), 1 T.R. 475, 99 E.R. 1205 (Eng. K.B.) -- considered

Stevens, Re, (sub nom. Cooke v. Stevens) [1897] 1 Ch. 422 (Eng. Ch. Div.) -- applied

Stump v. Bradley (1868), 15 Gr. 30 (Ont. Ch.) -- applied

Tarn v. Commercial Bank of Sydney (1884), 12 Q.B.D. 294 (Eng. C.A.) -- referred to

Wangford v. Wangford (1704), 89 E.R. 390, 1 Freem. K.B. 520, 1 Salk. 299, 3 Salk. 162, Holt. K.B. 311 (Eng. K.B.) -- applied

Webb v. Adkins (1854), 14 C.B. 401, 139 E.R. 165, 2 W.R. 225, 23 L.J.C.P. 96 (Eng. C.P.) -- referred to

Whitmore v. Lambert, [1955] 1 W.L.R. 495, [1955] 2 All E.R. 147 (Eng. C.A.) -- applied

Wilson v. Wilson (1877), 24 Gr. 377 (Ont. C.A.) -- considered

Wolfe v. Heydon (1619), Hut. 30, 123 E.R. 1078 (Eng. C.P.) -- applied

Statutes considered:

Common Law Procedure Act, 1852, (U.K.), 15 & 16 Vict., c. 76

Generally -- referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 11(2) -- considered

Evidence Act, R.S.O. 1990, c. E.23

s. 49 -- considered

Judicature Act, R.S.O. 1897, c. 51

s. 38 -- considered

Surrogate Courts Act, S.O. 1910, c. 31

Generally -- considered

Surrogate Courts Act, R.S.O. 1970, c. 451

s. 56 [rep. & sub. 1977, c. 43, s. 4] -- considered

Trustee Act, R.S.O. 1990, c. T.23

s. 47 -- considered

Variation of Trusts Act, 1958, (U.K.), 6 & 7 Eliz. 2, c. 53

Generally -- referred to

Variation of Trusts Act, R.S.O. 1990, c. V.1

Generally -- considered

s. 1 [am. 1996, c. 25, s. 8] -- considered

APPLICATION by executors and trustees of deceased's estate for order varying trusts contained in will.

***Cullity J.*:**

1 In this application under the *Variation Of Trusts Act* R.S.O. 1990, c. V.1 (the "Act"), the court was asked to approve an arrangement varying trusts contained in a will of the late Avrom Aubie Silver. Mr. Silver died on October 26, 1997. The will, dated June 27, 1997 and a codicil of September 8, 1997, have not been admitted to probate but the evidence filed with the court after the hearing is amply sufficient to support a grant if an application for probate were to be made. Each of the beneficiaries under the will -- who include Mr. Silver's widow and children -- has consented to the arrangement and the court's approval is sought on behalf of minor, unborn and unascertained beneficiaries. The variation is intended to benefit members of Mr. Silver's family who are beneficiaries of the trusts without affecting numerous bequests to charities. The benefits consist primarily in increasing the flexibility given to the trustees to enable them to administer the trusts in a tax-effective manner.

2 Counsel for the Children's Lawyer, who represents the beneficiaries who are minors- and who will represent the unborn and unascertained beneficiaries by virtue of the representation order I will make- supports the application on the ground that the requisite benefit to them will be provided. Having heard the detailed submissions of counsel for the trustees, I am in full agreement with the position taken by the Children's Lawyer and am satisfied that I should grant judgment approving the arrangement if the failure to have the will probated does not prevent me from doing so.

3 The trustees named in the will are also the executors. They would prefer not to apply for probate in order to avoid the imposition of the fees that are payable when a grant is issued. As I will indicate, the consequential benefit to the estate and its beneficiaries would be achieved primarily at the expense of the executors to the extent that they would lose the protection against personal liability that probate confers. The simple issue that I must resolve is whether I am permitted to give judgment approving the arrangement in these circumstances. In considering this issue, I do not think I should be influenced either way by the motives of the executors in declining to apply for probate. In particular, I believe, that, unless probate is required by some statute, rule of law or equity, or the practice of the court, judgment for the applicants should be granted, and not withheld in the interests of increasing provincial revenues by putting pressure on executors to apply for probate. As the legislature has seen fit to make nothing more than the grant of a particular order of the court an event that attracts taxation, it is only to be expected that people will refrain from seeking such an order unnecessarily. It is not the function of the court to compel them to do so. In *Re Aikins* (1928), 62 O.L.R. 33 (Ont. C.A.) it was recognized that attempts by executors to minimise taxes are part of the fiduciary responsibilities attached to their office. Middleton J.A. stated:

In my view, the executors owed a duty so to handle and realise upon the estate as to give the best pos-

> sible result to the residuary legatees, so long as this could be accomplished without interfering with the rights or interests of the other beneficiaries of the estate. The executors owe no duty so to manipulate things as to pay the maximum succession duty to the Crown. Beyond this, I think the residuary legatees have the right to require the executors so to deal with the estate. They are in reality the owners of the entire estate, subject to the claims for debts, administration expenses, succession duty, and the legacies given by the testator, and they have, I think, the right to insist upon the estate being dealt with so that they shall acquire the maximum benefit. (at p.39)

4 The legitimacy of tax planning by trustees received legislative recognition by the enactment of the *Variation of Trusts Act, 1958* (U.K.) on which our legislation is modeled and judicial approval of arrangements under such statutes is very commonly based on the tax benefits that will be achieved.

5 I have had two related concerns about the failure to obtain probate in this case. The first has to do with a possible precondition to the exercise of the court's jurisdiction under the Act. The other concern arises from judicial statements in cases stretching back over the centuries that might suggest that a personal representative cannot invoke the assistance of the court for any purpose without producing the grant of representation that, in the case of administrators, confers their status as such and, in the case of executors, confirms it. The first concern raises the question whether it is necessary for me to determine whether the will is valid even though this has not been raised as an issue in the application. The second relates to the evidence that is admissible if such a determination is necessary.

6 The opening words of section 1 of the Act are as follows:

> Where any property is held on trusts arising under any will, settlement or other disposition, the Superior Court of Justice may, if it thinks fit, by order approve on behalf of,....

These words must, I believe, be interpreted as limiting the court's jurisdiction to cases where property is held on valid trusts. The validity of the trusts with which I am concerned depends upon the validity of Mr. Silver's will. I indicated at the hearing that I did not think it would be an appropriate exercise of the jurisdiction to make an order approving the arrangement conditioned upon the validity of the trusts. In response to this, Mr Rabinowitz submitted that, as between the parties to the application, the validity of the trusts is not in issue and that, in consequence, the position is no different to that which arises when applications are made to vary trusts *inter vivos*. In such cases, if no question relating to the validity of the trust instrument, or the transfer to the trustees, is raised, it is treated as not in issue and the court will exercise its jurisdiction under the Act without addressing it. Whether a trust that has been varied under the Act was created by will or *inter vivos*, if its invalidity is subsequently determined, the court will have given its approval to a variation of invalid trusts and, if no question of *res judicata* arises, the approval of the arrangement will have had no bearing on the question and, of course, it would bind no one who was not a party to the proceedings.

7 Trusts *inter vivos*, like testamentary trusts, may be invalid because of fraud, undue influence or lack or mental capacity. The settlor of an *inter vivos* trust may, or may no longer, be alive at the hearing of an application to vary its provisions. The trust may, or may not, have been freely revocable in the settlor's lifetime. Although the requirements for the formal validity of *inter vivos* trusts are not as stringent, in each case the trusts must be effectively constituted. For this purpose, trusts *inter vivos* will generally be valid only if there has been a transfer of legal or equitable rights to the intended trustees, a binding declaration of trust or a specifically enforceable

contract. The effective constitution of testamentary trusts depends on the validity of the will and the representative status of the executor through whom the trustees trace their title. The question is whether an inquiry into the effective constitution of a testamentary trust should be required on an application under the *Variation of Trusts Act* although no such determination is necessary if the trust was created *inter vivos*.

8 I believe there is considerable force in Mr. Rabinowitz's submissions and that they should be accepted unless I am bound by authority to the contrary. I do not see why the validity of testamentary trusts should need to be proved on an application such as this where the question is not in issue between the parties, while that of trusts *inter vivos* would be presumed in similar circumstances. In each case, the validity of the trustees' title, and of the trusts, depends upon an effective disposition by a competent donor.

9 The principal-and, for the most part, rather elderly- authorities that might be thought to bear on this question are those which contain statements, of varying degrees of generality, to the effect that the court cannot recognize the title of an executor unless probate has been granted and is produced. It has been said that only when this has been done will the court have the "legal optics" to read the will: *Johnson v. Warwick* (1856), 17 C.B. 516 (Eng. C.P.), at p. 521; *Stump v. Bradley* (1868), 15 Gr. 30 (Ont. Ch.) at p. 31. This rule of practice, or evidence, was given a broad formulation by the Court of Appeal in *Re Eurig Estate* (1997), 31 O.R. (3d) 777 (Ont. C.A.) (reversed on other grounds, [1998] 2 S.C.R. 565 (S.C.C.)) where, in delivering the judgment of the court, Morden A.C.J.O. stated:

> Further, apart from the general legal duty to administer the estate promptly and efficiently, which almost invariably requires the executor to obtain probate, the law imposes the requirement that an executor must have probate to prove his or her title when an estate matter is before the court. Letters probate are the only evidence of an executor's title which a court will receive (see Hull and Hull, Macdonnell, Sheard and Hull, *Probate Practice*, 4th ed. (1996) at pp.185 and 188), even in a case where the defendant is willing to concede that the executor has title without evidence of probate: *Re Crowhurst Park*; *Sims-Hilditch v. Simmons*, [1974] 1 W.L.R. 583 (Ch), (at p. 792)

10 The point was not directly in issue in *Re Eurig Estate* but, as the statement I have quoted evidently represents a firm and considered view of the Court of Appeal, I must defer to it. There is, however, a question with respect to the circumstances in which it will be necessary to prove an executor's title. That question arises in this case and, I believe, it, and the meaning to be attributed to the reference to an "estate matter", must be determined in the light of the authorities that were cited. I emphasise this point because, apart from other considerations I will mention, there are will-settled exceptions to the rule affirmed by the Court of Appeal and I do not think I am entitled to infer that these were intended to be abolished.

11 Strict adherence to the rule rests more, I think, on its longevity than on any other basis. Given that, from as early as the 12th century, the ecclesiastical courts had exclusive jurisdiction to try the validity of wills of personalty, it was inevitable that courts of law and equity would require production of letters probate when the validity of an executor's title was in issue in proceedings before such courts. There was no other way in which the title could be proved to the extent that the will dealt with personalty: *R. v. Netherseal (Inhabitants)* (1791), 4 T.R. 258 (Eng. K.B.), at pp. 259-60; *Johnson v. Warwick* (above); *Stump v. Bradley* (above).

12 From this division of jurisdiction, a rule of practice emerged, at least as early as the beginning of the 17th century, that required an executor who was suing in his representative capacity to plead that he had received a

grant: *Hensloe's Case* (1600), 9 Co. Rep. 36 (Eng. K.B.), at 38 a; *Wangford v. Wangford* (1704), 1 Salk. 299 (Eng. K.B.), at pp. 302-3 and 309; *McGill v. Bell* (1835), 3 U.C.Q.B. (O.S.) 618 (U.C. K.B.). If the executor's title was challenged by the defendant in his reply, the grant would have to be produced, but not otherwise: *McGill v. Bell* (above). This rule of pleading, in effect, compelled an executor to raise the validity of the will as a potential issue.

13 As, since the abolition of surrogate courts in 1990, this court has full jurisdiction over testamentary causes and probate matters, the original basis for the rule that probate was the only evidence of the validity of a will of personalty that a court of common law or equity would accept has disappeared. Curiously, neither its influence nor that of the rule of pleading appears to have diminished as together they provide the basis for the authorities that are considered to establish the extended principle that was applied in *Sims-Hilditch v. Simmons* [reported at(1973), [1974] 1 W.L.R. 583 (Eng. Ch. Div.)] and accepted and restated in *Re Eurig Estate*. As I have indicated, it is a principle or rule with two branches or aspects: not only is probate the only evidence of the title of the executor that the court will accept but a grant must be produced "when an estate matter is before the court."

14 The status of the second aspect of the rule as originally one of pleading is illustrated by the decision in *McGill v. Bell* where it was held that a defendant who had not joined issue with respect to the executor's title could not set aside a decision on the ground that the letters probate, whose existence the executor had pleaded, had not been produced. By failing to put the title in issue in his replication, or defence, the defendant was held to have accepted its validity. This aspect of the rule, which required the issue to have been raised between the parties, appears to have been ignored in *Re Crowhurst Park*. The survival of the rule after the *Common Law Procedure Act*, 1852 was accepted in *Webb v. Adkins* (1854), 14 C.B. 401 (Eng. C.P.), but in quite a tentative manner that contrasts with the unqualified general statements in more recent cases. See, also, *Tarn v. Commercial Bank of Sydney* (1884), 12 Q.B.D. 294 (Eng. C.A.).

15 As far as I have been able to ascertain, all of the cases in which the second aspect of the rule has been applied -- as distinct from the more numerous cases in which it has been referred to -- were adversarial proceedings between the executors, or persons claiming through the executors, and third parties. This also appears to have been the case when the rule was adopted, in a rather more relaxed manner, by courts of equity which had a different system of pleadings: see, for example, *Newton v. Metropolitan Railway Co.* (1861), 1 Drew. & Sm. 583 (Eng. V.-C.), at p.591. Its application was typically in the context of actions brought by executors before probate to enforce personal or property rights of the testator that had arisen before the death. The authorities cited in *Probate Practice*, in the passages referred to do by the Court of Appeal in *Re Eurig Estate*, were cases of this kind.

16 Generally, the rule did not apply to actions brought against third parties by executors before probate with respect to transactions entered into by them after the deceased's death: see the discussion by Sir John Beverley Robinson C.J. in *McGill v. Bell* (above), at p.619 and by Macaulay J. at p. 628. (The headnote is misleading.) In such cases, the representative capacity of the executors would not normally be relevant to the issue between the executors and the third parties. The same would be the case with respect to actions to enforce rights arising from transactions of trustees who acquired their title through executors of a will that was not submitted for probate.

17 In addition to the cases I have mentioned, it was, of course, necessary to produce a grant in any proceedings in which the title of the executor or the validity of the will was otherwise in issue between the parties. This

was the aspect of the rule that was expanded in *Sims-Hilditch* in which it was found to be sufficient to attract its application that the rights that the plaintiff sought to enforce depended upon her status as her deceased husband's executor -- a status that the other party was willing to accept. In the view of Goulding J., the older authorities compelled him to require probate because the

> ... proceedings before me arise directly from notices expressly served by the defendant on the plaintiff as executrix of the late tenant, and the plaintiff's originating summons makes it clear that she claims and relies on the tenancies granted by the defendant to him. (at p. 593)

18 Although the decision treats the rule as applicable notwithstanding the fact that the title, or representative capacity, of an executor is not in dispute between the parties, it seems that it must still be in issue in the sense described by the learned judge. If, for example, a plaintiff's claim could be based on alternative grounds, of which only one depended on the status of an executor under an unprobated will, the claim could still, of course, succeed on the other ground: *R. v. Netherseal (Inhabitants)*, above.

19 I am not aware of any cases in which the rule was applied in proceedings between trustees of a testamentary trust and its beneficiaries where neither the enforcement of rights acquired by a testator before death nor the validity of the will was in issue between the parties-whether the issues raised concerned an alleged breach of trust, a question of construction or, as here, a variation of the trust. Strictly, of course, these are not matters involving an estate. Once administration has been completed by the executors and they -- or others -- hold the remaining assets in trust, such assets are no longer assets of the estate.

20 Neither aspect of the rule applied to wills to the extent that they disposed of real estate. In such cases, courts of common law and equity, which had no power to make grants of probate, would hear evidence and determine whether the will was valid. This exception was discussed in *Hollwey v. Adams* , [1926] 2 D.L.R. 960 (Ont. H.C.) and its existence was recognized in *Sims-Hilditch*, at p. 594. For this purpose, the court would not receive as evidence a grant made by another court with probate jurisdiction with respect to the validity of the will to dispose of personal property: see *Hollwey v. Adams* above. The position has been changed by section 49 of the *Evidence Act* R.S.O. 1990, c. E. 23 that makes a grant of probate proof of the validity of a will that disposes of realty "in the absence of evidence to the contrary". As Middleton J. observed in *Hollwey v. Adams*,

> This... only makes probate an admissible method of proving the will and does not make it obligatory. (at p.961)

21 Now that this court has full jurisdiction to determine the validity of wills, it is not clear to me why the rule that probate must be produced should still be rigidly adhered to in all cases where the validity of a will or the title of an executor is not disputed, and why there should continue to be a distinction between wills that dispose of personalty and wills of realty to which the rule of practice was never applicable. In some of the older cases the need to protect creditors was asserted as a justification for the requirement that the validity of the will be proved by the production of a grant before an executor could proceed with an action: see *Wangford v. Wangford* (above), at p. 303; *Wolfe v. Heydon* (1619), Hut. 30 (Eng. C.P.), at p. 31. This justification was repeated in *Sims-Hilditch* without explanation or elaboration. As I will indicate later in these reasons, I do not understand that probate, as such, provides significant protection to creditors in this jurisdiction at the present time when inventories are no longer required; nor do I understand why, if such protection is desirable, probate should be required only if the executor becomes involved in legal proceedings.

22 In *Williams, Mortimer & Sunnucks on Executors, Administrators and Probate* (17th edition, 1993), after stating that probate is the only method of proving the terms of a will in legal proceedings, the learned authors continue:

> Evidence of the existence of a will and of its terms, if these are not in issue, may however be accepted in the absence of a grant.(at p. 9).

23 In the only authority cited -- *Whitmore v. Lambert*, [1955] 1 W.L.R. 495 (Eng. C.A.) -- a will that had not been admitted to probate was accepted as evidence for the purpose of proving that the executrix was in a position to bargain for the continuation of a contractual tenancy to which she would have succeeded under the will. Although the decision was not based on a finding that the widow had succeeded to the tenancy, the court accepted evidence that the will was made "duly in accordance with the Wills Act" and found that the widow "could have justified her entry upon the premises by reference to the fact that she had been appointed by her husband as his sole executrix, and she could thereafter at any time, if necessary, have proved the will." The decision was distinguished in *Sims-Hilditch* and it is, perhaps, doubtful that it supports quite as broad a principle as that stated in the treatise.

24 In view of the reasoning of the Court of Appeal in *Re Eurig Estate* -- albeit reasoning based almost entirely on English decisions -- it may not be open to me to accept the broad statement of the principle in *Williams, Mortimer & Sunnucks* as representing the law of Ontario. If it were, I would do so without hesitation and it would be sufficient to resolve the issue that arises in this application if, as I would presume, matters that are not disputed are not "in issue". However, I do not think my inability to adopt that general principle would be the end of the matter. The question here does not arise in adversarial proceedings between an executor and third parties where the former attempts to enforce, or, as in *Sims-Hilditch*, relies on, rights formerly vested in the deceased in his lifetime, the proceedings do not involve an estate as such and neither the representative capacity of the executors nor the validity of the will has been raised, directly or indirectly, as an issue between the parties. Moreover, the limited nature of the court's jurisdiction in a case like this is not in doubt. The order of the court does not vary the trusts; the variation takes effect by virtue of the consents of the beneficiaries. The function of the court is merely to determine whether to give consent on behalf on those who are not able to consent for themselves. The sole issue in the proceedings is whether the variation would be for their benefit.

25 If I were to apply the second branch of the rule, the question would inevitably arise whether the position would be different if the application had been brought by one or more of the beneficiaries and the trustees had been named as respondents as might have been done, and as appears to be the approved practice in England. It is quite clear that the rule with respect to the production of a grant does not apply to actions against executors who have intermeddled with the estate without obtaining a grant.

26 The considerations I have mentioned, including those referred to earlier in these reasons, lead me to the conclusion that the rule that requires probate to be produced before executors can proceed with an action to enforce rights acquired by the deceased prior to death -- a rule that was originally a rule of pleading -- is inappropriate, and should not be extended, to summary proceedings between trustees of a testamentary trust and the beneficiaries where the validity of the will is not an issue between the parties. Unlike the situation in *Sims-Hilditch*, none of the parties is expressly relying -- as against any of the others -- on the right, or title, of the executors to deal with the property of the deceased. At the most, such a right is presupposed in the applica-

tion which is essentially concerned with the completion of a contract between the parties: *Re Holt's Settlement* (1968), [1969] 1 Ch. 100 (Eng. Ch. Div.), at p. 116-7; *Re Druce's Settlement Trusts*, [1962] 1 W.L.R. 363 (Eng. Ch. Div.), at p. 369. The approval of the court would bind no one else. In my judgment, this is not a case where it is necessary for the court to intrude officiously and insist that the title of the executors, or the validity of the will, be proved.

27 In the past, the traditional rule has not given rise to much practical difficulty as probate has generally been obtained and produced as a matter of course. The question has acquired some importance now simply because of the recent increase in the level of probate fees and it is likely to be important in the future only in cases where such fees are substantial and the executors are prepared to forgo the protection they would otherwise obtain from a grant of probate. It may be that the court should, in some circumstances, enter into an inquiry into the question of validity of its own motion when it is exercising its advisory -- or, as here, a form of *parens patriae* -- jurisdiction, but this should, in my view, be limited to cases where the record indicates that there is some doubt on the question.

28 If the conclusion is not correct, and if, contrary to my opinion, the court is obligated in a case like this to determine whether the will is valid before addressing the merits of the proposed variation, it does not follow that an application for probate must be made in separate proceedings. As this court now has full jurisdiction to determine the validity of wills, I see no reason why I cannot do this in these proceedings where all persons who would have rights to receive notice of an application for probate are before the court. I do not believe the statement of principle in *Re Eurig Estate* requires me to exclude this possibility.

29 As was indicated earlier in these reasons, there is more than sufficient evidence to support a finding that Mr. Silver's will and codicil are valid and would be admitted to probate if this were requested. If it were necessary, I would make such a finding but, if I did so, I see no reason why, against the wishes of the parties, I would be required to order that letters probate be granted.

30 It is, I think, worth nothing that declarations that wills were valid were made, in the past, by the High Court under legislation dating from 1849 that gave jurisdiction to try the validity of wills initially to the Court of Chancery and, from 1881, to the superior courts of this province, without vesting in them authority to make grants of probate or administration. The jurisdiction appears to have had no counterpart in English legislation. It could be exercised whether or not a grant of probate had been previously made in a surrogate court. In its most recent incarnation in section 38 of the *Judicature Act* R.S.O. 1897, c. 51 the provision read as follows:

> The High Court shall have jurisdiction to try the validity of last wills and testaments, whether the same respect real or personal estate, and whether probate of the will has been granted or not, and to pronounce such wills and testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the court has jurisdiction to try the validity of deeds and other instruments.

31 The section was not carried over into subsequent revisions of the statutes but, as was recognized by Middleton J.A. in *Hollwey v. Adams*, and in the third, and the earlier, editions of *Probate Practice*, the jurisdiction was preserved by a provision of the *Judicature Act*, and it is now continued by subsection 11(2) of the *Courts of Justice Act* that gives this court all the jurisdiction, power and authority previously exercised by courts of common law and equity in Ontario.

32 The scope of the section and, in particular, the extent of which it overlapped with the jurisdiction of surrogate courts was never propounded definitively. On one view, despite the opening words of the section, it only permitted the court to make declarations that wills were invalid. This approach to the interpretation of the section inevitably raised difficulties when the alleged ground for invalidity was the existence of a later will. In *Mutrie v. Alexander* (1911), 23 O.L.R. 396 (Ont. H.C.) a declaration that a will was valid was refused by Middleton J. primarily on the ground that the jurisdiction of the surrogate courts should not be usurped. Subsequently, however, the same learned judge felt constrained to follow earlier authority and granted a declaration with respect to the validity of a will: *Giffin v. Simonton* (1920), 47 O.L.R. 49 (Ont. C.A.); *Perrin v. Perrin* (1872), 19 Gr. 259 (Ont. Ch.); and see *Dickson v. Monteith* (1887), 14 O.R. 719 (Ont. H.C.), at p. 75 and *Wilson v. Wilson* (1877), 24 Gr. 377 (Ont. C.A.), at p. 394. The inability of the High Court to make grants of probate could be bypassed by issuing orders of mandamus directed to a surrogate court.

33 As Middleton J. recognized in *Mutrie v. Alexander*, no question of a usurpation of the jurisdiction of another court could arise in England after the Court of Probate was abolished in the *Judicature Act* (U.K.) of 1871 and its jurisdiction was transferred to the Supreme Court of Judicature. Since 1990, the position has been same in Ontario where this court now has both the jurisdiction continued by section 38 of the *Judicature Act*, R.S.O. 1897 c. 51 and the jurisdiction over testamentary causes and probate matters formerly conferred by the *Surrogate Courts Act*. On the effect of these changes, I respectfully prefer the opinion of Middleton J. to that of Goulding J. in *Sims-Hilditch*, at p. 590.

34 It follows that this is not a case where executors are seeking to rely on the provisions of a will without proof of its validity in a court that has no jurisdiction, or is otherwise unable, to deal with the question in the same proceedings. I have jurisdiction to determine whether Mr. Silver's will is valid and I am able to do so on this application. Even if probate had been granted, I would very likely have jurisdiction to make such a determination by virtue of subsection 11(2) of the *Courts of Justice Act* -- a jurisdiction that I would have, in any event, if I were dealing with a will of realty.

35 My acceptance of the validity of the will should not require that letters probate, or any other grant, be issued without an application for it by the executors or by any other person interested in the estate, and contrary to the wishes of such persons. Although a grant of probate can benefit beneficiaries and, perhaps, creditors, as well as the executors, it is established that there is no general obligation to apply for a grant. Avoiding probate is now a standard part of estate planning in Ontario. Wills are no longer submitted for probate as a matter of course. This was recognized by Greer J. in *Granovsky Estate v. Ontario* (1998), 156 D.L.R. (4th) 557 (Ont. Gen. Div.) in a similar context to the present -- namely, where the executors had determined that it was not in the interests of the estate to subject it to the payment of probate fees. Presumably, as here, they had determined that the disadvantages of foregoing probate would be outweighed by the fiscal burden on the beneficiaries if a grant were obtained. The position with respect to probate fees in Ontario is in marked contrast to that in England where, for the purpose of preventing avoidance of various duties and taxes, penalties were, from the end of the 18th century, imposed on executors who received or administered assets of an estate without obtaining probate: see *Halsbury's Laws of England* (3rd ed.,), Volume 15, at p. 149. The longevity of the rule that letters probate must be produced before an executor can seek the assistance of the court in that jurisdiction might usefully, perhaps, be viewed in this context.

36 It is, of course, well established that executors -- unlike administrators -- obtain their office, and their title,

from the will and not from the grant. For executors, the main advantages of probate are that the validity of the will and of their title will have been confirmed by the court and that, if the will is subsequently found to be invalid in proceedings to revoke the grant, the executors will have the protection of section 47 of the *Trustee Act* if they have acted in good faith.

37 While probate provides the beneficiaries with the same assurance with respect to the validity of the will, they, too, remain subject to the risk that the grant may subsequently be revoked and, as Middleton J. recognized in *Hollwey v. Adams*, protection under section 47 is not extended to them.

38 Although, in view of the possibility that a grant may subsequently be revoked, probate does not, in theory, provide executors and beneficiaries with complete certainty, as a practical matter it will usually do so. This advantage is enhanced by the singular rule that, unless the grant has been revoked, it will operate *in rem* and will not bind only the persons who received notice of the application for probate. While probate proceedings may have been elevated from a "mere ceremony" (*Smith v. Milles* (1786), 1 T.R. 475 (Eng. K.B.) at p. 480), to an application for a "certificate of appointment of estate trustee with a will", a grant continues, in most cases, to have the feature that, according to Pollock and Maitland (*The History of English Law*, Vol. 2, at p. 341), was its defining characteristic at the beginning of the 13th century: it establishes "once and for all" the validity of a will. The possibility of resealing in designated jurisdictions, and ancillary grants in others, extends this benefit beyond the boundaries of the province and Canada. In contrast, a finding that a will is valid, without a grant of probate, would bind only the parties to the proceedings.

39 Here, there is no reason to believe that there will be any detriment to the beneficiaries who are not *sui juris* -- the other beneficiaries have consented to the variation without probate -- and the executors are prepared to forego the protection afforded to them by section 47 of the *Trustee Act*. In the exercise of their discretion they have determined that it is in the best interests of the estate and the beneficiaries to refrain from applying for a grant and I do not think I should override their decision and order that a grant be issued even if I have power to do so of my own motion.

40 As far as creditors are concerned, the authority of the executors to pay debts of the deceased is not dependent on probate: *Re Stevens*, [1897] 1 Ch. 422 (Eng. Ch. Div.), at p. 429-30. Nor are they immune from suit where, as here, they have intermeddled with the assets of the estate. If a creditor wished to execute judgment against the assets of the estate, an order compelling the executors to apply for probate could be obtained: *Mordaunt v. Clarke* (1868), L.R. 1 P. & D. 592 (Eng. Patents Ct.). Since the amendments to the *Surrogate Courts Act* enacted by S.O. 1977, c.43, section 4, there is no longer in this jurisdiction an obligation on executors to file an inventory of the assets of the deceased and it has been held by Haley J. in earlier proceedings with respect to this estate that the executors were entitled -- and, I believe, could be compelled -- to pass their accounts: *Re Silver Estate* (1999), 31 E.T.R. (2d) 256 (Ont. S.C.J.); cf., *Re Stevens*, above.

41 In these circumstances, the only advantage that creditors could obtain from probate may well be that the identity of the personal representatives, the terms of the will and the amount of the assets declared- which may, or may not, correspond to those to which creditors are entitled to have recourse- will be a matter of public re- cord.

42 Quite apart from the fact that, on the application to pass accounts, the executors have sworn to the liabilities of the estate and the accounts have been passed and these are matters of public record, the advantages that

creditors might, in some cases, obtain from probate do not seem to justify a distinction between cases such as this where other proceedings have been commenced and those where, without probate and any other court proceedings, the executors proceed to administer and to distribute an estate. In any event, on the facts of this case, there is nothing to suggest that creditors might be prejudiced by the absence of probate and, if I have a discretionary power to order that a grant be made, I would decline to exercise it on the facts of this case.

43 I should add that, despite the mystique that over the years has attached to grants of probate emanating from courts that, until recently, exercised the archaic jurisdiction, in accordance with the arcane procedure, of the ecclesiastical courts in England, I am not aware of any authority that would compel me to direct that a grant be issued as a necessary consequence of a finding that the will is valid. As I have already mentioned, in the past there were cases in which a mandamus was issued to a surrogate court to grant probate after the validity of a will was tried in the Supreme Court of Ontario pursuant to section 38 of the *Judicature Act*, 1897 or its predecessors. In none of the reports of these cases is there any suggestion that the court must, or even should, issue such an order against the wishes of the executors. In the overwhelming majority of cases, of course, the executors would have wished to obtain a grant.

44 For the above reasons I granted judgment in accordance with the notice of application in an endorsement released in advance on August 30, 2000. The applicants are entitled to their costs out of the estate payable forthwith on a solicitor and client basis, subject to assessment if required by any beneficiary, or beneficiaries, of the trusts.

Application granted.

FN*. A corrigendum issued by the court on September 19, 2000 has been incorporated herein.

END OF DOCUMENT

Succession Law Reform Act
ONTARIO REGULATION 54/95

GENERAL

Last amendment: O. Reg. 203/09.

Preferential share

1. For the purpose of section 45 of the Act, $200,000 is prescribed as the amount of the preferential share. O. Reg. 54/95, s. 1.

Prescribed plans

2. Tax free savings accounts within the meaning of the *Income Tax Act* (Canada) are prescribed as plans for the purposes of Part III of the Act, regardless of when the designation of a beneficiary was made. O. Reg. 203/09, s. 2.

INFORMATION ON FILING OF REGULATION

O. REG. NUMBER	DATE FILED	ACT UNDER WHICH REGULATION MADE	REG. TITLE	e-LAWS DATE	GAZETTE DATE	REG. Type New (N) Amend (A) Revoke(R)	REG. AMENDED or REVOKED
203/09	28/05/2009	Succession Law Reform Act	Preferential Share	29/05/2009	13/06/2009	A	54/95

EXTRACT FROM *LEGISLATION ACT, 2006*

22. (1) A regulation that is not filed has no effect.

(2) Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force on the day on which it is filed.

(3) Nothing in this section authorizes the making of a regulation that is effective with respect to a period before its filing.