TAB 2

The Top Ten (or thereabouts) Decisions of Justice David Brown

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12th Annual **Estates and Trusts Summit**
Day Two - November 13, 2009

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Continuing Legal Education

THE TOP TEN (OR THEREABOUTS) DECISIONS OF JUSTICE DAVID BROWN*

Timothy Youdan**

Introductory Comments

I was asked to do this presentation on the top ten decisions released by Justice David Brown. It is a daunting and sensitive task to comment on a group of decisions simply because they were made by a particular judge – who is still very much active as a judge.

Since taking on the role of the judge responsible for the estates list in Toronto, Justice Brown has been active in sorting out problems affecting the administration of both routine applications for certificates of appointment of estate trustee and the conduct of litigation on the estates list. This is evident both in the new practice direction and various positions he has taken in particular cases. We should all be grateful for having a judge who has such an obvious interest in making things work better.

My job of reviewing, selecting and commenting on Justice Brown's decisions was made easier than it might have been because of his obvious intention to explain his decisions succinctly and clearly, and his success in doing this. The other general impression derived from my reading of many decisions of Justice Brown is his obvious concern to achieve sensible, practical and fair results. With these general comments as background, I shall proceed to consider ten (or thereabouts) decisions of Justice Brown.

Szabo Estate v *Adelson*[1]: Solicitor's Lien over a Will

Justice Brown held in this case that a solicitor's lien could be asserted over the original of a deceased person's will, stating[2]:

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* This paper was presented at the Law Society of Upper Canada, 12th Annual Estates and Trusts Summit, November 12 & 13, 2009.

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1 (2007) 32 ETR (3d) 239.

2 At 242.

> "...[as] a matter of principle I have difficulty differentiating a will from any other document that a solicitor might possess as a result of a retainer. No doubt a will is an important document, but so too are many other documents over which a solicitor may exercise a lien. The utility and efficacy of a lien rests on the fact that a solicitor may withhold important documents needed by a client. In my view, an original will stands in no different position than any other document in the possession of a solicitor, and a solicitor may assert a lien over it for unpaid fees. As I shall discuss below, it is open to a court to intervene to prevent an injustice to a client resulting from the exercise of a lien."

The court's power to intervene is derived from section 9(1) of the *Estates Act*,[3] which permits the court to order any person to bring before the registrar any writing purporting to be testamentary.

The only case cited by Justice Brown[4] on the question whether the lien could be asserted over a will was the decision of Lord Eldon in *Balch* v *Symes*, decided in 1823.[5] Justice Brown's concern with practical results suitable to current circumstances in Ontario may be reflected in an apparent scepticism about the value of old cases decided in England. He begins his treatment of the case by stating: "The decision of Lord Chancelor Eldon in that case must be read with some care. Set in Jane Austen's England... ."[6] Justice Brown correctly pointed out that the very brief comment about wills in the *Balch* case was obiter since the solicitor's counsel had consented to production of the will. However, Justice Brown's reason for distinguishing the dictum are not, with respect, convincing. He focussed on the fact that *Balch* v *Symes* concerned the will of a living person and assumed that Lord Eldon's concern was that in order to change the will the client would need the original document whereas he pointed out that today in Ontario a person can by statute revoke a will by making another one. There are two points on this. First, immediately after the dictum under consideration, the report of Lord Eldon's decision refers to a case called *Georges* v *Georges*.[7] This case was a decision of Lord Eldon in 1811 which did involve the will of a deceased person. Lord Eldon decided that the solicitor had no lien over it. Second, although Lord Eldon, in the *Balch* case, did refer to the fact that a will of a living person

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3 RSO 1990, cE21, as amended.

4 It appears that no cases were cited by counsel.

5 Turn & R88, 37 ER1028.

6 Jane Austen was born in 1775 and died in 1817.

7 (1811) 18 Ves Jun 293, 34 ER 294.

may be altered there was no relevant difference in the law about revocation of wills in Lord Eldon's time than in modern Ontario.[8] If Lord Eldon's comment was motivated by the need for possession of the document in order to make an alteration or revocation (and that is not apparent from the report), I suspect it was because there would in Jane Austen's England typically have been no copy of the will retained by the client, so that possession of the original was needed in order to consider a change to it.

Re Assaf Estate:[9] Appointment of Succeeding Estate Trustee; Amendment to Applications and Garnishment

Justice Brown became seized of the Assaf estate litigation, which gave him many opportunities for practicing patience, firmness and common sense in dealing with an obviously extremely difficult piece of litigation.[10] Three points in the litigation seem to me to be of general interest.

In one reported decision,[11] Justice Brown dealt with the appointment of a replacement estate trustee. In the unusual circumstances of the case, he was prepared to make the appointment only subject to various restrictions on the exercise of the estate trustee's powers without prior approval of the court, justifying the power of the court to do this by stating as follows:

> "The Superior Court of Justice possesses broad inherent and statutory powers to supervise and direct the management of an estate: MacDonell, Sheard and Hull, *Probate Practice*, *Fourth Edition*, at pp. 160 to 167. Although the power of an estate trustee generally flows from the will, a court can act to ensure that an estate trustee exercises those powers honestly and with proper regard to all proper interest."[12]

Although the cited passage from MacDonnell, Sheard & Hull does not in fact deal with the appointment of an estate trustee subject to restrictions, it makes obvious sense that the court should be able to do this. There are parallels with the court's inherent jurisdiction to control the

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8 See, *e.g.*, Atkinson, *Law of Wills*, 2nd ed. 1953 at 420.

9 (2008) 40 ETR (3d) 289; 43 ETR (3d) 93.

10 See also decisions of Brown J reported at (2008) 34 ETR (3d) 168, 182, 189; (2008) 39 ETR (3d) 306; 43 ETR (3d) 156; and the decisions of Strathy J reported at (2009) 48 ETR (3d) 42 and (2009) 49 ETR (3d) 149.

11 40 ETR (3d) 289.

12 At 298.

administration of trusts and its power to appoint estate trustees during litigation (which, on the basis of the wording in section 28 of the *Estates Act* strictly only applies "[p]ending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration".)

In the same decision, Justice Brown dealt with a motion to amend an application. He recognized that the *Rules of Civil Procedure* do not contain any specific provision governing the amending of applications but he drew an analogy with Rule 26.01, which deals with amendment of pleadings, to justify the position that the court does have power to grant leave to amend an application.

In a further decision in the Assaf litigation,[13] Justice Brown decided that an amount authorized by a previous order to be paid by the Accountant of the Superior Court of Justice out of court to Mrs. Assaf was not a "debt payable" by the Accountant to her and therefore was not subject to garnishment under Rule 60.08.

***Re Kerzner*:[14] Additional Affidavit Required for Multiple Wills**

This case concerned a routine uncontested application for a Certificate of Appointment of Estate Trustee with a Will where there were two wills and the Certificate was sought for only one of them ("Will No. 2"). Justice Brown was concerned that the application materials did not provide evidence that Will No. 2 remained in force notwithstanding the existence of another will. In general terms, he considered the solution to be as follows:

> "The simple solution to this problem, in my view, is to file with the probate application a brief affidavit attesting that the General Will [i.e. the will for which the Certificate is sought] is in force and has not been revoked by the other, Excluded Properties Will [i.e. the will for which a Certificate is not sought]. Armed with such information, the Estates Office can be satisfied that the General Will for which probate is sought remains in force and governs the disposition of the assets enumerated in it."[15]

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13 43 ETR (3d) 93.

14 (2008) 42 ETR (3d) 311.

15 At 312.

The application of this idea to the Kerzner application itself was dealt with as follows:

> "In the present application the General Will of Mr. Kerzner excluded from its reach shares in private companies. The General Will is labelled "Will No. 2". Section 1.9 of the General Will provides:
>
> > "I FURTHER DECLARE that I have an existing Will, executed by me earlier this day which Will deals with certain of my property and assets as are more particularly described therein and which Will I do not intend to revoke by the provisions of this Will."
>
> While that clause clearly expresses the testators intention not to revoke his Excluded Properties Will, which I assume he styled "Will No. 1", it does not provide evidence that Will No. 1 did not revoke the General Will, Will No. 2.
>
> I therefore direct the applicants to file an affidavit confirming that Mr. Kerzner's Will No. 2 remains in force and has not been revoked by his Excluded Properties Will. Once that evidence has been filed, I direct the Estates Office to proceed with the issuance of a Certificate of Appointment of Estate Trustees to the applicants provided the appropriate fees have been paid."[16]

In *Key Developments in Estates and Trusts Law in Ontario*,[17] Justice Brown commented, as follows, on the endorsement made by him in the Kerzner case:

> "In *Kerzner Estate (Re),* I requested that an applicant for probate of one of two multiple wills file a brief affidavit attesting that the will for which probate was sought had not been revoked by the other will, be it the general will or the limited assets will. Although Form 74.4.1 requires an applicant for a certificate limited to assets in a will to depose that he or she does not know of any later will or codicil affecting the assets in question, situations do arise where this language does not satisfy concerns that may arise in the case of multiple wills. Since judges deal with these applications on a chambers, or *ex parte*, basis, the filing of a brief affidavit attesting that the will for which probate is sought has not been revoked by the other multiple will clears away any ambiguity and usually eliminates the need to delay the processing of an application in order to make further inquiries of the applicant."

I have two, inter-related, concerns about this. First, it is a positive feature of Rule 74 of the *Rules of Civil Procedure* that it lists the materials required to be filed in order to obtain the certificate in question. It is true that there is a "basket clause" referring to "such additional or other material as the court directs", but it appears that it is the scheme of the Rules that in an

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16 *Ibid.*

17 2009 edition, Bonnie Croll & Melanie Yach, eds., at 3-4.

ordinary case the applicant, or his or her counsel, can determine what it is required by reading the applicable rule. The benefit of this is lost to the extent that it is necessary to go outside of the Rules to determine what is required pursuant to a juridical decision or, worse still, prevailing practice of the persons working in the Estates Office. The Rules and the Forms have been amended to accommodate multiple wills and it is preferable if it is possible for a routine application for a Certificate to be dealt with without the need for any additional materials or for the application to be taken to a judge.

My second point is that the applicable form – Form 74.4.1 – does effectively deal with Justice Brown's concern. The application contains an affidavit sworn by the applicant, paragraph 2 of which states as follows:

> "2. The exhibit(s) referred to in this application are the last will and each codicil (where applicable) of the deceased person relating to the assets referred to in the will and I do not know of any later will or codicil affecting those assets."

In the statement from the book quoted above, Justice Brown acknowledges this but then states that, "situations do arise where this language does not satisfy concerns that may arise in the case of multiple wills", and he states that, "the filing of a brief affidavit attesting that the will for which probate is sought has not been revoked by the other multiple will clears away any ambiguity". Frankly, I do not understand this. If the "non-probate" will revoked the will for which probate is sought, it would be a "later will...affecting those assets" (i.e., the assets dealt with by the will for which probate is sought). It seems to me that this deals effectively with the concern raised by Justice Brown without the need for any additional affidavit. If, contrary to my view, it is considered that other language would be preferable I suggest that the right way to deal with such concern is an amendment to the Form.

Re Goushleff Estate:[18] Certificates Obtained in Respect of Multiple Wills

This case deals with a relatively unusual situation where a person had made two wills, each naming different executors, and it was desired to have a separate Certificate in respect of the two wills and sets of executors. Justice Brown held that this could be done, stating as follows:

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[18] (2008) 43 ETR (3d) 319.

> "If separate grants of probate can be made in respect of executors appointed for different purposes under one will, in my view it follows that if a testator makes two wills, each naming different executors and each covering separate property of the testator, separate certificates of appointment can be granted to the different executors, but their respective grants would be limited in accordance with the terms of each will."[19]

The difficulty arose from provisions of the *Estates Act* dealing with the Estate Registrar for Ontario Certificate Clearance System, Rule 74 and related sections of the *Estates Procedure Manual*. Justice Brown carefully considered the relevant provisions in the context of the scheme of the Act and concluded that the relevant provisions of the Act and Rule 74, when properly interpreted,

> "do not prevent a local estates registrar from issuing separate certificates of appointment of estate trustee respecting limited assets to different executors appointed under multiple wills of a testator that deal with different property of the testator."[20]

***Re Henderson Estate*:[21] Requirements to Dispense with a Bond**

In this case, Justice Brown set out requirements relating to obtaining an order for dispensing with a bond. This is quite different from the situation in *Re Kerzner* where the Rules and Forms set out the requirements in the ordinary course for obtaining a certificate. Here the governing provisions of the *Estates Act* – section 6 (in the case of a grant of letters probate to a person not resident in Ontario or the Commonwealth) and section 35 (in the case of a grant of letters of administration) – require a bond to be obtained in a certain amount unless the court dispenses with or reduces the amount of the bond.[22] Neither the Rules nor any reported judicial decision provides guidance about what is required in order to obtain an order dispensing with a bond. As stated by Justice Brown in the Henderson case:

> "Each week the judge sitting on the Toronto Estates List is asked to consider up to two dozen requests by applicants for certificates of appointment of estate trustee for orders dispensing with the posting of an administration bond. Each week the

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19 At 321.

20 At 323.

21 (2008) 45 ETR (3d) 189.

22 See sections 5 and 37(2).

> judge rejects a significant number of those requests because of deficiencies in the filed materials.
>
> This is a source of frustration, both for the Bench, who spent time reviewing materials that turn out to lack key information and, no doubt, for the Bar, who cannot find guidance in the *Estates Act* or the *Rules of Civil Procedure* about the proper materials to file in support of such a request.
>
> This situation means that members of the public are not receiving the level of service to which they are entitled on an issue that affects many families in this city – the need to obtain certificates of appointment by persons of modest means for estates with modest assets.
>
> In my view this is an area where strong consideration should be given to amending the *Rules Of Civil Procedure* to provide filing directions for requests to dispense with administration bonds."[23]

Justice Brown then proceeded to provide detailed guidance as to what is required. This is extremely helpful, although I would suggest that it would be preferable (as Justice Brown suggested) if the requirements were set out in the Rules.

More generally, I suggest that consideration should be given to whether a general rule requiring bonding for administrators or even for foreign executors is justified. The matter was carefully considered in the Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* in 1991 and recommendations were made for bonds to be required only in certain particular circumstances. But nothing has been done about it and, as Justice Brown stated, in Toronto alone up to two dozen requests for orders dispensing with bonds are made each week. What a waste of time and money. One of the telling statements in the Ontario Law Reform Commission Report was the following:

> "While the costs of administration are increased by the necessity of obtaining a bond, it is quite rare for proceedings to be taken for enforcement. Indeed, none of the many practitioners or court officials consulted in connection with this project had any experience with the realization of administration bonds."[24]

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23 At 190.

24 At 225.

Justice Brown's helpful guidance as to obtaining an order dispensing the a bond is as follows:

"A. ***The content of the affidavit in support***

12 Accordingly, when an applicant for a certificate of appointment of estate trustee makes a request under section 37(2) of the *Estates Act* for an order that a judge dispense with the requirements to post an administration bond, the applicant should file affidavit evidence in support of the request which contains the following:

(i) The identity of all beneficiaries of the estate;

(ii) The identity of any beneficiary of the estate who is a minor or incapable person;

(iii) The value of the interest of any minor or incapable beneficiary in the estate;

(iv) Executed consents from all beneficiaries who are *sui juris* to the appointment of the applicant as estate trustee and to an order dispensing with an administration bond should be attached as exhibits to the affidavit. If consents cannot be obtained from all the beneficiaries, the applicant must explain how he or she intends to protect the interests of those beneficiaries by way of posting security or otherwise;

(v) The last occupation of the deceased;

(vi) Evidence as to whether all the debts of the deceased have been paid, including any obligations under support agreements or orders;

(vii) Evidence as to whether the deceased operated a business at the time of death and, if the deceased did, whether any debts of that business have been or may be claimed against the estate, and a description of each debt and its amount;

(viii) If all the debts of the estate have not been paid, evidence of the value of the assets of the estate, the particulars of each debt – amount and name of creditor – and an explanation of what arrangements have been made with those creditors to pay their debts and what security the applicant proposed to put in place in order to protect those creditors.

B. ***The form of the affidavit in support***

13 A practice has grown up in Toronto that those requesting an order dispensing with an administration bond simply file a bunch of loose documents, including

consents, affidavits and draft orders. Some organization needs to be brought to the materials filed. At a minimum, an applicant for a certificate who requests an order dispensing with an administration bond should file an affidavit that addresses the matters enumerated in paragraph 12 above and to which are attached, as exhibits, any consents or other documents referred to in the affidavit. Copies of the draft order should be separately filed.

C. ***Content of order***

14 The operative language of the draft order filed with the affidavit in support should read as follows:

> THIS COURT ORDERS that the posting of an administration bond by the Estate Trustee is dispensed with."[25]

Re McMichael Estate,[26] ***Robertson*** **v** ***Robertson***[27] **and** ***Re Pearsall Estate***:[28] **Place of Commencement of Application**

Rule 13.1.01 of the *Rules of Civil Procedure* provides that a proceeding may be commenced in any court office in any county named in the originating process unless a statute or rule requires the proceeding to be commenced, brought, tried or heard in a particular county. Section 7(1) of the *Estates Act* is such a statutory provision since it requires that an application for a grant of probate or letters of administration "shall be made to the Superior Court of Justice and shall be filed in the office for the county or district in which the testator or intestate had at the time of death a fixed place of abode."

In the *McMichael* case, the applicants sought, among other things, orders declaring that Robert McMichael's will was valid and that the applicants were the estate trustees and the duly authorized personal representatives of Mr. McMichael. The applicants had not complied with rule 74.04 which deals with an application for a certificate of appointment of estate trustee with a will nor had they used the applicable form. Mr. McMichael had died in Dufferin County. The applicants sought to file the application in Toronto.

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25 (2008) 45 ETR (3d) 189 at 192-193.

26 (2008) 40 ETR (3d) 285.

27 [2008] OJ No. 4054.

28 May 4, 2009.

Justice Brown held that "in essence" the applicants were seeking a court order certifying their appointment as estate trustees and that therefore the application should have been made in accordance with rule 74.04 and on the applicable form and the application should have been brought in the place where Mr. McMichael had his fixed place of abode at the date of his death, which was Dufferin County.

The *Pearsall* case concerned an application for an order that the respondents pass their accounts relating to the estate and to property of the deceased. The applicant had had difficulty in issuing the Notice of Application in Toronto because of the facts that the deceased died in Leamington, no certificate of appointment of estate trustee had been issued and the respondents also lived in Leamington. The *Estates Procedures Manual* stated as follows:

> "[An] estate trustee files an application to pass accounts at the Superior Court of Justice location where the certificate of appointment of estate trustee was issued or where the court appointed guardian of the property was appointed (as the case may be)."

Justice Brown clarified that the above statement was an inaccurate statement of the law and that an application to pass accounts of a trustee or of a guardian may be brought in any county.

The *Robertson* case dealt with a similar point. An informal policy had existed in the Toronto Estates Office that it will accept applications under the *Substitute Decisions Act* only where the person in respect of whom a declaration of incapacity is sought resides in Toronto. Again, Justice Brown clarified that there is no basis for this position.

Re Kaptyn Estate:[29] Refusal to Order Disagreeing Executors as to Commencement of Litigation

The issue, as framed by Justice Brown, was as follows:

> "When two co-executors of an estate are deadlocked over how to commence an action by the estate, and the expiry of the limitation period looms, what, if any, directions should the court give the co-executors?
>
> Two such motions for directions are before me. One co-executor, Henry Kaptyn, seeks leave to commence an action, on behalf of the estate, as sole plaintiff against several defendants, with the other co-executor, his brother Simon Kaptyn,

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[29] (2009) 48 ETR (3d) 278.

to be joined as a co-defendant under Rule 9.01(3) of the *Rules of Civil Procedure*. On his part, Simon Kaptyn seeks an order directing that both co-executors act jointly to retain a lawyer to commence an action on behalf of the estate against the same group of defendants before the limitation period expires. But, once commenced, to suspend the action until the co-executors can secure an independent legal opinion as to whether the estate's claims against each particular defendant have merit and are worth pursuing."[30]

Justice Brown refused to break the deadlock. After reviewing cases dealing with the circumstances in which a court may intervene to break a deadlock, Justice Brown stated as follows:

> "While courts, in appropriate circumstances, may intervene to ensure the due performance of powers granted to executors by a will regarding the sale or retention of estate assets, it is quite another matter to seek the intervention of the court on the issue of whether or how executors should commence an action on behalf of the estate. As a general rule, courts do not give advice or directions as to whether or how a person should commence an action. (The lifting of statutorily-imposed stays in some circumstances operates as a limited exception to this principle.) Instead, courts adjudicate actions once commenced; they do not offer advice as to whether to sue, whom to sue or how to sue.
>
> It is the obligation of the executors, not the courts, to decide whether an action should be commenced for the benefit of the estate and how to do so. Any risks associated with a decision about whether or not to sue should rest squarely on the shoulders of the executors. As I perceive these motions, both executors are attempting to shift much of that risk off their shoulders because if they secure a court order, then section 60(2) of the *Trustee Act* provides that an executor who acts upon the opinion, advice or direction of the court "shall be deemed, so far as regards that person's responsibility, to have discharged that person's duty as [executor] in the subject matter of the application..." I have no idea whether the litigation proposed by the executors has merit or is frivolous, and it is not the business of the court to make such an inquiry before litigation is being commenced. To grant the direction sought by the executors in my view risks cloaking, improperly, any resulting action on behalf of the estate with the apparent sanction of the court.
>
> The executors submit that with the expiry of the limitation period looming in two weeks, intervention by the court to give directions is imperative. Any problem regarding the imminent expiry of a limitation period has been created by the executors' conduct. If they think that they have painted themselves into a corner, with respect, it is not for the court to offer them an escape route; they must act in common to find their own way out.

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[30] At 279.

> The executors must exercise their powers in the best interests of the estate and all beneficiaries. If they think merit exists in commencing an action against their father's former estate advisors, then they should make that decision in common. If they fail to do so prior to the expiration of the limitation period, it is true that they may risk lawsuits from the beneficiaries of the estate for failing to discharge their duties as executors. The threat of such litigation may well impose a salutary discipline on the executors to fulfil, in common, whatever obligations they may owe the estate about this potential piece of litigation. I see no reason why the court should free these two executors from the operation of that discipline or relieve them from the risks associated with any failure to exercise in common their powers in respect of the Wills."[31]

It strikes me as surprising that the court would refuse to break such a deadlock. In other common law jurisdictions, it is a well established and commonly used procedure for trustees (and I do not believe the same would not apply to executors) to obtain orders of the court directing them whether to bring or defend proceedings (as the case may be). In England, such an order is known as a *Beddoe* order[32]. The main reason behind this is that the trustees may be personally liable for the costs of the proceedings if it turns out that they are unsuccessful and the trustees are determined, after the event, to have acted unreasonably. The rationale behind the *Beddoe* order is that it is appropriate for the trustees to obtain protection from such an outcome. It seems to me that this procedure would be particularly appropriate in a case where the executors have been unable to act because of their disagreement about whether the proceedings should be brought.

Perkovic v. *McClyment*:[33] Claim for Interim Support under Part V of *Succession Law Reform Act*

This is a very useful decision in which Justice Brown carefully analyzes and clarifies the applicable principles for determining whether a claimant is entitled to interim support under Part V of the *Succession Law Reform Act*.[34]

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31 At 284-285.

32 See, *e.g.*, the detailed discussion in *Lewin on Trusts*, 18th ed. , 2008 at 751-762.

See also Ford & Lee, *Principles of the Law of Trusts*, 3rd ed., 1996, s.17030 for Australian treatment of this procedure.

33 (2008) 43 ETR (3d) 124.

34 RSO 1990, as amended.

Justice Brown considered, as follows, the applicable legal framework:

> "Let me start by considering the legal framework in which Mr. Perkovic's claim for interim support must be considered. Section 58(1) of the *SLRA* provides that:
>
> > 'Where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased for the proper support of the dependants or any of them.'
>
> Section 64 enables an applicant to move for interim support:
>
> > 'Where an application is made under this Part and the applicant is in need of and entitled to support but any or all of the matters referred to in section 62 or 63 have not been ascertained by the court, the court may make such interim order under section 63 as it considers appropriate.
>
> Section 62 requires a court, in determining the amount and duration of any support, to consider "all the circumstances of the application" and the section enumerates a number of specific factors that a court should consider.
>
> To obtain interim support, Mr. Perkovic must establish that he "is in need of and entitled to support" (s.64). That, in turn, requires the applicant to establish that:
>
> (i) he falls within one of the qualifying relationships set out in section 57 of the *SLRA*, in this case within the extended definition of "spouse";
>
> (ii) he is a dependant of Ms. Marion, the deceased, in that she was providing support to him, or was under a legal obligation to provide support to him, immediately before her death (s.57); and
>
> (iii) Ms. Marion did not make adequate provision for his proper support (s.58(1)) in the sense that Mr. Perkovic is in need of support (s.64)."[35]

Justice Brown then referred to the claimant's counsel's argument, based on jurisprudence under the *Divorce Act* that on a motion for interim support the principal matters for the court to consider are the needs and means of the parties. Justice Brown disagreed:

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[35] At 127.

> "While motions for interim support under the *Divorce Act* or *Family Law Act* engage similar considerations as those under Part V of the *SLRA*, the considerations are not identical. By its terms, section 64 of the *SLRA* requires a court on a motion for interim support to consider both entitlement to support as well as the need for support. Moreover, in my view it is implied by the language of section 64 that a court will also take into account those matters enumerated in sections 62 and 63 of the Act which the court is able to ascertain from the materials filed on the interim motion. Finally, in *Cummings* v. *Cummings* ..., the Court of Appeal held ... that when judging whether a deceased has made adequate provision for the proper support of her dependant, a court must examine "the claims of all dependants, whether based on need or on legal or moral or ethical obligations". To the extent that moral obligations to the applicant and other dependants can be ascertained from the materials filed on an interim motion, a court may consider them as part of its analysis ... ."[36]

Justice Brown then considered how strong a case the claimant must put forward on each of the three elements in order to obtain an order for interim support. He referred to different formulations in various cases and then stated as follows:

> "I take from these various tests, or labels, the following principles. On a motion for interim support the onus is on the applicant to establish some degree of entitlement to, and the need for, interim support. On an interim motion a court can weigh and assess the evidence, to the extent permitted by the nature of the evidence and any pre-hearing testing of it. If after such assessment, the motions court concludes that the record contains credible evidence from which one could rationally conclude that the applicant could establish his claim for support, then an order for interim support may issue."[37]

One of the issues was whether the claimant was a "spouse" within the extended definition for the purposes of Part V of the *SLRA* and this turned on whether he had cohabited with the deceased. Justice Brown commented on the applicable legal principles as follows:

> "In ascertaining whether two people have co-habited courts generally employ the framework enunciated in *Molodowich* v. *Penttinen* ... in which the court identified seven groups of factors to consider in the analysis – shelter, sexual and personal behaviour, services, social, societal, support and children. Under the *Molodowich* framework no factor enjoys any presumptive weight and the extent to which the different elements are taken into account will vary with the circumstances of each case: *Sturgess* v. *Shaw* ... .

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36 At 127-128.

37 At 128.

> While the *Molodowich* framework regards a spousal relationship as a collection of functions to be unpacked and identified, in my view its very breadth, and the absence of an rank-weighting, dilutes its utility as an analytical tool. Its assumption that a spousal relationship does not possess any core attributes makes it difficult for a court, especially on an interim motion, to shift [*sic.*] through the various factors in its effort to determine whether or not a relationship between two persons falls within a statutory category – in this case the extended definition of "spouse". That the *Molodowich* framework found favour with the Supreme Court of Canada in *M* v. *H* ... does not make the breadth of its approach any easier to apply.
>
> In my opinion, for the purposes of this interim motion two of the *Molodowich* factors carry greater weight than the others – co-residency and sexual intimacy. First, although Mr. Perkovic maintained his own apartment, the evidence shows that in the three years prior to Ms. Marion's death Mr. Perkovic lived for much of the time at Ms. Marion's house. As was clear from paragraph 39 of Ms. McClyment's affidavit, when her mother died Mr. Perkovic was living at her mother's house and the children asked him to stay on for a while. Second, there is no dispute that I can see on the record that the relationship between Ms. Marion and Mr. Perkovic was a sexually intimate one."[38]

***Re Balaz Estate*:[39] Deleting Provisions from a Will**

The will was intended to be a spousal trust for the purposes of the *Income Tax Act* and the lawyer who drafted it had received instructions to prepare a will creating such a trust. It was concluded after the death of the testator that the will conferred certain powers on the trustees which might taint the trust so that it would not be accepted by the Canada Revenue Agency as a qualifying spouse trust.

Justice Brown held that the offending provisions could be deleted from the will on the basis that they were included inadvertently without the knowledge or approval of the testator. It is well-established that a will, or part of a will, is not valid to the extent that the testator did not know and approve it. The *Balaz* case was perhaps a benign application of this principle in the circumstance that there was no evidence that the testator did not know and approve the particular offending words: what she did not know and approve was the possible legal effect of the inclusion of these words.[40] Another interesting feature of the case is that Justice Brown drew

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38 At 132-133.

39 April 17, 2009.

40 *Cf.* the position taken in the well-known rectification case of *Juliar* v. *R.* (2000) 50 OR (3d) 728 (CA).

attention to the distinction between two questions: "(i) what document constitutes the will of which the testatrix knew and approved? (ii) What does the language of the will mean?" and the fact that the rules about the admissibility of evidence may be more restrictive regarding question (ii) than question (i).

At about the same time another case was decided by a different judge – *Nugent* v *Lang*[41] – in which Harris J dealt with a will where it was apparent that a legacy was, through inadvertent typing, written as $25,000 rather than $2,500. Harris J's conclusion was expressed as follows: "I am satisfied that the Hicks children's legacy was taken into the 2006 Will inadvertently without the knowledge or approval of [the testator]. The 2006 Last Will and Testament shall be rectified to reflect the intention of [the testator]. Accordingly, the words and numeric of "twenty five, thousand dollars" in paragraph III(c)(i) are to be deleted and the comma and decimal should be placed in their appropriate resting spots of: "$2,500.00" so that the 2006 Will conforms to the wishes of [the testator]."

This conclusion was fair and sensible. The problem is that the reasoning does not, on the basis of the established law, support it. The fact that the testator did not know and approve of the reference to $25,000 is a basis for deletion of such words but not their replacement by different words or figures. As a matter of interpretation, it may well have been possible to come to the conclusion arrived at by Harris J. but this gives rise to the question of what evidence is relevant for this purpose. Also, Harris J referred to the equitable remedy of rectification as if it were relevant to the determination of the words of a will – which would in fact be a quite novel position.

My point in referring to this is that this is an area of law which is crying out for reform. Reform was in fact carried out in England in 1982 regarding the ability to rectify wills and the evidence that could be taken into account for that purpose and there were also recommendations made by the Law Reform Commission of British Columbia in 1982.[42] However, nothing has been done in Ontario (or in British Columbia for that matter). Frankly, it seems to be unrealistic to expect this

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41 May 27, 2009.

42 I discussed the issues and these reforms and proposals In "Case Comment: *Re Rapp Estate* (1992) 43 ETR 229.

kind of reform to be undertaken by the Ontario legislature. In these circumstances, the only way reform will be achieved is if it is carried out by the judiciary.

Re Ignagni Estate:[43] Orders for Assistance Generally Not to be made *Ex Parte*

This case was commenced with a motion, made without notice pursuant to Rule 74.15(1)(a) of the *Rules of Civil Procedure*, for an order for assistance requiring the respondents to accept or refuse appointment as estate trustees with a will. Justice Brown concluded as follows:

> "The affidavit in support of the *ex parte* motion in the present case does not disclose any extraordinary urgency. The testatrix died almost two years ago. The moving party knows where the respondents live, so there should be no difficulty in serving the motion record. There is no suggestion that in the event notice is given to the respondents they will take steps to frustrate the process of justice before the motion is heard. Under such circumstances, I decline to grant the *ex parte* order sought by the moving party and direct that the motion be brought on notice to the respondents.

Section 9(1) of the *Estates Act* provides that the court may,

> "on motion or otherwise in a summary way, order any person to produce and bring before the registrar, or otherwise as the court may direct, any paper or writing being or purporting to be testamentary that is shown to be in the possession or under the control of such person."

Rule 74.15 provides for the issue of various "orders for assistance", including those made pursuant to section 9 of the *Estates Act*. Rule 74.15 (2) provides that a motion for such orders (except in the case of a motion for further particulars after a statement has been provided pursuant to an order under clause 1(d)), "may be made without notice". Consistently with the provision, and the prior practice under the Surrogate Court Rules, it has been practice for such orders typically to be obtained *ex parte*.

Justice Brown pointed out that other Rules deal with motions being brought without notice. Rule 37 is the general rule dealing with motions and Rule 37.02(1), (2) and (3) provides as follows:

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[43] September 30, 2009.

"(1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise.

(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.

(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice."

Rule 40 deals with interlocutory injunctions and mandatory orders pursuant to sections 101 and 102 of the *Courts of Justice Act*.[44] In that context, Rule 40.02(1) provides:

"(1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days."

Justice Brown referred to a "well-defined body of jurisprudence [identifying] when it is appropriate for a court to grant an *ex parte* order", referring to cases dealing with *ex parte* motions for injunctions.

Justice Brown recognized that, under the former Surrogate Court practice, citations (which were the equivalent of orders for assistance) were invariably issued on a without notice basis. He held, however, that such practice was not continued pursuant to the current Rules. He stated as follows:

> "By contrast Rule 74.15 does not contain any presumption that motions seeking orders for assistance are to be made without notice. Instead the rule echoes Rules 37 and 40 of the *Rules of Civil Procedure* by providing that a motion "may be made without notice". Further, orders for assistance are not mere administrative devices. As noted above, the consequences of failing to comply with an order of assistance are significant – the loss of rights to a share in an estate or to participation in its administration, or the potential exposure to a contempt motion. Consequently, in my view when a court is faced with an *ex parte* motion for an order for assistance, it is appropriate to consider whether any "extraordinary urgency" exists that would justify granting the order without notice to the responding party. If none does, the moving party should be required to give notice.
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> In those cases where a party may be justified in moving without notice to obtain an order for assistance, the moving party will be subject to the general requirement to make full and frank disclosure of all material facts, including those

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[44] RSO, 1990, c.43, as amended.

> arguments the moving party would anticipate the respondent would raise in opposition to the order sought. Failure to make such full and frank disclosure can operate as a sufficient ground to set aside any resulting *ex parte* order.
>
> Members of the Estates Bar may regard the requirement to give notice of a motion for an order for assistance unless "extraordinary urgency" exists as imposing undue costs on the administration of the estate. Against that must be weighed the fundamental principle that a court should not issue an order against a person without affording that person an opportunity to explain the other side of the story. Many estate disputes arise in the context of strained family relationships, or out-and-out family battles. Courts should exercise great caution before granting an order that imposes obligations on one side in a family dispute. Unless some extraordinary urgency exists prudence and the principles of natural justice require a moving party to give notice of the order requested so that the respondent enjoys the opportunity of placing the rest of the story before this court.

I would make two comments on this. First, it seems to me that Rule 74.15 does not echo Rule 37. Rule 74.15 simply provides that the motion "may be made without notice" whereas Rule 37.07(1) create a primary rule which is that the notice of motion shall be served on the persons effected by it and Rule 37.07(2) and (3) specifies particular circumstances in which the court may make an order without notice. Rule 40 deals with the particular context of interlocutory injunctions and mandatory orders. Particularly taking account of the prior Surrogate Court practice, it was a reasonable position that the wording of Rule 74.15 was intended to create a primary rule in favour of permitting *ex parte* motions in the context of that rule.

My second comment is that this case brings out a general point about the need for careful harmonization of the "estates" rules with the rest of the *Rules of Civil Procedure*. Justice Brown's rationale for assimilating the "estates rule" with the generally applicable rules is compelling. However, I suggest that, if possible, such changes in established practice should generally be carried out by changes in the rules so that the changes will be apparent on a reading of the rules.