TAB 9



# Stop, Think – Why Are You Litigating?

Felice C. Kirsh, C.S.
Rob Levesque
*Schnurr Kirsh Schnurr Oelbaum Tator LLP*

*13th* ***Annual*** **Estates and Trusts Summit**
**Day Two - November 18, 2010**

LET RIGHT PREVAIL
The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Professional Development

# Stop, Think: Why are You Litigating?

By Rob Levesque and Felice Kirsh

"If I had more time, I would have written a shorter letter"

- Mark Twain[1]

In dispute resolution, as in letter writing, there is great value in being economical and concise. Mark Twain's witticism captures the sense in which achieving such economy involves the discipline of identifying what is truly important, and separating out anything inessential. This skill is particularly important in the complicated and emotionally charged context of an estate dispute. Recent commentary from the bench confirms that the "culture of litigation", which has come to be associated with high costs, delay and lack of cooperation, is due for an overhaul. Before charging ahead in a litigation process that is long, complicated and expensive, a good lawyer should pause, and reflect on whether the dispute could be resolved in a more economical manner.

**Proportionality**

In 2007, the Honourable Coulter A. Osborne released his Report on the Civil Justice Reform Project, recommending changes that would make the civil justice

[1] Or so we think. This quote has been attributed to a number of different authors.

system more accessible and affordable to Ontarians.[2] The report was prompted by observations that the general public was hesitating to access the justice system because of the high costs and long delays associated with civil proceedings, problems that were being aggravated by what has been described as a "culture of litigation". The common thread running through the Osborne Report is the importance of proportionality. "Proportionality," wrote Justice Osborne, "simply reflects that the time and expense devoted to a proceeding ought to be proportionate to what is at stake."

The *Rules of Civil Procedure*[3] have been amended to give effect to many of Justice Osborne's recommendations. The principle of proportionality is now codified in Rule 1.04(1.1), which states: "the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding".

The practical effect of the addition of Rule 1.04(1.1) was recently considered in the estates context in *Abrams v. Abrams*.[4] In that case, a contested guardianship proceeding, Justice Brown made a case management Order directing the procedural steps to be followed by the parties. The Order frustrated one of the litigant's plans to proceed under a different procedure, which, in the Court's opinion, would have further delayed proceedings that had already "gone off the rails". The frustrated litigant challenged Justice Brown's jurisdiction to manage litigation on the Estates List. This provided Justice Brown with the opportunity to make some illuminating comments on Rule 1.04(1.1). He concluded that the new Rule is not a "mere interpretive principle". It empowers the court to deny a procedural right that would otherwise be available to a litigant in the name of proportionality. To hold otherwise would render the principle of proportionality

---

[2] Civil Justice Reform Project: Summary of Findings and Recommendations. Available at www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp
[3] R.R.O. 1990, Reg. 194 ("*Rules*")
[4] 2010 ONSC 2703 (CanLII) (S.C.J.)

toothless. Justice Brown took this conclusion a step further, predicting that the new Rule will fundamentally change the way that litigation is practiced:

> While the Rules of Civil Procedure are not often compared to the Little Red Book of Chairman Mao popularized during China's Great Proletarian Cultural Revolution, I do not think it an exaggeration to characterize the recognition of proportionality in our own Little Blue (or White) Book as a "cultural revolution" in the realm of civil litigation. Proportionality signals that the old ways of litigating must give way to new ways which better achieve the general principle of securing the "just, most effective and least expensive determination of every proceeding on its merits". These new ways need to be followed by the Bar which litigates and by the Bench.[5]

The implication of Justice Brown's remarks is that lawyers who fail to incorporate the principle of proportionality into their practice will find proportionality imposed on them by the judiciary.

Concerns about disproportionate costs are particularly relevant in estate litigation. Much estate litigation involves estates of a relatively modest size. Many litigants lack the means to independently fund complex and protracted litigation. If lawyers fail to pay heed to the principle of proportionality, the cost of litigating these lower-value claims can quickly outstrip the value of the client's claim.

The remainder of this paper will discuss strategies for achieving the goal of proportionality in estate litigation.

**Early intervention**

From the outset of an estate dispute, lawyers find themselves thrust into the midst of a complex and emotionally charged set of relationships. The litigants are not strangers passing in the night. They are influenced and motivated by a shared history, family dynamics, and patterns of interaction that in many cases have been established in childhood and reinforced over a lifetime. The prospect of litigation can bring long-simmering resentments and grievances to a boil.

---

[5] Ibid at para. 70.

From the moment she is retained, the lawyer should initiate a discussion with the client as to why it is to everyone's benefit to make a concerted effort to keep emotional matters in check as much as possible in an attempt to deal with the dispute in a practical and cost effective manner. The lawyer should also be mindful that the relationships between the parties have value over and above the value of the money and property that is the subject of the dispute.

The initial approach of the lawyers retained by the parties sets the tone of the dispute. While it is a lawyer's duty to zealously represent her client's interests, too often counsel have a tendency to take a very aggressive position both in discussions with the client and communication with counsel for the opposing parties. In doing so, the opportunity to introduce perspective and context into the dispute can be lost. In order to orient the client towards negotiation, it is helpful to arrange early meetings between the parties. These meetings may be configured in different ways, depending on the circumstances.

In some cases, a potential client seeks legal representation having only general suspicions about the conduct of a family member and a vague feeling of being aggrieved. In such cases, the lawyer may want to begin by asking the potential client whether he has raised his concerns with the family member directly. While it may seem oddly premature that the client would seek legal counsel without taking this obvious step, it is not uncommon in cases where family members are estranged from one another and have forgotten how to communicate. Urging the client to raise his concerns directly can open the lines of communication, and is preferable to an exchange of tersely-worded lawyer's letters, which may needlessly inflame familial tensions.

Alternatively, if it is apparent that there are numerous or complex legal and factual issues at play, it may be preferable to hold an initial meeting between counsel, without involving the litigants.

In any case, a meeting between the litigants and their counsel should be arranged as early as possible. Emotional volatility on the part of the litigants should not dissuade counsel from taking this step. If necessary, the litigants can be separated in their own rooms so that contact between them is minimized or eliminated altogether. The goal is to bring the parties physically together in order to discuss the issues and attempt to work their way towards a resolution of their own making, rather than having one imposed upon them by a Court.

**Don't lose sight of the big picture**

Estate litigation typically involves an array of issues, some big, others small. Some issues will involve the parties' strict legal rights, others will be of a purely emotional nature. In order to resolve the dispute in an orderly and cost-effective manner, it will be necessary to develop a plan prioritizing the various issues, and to discuss it with the client as soon as is practical. If the client demands that you send opposing counsel a letter establishing her entitlement to Grandmother's cherished candy dish, you may want to respectfully suggest that this is not an effective use of her money.

While an emotional client may want to fight the opposing party on every issue, it is essential to move the resolution of the dispute forward by identifying any issues on which there is consensus. Perhaps the parties can agree to cooperate on a step in the administration of the estate. Alternatively, it may be possible to move the parties closer together by conceding a point that will not prejudice the client's legal rights, but has great emotional importance to the opposing party. Finding common ground between the parties can be the first step in shifting their orientation away from litigation.

**Mediate with a view to settlement**

Anecdotal evidence suggests that over 90% of estate litigation is resolved without the necessity of a trial or hearing. It is important to impress upon the client that an early mediated settlement is preferable to settlement on the eve of trial. The benefits of an early settlement include the avoidance of the substantial cost, emotion toll, and uncertain outcome of the adversarial process. Resolving a dispute by mediation also ensures that sensitive family matters remain private.

Mediation in estate litigation is mandatory in Toronto, Ottawa and Windsor. While requiring the parties to meet in the same location is always a positive step, lawyers can further encourage the prospect of resolution by approaching the mediation with a view to settlement. To this end, it is suggested that drawn out plenary sessions should be avoided. The practice of holding extended plenary sessions during which the lawyers are given an opportunity to make opening statements and the litigants are given the opportunity to speak to those assembled can send a mediation off the rails before it has even started. Despite the best efforts and intentions of counsel, opening statements inevitably stress the differences between the positions of the parties and therefore have the potential to have a negative impact at a very sensitive and early stage of the mediation. Similarly, even seemingly well-tempered and civil statements by the litigants can carry an emotional charge that may leave the opposing party cold, frustrating the chances of resolution.

Settlement possibilities should be canvassed with the client well before the date of the mediation. It is unhelpful for litigants to come into a mediation having determined a point below or above which they will not move. No mediation can succeed without compromise from both sides. As such, the lawyer should engage her client in a specific discussion regarding the levels and degrees of financial compromise, without a focus on final position. The approach will

encourage the client to be open to comments and offers from opposing parties, as well as suggestions from the mediator.

**Be mindful of shifting attitudes towards costs**

The general rule regarding the costs of litigation has been expressed as "costs follow the result" or "loser pays". Traditionally, Canadian courts had recognized estate litigation as an exception to this rule, with the courts frequently ordering that all litigants' costs be paid out of the estate.[6] The courts adopted this approach for two policy reasons. First, because the conflicts or ambiguities that give rise to estate litigation are often caused by the actions of the testator, it is unfair for an unsuccessful party to bear the costs of those actions. Second, courts play an important societal role in ensuring that only valid wills are propounded.

Recently, however, the courts have revisited this approach to awarding costs. In *MacDougald Estate v. Gooderham*,[7] the Ontario Court Appeal noted that the application of the traditional approach too often led to a "virtually automatic" order that the costs of litigation be paid out of the estate. Counsel were inclined to put less emphasis upon potential cost consequence when advising their clients about the wisdom of commencing proceedings; litigants proceeded under the assumption that they had everything to gain and nothing to lose. This state of affairs encouraged unmeritorious lawsuits and could be particularly detrimental to modest estates, where the costs of litigating threatened to swallow up the estate capital.

The Court of Appeal held that a modern approach to awarding costs in estate litigation must recognize the need to restrict unwarranted litigation and protect estates from being depleted by litigation. As such, the Court concluded that the

---

[6] See the discussion in McDougald Estate v. Gooderham [2005] O.J. No. 2432 (C.A.) at para. 79.
[7] Ibid.

"loser pays" principle applies in estate litigation. A court may decide, after scrutinizing the litigation, that uncertainty caused by the testator's actions or the presence of reasonable grounds to question the validity of a will warrants an award of costs from the estate. However, the costs inquiry will be specific to the facts of each case. Accordingly, there are no general class exceptions from the "loser pays" principle. Subsequent cases have stressed that only where the parties can demonstrate that *reasonable* grounds existed to question the execution of the will or the competency of the testator, or the presence of *reasonable* dispute about the interpretation of a testamentary document, will the courts consider whether it is appropriate to award costs of the litigation from the estate.[8] As such, litigants should be cautioned against relying on weak or thinly veiled attempts to bring litigation under one of the exemptions, as their submissions will be scrutinized by the court; judicial scrutiny is only likely to increase now that the principle of proportionality has been codified in the *Rules of Civil Procedure*.

**New discovery rules**

The discovery process has the potential to add great costs and delay to a proceeding. Overly-broad requests for production, purposeful over-production, examinations of questionable relevancy and knee-jerk refusals are all strategies that drive up costs and stall the eventual resolution of a dispute. Recent amendments to the *Rules of Civil Procedure* now mandate greater cooperation between parties, and empower the court to ensure that discovery occurs in a manner that is consistent with the principle of proportionality.

Rule 29.1 requires a party to an action who intends to obtain evidence on discovery to file a discovery plan indicating the intended scope and timing of documentary and oral discovery. The object of a discovery plan is to reduce or

---

[8] *Smith v. Rotstein*, 2010 ONSC 4487 (CanLII) (S.C.J.); Vance v. Vance Estate [2010] O.J. no. 4240 (S.C.J.).

eliminate discovery-related problems by encouraging parties to collaborate early in the litigation process, on their own or with the assistance of the court if needed, on all aspects of discovery.

Rule 29.2 goes further in providing a list of factors that the courts must consider when determining whether a party must answer a question or produce a document. Such factors include whether:

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
(b) the expense associated with answering the question or producing the document would be unjustified;
(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
(e) the information or the document is readily available to the party requesting it from another source.

Principle 21 of the Advocates' Society's *Principles of Civility for Advocates*[9] recommends that counsel attending out-of-court examinations conduct themselves as if a judge were present. Unfortunately, some lawyers have a tendency to treat examination as an opportunity to embarrass the witness, to "score points" against opposing counsel, or to get their position on record. None of these approaches has anything to do with the actual purpose of examination, which is to obtain evidence and admissions from opposing witnesses. In cases where there is little to be gained from such an examination besides the chance

[9] Available at http://www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf

for posturing, proportionality may dictate that the best examination is no examination.

Finally, it has often been observed that problems with discovery are much less frequent in smaller cities, where the members of the bar share a more collegial relationship. Civility and cooperation between counsel are crucial in ensuring that discovery unfolds in a manner that is proportional to the nature of the proceedings.

**A capacity proceeding is not a forum for litigating family disputes**

An individual's capacity can be implicated in a number of different types of proceedings, including various guardianship proceedings under the *Substitute Decisions Act, 1992* ("*SDA*").[10] Where there is a conflict between the interests of an allegedly incapable person and the interests of family members or other potential substitute decision makers, the interests of the allegedly incapable person must prevail. Unfortunately, some litigants in guardianship proceedings are simply unable to separate their own interests from those of the incapable person. In such cases, the true focus of the proceedings can be obscured by peripheral matters that have little to do with the care and well-being of the incapable person.

*Abrams v. Abrams*[11] is such a case. It provides an example of the pitfalls of the culture of litigation, and how that culture is particularly ill-suited to capacity-related proceedings. Ida Abrams, 87, and her husband Philip, 92, had three children. In 2005, there was a falling out amongst the family members over the testamentary intentions of the parents. Subsequently, Ida executed Continuing Powers of Attorney for property and personal care naming her husband as attorney, and her daughter Judith as an alternate. Stephen, another of the

---

[10] S.O. 1992, c. 30, as am.
[11] [2010] O.J. No. 787 (S.C.J.)

siblings, brought an Application seeking declarations that Ida was incapable of managing her property and personal care, and an order appointing him as guardian. Two years later, the matter came before Justice Brown during a case management conference. In his endorsement, Justice Brown noted that all the parties to the proceeding had been guilty of preventing the matter from moving forward by delaying discovery and bringing successive motions in what amounted to a "war of attrition": The parties were admonished for treating the guardianship proceedings as a forum for litigating a family dispute:

> Might I respectfully suggest that had any of the parties really cared about Ida's well-being, they would have moved heaven and earth to have had this matter adjudicated yesterday. Instead, each, in his or her own way, has bickered and delayed, leading me to believe that Ida's best interests have been shoved to the back seat whilst other problems amongst these battling family members have been brought to the fore.
>
> Proceedings under the SDA are not designed to enable disputing family members to litigate their mutual hostility in a public court. Guardianship litigation has only one focus – the assessment of the capacity and best interests of the person whose condition is in issue. This court, as the master of its own process and as the body responsible for protecting the interests of the vulnerable identified by the legislature and the SDA, should not and will not tolerate family factions trying to twist SDA proceedings into arenas in which they can throw darts at each other and squabble over irrelevant side issues.[12]

The *Abrams* case highlights that considerations of proportionality are even more pressing in litigation involving power of attorney and guardianship disputes. The fact that an individual lacks the capacity for personal care of the management of her property does not render her mute. Complicated and contentious guardianship proceedings can be simplified if the incapable person is given a voice in the proceedings. Section 3 of the *SDA* provides that if the capacity of person who does not have legal representation is in issue in a proceeding under the *Act*, the court may direct the Public Guardian and Trustee to arrange for legal

---

[12] *Ibid* at paras. 34-35.

representation to be provided to that person, and he or she shall be deemed to have capacity to retain and instruct counsel.

Of course, a lawyer appointed under section 3 of the *SDA* can only represent a client to the extent that the client is able to provide instructions. If the client is unable to provide instructions about a particular aspect of her care or the management of her property, it is not open to the lawyer to substitute her best judgment for that of the client. However, in guardianship proceedings, the clients' instructions may be as simple as refusing to submit to a capacity assessment, refusing to produce private medical or financial records, or expressing a preference about a proposed guardian. These simple instructions can bring clarity and focus to a dispute which, if left to the individual's family members, might become a drawn-out and contentious debacle.

**Conclusion**

Zealous advocacy does not preclude cooperation and compromise. In many cases, a lawyer does her client a disservice by employing the aggressive tactics that have come to be associated with the culture of litigation. Estate disputes frequently involve broken family relationships and vulnerable individuals, making the prospect of protracted litigation unattractive or irresponsible. By taking the time to focus on the important issues, and being open to collaboration with opposing counsel, lawyers ensure that the costs of a result, both financial and emotional, do not exceed the value of the result.