

## ESTATE AND TRUST LITIGATION

### Obtaining Information from Non-Parties in Estate Cases

Where the validity of a will of a deceased person is being challenged, the party initiating the challenge (the "challenger") may wish to obtain information from the solicitor who prepared the will and persons who witnessed the signing of the will.

The challenger may also wish to obtain information from the health care providers who treated the deceased person. This is often the case where the deceased person is alleged to have lacked testamentary capacity at the time of the making and signing of the will.

These persons are not usually parties to the proceeding dealing with the will challenge. Their documentary and oral evidence may only be obtained by order of the court on a motion or application for directions under Rule 75.06, combined with a motion for production from a non-party under Rule 30.10 (production of documents) and Rule 31.10 (obtaining information by oral examination under oath).

#### The Solicitor's File:

The file of the solicitor who prepared the will contains confidential information and is privileged. The solicitor has a legal and ethical duty not to disclose any of this information to any person unless ordered to do so by the court. This duty survives the death of the testator and is said to extend to his or her heirs or successors in title.



The solicitor's file is often ordered to be produced as an exception to solicitor-client privilege. This exception favours production of the will file after the testator has died in order to try and resolve a dispute over the will.

The leading case on point is *Goodman Estate v. Geffen*, a 1991 decision of the Supreme Court of Canada. In that case, the court held that the policy rationale underlying the exception is to ascertain the true intentions of the testator through admission of the solicitor's evidence. The exception is intended to promote the interests of justice. In cases where the testamentary capacity of the deceased is in question, the purpose of the exception and disclosure of the file is to assist in the determination of the proper heirs or successors of the deceased.

The party seeking production of the solicitor's file should be prepared to demonstrate that there is an evidentiary basis underlying their opposition to the will. The standard of proof on these motions is not very high but the court will exercise its gate-keeping func-

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tion and refuse production where the request appears to be nothing more than a fishing expedition or based on wild speculation. The question in every case is whether the request engages the interests of justice.

### Evidence of Other Persons:

The evidence of other persons may be obtained under Rule 30.10 (documentary evidence) or Rule 31.10 (oral evidence).

A non-party may be compelled to produce a document that is in his or her possession, control or power where the document is not privileged and it is relevant to a material issue in the action and where it would be unfair to require the party requesting the document to proceed to trial without having discovery of the document.

This rule may be relied on to obtain the medical records of the deceased where an Estate Trustee has yet to be appointed by the court. These records are highly relevant in cases where the testamentary capacity of the deceased is in question. They are required to be produced to ensure a fair and just determination of the underlying proceeding involving the validity of the will.

Medical records are routinely ordered to be produced in these circumstances and the issue the court usually struggles with is the time period to be covered by the proposed order. In the recent Ontario case of *Verch v. Weckwerth*, the court held that the relevant time period is at or around the time the deceased gave instructions for the preparation of the will. The court also held that medical records prior to this date may be relevant and ought to be produced and that records subsequent to this date would be ordered to be produced if they were likely to shed light on the deceased's health and state of mind at the time the will was made. The court acknowledged, however, that the relevance of subsequent records will diminish as the time interval increases.

Oral evidence of a non-party may be admitted pursuant to Rule 31.10 where (1) the person is believed to have information relevant to a material issue in the action; (2) the information cannot be obtained from any other person; and (3) it would be unfair to require the party seeking the information to proceed to trial

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without having the opportunity to examine the person under oath. The court will not allow the admission of such evidence where the examination will unduly delay the trial, entail unreasonable expense or result in unfairness to the person proposed to be examined.

We recently obtained an order in an estate proceeding in Cornwall (*Gaucher v. Estate of Gaucher*) allowing us to examine the deceased's former lawyer under oath as to information the lawyer possessed with regard to the testamentary capacity of the deceased.

In that case, the deceased had used a particular lawyer for most of his life. Several months before he died, the deceased went to another lawyer and made two different wills that excluded several of his children. A few years before he died the deceased lost his driver's licence allegedly due to mental infirmity. The former lawyer acted for the deceased and was successful in obtaining reinstatement of his driver's licence. Evidence as to the deceased's capacity was determined to be relevant and material.

### Costs:

The costs of documentary production and oral examination of non-parties are borne initially by the party seeking the information. However, the court order should clarify that the Trial Judge has the final say in the matter and may include these costs in any award of costs made in the underlying proceeding. The order should also reflect that the costs of the Rule 75.06/30.10/31.10 motion are to be reserved for the Trial Judge, unless the motion is actively opposed by a party in which case costs should be sought against the opposing party.

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This publication is intended to discuss personal injury matters of interest. Comments provided reflect the views of the author and are not intended as legal advice. Persons who wish to be informed of the specific implications of any of the matters discussed or decisions referenced herein should consult with a lawyer.

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