Summary Resolution of Probate Disputes in Canada

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There has been a “culture shift” in the litigation of probate disputes in Canada. In many jurisdictions, persons interested in an estate must first apply to the court for an order permitting a challenge to the validity of a will. At this stage, some “minimal evidentiary threshold” must be met by the challenger to justify the dispute going any further, due to concerns about the costs and delays associated with probate litigation. A small estate could otherwise be depleted by the actions of a disgruntled, spiteful litigant. If the challenger cannot meet this threshold, or if any issues are “successfully answered” by the executor or other parties, then the Will should be proven in solemn form on a summary basis.

These principles were recently affirmed by the Ontario Court of Appeal in *Johnson v. Johnson*, 2022 ONCA 682, and indirectly by the Alberta Court of Appeal in *Duhn Estate*, 2022 ABCA 360. In British Columbia, where changes to the *Supreme Court Civil Rules* were made in 2014 to adopt the same approach, the caselaw is more limited. The courts have continued to apply the older test about whether a “triable issue” has been raised, and have not considered the larger policy considerations underlying the modern approach to probate litigation. This article will review the caselaw in various Canadian provinces before turning to the current state of the law in BC.

Principles Stated by Saskatchewan Courts

The most substantial body of caselaw can be found in Saskatchewan. The courts in that province follow a two-stage process for proof in solemn form cases. The challenger to a Will must first bring forth some evidence which, if accepted at trial, would tend to negate the validity of the Will. The propounder of the Will may attempt to answer the challenge by showing “unconditional and uncontroverted evidence” that affirms the Will. The Saskatchewan Court of Appeal has explained the underlying policy rationale to this approach as follows: “Proof in solemn form is a lengthy and expensive process and should not be entered into without sufficient foundation. Otherwise a substantial portion of the estate is at risk of being frittered away in pointless litigation”.[1] The requirement of showing an evidentiary basis for a probate challenge is to “weed out” challenges that do not raise a genuine issue, and would only deplete the estate and cause unwarranted delays.[2]

Recent Ontario Law

A similar procedure is now followed in Ontario. The leading case is *Neuberger v. York*[3] in which the Court of Appeal confirmed that persons interested in the estate have no right to require proof in solemn form; they only have the right to *request* formal proof of a testamentary instrument.[4] Gillese J.A. stated that a person interested in an estate must meet "some minimal evidentiary threshold" before the court will allow a proof in solemn form proceeding. Otherwise, estates "would necessarily be exposed to needless expense and litigation", and perhaps even depleted entirely. The estate should not be put to such costs and delay simply because "a disgruntled relative or other potential beneficiary makes a request for proof in solemn form".[5]

The meaning of the test articulated in *Neuberger* was most thoroughly analysed by Justice F.L. Myers in *Seepa v. Seepa*, 2017 ONSC 5368. He lamented the "cost, delay, and distress" that may arise in lengthy probate disputes caused by a disgruntled relative conducting a fishing expedition through the deceased's legal and medical records on "the most meagre of allegations of impropriety on no real evidence". The approach in *Neuberger v. York* requires a challenger to meet "some minimal evidentiary threshold". At this stage, the challenger does not need to prove his or her case, or that summary judgment is appropriate. Rather, the question for the court is "whether the applicant ought to be able to put the estate and the beneficiaries to the burden of proof, expense, and delay" of a proof in solemn form proceeding and, if so, what "tools" ought to be given to the challenger such as documentary discovery. Each case is fact-specific. The court will consider the appropriate process for resolving the dispute, and tailor the proceeding in accordance with the goals of efficiency, affordability, and proportionality.

The *Neuberger* approach has subsequently been applied in other Ontario cases.[6] For instance, in *Martin v. Martin*, 2018 ONSC 1840, the Court would not make a finding about the validity of a Will on a summary basis, but allowed for limited disclosure of medical and legal records relating to the will-maker. Once that step was completed, the Court would re-assess whether further litigation steps were justified.

These principles were recently affirmed in the case of *Johnson v. Johnson*[7] involving the estate of Mabel Johnson who died in 2020 at the age of 99. One of Mrs. Johnson's daughters, Nancy, challenged the validity of a Will made in 2015. She alleged that the Will, which divided the estate between her two siblings but excluded her, was "inexplicable" and that her mother lacked capacity. At a preliminary stage, a justice of the Ontario Superior Court of Justice dismissed Nancy's application for an order requiring a trial on the validity of the 2015 Will.[8] The respondents (the executor and beneficiaries) successfully answered the issues raised by Nancy in her application. For instance, it was not "inexplicable" for Mrs. Johnson to exclude Nancy from her estate, given a recent court proceeding in which Mrs. Johnson was forced to sue Nancy to recover investment accounts that had been in their joint names. There was also evidence of abusive conduct by Nancy towards her mother. The chambers judge also found the evidence of two lawyers – the lawyer who represented Mrs. Johnson in the litigation about the investment accounts, and the lawyer who drafted the Will – to be important. Despite a diagnosis of dementia for Mrs. Johnson, both lawyers found her to be very sharp and had no concerns about her capacity. Such evidence "neutralized" any suspicions raised by Nancy. In the end, the Court found that Nancy had not met the minimal evidentiary threshold needed for a probate dispute to continue, and Mrs.

Johnson's estate should not be put to any further expense. The Court later made an order of costs against Nancy.[9]

In October 2022, the Ontario Court of Appeal dismissed an appeal brought by Nancy, and affirmed the principles stated in cases like *Neuberger* and *Seepa*.[10] The Court held that, at its core, the appeal involved an invitation by Nancy for a reweighing of the evidence to make different findings. That is not the task of an appellate court. The chambers judge had engaged in a limited and careful review of the evidence, as required by the "preliminary vetting" of the *Neuberger* approach, to determine if Nancy had some evidence which, *if accepted at trial,* would call into question the validity of the 2015 Will. It was open to the chambers judge to find that the respondents had successfully answered their sister's evidence. Further, the Court of Appeal was cognizant of the knowledge imbalance that often occurs at this stage, with a challenger like Nancy not being in a position to have all of the evidence to prove their case. However, this is not a summary trial. The issue for the court is whether Nancy has met the minimal evidentiary threshold so as to be given the "tools", like document discovery, that are normally available to a litigant. It would defeat the purpose of the *Neuberger* approach to allow a challenger to have access to medical, financial and legal documents in every case, as that may lead to needless expense and delay. A chambers judge ought to measure the evidence adduced by a challenger against the evidence answered by the propounder(s) of the Will, and assess what processes (if any) are required to resolve the conflicts, keeping in mind the goals of efficiency, affordability and proportionality. The Court of Appeal also dismissed Nancy's challenge to the costs award, citing the "modern approach" to costs in estate litigation.

Alberta

The courts in Alberta have followed a similar approach to probate disputes, and require a "genuine issue to be tried" before allowing a proof in solemn form proceeding to continue: *Quaintance v. Quaintance (Estate)*, 2006 ABCA 47.

The principles from cases like *Neuberger* and *Seepa* were applied by the Alberta courts in a unique way in *Duhn Estate*, 2022 ABCA 360, aff'g 2021 ABQB 35. This case involved the estate of Alice Jean Duhn. The estate was significant, and Mrs. Duhn provided in her last Will that it be divided equally between her seven children. However, she also made large *inter vivos* transfers in the years immediately before her death. There was no challenge to the validity of the Will (perhaps due to a "no contest" clause) and there was no action challenging the validity of the *inter vivos* transfers. Instead, two of Mrs. Duhn's children sought an order, in the context of a passing of accounts, for full financial disclosure of these pre-death transactions. In 2021, Justice Eidsvik of the Alberta Court of Queen's Bench dismissed this application.[11] She held that an accounting by the personal representative of an estate is generally restricted to the time period after death, although there may be good reason in certain circumstances to investigate pre-death transactions. Such situations may include a person having a prior fiduciary duty under a power of attorney. A novel component of this decision is that Justice Eidsvik also adopted the *Neuberger* approach to probate disputes and asked whether there was a "minimal evidentiary threshold" concerning lack of capacity, fraud or other suspicious circumstances. It would be rare for a court to investigate a competent will-maker's private financial dealings without such an evidentiary threshold being met, to avoid the dangers about "fishing expeditions" described in the *Seepa* decision. Such circumstances would be "extremely limited" and did not arise here. Even

though the disclosure of pre-death banking statements may be fairly economical, it would constitute an undue intrusion into the private and confidential dealings of Mrs. Duhn while she was alive and competent. The applicants had not met their "minimal evidentiary threshold" to displace their mother's right to keep her pre-death financial life private and confidential.

The Alberta Court of Appeal recently upheld this decision.[12] In a somewhat underwhelming decision, the Court cited a passage in *Johnson v. Johnson*, 2022 ONCA 682 for the point that this was not a motion for summary judgment; instead, the issue for the court was to determine whether a litigant ought to be given the tools to pursue the claim, before being required to put their best foot forward on the merits. In the recent decision in *Estate of Gow,* 2022 ABKB 750, the Alberta Court of King's Bench also applied *Johnson, Neuberger* and *Seepa* and dismissed an application for an order setting aside a grant of probate and directing a trial on issues relating to the validity of a Will. The Court held that the applicants had not met the minimal evidentiary threshold.

British Columbia

The procedure in British Columbia for litigating probate disputes was fundamentally altered in 2014, at the same time that the *Wills, Estates and Succession Act* took effect. The new practice was based explicitly on the procedure followed in jurisdictions like Ontario and Alberta whereby such claims be brought by petition or application (if a probate file already existed) rather than by way of action. The court may decide the issues on a summary basis, if there is no credible challenge to the validity of the will, or give directions under Rule 25-14(8) in regards to how the litigation will proceed. Justice Abrioux confirmed this new approach in *Re Cook Estate*, 2019 BCSC 417 at paras. 72-73.

There is growing body of caselaw that reflects the modern approach to probate disputes, including decisions in which wills have been proven in solemn form on a summary basis. At this time, however, there are no cases in British Columbia applying the detailed policy considerations found in *Neuberger* and *Seepa*. Instead, most B.C. cases have followed more generic principles about whether a "triable issue" has been raised, therefore making it necessary to convert a petition proceeding into an action.[13] It should be noted that the B.C. Court of Appeal has now modernized the test on that point as well, and directed chambers judges to take a more nuanced approach. In *Cepuran v. Carlton*, 2022 BCCA 76, a proceeding brought under the *Patients Property Act,* the Court of Appeal revisited the governing test for converting petitions into actions, and found that the mere presence of a "triable issue" was no longer a good reason to convert a proceeding to an action. The modern approach in civil procedure is for the court to tailor pre-trial and trial procedures with regard to the goals of efficiency and proportionality, with the result that all the "bells and whistles" are not needed in every case.

In *Re Charbonneau Estate,* 2021 BCSC 2571 (19 November 2021, Blake J.), the Court allowed a petition by the executors for an order proving a Will in solemn form. The will-maker's son Alain had filed a response in which he sought a full trial to decide the issues of capacity and undue influence. Justice Blake referred to the pre-*Cepuran* law about converting proceedings to actions, and found that the test had not been met. She also found that Alain had not put forward any suspicious circumstances that would rebut the presumption of validity. It is significant that, in the course of that litigation, there had

been substantial disclosure of medical records to Alain, as well as production of the solicitor's file. Accordingly, it was not necessary for Justice Blake to consider whether Alain ought to have been given "tools", like wider document discovery, before requiring him to put his best foot forward on the merits.

A similar result occurred in *Konkin v. Harris*, 2022 BCSC 1067 (24 June 2022, Kirchner J.). There was a proceeding underway involving the estate of Francis Scallion which raised several issues including whether a 2017 Will was valid, whether it should be varied, and whether the plaintiff Konkin was the "spouse" of the Deceased. A few months before trial, an application was made to prove the 2017 Will in solemn form. Justice Kirchner was satisfied that Rule 25-14(4) allowed for such an application to be made within an existing proceeding. He held that the plaintiff had not raised any suspicious circumstances relating to the will-maker's capacity, and there were no "triable issues". Despite voluminous medical records being produced in the action, there were only three scant references to memory issues displayed by the Deceased. Further, such arguments were undermined by admissions made by the plaintiff at her examination for discovery that the will-maker was competent to manage his affairs at all times. Much like the *Charbonneau* case, there was obviously no need for the Court to consider whether the plaintiff ought to be given more pre-trial tools before deciding the case on its merits.

A final application of these principles can be found in the unusual case of *Re Grace*, 2022 BCSC 653 (26 April 2022, Lyster J.), reconsidered 2022 BCSC 1283 (28 July 2022, Lyster J.). The Deceased died of cancer at age 37 leaving her estate to her sister. The executor appointed in the Will sought an order proving the Will in solemn form on a summary basis. The Deceased's mother opposed the application, and asserted that the Will was invalid due to lack of knowledge and approval. The basis of this position was an alleged (hearsay) statement by the Deceased that she had not actually read the Will before signing it. Despite the Deceased's estate being less than $60,000, the Deceased's mother sought a trial of the probate issue.

At the initial hearing in April 2022, the Court held that the executor could not rely upon the presumption of validity. Although no "suspicious circumstances" were present, Lyster J. held that the Will could not be proven in solemn form on a summary basis due to the evidence that the Deceased had not read the Will before signing it. The Court's de-linking of "knowledge and approval" from the doctrine of suspicious circumstances, and the underlying presumption of validity, was an unfortunate error. The Court then (regrettably) referred the issue of the Will's validity to trial while urging the parties to reach a resolution. There was no consideration, akin to the *Seepa* case, about how to best tailor the dispute in light of the goals of proportionality and efficiency.

Fortunately for the beneficiaries of the estate, the executor sought a reconsideration of the Court's decision on the basis that a line of binding authority had not been brought to the court's attention at the earlier hearing. In particular, the parties had previously failed to advise the Court about the "presumption of due execution". On this basis, Justice Lyster exercised her discretion to reconsider the April 2022 decision and made an order that the Will be proven in solemn form without requiring a full trial. She held that the Deceased's mother had not rebutted the presumption of due execution.

The ultimate result in *Re Grace* was satisfactory, but only due to the wise decision to seek a reconsideration. It is unfortunate that the chambers judge had not considered the

factors cited by cases like *Neuberger* and *Seepa,* or the principles firmly set out by the Saskatchewan courts in a long line of cases, as that may have led to a finding that the Deceased's mother had not met her "minimal evidentiary threshold" to put the estate to the delay and expense of a trial. Litigants and counsel in British Columbia should go beyond the former "triable issue" test (even as modified by *Cepuran*) and consider the larger policy goals that are so comprehensively discussed in *Seepa.* Challengers to a Will must be able to meet this preliminary threshold in order to move ahead with such a dispute; likewise, the propounders of a Will must also make efforts to "successfully answer" any concerns at this stage, or be forced to deal with the delay and expense of a much larger probate dispute.

Footnotes

[1] *Royal Trust Corp. of Canada v. Ritchie*, 2007 SKCA 64 at para. 6.

[2] *Otto v. Kapacila Estate*, 2010 SKCA 85 at para. 27. A recent application is found in *McStay v. Berta Estate,* 2021 SKCA 51.

[3] 2016 ONCA 191, 129 O.R. (3d) 721, leave to appeal dismissed (15 September 2016), 2016 CanLII 60508.

[4] 2016 ONCA 191 at paras. 81-2, 97-98.

[5] 2016 ONCA 191 at para. 88.

[6] *Morrish v. Katona,* 2021 ONSC 3805 (25 May 2021, Nieckarz J.).

[7] 2022 ONCA 682, aff'g 2021 ONSC 6415.

[8] 2021 ONSC 6415.

[9] 2022 ONSC 160.

[10] 2022 ONCA 682.

[11] 2021 ABQB 35.

[12] 2022 ABCA 360.

[13] See *Lantzius Estate,* 2015 BCSC 935; *Royal Trust Corporation of Canada v. Huff,* 2021 BCSC 1400.

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