Publisher's Note

An Update has Arrived in Your Library for:

Please circulate this notice to anyone in your office who may be interested in this publication. *Distribution List*
☐
☐
☐
☐

WIDDIFIELD ON EXECUTORS AND TRUSTEES, 6TH EDITION

Carmen S. Thériault, B.A., LL.B.

Release No. 5, June 2022

Publisher's Special Release Note 2021

The pages in this work were reissued in September 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the September 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

THOMSON REUTERS CANADA®

Customer Support
1-416-609-3800 (Toronto & International)
1-800-387-5164 (Toll Free Canada & U.S.)
Fax 1-416-298-5082 (Toronto)
Fax 1-877-750-9041 (Toll Free Canada Only)
E-mail CustomerSupport.LegalTaxCanada@TR.com

This seminal work of Canadian legal literature is reviewed and updated by a team of authors drawn from the front ranks of the profession from across Canada. In keeping with the original, the sixth edition of Widdifield on Executors and Trustees offers a comprehensive exposition of the law relating to the exercise of the duties and prerogatives of executors and trustees in Canadian estates and trusts law.

What's New in This Update:

This release contains amendments and updates to the commentary in Chapter 2 (Assets); Chapter 3 (Claims Against the Estate for Debts); Chapter 4 (Expenses and Legal Costs); Chapter 5 (Bequests and Beneficiaries); Chapter 15 (Resignation, Removal and Appointment of Estate Trustees) and the Words and Phrases.

Highlights of This Release, Include:

Removal of trustee — Assets involving Precious Art — Lack of Specialized Knowledge — This case involved an application revolving around the authentication, evaluation, and sale of the so-called Sanders Portrait, a portrait purportedly of William Shakespeare painted during his lifetime. A 2016 appraisal of the portrait gave it a value of USD $50,000,000. This valuation assumed that a buyer would be persuaded that the portrait does, in fact, depict Shakespeare. If the portrait was simply a 400-year-old painting, it was worth a fraction of this amount. The portrait was owned by the estate of the deceased and it was its primary asset. The respondent was the sole trustee of the estate. He was the alternate trustee named in the will of the deceased. The applicant sought to replace the respondent as the estate trustee alleging that the respondent was not qualified to realize the portrait's value or otherwise administer the estate, and asserting that he, the applicant, was uniquely qualified to do so. The court refused to remove the trustee. The court noted a good deal of the applicant's argument focused on why he would be a better choice as estate trustee but its task was not to decide this. The testator's choice of trustee was presumptively good unless compelling evidence led the court to conclude that allowing the estate trustee to continue in this role endangered the estate. This had to be determined before the court would consider appointing the applicant to replace the respondent. With regard to whether the estate trustee lacked the knowledge required to administer the estate, the court acknowledged that this was really the heart of this application. The court found that this argument was founded on some fundamental misapprehensions about the role of an estate trustee in general and the role of the trustee of this particular estate. The court stated that an estate trustee is not required to have subject-matter expertise about the estate's assets, experience in administering estates, or any particular training or education. To the extent that a trustee lacks knowledge or expertise in an area relevant to their administration of the estate, they could retain appropriate experts. What was important was that the testator had confidence that the individual appointed would carry out the wishes expressed in their will. Moreover, the court held that even though the sale of the Sanders Portrait was critical to the administration of this estate, arranging for that sale was only a part of what the estate trustee needed to do in this case. Administering

the estate involved complex legal, accounting, insurance, and tax issues. The court doubted whether there was a single person alive capable of handling all the facets of the administration of this particular estate without calling on outside experts. The question instead was whether, based on the respondent's performance to date, there was compelling evidence that he had demonstrated such misjudgment or incompetence that the court had no choice but to remove him in order to protect the estate. Assessing the facts, the court found this to not be so: *Meuse v. Taylor*, 2022 ONSC 1436, 2022 CarswellOnt 2664 (Ont. S.C.J.).

Mutual Wills — Mutual Wills Agreement — Evidence — Burden of Proof — The Ontario Court of Appeal discussed the burden of proof to be applied in determining the existence of a mutual will agreement (MWA). In this case, the trial judge had refused to find a mutual will agreement on the facts. The trial court had stated that a MWA will not be found to exist when the evidence is more consistent with some loose understanding or moral obligation rather than a binding, enforceable agreement. The agreement may be proven either from the words of the will itself or from extrinsic evidence. The extrinsic evidence does not necessarily have to come from documents, and it may be hearsay testimony from interested parties, but mere assertions from which inferences should be drawn are not acceptable as reliable evidence to prove the existence of a MWA. The burden of proof rests with the party alleging the existence of a MWA and this is "heavy" in that there must be clear evidence of a mutual will agreement. The requirement of proof by "clear and cogent evidence" was a function of the importance of testamentary autonomy and the tension between that important value and a MWA which encroaches upon it. On appeal the applicant argued that the trial judge improperly elevated the burden of proof required to establish a mutual wills agreement to something more than a balance of probabilities. The Court of Appeal did not agree. It stated that the only civil standard of proof is proof on a balance of probabilities. In all cases, the evidence adduced to meet this standard must be "sufficiently clear, convincing and cogent" to persuade the trier of fact of the merits of the claim on a balance of probabilities. The "quality" of the evidence required to meet the standard will vary according to the nature of the claim and the evidence capable of being adduced. The court went on to consider some examples, including the discussion in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, 2016 S.C.R. 720 (S.C.C.) in which the Supreme Court of Canada held that the quality of the evidence to be adduced by a party seeking rectification is such that it must displace an instrument to which the party had previously subscribed. Cogent and convincing evidence will be needed to "counteract the inherent probability that the written instrument truly represents the parties' intention because it is a document signed by the parties": *Fairmont Hotels Inc.*, at para. 36. The court noted that the trial judge had reasoned that a mutual wills agreement must be proven by clear, cogent, and compelling evidence in part because a mutual will agreement interferes with the testamentary freedom of a testator, and testamentary freedom is very important. It observed that the Supreme Court had explicitly rejected the notion that a civil claim must be scrutinized with greater care when it has onerous consequences to one side. Accordingly, there was no principle that a mutual wills agreement demands a higher standard of proof due to its nature. *Fairmont Hotels Inc.*, in the court's view, should not be read to mean that a higher quality of evidence is required to prove a claim merely because of the claim's importance or because of its importance to a value such as "testamentary freedom." Nor, in its view, was this the basis for the trial judge's decision, rather her decision rested on the principle that a

court will "typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party's true, if only orally expressed, intended course of action": *Fairmont Hotels Inc.* at para. 36. As the trial judge explained - "the evidence against the existence of [a mutual wills agreement overwhelmed] any evidence (or suggested inferences) in favour of it": *Gefen Estate v. Gefen*, 2022 ONCA 174, 2022 CarswellOnt 2348 (Ont. C.A.).

Occupation Rent — Agreement to Occupy — Evidence of Agreement — The deceased named her son as one of the two executors of her will. The estate consisted of money and real property. For approximately seven years, until the real property was finally sold, the son resided in the property and did not pay rent. The applicants (his sisters) argued that he should pay occupation rent for that period. Applying the jurisprudence, the court found that there was a presumption that occupation rent was owed and the question arose as to whether this presumption was rebutted. Likewise, with the application of the doctrine of unjust enrichment, the question arose whether there is a juristic reason for any enrichment. Both questions, in the court's view, were answered by the determination of whether there was an agreement that permitted the son to occupy the property without paying rent. The court found no such agreement. This finding rested, *inter alia*, on the court's inability, from the evidence, to determine with sufficient certainty the intentions and expectations of the parties regarding the duration of his occupancy so as to find an agreement. The circumstances in which he had moved into the property included the deceased's move to an assisted living residence resulting in a need to deal with her vacant property. In this context, it made sense that he might briefly occupy the property. The absence of a clear indication of the duration or term during which he would occupy the property, rendered it sufficiently indefinite, vague and uncertain such that there was no agreement. Having concluded there was no agreement for his occupancy of the property, the presumption that he pay reasonable compensation for his occupation of the property is not rebutted. For this same reason, there was an absence of juristic reason for his enrichment arising from having the benefit of living on the property rent-free: *Dalrymple et al. v. DeMeyer Estate*, 2022 MBQB 31, 2022 CarswellMan 64 (Man. Q.B.).

ProView Developments

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable
- Footnote text only appears in ProView-generated PDFs of entire sections and pages