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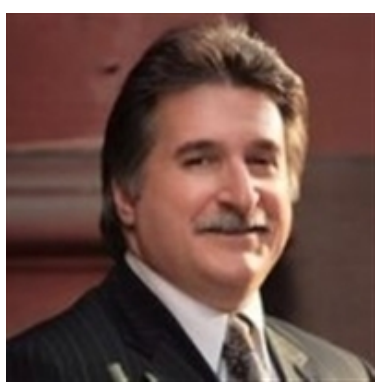
Estates & Wills & Trusts

Court clarifies process for will challengers

By AdvocateDaily.com Staff



Lawyers in the estates bar are breathing a sigh of relief after a recent decision provided some clarity on the evidence required to support a will challenge, Toronto-area estates litigator and mediator Charles B. Ticker tells AdvocateDaily.com.

In a series of cases dating back to 2010, courts have taken umbrage with the practice of counsel submitting boilerplate consent orders for directions and asking for some evidence to be adduced that supports the objection.

"The practice in this area has been routine," says Ticker, who practises estates litigation and mediation at Charles B. Ticker Law Office. " It's been a matter of counsel coming up with the terms of a consent order."

In a recent Superior Court of Justice decision, an estate trustee made a motion to dismiss an objection on the grounds that no evidence had been adduced to support it, building on previous cases. Documentary discovery was allowed to proceed with reasons that now provide some guidance to objectors and their lawyers.

"My read is that if the court is satisfied that the objection is not frivolous, you will be able to get orders for documentary discovery," says Ticker, who was not involved in the matter and comments generally.

He says standard Notices of Objection usually provide few details for the objection, and simply include some or all of the general objections.

"It's an unhealthy practice," Ticker says. "Will challenges can be drawn out and are very expensive. If there are no merits, they should be stopped early on."

Ticker recalls that in a 2010 decision — affirmed on appeal in 2011 — the court held that an objector must do more than simply file boilerplate objections "yet the practice still continued," he says.

One reason for generalized objections is the difficulty for objectors to find the information they need at a preliminary stage, he says.

"To be fair, an objector is not always privy to much of the information or documentation. It's a Catch 22 situation. Until they see the medical reports and drafting lawyer's file, they don't know what case they might have,"

The practice of filing *pro forma* objections and consent Orders Giving Directions is ongoing, notwithstanding comments in more recent cases, Ticker notes.

In a 2016 ruling, Justice Eileen Gillese of the Ontario Court of Appeal stated that "an applicant must adduce some evidence which calls into question the validity of the testamentary instrument that is being propounded."

The law was out there, Ticker says.

“It was not just a knee-jerk reaction on behalf of the court,” he says. “There’s a discretion to make an enquiry. The courts are saying to will challengers and the estate bar that there has to be something we can hang our hat on.”

Ticker says that in the 2016 decision, the Court of Appeal did not elaborate on the strength of the minimal evidentiary threshold that must be met. It was discussed again in a 2017 decision where Justice Frederick Myers of the Superior Court of Justice said, “Normally, a litigant must just plead facts that support a cause of action to become entitled to use the full panoply of fact-finding tools provided by the Rules. In estates cases, more is required. Some evidentiary basis to proceed is required in order to address the specific policy concerns that are discussed above.”

In the most recent case, there has finally been some guidance given on the evidentiary threshold required for an objection to proceed, Ticker says. The matter involved a beneficiary who objected to the appointment of the estate trustee on the grounds of undue influence, lack of testamentary capacity and suspicious circumstances.

“Counsel came in with a consent order, as usual, but was told by the judge to make some submissions on it,” he says. “The objector then put some evidence in addressing the trustee’s proximity to the deceased and gave the evidence of a caregiver. The estate trustee brought a motion to set aside a Notice of Objection so probate could go forward.”

The moving party argued that the objector had not provided any evidence to support the validity of her objection. “This likely came about as a result of the 2017 decision,” says Ticker. “The estate trustee thought he could knock the objection out right at the beginning.”

Justice Laurence Pattillo addressed the motion by clarifying that the threshold required for the beneficiary to maintain her objection is low. “It must be more than just suspicion,” Ticker says. “He was not satisfied that the propounder of the will had adequately answered the questions raised.”

He expects this most recent decision may finally make a change in the practice.

“Counsel should be prepared that even though they go in with a consent order, it may not be accepted. It behooves counsel to draft Notices of Objection more carefully and thoughtfully. They should be prepared to present more evidence rather than just bold allegations, even though it might only be a minimal amount.”

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