Wills & Estates
Winter 2018

Lecture Notes – No. 15

PROBATE AND ADMINISTRATION OF ESTATES

- A deceased person leaves his or her financial affairs to be concluded upon his or her death. Rather than think about the deceased as an individual, think of him or her as a business which needs to be wound up – people need to be informed, creditors need to be paid, inventories of assets need to be created, taxes need to be paid, etc. Happily there are differences between people and business, lawyers notwithstanding.

- There may be a Will that names a specific person to administer the estate. We have referred to this person using the traditional terms executor or executrix, although we must now use the language of the statute and identify that person as the *Estate Trustee with a Will*.

- An Estate Trustee designated in a valid Will draws his or her authority from the Will itself and from the moment of the deceased's death. The *Certificate of Appointment* in such cases (probate as it was called) is conclusive evidence of the authority of the Estate Trustee named in the Will to administer the estate.

- A person might also die intestate in which case the Court may appoint (on application) an *Estate Trustee without a Will* to administer the estate (administration as it was called). Here the Estate Trustee draws his or her authority not from the Will but from the Court's certificate.

- **However appointed, the Estate Trustee is a fiduciary to those interested in the estate and will usually require the advice of a solicitor to discharge the duty of care applicable to him or her, as well as to avoid breach of fiduciary obligations.** Even where a solicitor acts as an Estate Trustee, the nature of the duties of each office are different and the level of remuneration differs accordingly – **a solicitor may not seek compensation at his or her normal rate for legal services for discharging his or her duties as Estate Trustee.**

- It is not always the case that a certificate of administration is required. A small estate of few assets may only require a true copy of the Will to allow the Estate Trustee named in it to deal with third parties.

The Statutes

- The ***Estates Act***, R.S.O. 1990, c.E.21, deals with the process usually called probate (with a will) or administration (no will) – that is, the judicially recognized

right of a living person to deal with the assets and affairs of a deceased person in the form of a formal Certificate issued by the Court.

- The ***Estates Administration Act***, R.S.O. 1990, c.E.22, deals with the general duties of the deceased's personal representative and gives him or her powers in dealing with property (particularly in a manner that eases strict rules in respect of real property at common law in respect to the transfer of title) which facilitates the discharge of the deceased's obligations to creditors and transfer of assets to those entitled to those assets. In general, the personal representative will have the property of the deceased vested in his or her name and owe a trust obligation to beneficiaries under the will and those entitled at law under the intestacy rules.

- The ***Estate Administration Tax Act***, 1998, S.O. 1998, c. 34, deal with the rate of tax and assets that are taxable where a Certificate of Appointment is required. The current rate is .5% on first $50K, and 1.5% thereafter. The tax and its collection is presently subject to statutory reform.

- The ***Rules of Civil Procedure*** deals with estates matters in Rules 74 and 75 specifically.

Types of Certificates of Appointment

See Rule 74 of the Rules of Civil Procedure, and, the applicable provisions of the Estates Act.

Name	**Description**	**Reference**
certificate of appointment of estate trustee with a will	issued where there is a valid will and named estate trustees who are able and willing to act (includes the appointment of a trustee where there is a will, but no named estate trustee and trustee is alive or able or willing to act)	R.74.04
certificate of appointment of estate trustee without a will	issued where there is no valid will	R.74.05
certificate of appointment of a foreign estate trustee's nominee as estate trustee without a will	issued where a foreign estate trustee nominates an estate trustee to administer assets in Ontario	R.74.05.1
certificate of appointment of estate trustee to succeed an estate trustee with a will	issued where a second supplemental grant is required, such as on the happening of an event that requires the addition of another named estate trustee	R.74.06

	under the will. This also includes the appointment of a trustee to replace the estate trustees and trustees initially named in the will.	
certificate of appointment of estate trustee to succeed an estate trustee without a will	issued where an administrator of an estate dies leaving assets unadministered.	R.74.07
confirmation by resealing of the appointment of an estate trustee with or without a will	issued where a grant of probate has been given by a Commonwealth court outside Ontario; the grant may be "resealed" by the Superior Court of Justice of the county in which the deceased had assets	R.74.08
certificate of ancillary appointment of an estate trustee with a will	issued where a grant had been given by a non-Commonwealth court, an ancillary grant in Ontario is required to administer assets situated in Ontario	R.74.09
certificate of appointment of an estate trustee during litigation	issued in order to preserve assets of an estate where an action has been commenced that contests the validity of the will	R.74.10

Duties of the Administrator and Solicitor Distinguished

Examples:

Personal Representative / Administrator	Solicitor
Locate the will	Review contents of the will with the estate trustee
Make funeral and burial arrangements, and arrange for organ donation(s)	
Retain solicitor	Advise on the retainer of other professional as needed.
Determine assets and liabilities	Assist in determining assets and liabilities; advise on legal actions, etc.
Ascertain identities and contact information for beneficiaries and interested parties	Determine nature of elections and other important information to advise beneficiaries and interested parties

File tax returns and pay tax	Review forms and seek advice where necessary
Maintain proper accounts	Advise estate trustee on setting up and passing accounts; review remuneration
Invest assets when appropriate	Advise on selection of investments and delegation issues under the Trustee Act
Distribute the assets	Advise on the distribution scheme, ademption, abatement, etc

FAQ

When is a Certificate of Appointment with a Will Required?

A certificate of appointment is necessary where there is a Will *and the nature of the asset* requires the personal representative to be formally appointed – but this is properly a matter of the law (usually statute or regulation) that regulates disposition of that particular type of property. For example, real property usually requires a certificate but this is not always true and is truly a matter resolved by regulation under the Registry Act or the Land Titles Act according to value.

Why not always obtain a Certificate of Appointment with a Will?

The process of probating the Will is expensive. Moreover, Estate Administration Tax is payable on the value of the estate set out in the Will.

For an estate valued at $1,000,000, the probate fee is (50 x 5) + (950 x 15) = $14,500, a not insubstantial sum. – more so, once the legal fees to obtain the Certificate are factored into the analysis.

What is the Procedure on an Intestacy?

To obtain a *certificate of appointment of estate trustee without a will* (necessary as property will not vest in the estate trustee without it, and thus property cannot pass to those entitled under the intestacy rules), an application must be brought under the Estates Act, s.29:

> 29. (1) Subject to subsection (3), where a person dies intestate or the executor named in the will refuses to prove the will, administration of the property of the deceased may be committed by the Ontario Court (General Division) to,
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> (a) the person to whom the deceased was married immediately before the death of the deceased or person of the opposite sex or the same sex with whom the deceased was living in a conjugal relationship outside marriage immediately before the death;

(b) the next of kin of the deceased; or

(c) the person mentioned in clause (a) and the next of kin,

as in the discretion of the court seems best, and, where more persons than one claim the administration as next of kin who are equal in degree of kindred to the deceased, or where only one desires the administration as next of kin where there are more persons than one of equal kindred, the administration may be committed to such one or more of such next of kin as the court thinks fit.

Where there are no relatives at all, the Public Guardian and Trustee will be the appropriate party under the *Crown Administration of Estates Act*, R.S.O. 1990, c. C.47, s.1.

The general procedure is set out in R.74.05(1):

74.05 (1) An application for a certificate of appointment of estate trustee without a will (Form 74.14 or 74.15) shall be accompanied by,

(a) an affidavit (Form 74.16) attesting that notice of the application (Form 74.17) has been served in accordance with subrules (2) to (5);

(b) a renunciation (Form 74.18) from every person who is entitled in priority to be named as estate trustee and who has not joined in the application;

(c) a consent to the applicant's appointment (Form 74.19) by persons who are entitled to share in the distribution of the estate and who together have a majority interest in the value of the assets of the estate at the date of death;

(d) the security required by the *Estates Act*; and

(e) such additional or other material as the court directs.

What about a Foreign Will?

Where the foreign will has been probated in a Commonwealth court it can be 'resealed' for use in relation to assets in Ontario (and tax must be paid here on those assets). Thus the Rules provide:

74.08 (1) An application for confirmation by resealing of the appointment of an estate trustee with or without a will that was granted by a court of competent jurisdiction in the United Kingdom, in a province or territory of Canada or in any British possession (Form 74.27) shall be accompanied by,

(a) two certified copies of the document under the seal of the court that granted it, or the original document and one certified copy under the seal of the court that granted it;

(b) the security required by the *Estates Act*; and

(c) such additional or other material as the court directs.

How long, in general, does it take to complete the administration of an Estate? Is it up to the Estate Trustee?

At common law, it is traditional to talk of the 'executor's year'; that is, we expect that in most cases administration should take about a year. The Estates Administration Act provides in respect of intestacies:

> 26. Subject to section 53 of the *Trustee Act*, no distribution shall be made on an intestacy until after one year from the death of the intestate, and every person to whom in distribution a share is allotted shall, if any debt owing by the intestate is afterwards sued for and recovered or otherwise duly made to appear, refund and pay back to the personal representative the person's rateable part of that debt and of the costs of suit and charges of the personal representative by reason of such debt out of the part or share so allotted to the person, thereby to enable the personal representative to pay and satisfy such debt, and shall give bond with sufficient sureties that the person will do so.

In a simple estate, a year may not be required at all. In a complex estate, many years may have to be spent on administration. Complicating circumstances include:

- Sale of realty, particularly commercial real estate;
- Sale of operating or foreign businesses;
- Unpaid income taxes which must be determined and paid.

How and when does the Estate Trustee get paid?

Fees charged by the estate trustee are set in principle by the Trustee Act, RSO 1990, c.T.23:

> **61. (1) A trustee, guardian or personal representative is entitled to such fair and reasonable allowance for the care, pains and trouble, and the time expended in and about the estate, as may be allowed by a judge of the Superior Court of Justice.**
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> (2) The amount of such compensation may be settled although the estate is not before the court in an action.
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> (3) The judge, in passing the accounts of a trustee or of a personal representative or guardian, may from time to time allow a fair and reasonable

> allowance for care, pains and trouble, and time expended in or about the estate.
>
> (4) Where a barrister or solicitor is a trustee, guardian or personal representative, and has rendered necessary professional services to the estate, regard may be had in making the allowance to such circumstance, and the allowance shall be increased by such amount as may be considered fair and reasonable in respect of such services.
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> (5) Nothing in this section applies where the allowance is fixed by the instrument creating the trust.

An overall tariff is used:

- 2½ % of the total value of capital & revenue receipts
- 2½ % of the total capital & revenue disbursements
- annual fee of 2/5ths of 1% of the average annual market value of the capital (in the case of an ongoing trust)

Thus, on an estate with a net value of combined real/personal property of $1,000,000, the Estate Trustee can look to a fee of approximately $50,000 where all assets must in some way or another be received by the trustee and then later disbursed.

In appropriate cases, the fees are adjusted to reflect the simplicity or complexity of the work involved (overall 'fair and reasonable' compensation) with reference to 5 factors:

- the size of the estate
- the actual care and responsibility involved
- the time occupied in performing the duties
- the skill and ability shown; and
- the success resulting from the administration.

The Estate Trustee can be paid when he or she finishes their work (and the all beneficiaries are of legal age and consent) or, more formally, when he or she 'passes accounts' under Trustee Act and R.74.18. This is an audit of the work of the estate trustee and may be passed without a hearing, or there may be opposition and a hearing will be required.

SELECTED ISSUES – LITIGATION

Granger v. Granger
2016 ONCA 945 (Ont. C.A.)

This was an appeal taken in relation to a claim in unjust enrichment made by a son against his mother seeking a beneficial interest in her house; the son had lived in the house with his spouse without paying rent, and thus the case was one of mutual benefits having been exchanged. A narrow point was highlighted by the Court: the application judge had wrongly considered the value of the benefits exchanged as part of the analysis testing the claim advanced rather than in relation to defences to the claim and/or the question of remedy (and set-off) as mandated by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10 (S.C.C.). The case is note worthy in that the careful analysis of Jurisz J.A. should be of assistance in understanding such claims against estates.

Sweet v. Moore
2017 ONCA 182 (Ont. C.A.)

This case is an interesting one dealing with unjust enrichment and remedial constructive trusts. It should be noted at the outset that leave to appeal has been granted by the Supreme Court of Canada, 2017 CanLII 53388 (S.C.C.), and that the appeal has been fully argued. One expects a judgment within the next 6 months or so.

Here the proceeds of a policy of life insurance on the life of the deceased were at issue. The proceeds were originally designated in favour of the deceased's separated wife and later the deceased's common law spouse. The separated spouse paid the premiums, and thus the facts are somewhat reminiscent of ***Richardson Estate v. Mew*, 2009 ONCA 403 (Ont. C.A.)**. In that case, a man died leaving an ex-wife (and their children) and a second wife (and their children). He died in a long-term care facility as he developed Alzheimer's Disease and required institutional care in his final years. The second wife managed his affairs using a Power of Attorney provided for that purpose. A question arose in respect of a life insurance policy payable to the first wife. It had been taken out originally when the deceased was married to his first wife and then made subject of a condition in the separation agreement between them that the first wife remain as beneficiary for a year (the end of his child care obligations). He told his second wife that he would designate her as the beneficiary at the end of the commitment under the separation agreement but never did so. Some few years later, the deceased became incapable of managing his affairs due to Alzheimer's Disease. The costs of his care exhausted his retirement savings and the second wife assumed the costs of his care including paying the premiums due on the life insurance policy. It wasn't entirely clear in the report of the judgement whether it was established as a matter of fact that the second wife did actually pay premiums with her own money and the suggestion was that if she did, the sum was relatively modest. In any case, the action was brought in unjust enrichment claiming a constructive trust over the policy.

The Court of Appeal in *Richardson Estate v. Mew* held that while the first wife may have been enriched, there was no corresponding deprivation and a juristic reason that allowed her to retain – the contract of insurance. That is, the plaintiff might have a theoretical claim against the Estate for the premiums that she paid; 'theoretical' because she inherited the Estate. As against the designated beneficiary (the first wife),

there was no claim in unjust enrichment as the contract of insurance constituted a good juristic reason for her to retain the insurance proceeds. The separation agreement may have contained a standard clause release or renouncing all claims against the other's estate, but it is well recognized that the quality of title to insurance proceeds is unaffected where the policy continues to designate the former spouse as beneficiary upon death.

In *Sweet v Moore*, the separated spouse and the deceased agreed orally that the proceeds would go to the wife if she were to maintain the policy, which she did. It is notable that a written separation agreement between the deceased and his wife which post-dated the oral agreement was silent on the question of the policy of insurance. In any case, the later change in beneficiary designation was not surreptitious and was made by the deceased (according to the applicant) to ensure the applicant's support.

The majority of the Court of Appeal, Strathy C.J.O. and Blair J.A., held that the appeal must be allowed as the Application Judge had decided the case based on the application of the doctrine of equitable assignment which was not raised by either side and was not subject of argument. Beyond, on the question of unjust enrichment, the majority held that the separated wife had no interest in the proceeds of the policy arising by way of unjust enrichment but did have a meritorious claim for return of the premiums that she had paid. Blair J.A. provided an overview:

> **Constructive Trust**
> [62] I begin this portion of the analysis with the observation that this is not one of those cases – in spite of what it may seem at first impression – where the "equities" are heavily weighted in favour of one party or the other.
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> [63] It is the case that Ms. Moore had an oral agreement with Mr. Moore that if she paid the premiums she would receive the proceeds of the Policy. It is the case that she paid the premiums. And it is the case that Mr. Moore breached the agreement by designating Ms. Sweet as the irrevocable beneficiary under the Policy.
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> [64] On the other hand, Mr. Moore was a man of limited means, living in the post-separation period on a disability pension, and suffering from the disabilities associated with his physical, mental and substance abuse issues. Ms. Sweet – who is herself disabled – took care of Mr. Moore and, for practical purposes, provided him with a home, a place to live, and a supportive family during the 13 years of their relationship.
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> [65] There is little, if any, evidence on the record as to Ms. Moore's present financial needs. She continues to live in the former matrimonial home after Mr. Moore's transfer of his one-half interest at the time of separation. Ms. Sweet would appear from the record to be in financial need. Indeed, her evidence is that she was made a beneficiary of the Policy because Mr. Moore wanted to ensure that she would be able to remain in the apartment home that she had occupied for 40 years by the time of his death.
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> [66] On these facts, it cannot be said that Ms. Sweet is no more than a volunteer who gave nothing in exchange for being named irrevocable beneficiary, or that she is simply the recipient of a windfall. She was a 13-

> year spouse with heavier than normal caregiving duties (both she and Mr. Moore were disabled in varying degrees) and was the person primarily responsible for the home that they lived in.
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> [67] On the application, Ms. Moore's position was that she was entitled to the Policy proceeds on the basis of unjust enrichment. On appeal, her approach was more nuanced. She continued to rely on unjust enrichment but embraced the application judge's finding of equitable assignment in support of the claim, as well. She submitted that the application judge was correct in holding that the irrevocable designation of beneficiary provisions in the Insurance Act did not provide a juristic reason for Ms. Sweet's receipt of the proceeds. In the end, she fell back upon the more expansive view that a constructive trust may be imposed "where good conscience requires it".
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> [68] I have already concluded that, on the way the case was framed and argued before the application judge and on the record as it currently exists, it is not open for the court to determine whether the oral agreement constituted an equitable assignment. I turn, then, to a consideration of whether the claim for unjust enrichment can otherwise stand or, if not, whether a remedial constructive trust should be found on some other "good conscience" basis in these circumstances.
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> [69] In my view, Ms. Moore's claim cannot succeed on either basis.

As to the claim in unjust enrichment, the argument fails on the same basis that it did in *Richardson Estate v. Mew*: the beneficiary designation in favour of the common law spouse was an adequate juristic reason to explain why the proceeds should be paid to the designated beneficiary. As to a "good conscience" trusts, Blair J.A. held:

> **"Good Conscience" Trusts**
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> [100] There has been considerable debate in the jurisprudence and in academia about whether resort to the remedial constructive trust in Canada is now limited to two categories since the Supreme Court of Canada's decision in *Soulos* – unjust enrichment and wrongful acts – thereby eliminating resort to a more elastic "good conscience" trust, i.e., one based on no more than a sense of fairness to the effect that it would be "against all good conscience" to deny a plaintiff recovery in the circumstances of a particular case. At the end of the day, Ms. Moore submits that good conscience is satisfied by giving effect to the oral agreement without which the Policy would not have continued to exist.[5]
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> [101] It has long been accepted that equity is quintessential never-say-never terrain, and that concepts respecting its application develop with the times and to meet the needs of particular circumstances. This long-standing principle may work against establishing a completely closed set of categories as the foundation for imposing a remedial constructive trust.
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> [102] At the same time, McLachlin J. was pretty clear in *Soulos* that, while a constructive trust "may be imposed where good conscience so requires" (para. 34), "[t]he situations which the judge may consider in deciding whether

> good conscience requires imposition of a constructive trust may be seen as falling into two general categories" (unjust enrichment and situations where property had been obtained by a wrongful act) (para. 36). It was her view that "[w]ithin these two broad categories, there is room for the law of constructive trust to develop and for greater precision to be attained, as time and experience may dictate" (para. 43). Rothstein J. re-affirmed this view in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)*, 2012 SCC 71 (CanLII), [2012] 3 S.C.R. 660, at paras. 144-145.
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> [103] I do not think it is necessary to resolve this debate for purposes of this appeal.
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> [104] Most of the authorities in which courts have been willing to override a beneficiary designation can be explained on the basis of an agreement between one of the claimants and the insured that removed the insured's ability to designate a later beneficiary. As noted earlier, Shannon involved a separation agreement in which the insured undertook to name his first spouse as a beneficiary irrevocably. In Bielny, the separation agreement required the insured to name the children of the first marriage as irrevocable beneficiaries. In Fraser v. Fraser, the trial judge found on the facts that the terms of the separation agreement requiring the insured to maintain the plaintiff as beneficiary were tantamount to an irrevocable designation.
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> [105] Whether these authorities need to be re-examined in light of *Soulos*, as suggested in some authorities – see, for example, *Love v. Love*, 2013 SKCA 31 (CanLII), 359 D.L.R. (4th) 504 – is not something that need be determined here. As I have concluded above, it was not open to the application judge on this record to hold that the oral agreement between the Moores constituted an equitable assignment, or that it was tantamount to an irrevocable beneficiary designation.
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> [106] Absent those considerations, I do not see anything in the circumstances of this case that would place it in some other "good conscience" category not caught with the rubric of either wrongful act (not asserted here) or unjust enrichment. For that reason, I do not see the need to resolve the foregoing debate about whether *Soulos* has restricted the categories for imposing a remedial constructive trust to unjust enrichment or wrongful act or whether there remains some additional "good conscience" basis.
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> [107] Simply because wrongful act is not asserted, and unjust enrichment is unsuccessful, does not mean that some other "good conscience" basis must exist on the facts. To engage in such an exercise, on this record at least, it seems to me, would undermine the rationale for creation of the juristic reason element in the first place.
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> [Footnote omitted.]

Upon this point, Lauwers J.A. dissented. Justice Lauwers wrote:

[144] In order to contextualize the ruling in *Soulos*, it is necessary to acknowledge a perennial tension in the common law tradition between, on the one hand, the formal demands of the law as dispensed by the old common law courts, and, on the other hand, the mercies of equity dispensed by the old chancery courts. (Indeed, this tension helps explain some of the differences between my colleague and me.)

[145] The way equity operated is well known. When the common law courts reached a particularly harsh result flowing from the demands of formality and rigorous logic, chancery courts could intervene and mitigate the result in certain circumstances by exercising authority over the defendant's conscience and compelling the defendant not to act on his or her full legal rights.

[146] Law claims the virtues of certainty and predictability, while equity claims the virtues of doing justice and upholding fairness in particular cases. As my colleague observes, the ancient criticism of equity is that its mercies varied arbitrarily with the length of the Chancellor's foot. The fundamental tension lives on, even though law and equity have been fused in Ontario since the late 19th century.

[147] The constructive trust cases show this tension. Judges imposing constructive trusts sometimes cite the magnanimous words of Lord Denning in *Hussey v. Palmer*, [1972] 3 All E.R. 744 (C.A.), who spoke of a constructive trust, at p. 747, as:

[A] trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded on large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it.

[148] The tension between the legal and equitable impulses is evident in *Pettkus v. Becker*, 1980 CanLII 22 (SCC), [1980] 2 S.C.R. 834. Dickson J., at pp. 847-848, speaking for the majority, described the attributes of a remedial constructive trust:

The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan* [(1760), 2 Burr. 1005] put the matter in these words: " the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise.... The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury. [Citations omitted and emphasis added.]

[149] However, Martland J., in dissent, saw the majority's extension of the constructive trust remedy in Pettkus as undesirable, because he found, at p.

> 859, that: “It would clothe judges with a very wide power to apply what has been described as ‘palm tree justice’ without the benefit of any guidelines.” He then asked: “By what test is a judge to determine what constitutes unjust enrichment?” He answered: “The only test would be his individual perception of what he considered to be unjust.” This was what he resisted.

Lauwers J.A. went on to describe the creative nature of equity and a reading of the jurisprudence in the Supreme Court of Canada that should not be read as limiting constructive trusts to wrongs and unjust enrichment. Lauwers J.A. wrote:

> [175] In *Soulo*s, McLachlin J. worked through the history of constructive trusts in order to discern whether and how to recognize a remedial constructive trust for wrongful acts, which was the particular problem in the case before her. In my view she did not purport to restate and reframe the law of constructive trusts for all purposes, and she said nothing to close the categories of constructive trusts. Had she intended to abolish good conscience constructive trusts beyond the categories of unjust enrichment and wrongful acts, then one would have expected clear and definitive language to that effect, but there is none. Instead, McLachlin J.’s choice of language justifies the conclusion that the court expected constructive trust law to continue to develop beyond the categories of unjust enrichment and wrongful act.
> [176] Justice McLachlin disagreed with the position that a constructive trust cannot be imposed where there has been no unjust enrichment, at para. 16, which was the real issue in the case. She stated, at para. 17:
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> The history of the law of constructive trust does not support this view. Rather, it suggests that the constructive trust is an ancient and eclectic institution imposed by law not only to remedy unjust enrichment, but to hold persons in different situations to high standards of trust and probity and prevent them from retaining property which in "good conscience" they should not be permitted to retain.
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> [177] Justice McLachlin made several other pertinent observations of more general application, at paras. 20-22:
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> Canadian courts have never abandoned the principles of constructive trust developed in England. They have, however, modified them.
> …
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> This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as *Pettkus v. Becker* should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized. The language used makes no such claim. A. J. McClean, … describes the ratio of *Pettkus v Becker* as a “a modest enough proposition”. He goes on: “It would be wrong ... to read it as one would read the language of a statute and limit further development of the law”.

Other scholars agree that the constructive trust as a remedy for unjust enrichment does not negate a finding of a constructive trust in other situations.

[Emphasis added.]

[178] Justice McLachlin also noted, at para. 17, that the law of England and Canada could well be diverging:

In England, the trust thus created was thought of as a real or "institutional" trust. In the United States and recently in Canada, jurisprudence speaks of the availability of the constructive trust as a remedy; hence the remedial constructive trust.

She embarked on a review of English law, noting, at para. 24: “In sum, the old English law remains part of contemporary Canadian law and guides its development.”

[179] Justice McLachlin was well aware that English law was evolving. She described the opposition in England to Lord Denning’s expansive view of constructive trust, at paras. 30-31. She added, at para. 37, that: “In England the law has yet to formally recognize the remedial constructive trust for unjust enrichment, although many of Lord Denning's pronouncements pointed in this direction.” She also surveyed the law in New Zealand and the United States.

[180] Justice McLachlin expressed a critical conclusion, at para. 25:

I conclude that the law of constructive trust in the common law provinces of Canada embraces the situations in which English courts of equity traditionally found a constructive trust as well as the situations of unjust enrichment recognized in recent Canadian jurisprudence.

[181] This led McLachlin J. to the heart of the matter, at paras. 34-35:

It thus emerges that a constructive trust may be imposed where good conscience so requires. The inquiry into good conscience is informed by the situations where constructive trusts have been recognized in the past. It is also informed by the dual reasons for which constructive trusts have traditionally been imposed: to do justice between the parties and to maintain the integrity of institutions dependent on trust-like relationships. Finally, it is informed by the absence of an indication that a constructive trust would have an unfair or unjust effect on the defendant or third parties, matters which equity has always taken into account. Equitable remedies are flexible; their award is based on what is just in all the circumstances of the case.

Good conscience as a common concept unifying the various instances in which a constructive trust may be found has the disadvantage of being very general. But any concept capable of embracing the diverse circumstances in which a constructive trust may be imposed must, of necessity, be general. Particularity is found in the situations in which judges in the past have found

> constructive trusts. A judge faced with a claim for a constructive trust will have regard not merely to what might seem "fair" in a general sense, but to other situations where courts have found a constructive trust. The goal is but a reasoned, incremental development of the law on a case-by-case basis.
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> [Emphasis added.]
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> [182] These statements, in my view, decisively refute the appellant's argument that a court can impose a constructive trust now in only two categories of cases: to remedy an unjust enrichment or a wrongful act.
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> (5) Concluding Observations on *Soulos*
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> [186] In my view, the Supreme Court left open four routes by which a court could impose the "ancient and eclectic institution" of a constructive trust: (1) unjust enrichment; (2) wrongful acts or wrongful gain; (3) circumstances where its availability has long been recognized" (para. 21), such as "situations where a constructive trusts have been recognized in the past" (para. 34) or "other situations where courts have found a constructive trust" (para 35); and (4) otherwise, where good conscience requires it. In relation to this last point, the *Soulos* court anticipated that the law of remedial constructive trusts would continue to develop, consistent with the words of Dickson J. in *Pettkus*, at p. 847-848: "the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice."
>
> [187] I see no other way to give meaning to the words of McLachlin J. in *Soulos*, at para. 21: "This Court's assertion that a remedial constructive trust lies to prevent unjust enrichment in cases such as *Pettkus* should not be taken as expunging from Canadian law the constructive trust in other circumstances where its availability has long been recognized." See also BNSF Railway Company v. Teck Metals Ltd., 2016 BCCA 350 (CanLII), 89 B.C.L.R. (5th) 274, at paras. 45-55.
>
> [Emphasis in original; footnotes omitted.]

After reviewing some of the jurisprudence on constructive trusts and particularly remedial constructive trusts, Lauwers J.A. held as follows:[1]

> **Analysis**
>
> [265] The disappointed beneficiary cases utilize the rubric of unjust enrichment but gloss over the structural difference. This approach exemplifies the common law's inclination to use old tools for new tasks, even if they do not quite fit. We will always be feeling our way. As McLachlin J. noted in *Soulos* at para. 35: "The goal is but a reasoned, incremental development of the law on a case-by-case basis." That method is part of the genius of the common law.

[1] 2017 ONCA 182 at Paras. 265-276 (Ont. C.A.).

[266] In managing the deployment of remedial constructive trusts in aid of good conscience, the discipline of particularity is important, as McLachlin J. noted. To repeat her words in para. 35 of *Soulos*: "Particularity is found in the situations in which judges in the past have found constructive trusts." She noted: "A judge faced with a claim for a constructive trust will have regard not merely to what might seem 'fair' in a general sense, but to other situations where courts have found a constructive trust." She saw this careful approach as essential to "a reasoned, incremental development of the law on a case-by-case basis."

[267] I recapitulate the findings that must be made for a court to impose a constructive trust on life insurance proceeds, which have emerged so far in the cases involving disappointed beneficiaries. These serve as limits to discipline judicial discretion. First, the defendant has been enriched and the plaintiff deprived in a family context, not in the market world. Second, the deceased's ruling intent, before resiling, was to benefit the plaintiff. That intent can be found in an oral agreement, a separation agreement or in a court order, but it must comprise an obligation. Third, there is a proprietary link between the plaintiff and the life insurance proceeds. It is this life insurance policy that is in issue, not some other. Finally, providing the plaintiff with the remedy of a constructive trust does not breach any law. Experience with constructive trusts in the disappointed beneficiary context would undoubtedly add other refinements.

[268] The disappointed beneficiary cases represent a distinct type of case in which the constructive trust remedy is disciplined by the common structure and elements of the dispute, which ought to serve to assuage the concern that equity is off on a frolic of its own, paying no attention to the law. Equity follows the law; the imposition of a constructive trust does not block the law's operation, which in this case is the operation of the Insurance Act; it imposes an obligation in conscience on the appellant the moment her entitlement to the proceeds attaches, one that requires her to hold the proceeds in trust for the respondent.

[269] To my mind, the disappointed beneficiary cases constitute a genus in which a constructive trust can be imposed on life insurance proceeds consistently with the reasoning of McLachlin J in *Soulos*. They are situations in which courts have found a constructive trust.

[270] I do not agree with the appellant's argument that those disappointed beneficiary cases in which the court granted a remedial constructive trust have been overtaken by *Soulos* and are not good law, for several reasons.

[271] First, I am not persuaded by the obiter in *Ladner* and *Love* that the British Columbia Court of Appeal's reasoning in *Roberts* is to be doubted in light of *Soulos*. Neither court explained the basis for the doubt apart from the lack of a mention of *Soulos* in the decisions under review.

[272] Second, I would distinguish *Ladner* itself on two bases. The case proceeded under the rubric of wrongful act, which has a detailed set of elements according to *Soulos* that do not apply to the unjust enrichment

> rubric. Further, the proprietary connection between the new and old insurance policies that was missing in Ladner was very much present in this case between the policy and the payment of the premiums by the respondent.
>
> [273] Finally, in light of the limits I discussed earlier, I do not share the *Ladner* court's underlying concern that constructive trusts would become unmanageable.
>
> [274] Equity asks a pertinent question in the difficult dilemma posed in the disappointed beneficiary cases: which of the two claimants has the superior claim to the life insurance proceeds? Equity's answer, all things being equal, is to assist the one with the superior right in equity, as McKinlay J. pointed out in *Shannon*. In this case, that is the respondent, as the application judge found.
>
> **(3) Conclusion on Unjust Enrichment**
>
> [275] In my view, the application judge did not err in finding that the respondent's deprivation consisted of the life insurance proceeds. He also did not err in finding that the deceased's irrevocable designation in the appellant's favour under s. 191 of the *Insurance Act*, given his prior oral agreement with the respondent, did not provide a juristic reason to oust the availability of a constructive trust over the life insurance proceeds, despite the *Richardson Estate* decision.
>
> [276] But I would go further and add that, to the extent that they fit awkwardly under the rubric of unjust enrichment, the disappointed beneficiary cases are perhaps better understood as a genus of cases in which a constructive trust can be imposed via the third route in *Soulos* – circumstances where the availability of a trust has previously been recognized – and the fourth route – where good conscience otherwise demands it, quite independent of unjust enrichment.

What divided the majority and dissent in the Court of Appeal goes to the heart of the developing jurisdiction in unjust enrichment and how to approach the development of the remedial constructive trust outside of wrongs and straight-forward unjust enrichment claims. The difficulty, however, may be that the state of the record does not provide adequately to enable one to base the outcome on the nature of the oral agreement between the deceased and the separated spouse. Regardless, it will be interesting to see whether the Supreme Court of Canada sees fit to provide controlling criteria to the use of constructive trusts outside controlling categories.

Craven v. Osidacz
2017 ONSC 1757 (Ont. S.C.J.)

This case is painful to have to read. The strict legal issue is the indemnification for legal expenses claimed by an estate trustee in defending claims against the estate, which was denied. The deceased and his spouse were separated. He had been convicted of assault against her. The deceased killed his 8-year old child, forcibly confined his former spouse, and shot to death by the police who intervened to rescue the former spouse. The brother of the deceased was appointed his Estate Trustee and aggressively defended against litigation brought by the former spouse for damages. After settling liability for damages and other claims, Lofchik J. turned to the question of legal fees:

> [63] Michael denies that he acted outside of his duties and was unreasonable in his role as estate trustee, and denies that he should be held personally liable to repay the legal fees expended to defend the Estate. Further, he denies that he should be personally liable for all legal costs of Julie Craven.
>
> [64] From the total value of the assets of the Estate of $408,912.76 as mentioned above, the Estate has made the following expenditures:
>
> …
>
> 4. Estate litigation fees: Deborah Ditchfield of Waterous Holden Amey Hitchon LLP was retained by Andrew in and around April 2002 with respect to family law matters between himself and Julie Craven. Upon Andrew's death, Ms. Ditchfield continued to act for the Estate.
>
> In regards to the wrongful death/assaults action, the total amount of legal fees expended by the Estate trustee from the Estate was $71,000.00 with an additional $80,000.00 left owing. The defendant negotiated a reduction to $20,000.00 of these outstanding monies which has now been paid out of the Estate for a total payout of $91,000.00 in legal fees.
>
> ...
>
> [68] The general principle that estate trustees are indemnified for all costs including legal fees that are reasonably incurred is codified in s. 23.1 of the *Trustee Act* which reads as follows:
>
> 23.1 (1) A trustee who is of the opinion that an expense would be properly incurred in carrying out the trust may,
>
> (a) pay the expense directly from the trust property; or
>
> (b) pay the expense personally and recover a corresponding amount from the trust property.
>
> ...
>
> (2) The Superior Court of Justice may afterwards disallow the payment or recovery if it is of the opinion that the expense was not properly incurred in carrying out the trust.

[69] From this, I conclude that the executor is entitled, indeed, obliged to defend claims against the estate so long as the estate assets are expended reasonably.

[70] Where the reasonableness of expenses incurred by the trustee is in question, the estate trustee must show that they acted in good faith and had good reason to believe the expenditures were necessary for the benefit of the estate at the time the expense was incurred, and further, has the onus of proving that defending a proceeding is reasonable.

> Carmen Theriault, *Widdifield on Executors and Trustees*, 6th Ed. (Toronto: Carswell, 2003), at 4-2.

[71] *Geffen v. Goodman* is the leading case on the role of an estate trustee in covering expenses of the estate, both during administration of the estate and with respect to litigation involving the estate. The court stated:

> The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred. Reasonable expenses include the costs of an action reasonably defended: see Re Dingman (1915), 35 O.L.R. 51. In *Re Dallaway*, [1982] 3 All E.R. 118, Sir Robert Megarry V.C. stated the rule thus at p. 122:
>
> In so far as such person [trustee] does not recover his costs from any other person, he is entitled to take his costs out of the fund held by him unless the court otherwise orders; and the court can otherwise order only on the ground that he has acted unreasonably, or in substance for his own benefit, rather than for the benefit of the fund.

Geffen v. Goodman Estate, 1991 CanLII 69 (SCC), [1991] 2 SCR 353 at para. 74

[72] It is the plaintiff's position that Michael Osidacz should be personally liable for repayment of the $91,277.98 (plus interest) in legal costs paid to Waterous Holden LLP without a court order.

[73] The courts have held that a trustee may risk the expense of litigation as part of discharging his duties to "collect the assets". However, if there is some question as to whether the proceedings are "meritorious" and whether it is "prudent or appropriate" for a trustee to pursue them, "the appropriate course of action is for the trustee to apply to the court for its directions".

> *Bank of Nova Scotia Trust et al. v. Pressman* et al., 2006 CanLII 22143 (ON SC) at p. 12

[74] In the present case, the Estate trustee never sought directions from the Court concerning whether or not the defences and claims it was advancing were "meritorious" and whether or not it was "prudent or appropriate" to proceed; that is, embarking on a vigorous "tooth and nail"

defence or denying significant claims without evidence (even after liability was established).

[75] There is considerable evidence, given Michael Osidacz's interactions with the plaintiff and her family, of significant personal animosity – dare I say hate – between Michael Osidacz and Julie Craven and her family. Such animosity, it would appear, prevented him from exercising the fair and impartial judgment necessary of an estate trustee. Michael Osidacz also appears to have personal opinions about the events of April 2002 and March 18, 2006 contrary to facts found by impartial parties that influenced his judgment and overall approach to the litigation. Thus motivated, Michael Osidacz soldiered on with his agenda of hostility and denial. Viewing the relevant facts objectively, this would seem to be anything but "prudent or appropriate", in clear violation of the principles established in Bank of Nova Scotia Trust et al. v. Pressman et al., 2006 CanLII 22143 (ON SC) at p. 12.

[76] As indicated in *Bank of Nova Scotia Trust et al. v. Pressman et al*., supra, direction should have been immediately sought from the court as to whether or not the intended path of the estate trustee was "prudent or appropriate", especially where, as here, the vigorous defence of the litigation was not specified in the will, an aggressive approach to same could (and did) lead to significant expense and circumstances where the estate trustee was both personally and emotionally involved.

…

[80] To incur approximately $160,000.00 in legal fees defending an action that was clearly likely to succeed with virtually no evidence upon which to base the defence was totally irrational and reckless conduct on the part of the Estate trustee, amounting to dissipation of the assets of the overall modest size of the Estate.

[81] Spending tens of thousands of dollars in legal fees advancing frivolous and groundless defences either to see to it that Julie Craven saw no or at least the minimal amount of the assets of the Estate or to prevent personal liability from attaching to Michael Osidacz for legal fees is not a valid basis to "preserve" estate assets and does nothing for the creditors or the beneficiaries of the Estate.

[82] The "modern approach" to awarding estate litigation costs was set out in the decision of McDougald Estate v. Gooderham, 2005 CanLII 21091 (ON CA), [2005] OJ No. 2432 (CA). Essentially, it incorporates the modern "loser pays" approach to awarding costs of litigation as follows: "The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation".

[83] Such approach displaces the "traditional" approach to costs whereby the costs of a proceeding were generally paid out of the estate subject to certain exceptions as follows: "The practice of the English courts, in estate litigation, is to order the costs of all parties to be paid out of the estate where

> the litigation arose as a result of the actions of the testator, or those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate".
>
> *McDougald Estate v. Gooderham*, supra
>
> **[84] Essentially, Michael Osidacz ran up his legal bills to a maximum until he was stopped by an order of this Court. Michael Osidacz exercised dubious judgment at best and generally tried to evade responsibility by shifting blame for most decisions either to the lawyers, or the legal advice received, or to Julie Craven.**
>
> **[85] The fact that Michael Osidacz received legal advice, per se, does not permit him to abdicate his responsibilities as trustee or immunize him from the ultimate decisions made. That is especially where, as here, the decisions he personally made, including raising unnecessary and unsubstantiated defences – such as limitation periods, denying obvious claims and asserting that Julie Craven's injuries were a result of events prior to March 18, 2006, without any evidentiary basis, had enormous consequences resulting in a situation where the Estate trustee essentially used estate funds to bankroll his legal fees and run up a gigantic bill without regard to any of the consequences. I find it would be inequitable to allow Michael Osidacz to have used the assets of the Estate as kind of an ATM machine, from which withdrawals automatically flowed, to fund litigation that was totally unreasonable.**
>
> **[86] Based on the foregoing, it is ordered that there be no indemnity of the legal costs incurred by Michael Osidacz and that he repay to the Estate the sum of $91,277.98, save and except for some limited costs which would be reasonably incurred in relation to the investigation and initial receipt of the claims which I fix at $20,000.00, leaving the amount to be repaid to be $71,277.98.**
>
> [Emphasis added.]

The disposition of the issues in this case seems eminently reasonable.