Estate Litigation: A Primer

Orders for Directions: Making the Best Use of Preliminary Orders in Estates Litigation

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ORDERS FOR DIRECTIONS: MAKING THE BEST USE OF PRELIMINARY ORDERS IN ESTATES LITIGATION

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Getting the right order for directions signed is the main goal for a first court appearance in an estate dispute. Orders for directions are powerful, flexible tools for shaping the progress and resolution of a contentious estate proceeding. Crafting them with the appropriate scope can simplify litigation, minimize costs and speed the resolution of even the most contentious of estates disputes. Attached as an appendix to this paper is a chart containing precedent language used for various forms of relief sought by way of orders for directions.[2]

Orders for directions can be used to gain access to information such as financial and health records, to trace and freeze assets pending the resolution of litigation, to get evidence from third parties, to create a timetable for the progress of litigation, to appoint someone to manage an estate while the parties fight it out and to extend statutory rights such as the time period for filing a *Family Law Act*[3] election. The proper use of orders for directions is an effective way to limit the costs of estates litigation, although the issue of costs is beyond the scope of this paper.

The authority for obtaining Orders for Assistance and for Directions, the distinction between which is set out below, is derived from Rules 74 and 75 of the *Rules of Civil Procedure* and s.9 of the *Estates Act*.[4] In drafting Orders, negotiating with opposing counsel or unrepresented and self represented parties, you also need to bear in mind the Practice Direction Concerning the Estates List of the Superior Court of Justice in Toronto (the "Estates List Practice Direction"),[5] the changes to the *Rules* which will be

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[2] Thank you to Craig Vander Zee of Hull and Hull for his permission to recycle the chart which he provided with his paper "The First Court Appearances and Orders", published for the 2007 Ontario Bar Association CLE "Will Challenges: from Notice of Objection to Trial."

[3] *Family Law Act*, R.S.O. 1990, c. F-3.

[4] *Estates Act,* R.S.O. 1990, c. E-21.

5 Practice Direction Concerning the Estates List of the Superior Court of Justice in Toronto.

implemented on January 1, 2010, and a number of recent decisions of the court relating to the conduct of Estates Litigation.

Unfortunately our clients rarely come to us with tidy problems; more often than not an estates dispute will involve overlapping issues of testamentary capacity, management of a deceased person's property prior to death by someone in a position of trust, provision for dependants, the validity of a will or the absence of any will at all. Throw into the mix a healthy dose of sibling rivalry, jealousy, distrust, greed and anger and without careful management on the part of counsel a seemingly simple dispute will quickly deteriorate into nasty protracted litigation.

Toronto is not the center of the universe…

Although the Estates List Practice Direction applies only to estates applications commenced in Toronto, the principles it reflects are relevant to proceedings commenced anywhere in the province. For example, as of January 1, 2010, Rule 1.04 (1.1) directs that:

> In applying these Rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

This sentiment is echoed in the Estates List Practice Direction:

> **II: Principles guiding the Estates List**
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> [2] The following principles shall guide all proceedings conducted on the Estates List:
>
> - The time and expense devoted to a proceeding should be proportionate to what is at stake in the proceeding; and,
> - Co-operation, communication, civility and common sense should prevail amongst all parties and counsel.

Under the Estates List Practice Direction, the first appearance for an estates application – whether it is a contested passing of accounts, will challenge or other dispute, is to be used as a 10 minute scheduling appointment. Where an order for directions is required for an estates application, the scheduling appointment can be used to obtain that order, if parties can agree on the terms of a consent order giving directions, including a timetable for each pre-hearing step agreed upon.

If the parties cannot agree on an order giving directions prior to the Scheduling Appointment, the parties should file, at least two days in advance of the Scheduling Appointment, copies of their respective draft orders giving directions, including timetables for each pre-hearing step. If the dispute about directions can be resolved during the 10 minute Scheduling Appointment, the judge may issue the order giving directions, including a timetable for pre-hearing steps. If the argument about the terms of an order giving directions will require longer than the 10 minute Scheduling Appointment, the judge can schedule a date for the hearing of a contested application for directions.

Therefore as you wade through your client's information and allegations, and begin to shape their dispute into a court proceeding, regardless of where you practice, you must balance their sense of injury against mounting legal costs, the value of the estate and the legal rather than personal issues at stake.

A well focussed order for directions can offer great assistance in keeping even a hotly contested dispute on track. To guide your drafting, ask yourself:

- What do you and your client need to know in order to make informed decisions about resolving your client's dispute?
- Who has that information, and do you need court authority to access it?
- Who is entitled to know you are looking for this information or relief?

- Do you need to preserve the *status quo* while you are gathering information or seeking relief? Is a court order required to do so?
- Do you need interim access to property (for example the right to remain living in a home, or the payment of support) while the application is pending?
- How should the application proceed? When do you want to mediate? Will pleadings be required and if so, when? How should the issues for trial be set out?

Your order will reflect the answers to these questions.

A Simple Will Challenge:

With the proviso that there really is no such thing, I've created a simple will challenge fact scenario to illustrate the process of drafting an order for directions.

> Imagine that a father of 6 adult children, let's call him Ike, has died.[6] Ike had a Will leaving everything in his estate to one of his ex-wives, who is also named as Estate Trustee. Some of Ike's children have stepped forward to challenge the Will, claiming that when it was executed Ike was already suffering from dementia and did not have the wherewithal to execute a valid Will. The children are concerned about property which was transferred out of Ike's name into his and his ex-wife's name as joint tenants when Ike was suffering advanced dementia, and think but cannot find any documents to prove that the ex-wife had a Continuing Power of Attorney appointing her as attorney for Ike's property during the same time period. There is no cash in the estate, but Ike owned publishing rights which could generate a great deal of money in years to come. Ike was sick for two years before he died and his ex- had acted as his attorney for the same amount of time.

[6] Inspired by the legal battle which continues to be fought over the estate of the late Ike Turner. Ike died with somewhere between 5 and 13 ex-wives, 6 children, two handwritten and likely invalid Wills and no money. Better than money, Ike owned the publishing rights to roughly 4,0000 songs, including the songs which brought him and Tina Turner to fame.

After reviewing the issues that must be addressed within an order for directions I will provide a sample order reflecting the issues raised by this fact situation.

The Rules

Rules 74 and 75 of the *Rules of Civil Procedure* provide the framework for obtaining Orders for Directions

Rule 75.06 provides that any person who appears to have a financial interest in an estate may apply for directions, or move for directions in another proceeding, as to the procedure for bringing any matter before the court. This Rule gives the court broad scope to direct the issues to be decided, the identity of parties, the time for and methods of service of an order, the appointment of an estate trustee during litigation, the conduct of mediation and "such other procedures as are just."

By Motion or by Application

The procedure for obtaining an order for directions depends upon the type of dispute and whether an underlying proceeding has been commenced. Proceedings commenced by application include:

- Proof of a will in solemn form (Rule 75.01);
- Proof of a lost or destroyed will (Rule 75.02);
- Revocation of a certificate of appointment, also known as removal of estate trustee. (Rule 75.04);
- Directions of the court where no other proceeding has been commenced (Rule 75.06(1)).

If litigation has already been commenced, an order for directions can be obtained by motion under Rule 75.06. A will challenge is commenced by way of motion under Rule 75.06(1) after a Notice of Objection to the issue of a Certificate of Appointment of Estate Trustee has been filed. Other circumstances where an order for directions is obtained by motion include:

- If an objection to the issue of a certificate of appointment has been filed the applicant or objector may move for directions (75.03(6));
- Motion for return of a certificate of appointment (75.05);
- Motion for production of testamentary documents (s. 9 of the *Estates Act*);
- Motion for orders for assistance.

Orders for Assistance

Orders for assistance can be obtained whether or not a proceeding is pending in the court with respect to an estate. Rule 74.15 sets out the types of issues which can be addressed through orders for assistance:

- acceptance or refusal of appointment as Estate Trustee with or without a Will;
- consent or objection to a proposed appointment as estate trustee with or without a Will;
- filing of a statement of assets of an estate by the estate trustee or for further particulars of that statement;
- requiring a beneficiary or spouse of a beneficiary who witnessed the will to satisfy the court that they did not exercise improper or undue influence on the testator;
- requiring a former spouse of the deceased to take part in a determination under ss. 17(2) of the *Succession Law Reform Act* of the validity of the appointment of the former spouse as estate trustee, a devise or bequest or a beneficial interest to the former spouse or the conferring of a general or special power of appointment on him or her
- compelling an estate trustee to pass accounts
- "any other matter that the court directs"

Although Orders for Assistance can be obtained in stand-alone proceedings, they are often sought within broader litigation. For example an order compelling an estate trustee

to pass accounts will frequently be sought within an application to remove and replace an estate trustee. Orders for assistance can be excellent tools to un-stick a log jam in a disputed estate, and offer a way to facilitate estate administration when trustees and beneficiaries are battling. The information which can be obtained through orders for assistance, whether through the production of testamentary documents, listing of assets or accounting, will often be crucial in identifying your client's interests and providing them with the tools necessary to make informed decisions about their rights.

Service

In preparing your Notice of Application, you will have identified those with a "financial interest in an estate" – naming as parties the named beneficiaries in the impugned Will and those entitled to take if the consequence of a Will challenge is an intestacy. Rule 7 sets out who to serve if there is a minor, mentally incapable, or absentee respondent.

Use the first appearance as an opportunity to perfect service so that should compliance and enforcement become an issue parties cannot raise dispute service to delay proceedings or circumvent court Orders. If a respondent is dodging service the first appearance is an ideal time to address this issue with the court, upon filing affidavit evidence of efforts to locate and serve that respondent. Similarly, if a respondent cannot be located you may wish to include a clause in the order sought that a trustee search for them.

Rule 74.15(2) states that a motion under subrule (1) *may* be made without notice, except a motion under clause (1)(e) (further particulars), although the recent endorsement of Justice Brown in *Ignagni v. Ignagni*[7] calls into question whether *ex parte* Orders will be as readily available under this Rule as has been the custom.

***Ex Parte*: a word of caution**

Historically, under the rules of the Surrogate Court, an order for assistance was frequently obtained without notice and the practice continued under the present-day

[7] (2009) CarswellOnt 6115 (S.C.J.).

Rules. The recent endorsement of Justice Brown in *Ignagni v. Ignagni* has curtailed the availability of orders for assistance on *ex parte* basis. Justice Brown stated that Rule 74.15 must be read in conjunction with Rules 37.07 (service of notice) and 40.02(1) (interlocutory injunctions made without notice), concluding that a party needed to demonstrate some element of "extraordinary urgency" in order to secure an *ex parte* order for assistance, much the same as if a party were seeking and interlocutory injunction.

Regardless of the permissive wording of Rule 74.15, the *Ignagni* decision stands as a caution to counsel: if you believe that the circumstances warrant proceeding on an *ex parte* basis, the affidavit evidence filed will need to satisfy the court that there is extraordinary urgency which justifies granting the order without notice, address whether or not it was possible to give notice to the effected parties, whether the order sought will result in loss or compromise of rights of someone you could have served, and make full and frank disclosure of all material facts, including those arguments the moving party would anticipate the respondent would raise in opposition to the order sought.

Parties, Non-parties and disclosure rights

Among the most useful rights which can be obtained on an order for directions is the right to compel documents and examine non-parties. The resolution of a will challenge will typically require:

- access to the legal file of the lawyer or lawyers involved in drafting wills or powers of attorney documents for a deceased;
- detailed knowledge of the health of a deceased around the time a Will was prepared;
- notes and records of health care providers made around the time an impugned will was created;
- Financial records of the deceased and any attorneys for property can readily identify what the size of the estate ought to be without the need for expensive forensic accounting

Third party records can be determinative of the issue of testamentary capacity, and the record-makers are often unbiased and uninvolved in the estate of the deceased, giving their records greater credibility in the midst of a family feud.

Federal and Provincial privacy laws, the rules of professional conduct and the laws regarding privilege are barriers which prevent access to many of these files and often the only way to get legal, medical and financial records is to compel their production through court order.

The financial institutions, health care facilities and lawyers whose records you seek to access do not need to be named as parties to the application – although circumstances may warrant – however, it may be necessary to serve them with notice that you are seeking their records and it is certainly a matter of professional courtesy to serve notice that you plan to move for an order permitting access to files. In light of the *Ignagni* decision referred to above, it would be wise to provide a third party with a copy of the application or motion record and notice of the date you will ask the court to sign an order permitting access to the third party's records. In many cases third parties are willing to cooperate with production of their records but require the court order to protect them against a claim that they have violated privacy obligations and it is advisable to review the language of your intended order with those parties prior to getting it signed: this will protect against the situation of an order which does not provide sufficient or proper authority for the release of the records you seek.

A note regarding lawyers files

Solicitor-client privilege between a testator and their legal advisor does not end when the testator dies. Where legal advice of any kind is sought, the communications relating to that advice are protected from disclosure by the legal advisor unless the privilege is waived.[8] On death the privilege passes to the testator's personal representative – usually the estate trustee. The lawyer who previously advised the testator has a positive obligation to assert the privilege and cannot produce his or her file in the absence of a

[8] See *R. v. McClure* [2001] 1 S.C.R. 445.

court order or direction from the testator's personal representative. In the context of a will challenge there may be no estate trustee or other person with the capacity to waive privilege. In these circumstances an order that the legal file be produced is necessary.

Not all documents in a legal file belong to the client or former client: documents sent by a testator to his or her lawyer during the course of a retainer belong to the lawyer as do documents prepared by the lawyer for his or her own benefit or protection, such as notes regarding the steps taken to confirm capacity. These documents, "lawyers notes", will often form vital evidence in a will challenge, and specific reference to lawyers notes ought to be included in your order for directions.[9]

Discovery

The timing of the exchange of affidavits of documents and examinations for discovery can be very flexible within estates disputes. Depending on the answers provided by the medical, legal and financial records obtained, the parties may be in a position to settle their dispute without undergoing the expense of preparing affidavits of documents or conducting examinations for discovery. Language in the preliminary order for directions can specify that records obtained from third parties are to be provided to all parties to the dispute, not just the requester, and this may satisfy the information sharing that would otherwise be achieved through the exchange of affidavits of documents. This is a fact-driven issue, and will reflect the complexity and temperature of the dispute.

The language incorporated into an order for directions can be crafted such that the parties can agree to dispense with affidavits or examinations and proceed to mediation without the need to return to court for further directions.

Oral examinations of third parties may be necessary, and it is possible those people you wish to examine may be prevented from answering questions at examinations in the absence of a court order requiring them to do so. If you need to examine a lawyer

[9] See *Aggio v. Rosenberg* (1981) CarswellOnt 407 (S.C.) for a discussion of who owns what in a lawyer's file.

include express language in the order for directions that the lawyer may give evidence concerning what would otherwise be privileged communications made by the former client and that any claim for solicitor client privilege or confidentiality be waived.[10]

The amendments to the *Rules of Civil Procedure* which come into effect January 1, 2010, impact the availability of examinations for discovery. Rule 31.05.1 specifies that examinations cannot exceed 7 hours, regardless of the number of parties, except on consent or with leave of the court.

In determining whether leave should be granted under subrule (1), the court shall consider,

> (a) the amount of money in issue;
>
> (b) the complexity of the issues of fact or law;
>
> (c) the amount of time that ought reasonably to be required in the action for oral examinations;
>
> (d) the financial position of each party;
>
> (e) the conduct of any party, including a party's unresponsiveness in any examinations for discovery held previously in the action, such as failure to answer questions on grounds other than privilege or the questions being obviously irrelevant, failure to provide complete answers to questions, or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy;
>
> (f) a party's denial or refusal to admit anything that should have been admitted; and
>
> (g) any other reason that should be considered in the interest of justice.

It is too early to say how readily leave will be available; however, early indications from the bench suggest that the threshold will be high and that counsel will have to be very cautious in planning their use of examinations for discovery. Documentary discovery and access to third party records may take on an even more significant role in resolving estates. In planning whether and how to use examinations for discovery it will be more

[10] See *Re Nieweglowski Estate*, 2009 CarswellOnt 1584 (S.C.J.).

important than ever for counsel to bear in mind the proportionality of the time and expense of particular steps in a proceeding against what is at stake and to use co-operation, communication, civility and common sense to avoid unnecessary steps.

Discovery Plans

An additional requirement under the amended Rules is the development of a Discovery Plan by counsel. Under Rule 29.1, if a party to an action intends to obtain evidence under the following Rules, the parties must agree to a written Discovery Plan:

- Rule 30 (Discovery of Documents);
- Rule 31 (Examination for Discovery);
- Rule 32 (Inspection of Property);
- Rule 33 (Medical Examination); and
- Rule 35 (Examination for Discovery by Written Questions)

The Plan must be written but does not need to be filed with the Court, and shall include the following:

> (a) the intended scope of documentary discovery under rule 30.02, taking into account relevance, costs and the importance and complexity of the issues in the particular action;
>
> (b) dates for the service of each party's affidavit of documents under rule 30.03;
>
> (c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons;
>
> (d) the names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and
>
> (e) any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.

As the amendments are not yet in force, it is only possible to speculate on how this Rule will change how orders for directions are used or ought to be drafted to manage the

collection of evidence in a will challenge or other estates dispute. I suggest that in many cases orders for directions function as informal Discovery Plans and that experienced estates litigators will merely have to tweak their practices to comply with this Rule.[11]

Trials of Issues and Exchange of Pleadings

If the parties to an estates dispute cannot resolve their differences through mediation or other negotiations a trial will be necessary. An applicant can set out the issues to be tried in the notice of application, the issues can be set out in the order for directions or pleadings can be ordered pursuant to Rule 75.07.

There is little guidance in the Rules to the question of whether or not statements of claim and defence ought to be drafted: time and costs are obviously a factor to consider. The advantage of requiring pleadings is that it forces both sides of a dispute to set out a concise statement of the material facts upon which it relies. This can be a very effective way of focussing parties and counsel alike. Respondents resisting an application do not have to file a document which mirrors the Notice of Application issued by the applicant, and pinning those Respondents down through the exchange of pleadings can be an effective exercise.

The Rules do not require that pleadings be exchanged at any specific point in an estates dispute, and when drafting an order for directions be mindful of the need to have flexibility to incorporate the exchange of pleadings, if at all.

Appointment of Estate Trustee During Litigation – who, how, why

If the validity of a Will has been called into question, leaving no one with the authority to administer the estate of a deceased, it is often the case that someone must be appointed to look after the estate for its ultimate beneficiaries. The person so appointed will have all

[11] Discovery Plans must be developed with reference to the principles reflected by the "Sedona Canada Principles Addressing Electronic Discovery", which among other things encourage the proportionality in determining the scope of discovery.

of the rights and powers of a general administrator, other than the right of distributing the residue of an estate.[12] Who to appoint as the Estate Trustee During Litigation ("ETDL") can be a hotly contested issue.

Under s. 28 of the *Estates Act*, the ETDL is entitled to compensation in the amount determined reasonable by the court. This potential expense is often a factor in determining whether an individual or a trust company is a suitable ETDL. The size of the estate in question, the complexity of the assets that need to be managed pending resolution of the dispute and the level of hostility amongst the litigants will also guide the decision of whether to appoint and ETDL. The role of the ETDL can be limited by the order for directions, and an ETDL can be directed to take specific steps to administer the estate while the parties are conducting their litigation.

If there are commercial decisions which need to be made while the parties resolve their differences, if there is livestock which needs to be tended to, or if calling in assets and determining liabilities is less than straightforward, an ETDL will be required.

Because the size of the fight is frequently disproportionate to the value of the property being fought over, there are ways around the need to appoint and ETDL. For example, if the named executor is not in a position of conflict of interest it may be more advantageous to have that person act but stipulate in the order for directions that they not make any distributions absent agreement of the parties or further order of the court.

Where an estate's assets and debts are all known or easy to identify and manage, and the complexity and value of an estate does not support the costs of appointing an ETDL, the order for directions can be crafted to authorize the collection of assets into a neutral account, such as a lawyer's trust account, the payment of bills, and the expense of appointing an ETDL can be avoided. Consider whether someone needs to be appointed to preserve property and prevent waste or mismanagement. If no assets require management pending resolution of the dispute, no ETDL need be appointed.

[12] s. 28, *Estates Act*.

The appointment of an ETDL is not usually required in the context of claims under the *Succession Law Reform Act*, the *Family Law Act*, or *quantum meruit* claim because the validity of the Will is not being challenged and therefore the person nominated as estate trustee can administer the estate, subject to sorting out the entitlement of the claimant. However, if the claimant also happens to be the person named as estate trustee, he or she cannot act – in the context of such claims, it may be necessary to appoint an ETDL, and similar reasoning to that applicable to a will challenge applies: is there property which needs to be collected, maintained or preserved during litigation? If not, the expense can be avoided and the estate administered after the litigation resolved.

Preservation of assets & interim relief:

Rules 42, 44 and 45, as well as s. 103 of the *Courts of Justice Act*,[13] provide mechanisms for preserving property pending the resolution of an estates dispute. These may be steps that the ETDL needs to pursue, or steps that counsel for the parties can pursue after receiving court authority. As with all issues in a will challenge, the amount at stake will offer guidance to the wisdom of pursuing various orders to recover or preserve property pending resolution of a dispute.

In many estates the most significant asset is the real property owned by a deceased. A Certificate of Pending Litigation ("CPL") is available pursuant to s. 103 of the *Courts of Justice Act* and Rule 42.01. Under Rule 42, to be entitled to a CPL, an interest in land must be in question in the proceeding. The claim to entitlement must be asserted in the originating process. The definition of "interest in land" is not without controversy: a residual beneficiary of an estate which consists almost or entirely of real property arguably has no interest in the land itself, but only in the value of the land. If no specific bequest of the real property is made be prepared to address this issue with the judge from whom you seek an order authorizing the CPL.

[13] R.S.O. 1990, c. C-43.

There are alternatives to preserve real property and prevent its sale or transfer pending resolution of litigation, short of obtaining a CPL. A caution may be registered on title under the *Land Titles Act*, which does not register an estate in land but provides a means to trigger notice to the person who lodged the caution if efforts to convey title are made. Depending upon the nature of your client's interest in the estate and in the real property in question, the temperature of the file and the relationship with opposing counsel, restraint from transfer of real property can be dealt with by undertaking or secured by a court order and the need to move for a CPL can be avoided.

The recovery of personal property can be a very heated issue for estates litigants: Royal Doultons may be cheap on e-bay, and 1991 Escorts may only have a trade in value of $880.00, but litigants may be ready to fight to the last penny over these items. If circumstances – and finances – warrant, there are mechanisms under Rules 43 and 45 to recover or preserve personal property pending resolution of litigation. Certainly there are items of personal property whose value justifies moving for their recovery and specific reference to these Rules ought to be made to determine if the test for relief is likely to be met. The affidavit evidence required to succeed under Rule 43 must satisfy the court that the moving party has a high degree of assurance that the party seeking the order will succeed at trial.

In many cases it is preferable to work with the ETDL to arrange for property to be held and not dissipated pending resolution.

The Accountant of the Superior Court of Justice ("ASCJ"), the depository for all money, mortgages and securities paid into the Superior Court of Justice, can be used as a depository of funds where the right of a party to that specific fund is in question. The balance of convenience ought to favour paying the funds to the ASCJ. If the funds are paid to the ASCJ pursuant to court order, the ASCJ must receive a copy of that order, and when it comes time to have those funds paid out the ASCJ will require a further order authorizing them to do so.

Mediation

In Toronto, Ottawa and Essex County, Rule 75.1.02(1) stipulates that mandatory mediation applies to the following proceedings:

- Contested applications to pass accounts;
- Formal proof of testamentary instruments;
- Objections to issuing a certificate of appointment;
- Return of a certificate of appointment;
- Claims against an estate;
- Proceedings under Part V of the *Succession Law Reform Act*;
- Proceedings under the *Substitute Decisions Act, 1992*;
- Proceedings under the *Absentees Act*, the *Charities Accounting Act*, the *Estates Act*, the *Trustee Act* or the *Variation of Trusts Act*;
- Applications under Rule 14.05(3) whether the matters at issue relate to an estate or trust; and,
- Proceedings under s. 5(2) of the *Family Law Act*.

Regardless of where you practice, mediation should be contemplated. The most intractable of disputes can be resolved or at least simplified through mediation, offering considerable savings and promoting much earlier resolution to estates disputes.

If practicing in Toronto, the Estates List Practice Direction provides that:

> [49] On contested passing of accounts applications parties should be prepared to deal with the issue of directions for mandatory mediation on the initial return date specified in the notice of application.
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> [50] In all other matters, motions for directions for the conduct of a mandatory mediation normally should form part of, or be combined with, a motion for directions under Rule 75.06. Consent mediation orders can be obtained through a Scheduling Appointment.

> [51] In addition to addressing the matters set out in Rule 75.1.05(4), an order giving directions for mediation should, where appropriate, deal with any further information the parties require in advance of the mediation in order to ensure a productive mediation session.

The proper timing of mediation is dependant upon the file and influenced by the particular facts of each case. Where certain evidence needs to be established, such as the deceased's mental state in and around the date a Will was prepared, mediation would be premature prior to obtaining some medical evidence. It may not be necessary to nail down with complete specificity all evidence: an estimate of the value of an estate may suffice, rather than proof to the penny of value; some medical evidence may satisfy the parties that the deceased's capacity was questionable and for the purpose of early settlement that may be enough.

Back to Ike:

Returning to the scenario set out at the beginning of the paper, in order to resolve Ike's kids' challenge to their father's will, an order for directions ought to contain language addressing:

- Service of the application – if the 13 or so ex-wives need to be served, and some of them or some of the kids cannot be located or are evading service deal with this before it is time to deal with the substantive issues contained in the application;
- Appointment of an Estate Trustee During Litigation, plus terms relating to compensation and powers of the ETDL;
- Production of Ike's medical records from the time he became ill to death, including primary care physician's and home care provider's records, any hospital records for the same time period;
- Production of Ike's financial records for the time Ike's attorney/ex-wife managed his property and perhaps her financial records too;
- Access to legal files and the right to examine counsel involved in the preparation of Ike's Will, power of attorney documents,

divorce from his ex-wife and transfers of any property for about the same time frame;

- Payment of any royalties due to the publishing rights to the ETDL, pending resolution of the dispute;
- Waiver of privilege; and
- Set out the timetable for mediation, exchange of affidavits of documents, examinations for discovery, exchange of pleadings

A precedent order is included at the end of this paper to illustrate what an order for directions for this dispute might look like.

Conclusion:

As with most issues we grapple with in our legal practices, rarely is it necessary to reinvent the wheel. There are a number of sources for precedent language which can be used with the appropriate modifications for Orders for Directions. Thank you again to Craig Vander Zee of Hull and Hull for his permission to reuse the precedent chart included with this paper.[14] On occasion the court will issue endorsements or reasons for judgment which clarify the language which ought to be used in orders, and it important to monitor recent decisions of the Toronto Superior Court of Justice especially for releases.[15]

There are other sources of precedent language floating around, and my caution is to use precedents mindfully and resist the urge to draft orders which are overly broad or so vaguely worded that the parties upon whom the orders will be served have difficulty identifying or locating the information you seek. By keeping the language you use to draft orders simple and precise, by avoiding legalese and jargon, by staying focussed on the relevant time frames and people, you will end up with a powerful tool in resolving your client's dispute.

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[14] See for example Brian Schnurr, *Estate Litigation*, 2nd Ed., (Toronto: Carswell, 1994, loose leaf). This text is also available through Westlaw's Estates & Trusts Source and in a folio format.

[15] See for example *O'Reilly (Re)*, 2009 CanLII 60091 (ON S.C.), in which Justice Brown specified the language to be used in a draft order for an application to prove a will in solemn form.