

## **Hull on Estates Podcast #38**

### Managing Estate Litigation - Orders Giving Directions

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Bianca La Neve: Hi and welcome to Hull on Estates. You're listening to Episode #38 on Tuesday, December 12<sup>th</sup>, 2006.

*Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by the lawyers of Hull and Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.*

Craig Vander Zee: Good morning Bianca, how are you today?

Bianca La Neve: Good, how are you?

Craig Vander Zee: Good thanks.

Bianca La Neve: Today we're starting a series of podcasts on managing litigation. We'll be discussing a variety of techniques and ways that litigators can manage litigation in disputes in estate disputes, such as order for directions and contempt motions.

Craig Vander Zee: This morning, then Bianca, we'll talk about orders giving directions and orders for directions. And some provisions that you might want to include in them when you're thinking about your dispute and we'll leave certain aspects of orders giving directions and manner of enforcing orders that are disobeyed by opposing parties to another day and by that, I mean bringing a contempt motion if it's necessary in the circumstances. There's oral discovery, mediation and/or pre-trial conference, there may be jurisdictions where the mediation is required or the parties agree upon it, and if the mediation is not successful, then it must proceed to a pre-trial conference. It thereafter goes to a trial if it can't be resolved. One of the factors that I just mentioned was who the order for directions needs to be served on and the method and times of that service. This is a particular item which thought should be given to because it may be that there are parties that need to be included but, depending on where they are located, you want to work out with the court and get the court's blessing as to how the order for directions and perhaps other documents can be served on an individual. Say, for example, there are American beneficiaries in California or Hawaii or Florida or any other State, or perhaps somewhere in Europe or any other foreign country. It may be in the order for directions you want to have the permission of the court to simply serve documents by way of regular mail, or perhaps registered mail, so that you don't have the cost of personal service in a foreign jurisdiction and the difficulties that may go along with that. Again, another point to be mindful of that I've touched upon is that the nature of the provisions are always subject to the discretion of the court. Now a court may not simply intervene to ask questions regarding the provisions that are sought by the parties. It may in fact intervene and make directions of its own, regardless of whether the parties have been able

to negotiate or agree upon the order or even suggest a provision. This may occur in instances where certain parties are unrepresented or should be added but have not been, or an instance where the order is to effect non-parties, or where the ultimate judgment in the matter shall operate *in rem*, and by that I mean that it will bind not only the parties to the litigation, but all others and hence the term *in rem*.

Bianca La Neve: So really depending on the nature of the proceeding, the order for directions can be quite simple or it can be quite complex. Now Craig, let's get into a number of the areas that you can consider including in an order for directions as a way to manage the estate litigation. The first consideration, as you mentioned, should be who the appropriate parties are to the proceeding and whether representation will be required or should be ordered by the court.

Craig Vander Zee: Well, that's right. It's pretty difficult to pursue a dispute when not all the parties that need to be included are included, and perhaps those parties don't know of the dispute yet and simply need to be advised of it. It may mean that simply advising a party may be enough. They may in turn choose not to participate. So it's not meant to complicate the proceeding, but in many estate proceedings, certainly contentious estate proceedings, it's important to have all those represented who need to be represented. Because in the end, if you come to a resolution or even if you come to a resolution that is judged by the court, in the end, if those parties who are entitled to be part of the proceeding are not, and it's overlooked, it may very well be the case that the proceeding as a whole may be challenged down the road. And there may be good cause for that. So one of the things that we should be mindful of then is which parties are submitting their rights to the court. And where it is known that a party is going to submit his or her rights or their rights to the court, that provision is to be included in the order giving directions. And specifically, Rule 75.07.1 addresses the submission of rights to the court by a party. Now, when a person submits their rights to the court, that is following service of the initial materials, that person is no longer a party to the proceeding. And in fact, that party is only entitled to the service by the plaintiff of written notice of the time and location of the trial, and a copy of the judgment disposing of the matter. What's key here is that that person who submits their right is not entitled to any further notice other than I've just mentioned if the matter is to proceed to a trial, and is not entitled to costs in the proceeding, but is not liable for costs in the proceeding. And this can often be the case where there is a beneficiary who doesn't have a significant interest in an estate. They don't wish to become embroiled in a family dispute per se and chooses to submit their rights. By that, they're putting their rights in the hands of the court, and they're going to live by the result of the court. Now what has to be remembered, though, is that if the parties who are party to the dispute settle it, they can't simply proceed on the basis of that settlement in the absence of advising the person who submitted their rights. And that's because the person who submits their rights does so with the knowledge that ultimately it will be decided by the court. So as a matter of law, they will either get their rights or their rights will be curtailed, or perhaps found non-existent. So if there is a settlement amongst the parties that are disputing the matter, or in the dispute, in order to deal with the party who has submitted their rights, they must file a written consent of the person who submitted their rights with the court with their settlement materials. Or alternatively

an Affidavit must be filed by a solicitor of record in the proceeding who is prepared to attest to the fact that a Notice of Settlement appended to his Affidavit has been personally served on the person who submitted their rights and that there has been no rejection of the settlement in response. In other words, if parties settle a dispute and somebody has submitted their rights, the person who has submitted their rights still has an opportunity to reject the settlement. Now they may very well have to answer for it before the court and there may be an argument before the court as to whether the settlement is reasonable, proper and abides by law before a court, but having said that, the person who submits their rights cannot be forgotten.

Bianca La Neve: Now in cases where there are minor children and/or incapable parties, it may be that a litigation guardian needs to be appointed for them by the court. In such cases, you would need to serve your application or motion materials on either the Office of the Children's Lawyer or the Office of the Public Guardian and Trustee so that they have an opportunity to consider your materials and respond and become involved as they deem appropriate. Now, Rule 7 of the Rules of Civil Procedure regulates the bringing of proceedings by or against parties under disability. And remember that a party under disability includes a minor child and a person deemed incapable. The central requirement is that persons under disability must be represented by a litigation guardian and the only exception is really where the party is a respondent to an application under the *Substitute Decisions Act*.

Craig Vander Zee: There are specifically two instances, Bianca, that one might turn their minds to and that is, whether the incapable or minor, that is a person under disability, is intended to be a plaintiff in a dispute or intended to be a defendant in a dispute. If the person under disability is meant to be a plaintiff, a litigation guardian can act for the person under disability without court appointment so long as they file the required Affidavit with the court. Rule 7 addresses this as well and creates a presumptive right for a mentally incapable person's guardian or an attorney under Power of Attorney to act as litigation guardian so long as the guardian or attorney has the authority to act by the terms of their appointment as guardian or obviously under the Power of Attorney. And that seems to make perfect sense, that if a person has a guardian and has an attorney under a legitimate and valid Power of Attorney, that those individuals who are deemed to have authority over the person under disability be able to be a litigation guardian in the case of an incapable person who is going to be a plaintiff. However, where the incapable person is intended to be a defendant, the Rule somewhat changes. A litigation guardian for such a defendant must be appointed by the court. Remembering again when it was a plaintiff, they didn't have to be specifically appointed by the court, but just had to file the appropriate materials with the court. The court procedure is, however, the same and is set out rather in Rule 7.03. Unless there is some other person willing to act as a litigation guardian in this circumstance, the court is to appoint the Children's Lawyer or the Public Guardian and Trustee as applicable. Now Rule 7.03 specifically requires that where a proceeding is against a minor in respect of a minor's interest in an estate or trust. Again this is different from ordinary litigation, perhaps litigation that involves a personal injury to the incapable person. If the incapable person is intended to be a defendant in a circumstance where they have an interest in an estate or trust, if it's a minor, the

Children's Lawyer is obligated and shall act as the litigation guardian for the minor defendant or respondent unless the court orders otherwise. It may also be the case that a representation order is necessary. Rule 10 of the Rules of Civil Procedure addresses that requirement, and as Rule 10 stipulates in its preamble, situations can arise where the outcome of a situation, that is, litigation, may have an impact on persons who are not before the court or who cannot be brought into the litigation because they are unborn or unascertained or because they cannot be readily found or served. So in dealing with who the parties are before the court, we've touched upon this morning those parties that may submit their rights to court, but still need to be included in the proceeding, that is, served with the materials, so they have the opportunity to make that decision. And then also consideration given as to whether there is an incapable person, and whether that incapable person needs to be represented pursuant to Rule 10 or pursuant to Rule 7, that is, of the Rules of Civil Procedure. And I think at this point, Bianca, we will move on in our next session to deal with other factors that go into an order giving directions such as estate trustees during litigation, when they're appointed, when they ought to be appointed, when they might not need to be appointed, freezing assets of estate and other factors such as multiple proceedings and how to deal with same, and the gathering of evidence.

Bianca La Neve: I look forward to our next session.

*This has been Hull on Estates with the lawyers of Hull and Hull. The podcast you have been listening to has been provided as an information service. It is a summary of current legal issues in estates and estate planning. It is not legal advice and you are reminded to always talk with a legal professional regarding your specific circumstances.*

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