

Hull on Estates Podcast #48

Tips for Directing and Controlling Estate Litigation

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Bianca La Neve: Hi and welcome to Hull on Estates. You're listening to Episode #48 of our podcasts on Tuesday, February 27th, 2007.

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 & Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.

Bianca La Neve: Hi Craig, how are you?

Craig Vander Zee: Good thanks, yourself? How are you enjoying the snow that we got yesterday?

Bianca La Neve: I had a bit of trouble getting into work but I made it, how about yourself?

Craig Vander Zee Well, I think my kids enjoyed it a little bit more than the people doing the snow shoveling.

Bianca La Neve: That's for sure. So today we are continuing our discussion of the two previous podcasts on managing estate litigation and tips on controlling and managing your estate litigation. And I thought it would be a good idea for you to perhaps review some of our previous topics before we get into some new material today.

Craig Vander Zee: Well specifically Bianca, we chatted about the rule that governs orders giving directions being Rule 75.06 and the thoughts that you might have or that I have when I address an order giving directions. We talked about specifically the parties and not simply the parties who are named or to be named in the action, but those that may not have been thought of and ought to have been included, such as minors or persons under disability and consideration needs to be given as to whether the Children's Lawyer, or Public Guardian and Trustee needs to be included. We also chatted about different aspects of documentary discovery and the evidence requirements that you may face. Today we'll continue that discussion with respect to oral discovery. We also talked about estate trustees during litigation and other issues associated with an estate trustee during litigation. And I think that that's a good jumping off point for us to continue the discussion today on oral discovery and mediation and perhaps another topic.

Bianca La Neve: Along with documentary discovery, orders giving directions also provide typically for examinations of the parties to the proceedings. And depending on whether there is a related proceeding, provision may also be included in the order where

examinations from the related proceeding can be relied upon by the parties and form part of the proceeding at issue.

Craig Vander Zee: That's a good point, Bianca, because it could very well be the case that there is an existing proceeding out there wherein parties, perhaps even the same parties to the matter that's now going to be going before the court that your order giving directions is meant to deal with, may have already pursued examination, both documentary and perhaps even oral discovery with the result that if those modes of gathering evidence could be adopted, then the parties may save a significant amount of costs on a going forward basis, let alone the time that is usually required to obtain the evidence. So I think that that's a strong point to consider the litigation environment surrounding what you are doing, to see if you can utilize evidence from other proceedings in a fair, appropriate and proper manner.

Bianca La Neve: And to avoid confusion or later dispute among the parties, if there are examinations from related proceedings that you are going to rely on in your actual proceeding, then you should have a provision in your order giving directions specifically allowing the parties to do so. Now another provision you might consider in your order giving directions is whether you need to conduct a *de bene esse* examination. And this is essentially an examination of a party or a non-party out of court. It should be videotaped so that it can be used at the hearing of the matter, so that the witness's evidence and demeanor can be ascertained by the trial judge or judge hearing the application.

Craig Vander Zee: What's important about putting a provision for this kind of examination in an order giving directions is usually the urgency within which the examination must be obtained. Usually this kind of examination could be someone who might be in a different jurisdiction possibly, and the expectation might be that it may be difficult to get them to this jurisdiction, so you may want to take an examination if it's possible. Also, in situations where there may be mental health considerations for an individual, mental health or physical health considerations where it's quite possible that that person may not be competent at the time of the actual trial or the hearing of the application, and as such, you want to get that evidence up front.

Bianca La Neve: That's right, and also when you are considering examinations of the parties, you should also consider whether there are non-parties to the proceeding that you should be examining. And then you can include a provision in your order giving directions that the parties be granted leave pursuant to Rule 31.10 of the Rules of Civil Procedure to conduct such examinations. And a prime example of a non-party that you would wish to examine is the solicitor who prepared the subject Will in a Will challenge, or a solicitor who has prepared any other Will that is the subject of a Will challenge, because usually in Will challenges, you are not only looking at the Will at issue but you are probably also looking at all other testamentary documents prepared by the deceased person.

Craig Vander Zee: Again, with respect to the examination of a lawyer who has prepared a Will, in that specific circumstance again one of the primary pieces of information that

you are trying to obtain is the intention of the testator in the making of the Will and as such, it's quite possible to look beyond the actual terms of the Will itself if there are any issues with respect to the validity of the Will on whatever basis that objection may be raised. It may be that you need the solicitor's notes and records and have to have an examination to completely find out what the intention of the testator was. Now in dealing with solicitor's notes, records and examinations there's a couple of unique issues that come up. One would be solicitor/client privilege that may attach to records or perhaps even a duty of confidentiality that a solicitor may feel is owed with respect to the file. And that is why you want the provision to be included in the order giving directions such that the person is ordered to be examined and that the issue of solicitor/client privilege is waived with respect to this proceeding. Now in dealing with certain kinds of files, there may be an issue of solicitor's negligence and it may very well be that at the beginning of the proceeding, or even during the discovery stage, whether a solicitor has been negligent in an estate plan including the draft of a Will, may not be known. And as such, you would like to have a waiver of the deemed undertaking rule, Rule 30.1.013, not to be overly technical about it, but that would be the rule, such that any evidence, whether it be by way of oral discovery and/or documentary discovery or production, is not prohibited from being used in another proceeding against that solicitor if a negligence allegation is appropriate. So those are key things to consider at least when you are examining a lawyer as a non-party, but it doesn't have to be limited to a lawyer. It could be an accountant who has the most information on the assets of the estate and feels that without an order that he or she is not prepared to provide the documentation as they are not completely certain as to the proper authority for the estate. That is, who it should all be turned over to, and that's a fair comment in disputes regarding estates and estates' assets where it's highly adversarial.

Bianca La Neve: So when you're seeking to examine non-parties, you should consider serving them with the actual motion or application materials calling for their examination before the hearing, because that gives them a chance to respond to the motion or bring up any concerns they may have about their potential examination. Now when the examination of a non-party is obviously required, such as I would argue in the case of a Will challenge and examining the solicitor who prepared the Will, the court may be content to simply order that the order giving directions is served on this non-party within a specified time period and in a certain manner.

Craig Vander Zee: Aside from considerations for provisions regarding oral discovery, it's crucial to consider whether mediation is going to be a component of the process, at what time it's going to be part of the process and then knowing that, or at least having considered that, considering your order giving directions with or without a mediation.

Bianca La Neve: So mediation is mandatory in certain proceedings commenced in the City of Toronto, in the City of Ottawa and in the County of Essex. And perhaps, Craig, you can take us through the various instances when such mediation is mandatory.

Craig Vander Zee: Well Rule 75.1.02, again on a technical basis, of the Rules of Civil Procedure, covers off mandatory mediations and the requirement for them. And in short,

it deals with contested estate proceedings and specifically, when there is a contested passing of accounts, when there is contested issues regarding the formal proof of a testamentary instrument, objections regarding a Certificate of Issuance, a return of certificate, claims against the estate. And that's natural that those would be considered as contested estate proceedings and the parties would want to have mediation. But it also applies in the instance of a dependent support claim under Part V of the *Succession Law Reform Act*, and issue under the *Substitute Decisions Act*, various other Acts including the *Absentees Act*, the *Charities Accounting Act*, the *Estates Act*, the *Trustee Act* or the *Variation of Trust Acts* and Section 5.2 of the *Family Law Act*. So you can see that pretty much almost every kind of contentious estate litigation in the cities of Toronto, Ottawa and the County of Essex are going to be covered by mandatory mediation.

Bianca La Neve: And when you have to include mediation as part of your order giving directions in these jurisdictions, you'll typically include a provision regarding the conduct of the mediation and what issues are actually going to be mediated by the parties.

Craig Vander Zee: In addition to that as well, Bianca, the logistics of the mediation can be covered off in your order giving directions. A simple but important thing could be the date and location and the time of the mediation itself and so a provision could be included that those items would be, or points would be agreed to on a mutual basis between all the parties. And also the issue as to costs on the mediation can be dealt with, either because the parties don't want to share the cost of the mediator, or because they may not be able to, there could be a provision that includes the payment of the mediator and the location costs can be paid for out of the estate at first instance. And the ultimate responsibility or liability for those costs can be left to the judge hearing the application or the trial.

Bianca La Neve: And remember, even if you're in a jurisdiction where mediation is not mandatory, such as, let's say bringing a proceeding in Brampton, you could still negotiate with the parties or ask the judge to include a provision in the order giving directions calling for mediation, especially if you think that will lead to an early settlement of the matter in a timely and cost-efficient manner.

Craig Vander Zee: A last thought on mediation is that while we are talking about it in the context of an order giving directions, even where it is mandatory and perhaps in situations where it's not mandatory, it can be discussed and pursued outside the context of the proceeding itself. It may very well be that counsel and the parties, knowing that a matter is going to go to mandatory mediation, are prepared to pursue the mediation, albeit with a mediator that they both agree upon and on a date and time they agree upon, without the need of going to court to start the process. They could agree that documents be disclosed to one another even on a "without prejudice" basis, and that the mediation actually is really the first step outside of the exchange of documentation. And this could be pursued where the parties have an understanding from the get go that a settlement or resolution is possible, and is favorable to all those concerned. Now we had hoped to talk about more today, Bianca, but I suppose we were just having too much fun on the issues of discovery and mediation, and at this point, I think we'll end today's session and pick it up in the next.

Bianca La Neve: Sounds great.

This has been Hull on Estates with the lawyers of Hull & 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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