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ANNOTATED ONTARIO ESTATES STATUTES

Schnurr

Release No. 4, November 2024

The *Annotated Ontario Estates Statutes* is a comprehensive reference that brings together, in a single loose-leaf volume, easy access to the legislation and case law critical to the practice of estates law in Ontario. The text includes complete annotations of estates-related legislative provisions, and section-by-section commentary written by a leading practitioner in estates law.

What's New in this Update

This release features updates to the case law and commentary in Chapters 1 (Absentees Act), 2 (Accumulations Act), 4 (Children's Law Reform Act), 8 (Estates Act), 10 (Evidence Act), 11 (Family Law Act) and 12 (Health Care Consent Act).

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Highlights

Chapter 4 – Children's Law Reform Act – In *MacDonald v. Gabriel*, 2024 CarswellOnt 3298 (Ont. S.C.J.), the Court declined to admit two DNA paternity test reports as evidence. The test reports were introduced into the record by appending them as exhibits to the parties' affidavits, into evidence where no order had been made pursuant to s. 17.2 (1) granting leave to submit the results into evidence. Absent a provision in a statute or the *Rules*, and absent an agreement of the parties with the court's approval, attaching a DNA test report to a party's affidavit does not elevate the report into admissible evidence. Even where a DNA test report is admitted into evidence pursuant to a statute or the *Rules*, or on consent, there still must be compliance with the *Rules* relating to expert opinion evidence.

Chapter 12 – Health Care Consent Act – This update discusses a Form G application under the *Health Care Consent Act* ("*HCCA*"), which requires the Ontario Consent and Capacity Board to determine whether a substitute decision maker is acting in accordance with the principles of giving or refusing consent specified in s. 21 of the *HCCA*. In *WR, Re*, 2024 CarswellOnt 11026 (Ont. Cons. & Capacity Bd.), the Board analyzed whether a daughter's refusal to consent to her mother's doctor's treatment plan was in compliance with s. 21, consisting of two branches: (1) whether the incapable person expressed a prior capable wish applicable to the circumstances; and (2) whether the substitute decision maker's decision is in the incapable person's best interests.

The doctor gave evidence that the mother's dementia had left her unable to communicate, walk or understand language. The mother was fed through a nasal-gastric tube. The doctor felt that the mother already had a very poor quality of life that would grow worse as her dementia advanced and her physical condition weakened. For this reason, the doctor felt that prolonging the mother's life with a tracheostomy and ongoing mechanical ventilation would only increase her suffering without improving her condition. It was more humane to transition the mother to palliative care.

There was no concrete evidence that, while still capable, the mother had expressed a clear wish, that was applicable to the circumstances. The mother and daughter had a brief conversation where the mother expressed that she "wanted to be kept alive". The panel determined that this expression was vague, unsubstantiated and not in contemplation of the mother's circumstances, and did not qualify as a prior capable wish under s. 21(1). The panel determined that the benefit of the proposed treatment outweighed the risks of any other alternative. The best interests' analysis required the balancing of quality of life with duration of life. As the panel determined that the daughter had not fulfilled her obligation to consider all of the relevant factors in making treatment decisions on behalf of the mother, the panel substituted its opinion about the mother's best interests for that of the daughter.