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ESTATE LITIGATION

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Release No. 4, June 2023

Estate Litigation, 2nd Edition, is a comprehensive, practical work covering all facets of estate litigation including mental incompetency disputes, challenges to wills, *Family Law Act* claims, passing of executors' accounts, presumption of death and dependant support claims. The publication includes extensive precedents along with relevant statutory material.

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What’s New in this Update:

In this release, a new memo has been added: What is the Minimal Evidentiary Threshold in Will Challenges? In addition, two memoranda in Appendix IF (Issues in Focus) have been updated (Will Revocation Clauses—Whether the clause ‘I revoke all former wills & testamentary dispositions’, contained in a will, has the effect of revoking beneficiary designations?; What is the role of the Public Guardian and Trustee (“PGT”) in circumstances pertaining to the determination of one’s mental capacity, and by extension their susceptibility to harm due to undue influence, misconduct, neglect, etc., pursuant to the Substitute Decisions Act, 1992 (“SDA, 1992”)?).

This release also contains updates to the case law in Chapter 21 (Solicitors’ Negligence In Estate Matters). In addition, the Words and Phrases tab has also been updated.

Highlights Include:

Chapter 21—Solicitors’ Negligence In Estate Matters—K was named co-executor of her late brother’s estate, as was their niece, B—B misappropriated money from estate, and while judgment against her was extant, it appeared that further recovery was unlikely—While misappropriations were ongoing, co-executors were being advised by legal counsel—K and estate brought action against law firm for advice given—Case management judge denied K additional \$200,000 from estate to pay for her defence of claim brought by estate against her—K appealed, claiming she did not have means to fund legal representation and, without requested funding, would be left to represent herself at trial —Appeal allowed in part; if estate proceeded against K first, she would have access to further \$150,000 for her defence; order was to take effect only if estate insisted on proceeding with K action before law firm action, and was only to cover legal expenses incurred after date on which order was to take effect—There was disagreement with K’s analysis that law would ordinarily allow such funding to be made available to her in advance of action; however, this was most unusual case—It was not alleged that K misappropriated any money or that she benefited from B’s misappropriations—It was accepted that, without funding, K would be forced to represent herself at trial and may well lose case that she could win if she was represented by counsel, and be left owing judgment of more than \$1,000,000; that did not appear, to this court, to be right. *Kerswell v. Mayhew*, 2022 CarswellAlta 3108, 2022 ABCA 349, 82 E.T.R. (4th) 19.

Words and Phrases—WP:174.50 Disability—The definition of “disability” in s. 2 of the Accessibility for Ontarians with Disabilities Act, 2005 makes it clear that it encompasses far more than just a physical disability and includes the mental and cognitive impairments: *Hejka v. The Regional Municipality of Durham*, 2022 ONSC 2233, 2022 CarswellOnt 4936 (Ont. Div. Ct.), at para. 43 H. Sachs J., Lederer J., and J.A. Ramsay J.

ProView Developments

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