

# Table of Contents

<i>Dedication</i> .....	iii
<i>Preface</i> .....	v
<i>Table of Cases</i> .....	xvii
<i>List of Estate Rules</i> .....	xxxii
<b>PART I: INTRODUCTION</b> .....	<b>1</b>
<b>Chapter 1 Information to Obtain at the First Client Meeting</b> .....	<b>3</b>
Copy of the Will(s) .....	5
Inventory of the Estate.....	6
Client's Personal Circumstances .....	6
Will Checklist.....	7
Retainers.....	11
Mirror and Mutual Wills in Joint Estate Planning.....	12
Considerations Before Accepting Joint Retainers to	
Draft Mirror Wills .....	13
Client Consent to the Joint Retainer .....	14
Separate Representation .....	15
<b>Chapter 2 Legal Issues in the Challenge to the Will</b> .....	<b>17</b>
Formal Validity/Due Execution.....	17
Due Execution of Formal Wills.....	19
Witnesses to the Will.....	20
Position of Testator's Signature.....	20
Mandatory Compliance and Substantial Compliance.....	21
Historical Background — Mandatory	
Compliance .....	22
Holograph Wills.....	24
Wills of Members of the Armed Forces and Mariners,	
and International Wills .....	26
Relevant <i>Rules of Civil Procedure</i> .....	26
Establishing Date of Execution .....	26
Substantive Validity: Testamentary Capacity, Undue	
Influence, Fraud and Mistake .....	27
Testamentary Capacity .....	28
The Test for Testamentary Capacity.....	29
Capacity Assessments.....	32
Onus and Burden of Proof.....	33
Knowledge and Approval and Mistake .....	33

Suspicious Circumstances .....	34
Undue Influence.....	36
Fraud.....	38
The Role of Professionals in Protecting Individuals with a Potential for Diminished Capacity and Undue Influence .....	38
The Drafting Solicitor's Role .....	38
The Medical Practitioner's Role .....	39
Retrospective Capacity Assessments: The Admissibility of Expert Opinion Evidence .....	40
Form of Opinion.....	42
Retrospective Assessments and Settlements .....	43
Evidentiary Issues in a Will Challenge.....	43
When Formal and Substantive Validity Do Not Matter:	
Public Policy and Testamentary Freedom.....	44
Limits to Testamentary Freedom .....	45
Void for Public Policy.....	46
Consequences of a Valid Will: Rights <i>In Rem</i> .....	47
Estate Trustee's Duty to Propound the Will.....	48
Standing in Will Challenges.....	48
Notice of Proceedings .....	49
Estate Litigation in the Context of a Series of Wills and Many Interested Parties.....	50
Mediation .....	51
Know the Mediator.....	51
What is the Purpose of the Mediation?.....	52
Documentary Preparation for Mediation.....	52
Preparing One's Client .....	53
Drafting Minutes of Settlement in Will Challenges .....	54
Summary Judgment.....	55
Intestacy .....	56
Limitation Periods .....	58
Discoverability and Intervening Factors to Toll the Running of the Limitation Period .....	58
Exception to Discoverability in the <i>Trustee Act</i> .....	60
<b>Chapter 3 General Notes on Practice .....</b>	<b>61</b>
Probate .....	61
Proof in Common Form .....	61
Proof in Solemn Form .....	61
Proof of Lost or Destroyed Wills .....	62
Presumption of Revocation .....	62

Procedural Rules for Proving a Lost or Destroyed Will .....	62
The Test for Proving a Lost or Destroyed Will .....	63
Conditional Revocation .....	64
Admissible Evidence for Proving the Contents of a Lost or Destroyed Will .....	64
Rules for Commencement of Proceedings.....	65
Appointment of Estate Trustee — Non-Contentious .....	65
Non-Contentious Proceedings — Generally.....	65
Contentious Proceedings — Generally.....	66
Manner of Proof Determined by the Court .....	66
Objection to Issuing a Certificate of Appointment..	66
Application or Motion for Directions.....	67
Estate Administration During Litigation .....	67
Other Interested Parties — Request for Notice of Commencement of Proceeding .....	67
<b>PART II: NON-CONTENTIOUS PROCEEDINGS .....</b>	<b>69</b>
<b>Chapter 4 Will Deposit.....</b>	<b>71</b>
Deposit for Safekeeping .....	71
Depositing a Will with the Registrar .....	72
Locating a Deposited Will.....	73
Accessing a Deposited Will .....	73
Digital Resources for Will Registration .....	75
Procedure on Applications for Certificates of Appointment of Estate Trustees.....	75
Material Required from Estate Registrar.....	75
Where Certificate Shows Deposited Will or Codicil.....	76
Wills Deposited in Other Canadian Jurisdictions .....	76
Forms .....	78
<b>Chapter 5 Appointing an Estate Trustee in Ontario .....</b>	<b>79</b>
Certificates of Appointment .....	79
Application for Certificate of Appointment .....	80
Certificate of Appointment of Estate Trustee with a Will .....	81
Certificate of Appointment of Succeeding Estate Trustee with a Will.....	87
Certificate of Appointment of Estate Trustee without a Will.....	88
Certificate of Appointment of Succeeding Estate Trustee without a Will .....	90

Certificate of Appointment of Foreign Estate Trustee's Nominee as Estate Trustee without a Will.....	91
Confirmation by Resealing of Appointment of Estate Trustee with or without a Will.....	92
Certificate of Ancillary Appointment of Estate Trustee with a Will.....	93
Certificate of Appointment of Estate Trustee During Litigation .....	93
General Procedure on Applications for Certificates of Appointment of Estate Trustees .....	94
Payment of Estate Administration Tax.....	96
Issuing, Authenticating and Confirming a Certificate of Appointment of Estate Trustee.....	98
Issuing a Certificate of Appointment of Estate Trustee..	98
Authentication of Certificate of Appointment .....	99
Confirmation of Estate Trustees.....	99
Forms .....	100
<b>Chapter 6 Orders for Assistance - Kinds of Orders.....</b>	<b>103</b>
Production of Instruments Purporting to be Testamentary .....	104
Examination of Persons Touching Instruments Purporting to be Testamentary.....	105
Order to Accept or Refuse Appointment .....	105
Order to Consent or Object to Proposed Appointment.....	106
Order to File Statement of Assets of the Estate.....	107
Order for Further Particulars .....	108
Order to Beneficiary Witness.....	109
Order to Former Spouse .....	110
Order to Pass Accounts.....	111
Order for Other Matters.....	112
Procedure for Obtaining Orders for Assistance.....	112
Forms .....	113
<b>PART III: CONTENTIOUS PROCEEDINGS.....</b>	<b>115</b>
<b>Chapter 7 Revocation or Return of Certificate of Appointment .....</b>	<b>117</b>
Revocation of Certificate of Appointment .....	118
Return of Certificate .....	118
Motion for Return of Certificate.....	118
Effect of the Order .....	119
Motions for Directions.....	120
Release of Certificate .....	120

**Chapter 8 Claims Against the Estate Pursuant to the Estates Act ..... 123**

- Notice of Contestation ..... 124
- Application for Order Allowing Claim ..... 124
  - Claim Against Estate..... 124
  - Limitation Periods ..... 125
  - Date and Manner of Trial..... 126
- Powers and Orders of a Court..... 127
  - Enforcement of Judgment for Established Liquidated Claims..... 127
  - Powers of the Court Relating to Unliquidated Claims..... 127
- Solicitor of Record..... 127
- Forms ..... 128

**Chapter 9 Objection to Issuing a Certificate of Appointment..... 129**

- Notice of Objection..... 129
  - Applicants to Whom a Notice of Objection Applies .... 130
  - Interest of the Objector ..... 130
  - Grounds for Objection ..... 130
- Vacating a Notice of Objection ..... 131
- Notice to Applicant..... 131
- Notice to Objector ..... 131
- Motion for Directions ..... 132
- Practice Points ..... 132
  - Benefits of a Notice of Objection ..... 132
  - Preventing Distributions by the Applicant ..... 133
  - Overcoming Delay by the Applicant..... 133
  - Vacating a Notice of Objection ..... 133
  - Where a Notice of Objection Does Not Apply ..... 134
- Forms ..... 134

**Chapter 10 Certificate of Appointment of Estate Trustee During Litigation or Litigation Guardian..... 135**

- Certificate of Appointment of Estate Trustee During Litigation ..... 135
- Bond Requirements..... 137
- Appointment of Litigation Administrator..... 138
- Appointment of Litigation Guardian..... 138
  - Litigation Guardians of Mentally Incapable Persons ... 139
  - Litigation Guardians of Minors ..... 139
  - Absenteeism ..... 140
- Procedural Rules Where a Party is Represented by a Litigation Guardian ..... 140

Forms .....	141
<b>Chapter 11 Application or Motion for Directions.....</b>	<b>143</b>
Service .....	144
Order .....	145
Mediation .....	146
Pleadings.....	147
Procedure Where Statement of Claim Served.....	147
Effect of Failure to File Pleadings .....	147
Submission of Rights to Court .....	148
Legal Issues and Practice Points.....	149
Legal Issues.....	149
Practice and Procedure.....	149
Trial by Jury .....	149
Forms .....	150
<b>Chapter 12 Submitting Rights to the Court .....</b>	<b>151</b>
Statement of Submission of Rights.....	151
Application or Motion for Directions.....	152
Statement of Claim .....	154
Forms .....	154
<b>Chapter 13 Evidence in Contentious Proceedings .....</b>	<b>155</b>
Onus .....	156
Medical Witnesses as Evidence in Contentious	
Proceedings .....	157
Examination for Discovery in Contentious Proceedings.....	158
Justice Perell’s “Evidence Cheat Sheet” .....	161
Corroboration .....	161
What Constitutes Meaningful Corroboration .....	163
Lay Witness Evidence .....	164
Admissibility of Business Records .....	167
Admissibility of Expert Opinion Evidence Generally ...	168
The Use and Admissibility of Retrospective Opinions	
on Testamentary Capacity.....	170
Hearsay Generally.....	172
Past Recollection Recorded/Present Recollection	
Revived.....	173
The Rule in <i>Browne v. Dunn</i> .....	175
<b>Chapter 14 Passing of Accounts.....</b>	<b>177</b>
Who May Pass Accounts?.....	177
Obligations to Keep and Pass Accounts .....	178
Attorney and Guardian Accounts .....	178
Executor, Administrator and Trustee Accounts .....	180

Practice Points .....	181
Notice of Application to Pass Accounts .....	182
Affidavit Verifying Accounts .....	182
Service .....	183
Notice of Objection to Accounts .....	184
Valuation, Control, and Custody and Inventory of the Assets .....	184
Form of Accounts .....	185
Form of Accounting for Corporate Information.....	187
Disclosure of Corporate Information to Beneficiaries .....	188
Passing of Accounts — Without a Hearing .....	189
Contested Passing of Accounts — With a Hearing .....	190
Compulsory Passing of Accounts .....	192
Voluntary Passing of Accounts.....	193
Costs of Audit .....	194
Powers of Court.....	195
<b>Chapter 15 Preparation for Mediation, Pre-Trial or Trial.....</b>	<b>197</b>
Mandatory Mediation .....	197
Preparation for Mediation.....	198
Pre-Trial or Trial .....	199
Trial of Issues .....	201
Trial Considerations.....	201
Closing Argument .....	203
Judgment .....	203
Settlement .....	204
Forms .....	205
<b>Chapter 16 Locating Missing Beneficiaries .....</b>	<b>207</b>
Legal Obligation of the Estate Trustee to Locate Missing Heirs.....	207
Defining “Reasonable Inquiries” .....	208
The Source of the Beneficiary Identification Issue .....	209
Distribution to Beneficiaries Under Terms of a Will....	209
Distribution to Beneficiaries on Intestacy .....	210
Surviving Spouse — No Issue .....	210
Surviving Spouse — With Issue.....	211
No Spouse — Surviving Issue .....	211
No Spouse, No Surviving Issue — Ascendants and Collaterals.....	212
How to Identify a Missing Heir .....	212
Initial Searches.....	212
A Professional Researcher .....	213

How to Locate and Notify a Missing Heir .....	214
Handling Missing Persons: The <i>Declarations of Death Act</i> and the <i>Absentees Act</i> .....	215
<i>Declarations of Death Act, 2002</i> .....	215
<i>Absentees Act</i> .....	215
Court Application to Ascertain Heirs .....	217
Liability .....	218
<b>Chapter 17 Costs in Estate Litigation .....</b>	<b>219</b>
The Modern Approach to Costs in Estate Litigation .....	221
<i>McDougald Estate v. Gooderham</i> — When Should the Estate Pay Costs? .....	222
The New Approach in Action .....	223
Does the Estate Pay All Costs? .....	225
<i>Sweetnam v. Williamson Estate</i> : Consequences of the New Approach.....	226
Conclusion .....	229
<b>Chapter 18 Breach of Fiduciary Duty Claims .....</b>	<b>231</b>
Parent/Child Estrangement.....	232
Parental Obligation .....	233
Limitation Periods .....	233
Evidence .....	234
<b>Chapter 19 The Deemed Undertaking Rule and Estate Litigation.....</b>	<b>237</b>
Underlying Principles — <i>Juman v. Doucette</i> .....	238
Deemed Undertaking Rule in Estate Litigation .....	238
Order for Examination of Non-Party Witness .....	239
Case Law .....	240
<b>Chapter 20 Unjust Enrichment in Will Challenge Matters.....</b>	<b>243</b>
Unjust Enrichment in Canada .....	244
The Trilogy: <i>Murdoch v. Murdoch, Rathwell v. Rathwell</i> and <i>Pettkus v. Becker</i> .....	245
Developments Since the Trilogy .....	246
Remedies .....	247
Canadian Case Law .....	248
<i>Belvedere v. Brittain Estate</i> .....	248
<i>McMillan v. Johnson Estate</i> .....	250
<i>Lata v. Rush</i> .....	251
<i>Lavoie v. Trudel</i> .....	252
Conclusion .....	253
<b>Chapter 21 Solicitor’s Negligence.....</b>	<b>255</b>
Standard of Care and the Principles of Negligence .....	256



Duty of Care.....	259
The Nature of the Retainer .....	262
Duty to Advise Outside the Express Terms of the Retainer .....	264
The Ontario Retainer Experience: <i>Hall v. Bennett Estate</i> ....	265
Practical Strategic Steps to Consider .....	266
Examining Drafting Solicitor.....	268
Examination Questions .....	269
General Questions .....	269
Specific Questions .....	269
Medical Evidence .....	270
Particulars of Execution .....	270
Facts Relating to Instructions Given to Solicitor on Preparation and Execution of Will .....	270
Conclusion .....	272
<b>Chapter 22 Acting for Children and the Mentally Incapable.....</b>	<b>273</b>
Defining Mental Capacity .....	273
The <i>Substitute Decisions Act, 1992</i> .....	273
Practical Considerations and Common Law Interpretations.....	274
The <i>Rules of Civil Procedure</i> .....	275
The Law Society <i>Rules of Professional Conduct</i> .....	277
Applying Concepts of Mental Capacity to Practice .....	278
Stage #1: Initial Meeting and Retainer .....	279
Capacity to Instruct Counsel.....	281
Stage #2: Commencing Litigation/Appointment of a Litigation Guardian .....	283
Role of the Office of the Children’s Lawyer .....	285
Role of the Office of the Public Guardian and Trustee.....	285
Role of a Litigation Guardian.....	286
Role of the Lawyer .....	287
Stage #3: Potential Issues During Litigation.....	287
Taking Instructions .....	287
Competency of Counsel .....	287
Confidentiality .....	288
Disagreement Between Clients and Their Legal Representatives .....	289
Possibility of Abuse.....	289
Changes to Capacity .....	290
Other Issues for Consideration .....	290
Stage #4: Discoveries and Trial .....	290

Stage #5: Settlement.....	294
<b>Chapter 23 <i>Estate Administration Tax Act, 1998: Estate Information</i></b>	
<b>Returns .....</b>	<b>297</b>
The 2015 Regulation .....	297
Filing Requirement .....	298
The Estate Information Return .....	298
Inclusion of Assets .....	299
Valuation .....	301
Additional Returns/Amendments .....	301
Valuation Unknown.....	302
Incorrect or Incomplete Information .....	302
Subsequently Discovered Property.....	302
Assessment.....	302
Contesting the Assessment .....	303
Liability Issues .....	303
Offences .....	304
Drafting Protection .....	304
Reporting Letters .....	304
<b>Appendices: Table of Contents .....</b>	<b>307</b>
Appendix 1 Precedents and Court Forms .....	309
A. Precedents.....	309
B. Court Forms.....	345
Appendix 2 Fees Payable in Estates Matters .....	427
Appendix 3 Procedural Flowchart .....	429
Appendix 4 Glossary.....	431
Appendix 5 Directory of Estate Registrars and Ontario Courts (General Division) .....	435
<i>Index</i> .....	445