

# INDEX

- absenteeism, appointment of committee, and, 140
- Absentees Act*
  - absentee defined, 140
  - appointment of committee, and, 140
  - locating missing beneficiaries, 215-217
- accounts, passing of
  - affidavit verifying accounts, 182-183
  - assets, valuation, control, custody and inventory of, 184-185
  - audit, costs of, 194-195
  - compulsory, 192-193
  - corporate information
    - disclosure to beneficiaries, 188-189
    - form of accounting for, 187-188
  - court, powers of, 195
  - form of accounts, 185-187
  - notice of application to pass accounts, 182
  - notice of objection to accounts, 184
  - obligation to keep and pass accounts
    - attorney and guardian accounts, 178-180
    - executor, administrator and trustee accounts, 180-181
  - practice points, 181-182
  - service, 183
  - voluntary, 193-194
  - who may pass accounts, 177-178
  - with hearing, 190-192
  - without hearing, 189-190
- administrator *pendente lite*, *see* certificate of appointment of estate trustee during litigation
- admissibility of expert opinion, generally, 40-41, 168-170
- appointment of estate trustee in non-contentious proceedings
  - certificates of appointment
    - application for, 80-81
    - authenticating certificate, 99
    - confirmation by resealing of appointment of estate trustee with or without will, 92-93
    - confirmation of estate trustees, 99-100
    - during litigation, 93-94
    - estate trustee with a will, 81-87
    - estate trustee without a will, 88-90
    - foreign estate trustee's nominee as estate trustee without a will, 91-92
    - generally, 79-80
    - issuing certificate, 98-99

- order to accept or refuse appointment, 105-106
  - order to consent or object to proposed appointment, 106-107
  - succeeding estate trustee with a will, 87-88
  - succeeding estate trustee without a will, 90-91
- estate administration tax, payment, 96-98
- Forms, 100-102, Appendix 1B
- general procedure, 94-96
- generally, 79
- material required from estate Registrar, 75-76
- where certificate shows deposited will or codicil, 76
- armed forces, members, wills of, 26
- beneficiaries, locating missing
  - beneficiary identification issue
    - distribution on intestacy, 210-212
    - distribution under will, 209
  - court application to ascertain heirs, 217
  - how to identify missing heir
    - initial searches, 212-213
    - professional researcher, 213-214
  - how to locate and notify missing heir, 214
  - legal obligation to locate
    - generally, 207-208
    - reasonable inquiries, defined, 208-209
  - liability, 218
  - missing persons
    - Absentees Act*, 215-217
    - Declarations of Death Act, 2002*, 215, 216, 217
- bond requirements for appointment of estate trustee during litigation
  - Bond – Insurance or Guarantee Company, Form 74.32, Appendix 1B
  - Bond – Personal Sureties, Form 74.33, Appendix 1B
  - generally, 137-138
- breach of fiduciary duty claims
  - generally, 231-232
  - parent/child estrangement, 232-233
  - parental obligation
    - evidence, 234-235
    - generally, 233
    - limitation periods, 233-234
- Browne v. Dunn*, rule in, 175
- business records, admissibility, 167-168
- capacity assessments
  - Capacity Assessment Office (CAO), 276-277
  - form of opinion, 42-43
  - generally, 32
  - retrospective assessments, admissibility of expert evidence, 40-41
- certificate of appointment of estate trustee during litigation

- appointment during litigation, 135-137
- bond requirements, 137-138
- Forms, 141, Appendix 1B
- litigation administrator, appointment, 138
- litigation guardian
  - absenteeism, 140
  - generally, 138-139
  - mentally incapable persons, 139
  - minors, 139-140
  - procedural rules, and, 140-141
  - Request for Appointment of Litigation Guardian, Form 7A, Appendix 1B
- objection to issuance
  - Forms, 134, Appendix 1B
  - motion for direction, 132
  - notice of objection, 129-131
  - notice to applicant, 131
  - notice to objector, 131-132
  - practice points, 132-134
  - vacating notice of objection, 131
- return
  - effect of order, 119
  - motion for directions, 120
  - motion for return of certificate, 118-119
  - release of certificate, 120-121
- revocation, 117-118
- certificate of appointment of estate trustee in non-contentious proceedings
  - application for, 80-81
  - authenticating certificate, 99
  - confirmation by resealing of appointment of estate trustee with or without will, 92-93
  - confirmation of estate trustees, 99-100
  - during litigation, 93-94
  - estate administration tax, payment, 96-98
  - estate trustee with a will, 81-87
  - estate trustee without a will, 88-90
  - foreign estate trustee's nominee as estate trustee without a will, 91-92
  - Forms, 100-102, Appendix 1B
  - general procedure, 94-96
  - generally, 79-80
  - issuing certificate, 98-99
  - succeeding estate trustee with a will, 87-88
  - succeeding estate trustee without a will, 90-91
  - where certificate shows deposited will or codicil, 76
- Children's Lawyer, Office of the (OCL)
  - generally, 140, 141
  - notice of application for appointment of estate trustee with will, 83, 87

- notice of proceedings, 50
- role of, 285
- service of notice of application on, 184
- claims against estate under Estates Act
  - application for order allowing claim
    - claim against estate, 124
    - date and manner of trial, 126
    - limitation periods, 125-126
  - Forms, 128, Appendix 1B
  - generally, 123
  - notice of contestation, 124
  - powers and orders of court
    - enforcement of judgment for established liquidate claims, 127
    - unliquidated claims, 127
  - solicitor of record, 127-128
- common form, proof in, 61
- compliance with statutory provisions, mandatory and substantial, 21-24
- corroboration, 161-164
- costs in estate litigation
  - generally, 219-221, 229
  - McDougald Estate v. Gooderham*, when estate should pay costs, 222-225
  - Sweetnam v. Williamson Estate*, new approach to costs awards, 226-229
  - whether estate pays all costs, 225-226
- Declarations of Death Act, 2002*, 215, 216, 217
- deemed undertaking rule
  - case law, 240-242
  - evidence to which rule applies, 237
  - exceptions to rule, 238
  - generally, 238-239
  - Juman v. Doucette* – underlying principles, 238
  - order for examination of non-party witness, 239-240
- deposit of will, see will deposit
- directions, application or motion for
  - Forms, 150, Appendix 1B
  - generally, 143-144
  - legal issues, 149
  - mediation, 146-147
  - order, 145-146
  - pleadings, 147
  - practice and procedure, 149
  - service, 144-145
  - statement of claimed served, where failure to file pleadings, 147-148
  - submission of rights to court, 148-149
  - trial by jury, 149-150
- directory of estate registrars and Ontario Superior Courts of Justice, Appendix 5
- discoverability, limitation periods and, 58-60

- discovery where litigation guardian has been appointed, 290-294
- Estate Administration Tax Act, 1998*
  - 2015 regulation, 297
  - additional returns/amendments
    - incorrect or incomplete information, 302
    - subsequently discovered property, 302
    - valuation unknown, 302
  - assessment, 302-303
  - contesting the assessment
    - drafting protection, 304
    - liability issues, 303
    - offence, 304
    - reporting letters, 304-306
  - estate information return, 298-299
  - filing requirement, 298
  - inclusion of assets, 299-301
  - valuation, 301
- estate administration tax, payment, 96-98
- estate information returns, 298-299
- estate trustee during litigation, see certificate of appointment of estate trustee
  - during litigation
- estate trustee's duty to propound will, 48
- Estates Act*, see also claims against estate under *Estates Act*
  - s. 2 – depositing will for safekeeping with registrar, 72
  - s. 6 – security bond required, 85, 137
  - s. 8 – trial by jury, 149-150
  - s. 9 – production of instruments purporting to be testamentary, 104-105
  - ss. 21 and 22 – caveats, 129
  - s. 23 – parties to a will challenge, 48-49, 178
  - s. 28 – appointment of estate trustee during litigation, 136
  - s. 29 – parties entitled to be appointed estate trustee, 65-66
  - s. 32 – valuation of deceased's property, 97
  - s. 35 – where bond required, 85, 137
  - ss. 44 and 45 – claims against estate, 123-125, 127
  - s. 49 – powers of judge on passing of accounts, 180-181, 185
  - s. 52(3) – security required before letters of administration sealed, 93
- evidentiary issues
  - admissible evidence for proving contents of lost or destroyed wills, 64-65
  - “evidence cheat sheet”
    - admissibility of expert opinion, generally, 168-170
    - Browne v. Dunn*, rule in, 175
    - business records, admissibility, 167-168
    - corroboration, 161-164
    - generally, 161
    - hearsay, 172
    - lay witnesses, 164-167

- past recollection recorded/present recollection revived, 173-175
- retrospective opinions on testamentary capacity, 170-172
- examination for discovery, 158-161
- expert opinion evidence, admissibility, 40-41, 168-170
- generally, 43-44, 155-156
- medical witnesses, 157-158, 166
- onus, 156-157
- expert opinion, see also capacity assessments
  - admissibility of evidence generally, 40-41, 168-170
  - medical witnesses, 157-158, 166
  - retrospective assessment, and, 43
  - retrospective opinions on testamentary capacity, 170-172
- fees payable in estate matters, Appendix 2
- fiduciary duty, see breach of fiduciary duty claims
- first client meeting, information to obtain
  - consanguinity, 5
  - copy of will(s), 5-6
  - generally, 3-5
  - inventory of estate, 6
  - likely parties, 3-4
  - personal circumstances of client, 6
  - retainer, 11-12
  - will checklist, 7-11
- foreign estate, certificate of appointment of estate trustee without will
  - Forms, 102, Appendix 1B
  - generally, 91-92
- formal validity/due execution
  - armed forces, mariners, international wills, 26
  - compliance, mandatory and substantial, 21-24
  - formal wills, due execution, 19-21
  - generally, 17-18
  - holograph wills, 24-25
  - Rules of Civil Procedure*, 26-27
- Forms, Appendix 1B
- fraud
  - allegations, unfounded, costs consequences, 149
  - due execution of formal wills, 19
  - revocation of certificate of appointment, and, 118
  - Statute of Frauds*, 22, 244
  - substantive validity of will, and, 27, 38
- glossary, Appendix 4
- Hall v. Bennett Estate*
  - nature and extent of retainer agreement, 265-266
  - test for testamentary capacity, 29-30
- hearsay evidence
  - generally, 172

- past recollection recorded/present recollection revived, 173-175
- heirs, missing, see missing beneficiaries, locating
- holograph wills
  - affidavit attesting to handwriting and signature of deceased, Form 74.9, 84, Appendix 1B
  - execution, 19-20
  - generally, 5, 7, 24-25
  - validity, 17-18
- in rem* rights, 47
- independent legal advice, 12, 13, 14, 55, 204
- international wills, 26, 77
- intestacy, 56-58
- joint retainer
  - client consent to, 14-15
  - considerations before accepting, 13-14
  - duty of lawyer, 11-12
  - independent legal advice, 12
  - separate representation, vs., 15
- Juman v. Doucette* – underlying principles of deemed undertaking rule, 238
- limitation periods, 58-60
- litigation administrator, appointment, 138
- litigation guardian
  - absenteeism, 140
  - appointment and commencement of litigation, 283-287
  - generally, 138-139
  - mentally incapable persons, 139
  - minors, 139-140
  - procedural rules, and, 140-141
  - Request for Appointment of Litigation Guardian, Form 7A, Appendix 1B
  - role of, 286
- “litigation-proof” will or trust – strategic steps, 266-268
- lost or destroyed wills, proof of
  - evidence, admissible, for proving contents, 64-65
  - presumption of revocation, 62
  - procedural rules, 62-63
  - revocation, conditional, 64
  - test, 63-64
- mariners, wills of, 26
- McDougald Estate v. Gooderham*, when estate should pay costs, 222-225, 229
- mediation, see preparation for mediation, pre-trial or trial
- mentally incapable persons, acting for
  - generally, 273
  - litigation guardians of, 139
  - mental capacity defined
    - Law Society Rules of Professional Conduct, 277-278
    - practical considerations and common law interpretations, 274-275

*Rules of Civil Procedure*, 275-277

*Substitute Decisions Act, 1992*, 273-274

practice

Stage #1: initial meeting and retainer, 279-283

Stage #2: commencing litigation/appointment of litigation guardian, 283-287

Stage #3: potential issues during litigation, 287-290

Stage #4: discoveries and trial, 290-294

Stage #5: settlement, 294-296

role of professionals in protecting those with diminished capacity

drafting solicitor's role, 38-39

medical practitioner's role, 39-40

minors, *see also* mentally incapable persons, acting for

litigation guardians of, 139-140

minutes of settlement in will challenges, drafting, 54-55

mirror wills in joint estate planning

considerations before accepting joint retainers to draft, 13-14

generally, 12-14

mistake in signing, 33

missing beneficiaries, locating

beneficiary identification issue

distribution on intestacy, 210-212

distribution under will, 209

court application to ascertain heirs, 217

how to identify missing heir

initial searches, 212-213

professional researcher, 213-214

how to locate and notify missing heir, 214

legal obligation to locate

generally, 207-208

reasonable inquiries, defined, 208-209

liability, 218

missing persons

*Absentees Act*, 215-217

*Declarations of Death Act, 2002*, 215, 216, 217

mutual wills in joint estate planning, 12-14

negligence of solicitor

duty of care, 259-262

duty to advise outside express terms of retainer, 264

examination for discovery

examination questions, 269-272

examining drafting solicitor, 268-269

generally, 255-256, 272

*Hall v. Bennett Estate*, nature and extent of retainer agreement, 265-266

retainer

duty to advise outside express terms of retainer, 264



- Hall v. Bennett Estate*, nature and extent of retainer agreement, 265-266
    - nature of, 262-264
    - standard of care, 256-258
    - strategic steps – making will or trust “litigation-proof”, 266-268
- objection to issuing certificate of appointment
  - Forms, 134, Appendix 1B
  - motion for direction, 132
  - notice of objection, 129-131
  - notice to applicant, 131
  - notice to objector, 131-132
  - practice points, 132-134
  - vacating notice of objection, 131
- orders for assistance
  - accounts, order to pass, 111
  - appointment
    - order to accept or refuse, 105-106
    - order to consent or object to proposed appointment, 106-107
  - beneficiary witness, order to, 109
  - former spouse, order to, 110-111
  - Forms, 113, Appendix 1B
  - further particulars, order for, 108-109
  - generally, 103
  - other matters, order for, 112
  - procedure to obtain, 112-113
  - production of instruments purporting to be testamentary, 104-105
  - statement of assets of estate, order to file, 107-108
- passing of accounts
  - affidavit verifying accounts, 182-183
  - assets, valuation, control, custody and inventory of, 184-185
  - audit, costs of, 194-195
  - compulsory, 192-193
  - corporate information
    - disclosure to beneficiaries, 188-189
    - form of accounting for, 187-188
  - court, powers of, 195
  - form of accounts, 185-187
  - notice of application to pass accounts, 182
  - notice of objection to accounts, 184
  - obligation to keep and pass accounts
    - attorney and guardian accounts, 178-180
    - executor, administrator and trustee accounts, 180-181
  - practice points, 181-182
  - service, 183
  - voluntary, 193-194
  - who may pass accounts, 177-178
  - with hearing, 190-192

- without hearing, 189-190
- past recollection recorded/present recollection revived, 173-175
- practice points
  - application or motion for direction, 149-150
  - objection to certificate of appointment, 132-134
  - passing of accounts, 181-182
- precedents, Appendix 1A
- preparation for mediation, pre-trial or trial
  - client, preparation, 53
  - closing argument, 203
  - directions of court regarding, 146-147
  - documents, preparation, 52-53
  - generally, 51, 197
  - judgment, 203-204
  - know the mediator, 51-52
  - mandatory
    - generally, 197-198
    - preparation, 198-199
  - pre-trial checklist, 199-201
  - purpose, 52
  - sample judgment - Judgment After Trial of an Issue (or on Motion), Appendix 1B
  - settlement, 204
  - trial considerations, checklist, 201-202
  - trial of issues, 201
- pre-trial preparation, see preparation for mediation, pre-trial or trial
- probate
  - common form, proof in, 61
  - lost or destroyed wills, proof of
    - evidence, admissible, for proving contents, 64-65
    - presumption of revocation, 62
    - procedural rules, 62-63
    - revocation, conditional, 64
    - test, 63-64
  - solemn form, proof in, 61-62
- procedural flowchart: contentious and non-contentious proceedings, Appendix 3
- proceedings, non-contentious
  - appointment of trustee, 65
  - depositing will for safekeeping
    - accessing deposited will, 73-75
    - digital resources for will registration, 75
    - generally, 71-72
    - locating deposited will, 73
    - registrar, with, 72-73
  - generally, 65-66
  - will deposit generally, 71

- proceedings, rules for commencement
  - contentious proceedings, generally, 66-67
  - estate administration during litigation, 67
  - interested parties, request for notice of commencement of proceeding, 67-68
  - non-contentious proceedings
    - appointment of trustee, 65
    - generally, 65-66
- propounding will, estate trustee's duty, 48
- protection of individuals with diminished capacity, role of professionals in
  - drafting solicitor's role, 38-39
  - medical practitioner's role, 39-40
- Public Guardian and Trustee, Office of the (PGT)
  - application for appointment of estate trustee without will, and, 90
  - mentally incapable persons, and, 139, 141
  - notice of application for appointment of estate trustee with will, 83, 87
  - notice of proceedings, 50
  - role, of, 285-286
  - service of notice of application on, 184
- reasonable inquiries, defined, 208-209
- retainers
  - client consent to joint retainer, 14-15
  - considerations before accepting joint retainers to draft mirror wills, 13-14
  - generally, 11-12
  - mirror and mutual wills, 12-13
  - separate representation, 15
- return of certificate of appointment in contentious proceedings
  - effect of order, 119
  - generally, 117-118
  - motion for directions, 120
  - motion for return of certificate, 118-119
  - release of certificate, 120-121
- revocation of certificate of appointment in contentious proceedings, 117-118
- Scott v Cousins*, suspicious circumstances surrounding making of will, 34-35
- separate representation, 15
- settlement, see also mentally incapable persons, acting for
  - drafting minutes of, 54-55
  - generally, 204
  - litigation guardian, where, 294-296
  - Notice of Settlement, Form 75.11, Appendix 1B
  - Rejection of Settlement, Form 75.12, Appendix 1B
- solemn form, proof in, 61-62
- solicitor's negligence, see negligence of solicitor
- standing in will challenges
  - generally, 48-49
  - notice of proceedings, 49-50
  - series of wills, many parties, 50-51

*Statute of Frauds*, 22, 244

- submission of rights to court
  - application or motion for directions, 152-153
  - Forms, 154, Appendix 1B
  - generally, 148-149, 150
  - statement of claim, 154
  - statement of submission of rights, 151-152
- substantive validity
  - fraud, 38
  - generally, 27
  - knowledge and approval and mistake, 33-34
  - suspicious circumstances, 34-36
  - testamentary capacity, 28-33
  - undue influence, 36-38

*Substitute Decisions Act, 1992*

- s. 1(1) – definitions, 274
- s. 3(1) – counsel for person with capacity in issue, 285-286
- s. 6 – criteria for designating individual incapable of managing property, 276
- s. 39 – directions from court, 289
- s. 42 – passing of accounts, 178
- s. 45 – criteria for designating individual incapable for personal care, 276
- s. 58 – finding of incapacity, 139
- s. 59 – guardianship, 139
- s. 68 – directions from court, 289
- s. 79 – order for assessment, 277

*Succession Law Reform Act*

- Pt. II – intestacy, 56
  - Pt. V – claims for dependant support, 45
  - s. 1(1) – definitions, 18
  - ss. 3-4 – formal requirements of due execution, 19, 20
  - s. 5 – exceptions to formal compliance for members of Canadian Forces, 19, 26
  - s. 6 – holograph will, 19-20, 24
  - s. 7 – signature requirements, 20
  - s. 12(1) – bequests to witness, 95-96, 109
  - s. 17(2) – gift voided after termination of marriage, 96, 110
  - s. 42 – international wills, 26
  - s. 44 – intestacy where spouse and no issue, 57
  - s. 45 – preferential shares, 57
  - s. 47 – consanguinity, 5, 57
- summary judgment, 55-56
- Sweetnam v. Williamson Estate*, new approach to costs awards in estate litigation, 226-229
- testamentary capacity
  - capacity assessments, 32, 40-43
  - generally, 28
  - onus and burden of proof, 33

- retrospective opinions on testamentary capacity, use and admissibility, 170-172
- test for capacity, 29-32
- testamentary freedom
  - generally, 44-45
  - limits, 45
  - void for public policy, 46-47
- trial preparation, see preparation for mediation, pre-trial or trial
- Trustee Act*
  - s. 23 – passing of accounts, 178
  - s. 38 – discoverability exception, 60
  - s. 53 – distribution of assets, notice to heirs, 209
- undue influence
  - challenging validity of will, 36-38
  - role of professionals in protecting individuals
    - drafting solicitor’s role, 38-39
    - expert opinion evidence, admissibility, 40-42
    - form of opinion, 42-43
    - medical practitioner’s role, 39-40
    - retrospective assessments and settlements, 43
- unjust enrichment
  - Canadian case law
    - Belvedere v. Brittain Estate*, 248-249
    - Lata v. Rush*, 251-252
    - Lavoie v. Trudel*, 252-253
    - McMillan v. Johnson Estate*, 250-251
  - elements, 243
  - generally, 243-244, 253-254
  - remedies, 247-248
  - the Trilogy
    - developments since, 246-247
    - generally, 245
- validity of will, see also formal validity/due execution
  - formal, 17-27
  - in rem* rights, 47
  - substantive, 27-38
  - when formal and substantive validity do not matter, 44-47
- Vout v. Hay*, suspicious circumstances surrounding making of will, 34, 156
- will checklist, 7-11
- will deposit
  - deposit for safekeeping
    - accessing deposited will, 73-75
    - digital resources for will registration, 75
    - generally, 71-72
    - locating deposited will, 73
    - registrar, with, 72-73

- Forms, 78, Appendix 1B
  - generally, 71
  - other Canadian jurisdictions, where wills deposited, 76-78
- will, four types, 17
- will registration, digital resources for, 75
- Wills, Estates and Succession Act (B.C.)*, 18, 23-24