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WIDDIFIELD ON EXECUTORS AND TRUSTEES, 6TH EDITION

Release No. 7, September 2026

This seminal work of Canadian legal literature is reviewed and updated by a team of authors drawn from the front ranks of the profession from across Canada. In keeping with the original, the sixth edition of Widdifield on Executors and Trustees offers a comprehensive exposition of the law relating to the exercise of the duties and prerogatives of executors and trustees in Canadian estates and trusts law.

What's New in This Update:

This release contains amendments and updates to the commentary in Chapter 2 (Assets); Chapter 5 (Bequests and Beneficiaries); Chapter 15 (Resignation, Removal and Appointment of Trustees); Chapter 17 (Dependants' Relief Claims and Spousal Property on Death); and Words and Phrases.

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Highlights of This Release, Include:

Testamentary Intentions—Substantial Compliance—Validation of Will Existing Only in Digital Form—This case dealt with the very live issue of whether a draft electronic will that was never printed, signed or witnessed can be validated pursuant to s. 21.1(2) of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 ("*SLRA*"). It also went on to determine that if the answer to this first issue was yes, did the draft electronic will express a deliberate, fixed and final testamentary intention? To come to its decision on the first issue the court had to consider the interplay between s. 21.1 of the *SLRA* and s. 31(1) of the *ECA* (*Electronic Commerce Act, 2000*, S.O. 2000, c. 17). It concluded that as a result of the interplay between s. 21.1 of the *SLRA* and ss. 4, 5 and 31(1) of the *ECA*, a testamentary document that exists only in electronic form cannot be validated pursuant to s. 21.1. The court noted that s. 21.1 of the *SLRA* was enacted to relieve against the harsh consequence of non or imperfect compliance with the formalities required to make a valid will. However, the power to validate was subject to s. 31 of the *ECA*. The *ECA* was enacted to facilitate electronic transactions by providing legal recognition for electronic documents and signatures by virtue of "Functional Equivalency Rules". It noted, at para. 69, that ss. 4 and 5 of the *ECA* provide that:

> 4. Information or a document to which this Act applies is not invalid or unenforceable by reason only of being in electronic form. (emphasis mine)
>
> 5. A legal requirement that information or a document be in writing is satisfied by information or a document that is in electronic form if it is accessible so as to be usable for subsequent reference.

The court observed that if the *ECA* made no other provision, then the validation process under s. 21.1 would be available by virtue of s. 4 of the *ECA*. The requirement in s. 4 of the *SLRA* that a will be in writing would be satisfied by s. 5 of the *ECA* and the electronic document would not be invalid only because of its electronic form. However, s. 4 was subject to s. 31(1) which provides that:

> 31. (1) This Act does not apply to the following documents:
>
> 1. Wills and codicils.

In the court's view the combined effect of these sections was to exempt an electronic will from the operation of the Functional Equivalency Rules. In other words, an electronic will cannot be the functional equivalent of a hard copy document and as a result the court cannot validate an electronic will. The court noted that an interpretation that led to the opposite conclusion would render s. 21.1(2) of the *SLRA* and s. 31 of the *ECA* meaningless. In the course of coming to its decision, the court considered the emerging case law considering the interplay between s. 21.1 of the *SLRA* and s. 31 of the *ECA*, noting that there were two decisions of the Ontario Superior Court of Justice that squarely confronted the issue and came to opposite conclusions. The first is the decision of Sanfilippo J. in *Madhani v. Fast*, 2025 ONSC 4100, 2025 CarswellOnt 11207 (Ont. S.C.J. [Estates List]), in which he determined that s. 21.1 of the *SLRA* cannot save a testamentary document that exists only in electronic form (at paras. 44-46), and the decision of Corthorn J. in *Gebremariam v. Menghesha*, 2026 ONSC 545, 2026 CarswellOnt 1252 (Ont. S.C.J.), leave to appeal refused 2026 ONSC 3265, 2026 CarswellOnt 9157 (Ont. Div. Ct.), in which she came to the opposite conclusion. She held that the *SLRA* and the *ECA*, when read together, do not prohibit the reliance on an electronic document in support of a s. 21.1 application and its validation as an effective will. The court disagreed with Corthorn J.'s decision and agreed with that of Sanfilippo J. It concluded

that as a result of the interplay between s. 21.1 of the *SLRA* and ss. 4, 5 and 31(1) of the *ECA*, a testamentary document that exists only in electronic form cannot be validated pursuant to s. 21.1. The court went on to consider, in the event it was mistaken in this conclusion, whether the electronic will in the case before it, was authentic and a fixed and final expression of the deceased's testamentary intent. It found that the evidence fell short of demonstrating this. The electronic will was the second will of the deceased. Both the first and second wills appeared to have been prepared using forms taken from a will kit. The first will was in printed form, duly executed and witnessed. An indication, in the court's view, that the deceased must have understood the customary formalities associated with the preparation of a will, the second will was never printed, was unsigned and unwitnessed. Moreover, there were two versions of the second will. The court found that the fact that the deceased had made changes, albeit reasonably minor, to the first draft of the second will suggested that the document was a work in progress and susceptible to further refinement or amendment. Further, the court found that it was significant that the deceased had not signed the second will at any time between its creation and his, *albeit*, untimely death, some four months later. The evidence of the plaintiff and her son that the deceased told them he intended to prepare a will and later told them that he had done so, did not assist: *Samide v. Taylor*, 2026 ONSC 3589, 2026 CarswellOnt 11275 (Ont. S.C.J.).

Resulting Trust—Real Estate—Purchase Money—Gift Letters—As pointed out by the court, raised "the interesting and important question of the extent to which 'gift letters' signed, as part of the mortgage approval process, by a family member helping with a down payment can be relied on in subsequent litigation, not with the lender or some other arms-length creditor, but within the family itself. This problem arises both in family litigation in the strict sense and in estate litigation. … Because it is not an uncommon situation for a family member — often a parent — to advance all or part of a down payment in a home purchase, mortgage lenders typically insist on a 'gift letter' from the person advancing the funds, so that the parent does not subsequently argue that they have a beneficial interest or debt competing with the mortgage debt in a foreclosure or bankruptcy" at paras. 1 and 51. The court noted that the question of how such letters should be characterized legally has arisen on a number of occasions in family or estate litigation, but not, so far as counsel has been able to determine, in litigation involving the mortgagee who insisted on the "gift letter". The court reviewed several cases including *Dhaliwal v. Olleck*, 2010 BCSC 1524, 2010 CarswellBC 2917 (B.C. S.C.), reversed in part 2012 BCCA 86, 2012 CarswellBC 443 (B.C. C.A.), which it held stood for the proposition "that a gift letter obtained by a lender is not determinative (and possibly not even very strong) evidence of intentions *among* the family members and that it is *those* intentions that are relevant to defeating the presumption of resulting trust in litigation within the family unit (regardless of whether it is in the form of civil, family or estate proceedings). Since equitable interests, unlike legal ones, are not always good against everyone, that means a resulting trust can arise, but not one that can be asserted against the lender (again in the absence of duress, undue influence and so forth)" at para. 59. The court observed that "this fits with general social expectations. When people sign these 'gift letters' they can reasonably be expected to be aware that they are not going to be able to assert a proprietary interest or debt against the financial institution that is lending the money to their family member, and are taking on this risk so that their family member can get the loan. If they think about it, they may also realize that they are not going to be able to assert a claim in bankruptcy at

least as long as the mortgage is undischarged. They are *not* necessarily giving up what would otherwise be their rights with respect to the other family members..." at para. 60. The court noted that the plaintiff had made "the legitimate point that parties of full capacity should be presumed to intend the consequences of the legal documents they sign, particularly when they are stated as clearly as standard-form 'gift letters' typically are. Neither the law nor equity allows adults of full capacity to rely on unexpressed mental reservations when they sign clearly worded legal documents they sign, in the absence of undue influence, duress or unconscionability. Indeed, commercial law would come to a halt if they did" at para. 63. The court noted, however that its court and the Court of Appeal, had, in the past, placed little or no weight on such letters in the estate or family law context when they have been advanced to combat the presumption of resulting trust. This was because "these cases start with the general principle that *context* is important to the interpretation of private law documents: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 46-47. In the specific context of helping a family member get a mortgage it makes sense that these letters clearly are intended to be relied on by those financial institutions, but would not necessarily be understood to be determinative within the family unit itself. (Similar points might be made among friends as well.) The legal context of resulting trusts is also relevant, since equity has long distinguished who has legal authority to make decisions for the trust unit as a whole and the obligations that person has to those within the trust and it has done so because this tracks social expectations. As an equitable interest, a resulting trust can be asserted against some parties, but not against those giving value without notice. A gift letter estops the parent or other contributing family member from asserting the mortgage lender had notice of its interest, and that is sufficient for the operation of the mortgage system" at para. 65. In the court's view then, "the 'gift letter' cases are not taking an excessively psychological or subjective view of intention, which would be an error. Rather, they are saying that the willingness of the family member advancing the funds to have that lender and other strangers treat them as a donor does not imply a willingness to let the other family members treat them that way" at para. 66. The court went on to note that "precisely because context matters, *in some cases* gift letters really will indicate intention to make a gift, including within the family or friend unit. However, those cases will be unusual and there will usually be some corroborative evidence that the gift letter was meant within the family circle itself" at para. 68: *Kirkwood Estate v. Whitefield*, 2026 BCSC 1265, 2026 CarswellBC 2304 (B.C. S.C.).

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