Unusual Probate Applications

By Donna S.M. Neff for 22nd East Region Solicitors Conference, May 13-14, 2016

Introduction[1]

In this paper I discuss unusual probate applications that I have encountered in my estates practice and review the law with respect to these kinds of applications. In the Appendix, I have provided samples of the documents used to successfully obtain a Certificate of Appointment of Estate Trustee ('probate') in the applications discussed.

In the first and most complex of the three applications, a young couple, recent immigrants to Canada from Russia, died a few hours apart as a result of a motor vehicle accident. The couple were on their way to Toronto to catch a flight to a southern resort. It was December and driving conditions were less than ideal. Both died intestate and neither had children. The couple's family members lived in Russia.

The second unusual probate application required probate of a Quebec notarial will. At the date of death, the deceased was a resident of Ontario but did not have an Ontario will. Her last will was a Quebec notarial will which had been prepared when she lived in Quebec some years before.

In the third unusual probate application, the deceased had a formal will prepared and executed in Ontario. After he died, the will could not be found. It was assumed that

[1] I gratefully acknowledge the research assistance of Robert Maratta and Robert Gencarelli (Associates) and Matt Taft (Articling Student) at Cunningham, Swan, Carty, Little & Bonham LLP, Kingston, Ontario.

the will had been lost during the process of cleaning out the deceased's residence in preparation for a move to a retirement residence.

Dying Intestate with Foreign Beneficiaries

One of the practical issues involving intestacies when relatives are not close-by is ascertaining who the beneficiaries are and how the estate should be distributed. This difficulty is discussed in the following excerpt from the *Canadian Estate Administration Guide*:

> Usually, finding the identity of heirs on an intestacy or partial intestacy is not an overly challenging task; family members are often well-known and nearby. Complications can arise when searching for the more remote degrees of consanguinity, such as nephews, cousins or even further remote relatives.
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> More difficult are situations dealing with estates of immigrants who leave no close relatives in the jurisdiction. These cases are made even more difficult when human disasters or confiscatory regimes have developed in the country of origin. Two examples of these are the Holocaust and the former communist governments in eastern Europe.[2]

An example of a recent case where the court grappled with identifying heirs of an alleged immigrant from England is *Morphy v. Ontario (Public Guardian & Trustee)*.[3] In *Morphy*, the court dealt with an application to determine if the applicants were the lawful heirs of the deceased, who died intestate in Toronto in 1955, and whose estate had escheated to the crown.[4] The applicants were the beneficiaries of the Morphy estate who were assisted by Mondex Corporation which specialized in locating missing heirs.[5] The applicants alleged that the man who died in Toronto was actually an immigrant to Canada who was born in England.[6] The applicants submitted several pieces of evidence to show that the man who died in Toronto was an immigrant from England. The court

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[2] Jennifer Greenan & Ian M. Hull, *Canadian Estate Administration Guide,* Publication 6043, Release 254, Loosleaf consulted on 18 April 2016, (Toronto; LexisNexis Canada; February 2016) at ¶ 13,951.
[3] 140 A.C.W.S. (3d) 219, 2005 CarswellOnt 2565 [*Morphy*].

[4] *Ibid* at para 1.

[5] *Ibid* at para 2.

[6] *Ibid* at para 3.

ultimately agreed that the applicants had proved this on a balance of probabilities:

> 18 In my opinion, taken collectively, the foregoing information is sufficient to establish on a balance of probabilities that the Deceased and FRM were the same person. The combination of the various pieces of information, including names, birth dates, parental names, father's occupations and details from census records suggest that the numerous commonalities between the Deceased and FRM are unlikely to be the product of mere coincidence. A more logical explanation is that the various bits of data relate to the same individual.
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> 19 I acknowledge that not all pieces of the puzzle are available and that some of the pieces do not necessarily fit perfectly. I attribute the latter to a combination of inaccuracies in the manner in which information was recorded or inaccuracies in the information supplied by the Deceased at various times. Notwithstanding those apparent incongruities, on balance I am satisfied that the applicants have established that they are the lawful heirs of the Deceased.[7]

In the case of the intestate estates of the Russian immigrants that I dealt with, a co-worker and friend of the deceased husband, also an immigrant from Russia spoke fluent Russian and was able to assist in communicating with family members of the deceased couple who were all living in Russia. As the couple had both died intestate on the same day, it was essential to confirm who had died last. We could then review the intestacy provisions of the *Succession Law Reform Act (SLRA)* to determine who the beneficiaries would be.

It was eventually confirmed that the wife died at the scene of the accident and the husband died later the same day. Under the *SLRA*, s.44, the husband inherited the entire estate of his wife. Under the *SLRA*, s. 43(3) the husband's parents then inherited their son's estate.

There were delays in obtaining the necessary reports to prove the order of death. Language and distance as well as difficulties in obtaining an executor's bond all contributed to significant delays in obtaining probate and in administering the estates. In fact, the administration of the estates took more than six years. The husband's father died during that time resulting in further steps to determine who was the person with authority to administer the father's estate and receive his portion of the inheritance. He had divorced his first wife, the mother of the deceased husband, and had married again.

Although perhaps not truly part of obtaining probate, once a bond is posted, the

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[7] Ibid at paras 18-19.

estate trustee and his/her lawyer should be aware that upon completion of the estate administration, a motion needs to be made to have the bond released for cancellation. Sample documents for such a motion are included in the Appendix.

Other issues that often arise out of intestacies are contests between beneficiaries, both foreign and domestic. An example of a recent interesting case is the 2015 British Columbia Supreme Court decision of *Re Coombes Estate*.[8]

In *Coombes*, the deceased died intestate at the age of 23 while living in Ontario.[9] The applicant was in a long-term relationship with the deceased and applied for a declaration that she was his spouse. This was opposed by the deceased's biological father.[10] Although the applicant had been living with the deceased, prior to his death she had moved to Dubai where she worked as a flight attendant.[11]

The issue for the court was to determine whether or not the relationship had matured to the point where it could be categorized as a marriage-like relationship, despite the fact that the applicant had moved to Dubai.[12] The court found that there was a marriage-like relationship that persisted even after the applicant's move:

> 63 In this case, I find that Meredith and Gareth were in a marriage-like relationship from at least February 2010 until they moved to Ontario in 2011. They continued in a marriage-like relationship in Ontario through August 2011, both in Toronto and later in London, Ontario. That relationship carried on until December 5, 2011 when Meredith left for Dubai. The question is, did the relationship continue as a marriage-like relationship after that date.
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> 64 I am of the view and find as a fact that the answer to that question is "yes", the relationship did continue in a marriage-like relationship. The evidence satisfies me that the parties remained committed and exclusive to each other and expressed a shared intention of a long-term future together. In my view, the absence that they were experiencing at the time of Gareth's death was planned by each of them to be a temporary one. The relationship between Gareth and Meredith was more than that of a young couple living together and discussing future plans while they were attending university. They had demonstrated a mature, strong and loving bond that was likely to continue.[13]

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[8] 2015 BCSC 2050, 2015 CarswellBC 3249 [*Coombes*].

[9] *Ibid* at para 18.

[10] *Ibid* at para 1.

[11] *Ibid* at paras 16-18.

[12] *Ibid* at para 41.

[13] *Ibid* at paras 63-64.

This case illustrates how foreign beneficiaries can fight for their rights to entitlement when there is an intestacy in Canada. However, the difficulties with managing intestacies are not restricted to merely ascertaining the proper heirs to an estate. There is generally a requirement for the estate trustee to obtain an executor's bond from an insurance company. I have found such bonds increasingly difficult to obtain.

In certain circumstances, asking the Court to waive the requirement for an executor's bond may be successful. This was discussed in the 2008 Ontario Superior Court of Justice decision of *Re Henderson Estate,* which outlined the legal requirements for an executor's bond and the justification for avoiding the bond:

> II. The statutory requirement for administration bonds
> 5 Section 35 of the Estates Act provides:
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> 35. Except where otherwise provided by law, every person to whom a grant of administration, including administration with the will annexed, is committed shall give a bond to the judge of the court by which the grant is made, to enure for the benefit of the Accountant of the Superior Court of Justice, with a surety or sureties as may be required by the judge, conditioned for the due collecting, getting in, administering and accounting for the property of the deceased, and the bond shall be in the form prescribed by the rules of court, and in cases not provided for by the rules, the bond shall be in such form as the judge by special order may direct.
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> 6 This statutory requirement for the posting of a bond most frequently arises in two situations — where a person dies intestate and an application is made for a certificate of appointment of estate trustee without a will, or where a person dies testate, but the will does not name an executor and an application is made for a certificate of appointment of estate trustee with a will. (The posting of a bond is also required in the cases of a foreign executor [Estates Act, s. 6], a foreign estate trustee's nominee as estate trustee without a will [Rule 74.05.1(1)(d)], and a succeeding trustee with a will where the sole or only surviving estate trustee has died and the will makes no provision for someone else to be appointed [Rules 74.06 and 74.07]).
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> 7 Exemptions exist to the requirement. Section 36(1) of the Act exempts the Government of Ontario, any ministry or any provincial commission or board from the requirement to post a bond, and section 36(2) also dispenses with the need for a bond where the administration on an intestacy is granted to the surviving spouse of the deceased, the net value of the estate does not exceed the preferential share of $200,000 presently prescribed under the Succession Law Reform Act, and there is filed with the application for administration an affidavit setting out the debts of the estate. Also, section 175(4) of the *Loan and Trust Corporations Act*, R.S.O. 1990, c. L.25, exempts from the requirement of a bond a registered and approved trust company that applies for appointment as estate trustee.

> 8 Section 37(1) specifies the amount of the bond — double the amount under which the property of the deceased has been sworn — and then section 37(2) provides:
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> The judge may at any time under special circumstances reduce the amount of or dispense with the bond.
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> 9 The Estates Act does not articulate the factors that a judge should take into account when considering a request to dispense with a bond, but those factors can be gleaned from the language of the bond prescribed by Form 74.32 of the Rules of Civil Procedure which imposes the following obligations on the estate trustee:
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> The principal as an estate trustee is required to prepare a complete and true inventory of all the property of the deceased, collect the assets of the state, pay the debts of the estate, distribute the property of the deceased according to law, and render a complete and true accounting of these activities when lawfully required. (emphasis added)
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> As well, Rule 74.11(2) permits a person who has a contingent or vested interest in an estate, including a creditor, to move for an order that an estate trustee, or applicant for appointment, file a bond.
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> 10 These provisions make clear that the main purpose of an administration bond is to ensure that an estate trustee pays the debts of the estate and distributes the property of the estate to those who are entitled to it. It follows, therefore, that an applicant for a certificate of appointment who seeks an order dispensing with the posting of an administration bond must satisfy the court, by way of evidence, that the protection afforded by a bond to beneficiaries and creditors is not required or will be met in some other way.[14]

As discussed in *Henderson*, one of the scenarios requiring the posting of a bond is where a person dies intestate and an application is made for a certificate of appointment of estate trustee without a will. This includes someone who dies intestate with foreign beneficiaries.

An important exemption to this rule is found in s.175 (4) of the *Loan and Trust Corporations Act*, R.S.O. 1990, c. L.25 which allows a registered and approved trust company to act as trustee.

> Security not required
> (4) Despite any rule, practice or statutory provision, it is not necessary for a trust corporation approved under subsection (2) to give any security for the due performance of its duty as

[14] *Henderson Estate, Re*, 173 A.C.W.S. (3d) 1258 , [2008] O.J. No. 5407 (QL Canada) [*Henderson*].

> executor, administrator, trustee, receiver, liquidator, assignee, guardian or committee unless so ordered by a court. R.S.O. 1990, c. L.25, s. 175 (4)[15]

The other exemption discussed in *Henderson* is proving to the court that special circumstances exist pursuant to s.37(1).[16] However, in the distribution of an intestate estate to foreign beneficiaries, it would be difficult to argue that the protection afforded by a bond can be met in some other fashion.

Probating a Quebec Notarial Will

In Ontario, there are two forms of wills – formal wills and holograph wills. In the province of Quebec, however, a third form of will, a notarial will is also recognized along with formal and holograph wills. The original notarial will is retained by the notary and a central registry of notarial wills is maintained by the Chambre des Notaires du Quebec.[17]

Notarial wills are unique to Quebec and are governed by a specific set of formalities and rules. Provinces outside of Quebec have enacted legislation to help reconcile situations where estate administration and/or litigation arises with respect to notarial wills.

In Ontario, Section 15 of the *Estates Act,* RSO 1990, c. E-21, governs the filing requirements for the probate of a Quebec notarial will. Section 15 states:

> Quebec Notarial Wills
> 15. A notarial will made in the Province of Quebec may be admitted to probate without the production of the original will upon filing a notarial copy thereof together with the other proper proofs to lead grant.

Therefore, under section 15, the applicant must satisfy two requirements:

1. Filing of a notarial copy of the notarial will, and

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[15] Loan and Trust Corporations Act, R.S.O. 1990, c. L.25 at s.175(4).

[16] *Supra* note 14 at para 8.

[17] Davis, Sharon, Probate of a Quebec Notarial Will in Ontario (Hull and Hull LLP), 21 April 2010, http://estatelaw.hullandhull.com/2010/04/articles/topics/estate-trust/probate-of-a-quebec-notarial-will-in-ontario/.

2. Filing of the other proper proofs to lead grant,

From an evidentiary standpoint, the first component requires that the notarial copy comply with section 39(1) of the *Ontario Evidence Act*, RSO 1990, c E23, which provides:

> (1) A copy of a notarial act or instrument in writing made in Quebec before a notary and filed, enrolled or enregistered by such notary, certified by a notary or prothonotary to be a true copy of the original thereby certified to be in his or her possession as such notary or prothonotary, is receivable in evidence in the place and stead of the original, and has the same force and effect as the original would have if produced and proved.
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> (2) The proof of such certified copy may be rebutted or set aside by proof that there is no such original, or that the copy is not a true copy of the original in some material particular, or that the original is not an instrument of such nature as may, by the law of Quebec, be taken before a notary, or be filed, enrolled or enregistered by a notary.

The second requirement under section 15 was discussed in the following excerpt:

> "A notarial will, or authentic form will, which is a will executed in Quebec before two notaries, or one notary and two witnesses, may be admitted to probate upon filing a notarial copy of the will and proving the will as in any other application for Certificate of Appointment of Estate Trustee with a Will."

Rule 74.04 of the *Rules of Civil Procedure,* RRO 1990, Reg 194, outlines the required documents that must be provided by an applicant for probate of a will, including, as per the excerpt above, an application for probate of a Quebec notarial will:

> 74.04 (1) An application for a certificate of appointment of estate trustee with a will (Form 74.4 or 74.5 or, if the application is for a certificate limited to the assets referred to in a will, From 74.4.1 or 74.5.1) shall be accompanied by,
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> (a) the original of the will and of every codicil; [NOTE: In the context of a Quebec notarial will, this is addressed by section 15 of Estates Act, as noted above]
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> (a.1) proof of death;
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> (b) an affidavit (Form 74.6) attesting that notice of the application (Form 74.7) has been served in accordance with subrules (2) to (7);
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> (c) an affidavit of execution (Form 74.8) of the will and of every codicil, or if neither of the witnesses to the will or the codicil can be found, or both have died, such other evidence of due execution as the court may require;

> (d) if the will or a codicil is in holograph form, an affidavit (Form 74.9) attesting that the handwriting and signature in the will or codicil are those of the deceased;
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> (e) if the will or a codicil is not in holograph form but contains an alteration, erasure, obliteration or interlineation that has not been attested, an affidavit as to the condition of the will or codicil at the time of execution (Form 74.10);
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> (f) a renunciation (Form 74.11) from every living person who is named in the will or codicil as estate trustee who has not joined in the application and is entitled to do so;
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> (g) if the applicant is not named as an estate trustee in the will or codicil, a consent to the applicant's appointment (Form 74.12 or, if the application is for a certificate limited to the assets referred to in the will, Form 74.12.1) by persons who are entitled to share in the distribution of the estate and who together have a majority interest in the value of the assets of the estate at the date of death;
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> (g.1) in the case of an application for a certificate of appointment of estate trustee with a will limited to the assets referred to in the will, a draft order (Form 74.13.2) granting the certificate of appointment;
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> (h) the security required by the Estates Act; and
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> (i) such additional or other material as the court directs.

The leading case on section 74.04(c) is *Re Wallbridge*[18]*,* in which the court emphasized that strict technical compliance is not required regarding the filing of an affidavit of execution. In that case, the court stated:

> Notwithstanding that in this case the applicant has not filed an Affidavit of Execution as required by Rule 74.04(1)(c) and notwithstanding that the execution language contained in the submitted Affidavit of Condition does not precisely track that in the Prescribed Affidavit of Execution, I am prepared to relieve such technical non-compliance pursuant to Rule 2.03…"19

A notable case in this context is *Re Riva Estate*[20] that deals with a situation where no witnesses to the execution of the will or codicil could be found. In that case, the court was satisfied that evidence had been produced demonstrating that all reasonable efforts had been exhausted in attempting to locate the two witnesses but that they still could not be found. [21]There was, therefore, no evidence of due execution of the

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[18] *Re Wallbridge,* 2010 ONSC 3409.

[19] *Ibid* at para 9.

[20] *Re Riva Estate,* 1978 CarswellOnt 524.

[21] *Ibid* at para 10.

will, as was required by section 11(1) of the *Wills Act*. However, after being satisfied that all reasonable efforts had been made, the court was willing to apply a presumption of due execution.[22] The court stated:

> There is a presumption of due execution where there is a proper attestation clause even though the witnesses have no recollection of having witnessed the will…It may be rebutted by evidence of the attesting witnesses, but the evidence as to some defect in execution must be clear, positive, and reliable, since the court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause and signed by the testator, was not duly executed.23

Thus, the presumption of law is in favour of the due execution of a will.[24] If a will is apparently properly executed, evidence of some defect in execution must be clear, positive, and reliable. Absent such evidence, all things are presumed to have been rightly and duly performed.[25] While no form of attestation clause is actually required, an attestation clause reciting the requirements of the statute strengthens the presumption in favour of due execution. [26]

Therefore, in the case of Quebec notarial wills, one might want to proceed as follows[27]:

1. If possible, obtain and file the Application with an affidavit of execution of the notary.[28]
2. If the notary cannot be found or is unavailable, obtain and file an affidavit of execution from one of the other witnesses or other persons present at the time of signing along with an affidavit explaining the attempts to locate the notary or explaining why an affidavit of execution from the notary cannot be obtained.

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[22] *Ibid* at para 92.

[23] *Ibid* at para 73.

[24] *Re Laxer,* [1963] 1 OR 343 (Ont CA).

[25] *Beniston Estate v Shepherd* (1996), 16 ETR (2d) 71 (BCSC).

[26] *Re Gardner,* [1935] OR 71 (Ont CA).

[27] Procedure generally outlined in *supra,* note 17.

[28] *Supra* note 17; DG Petrie, *In Defence of Notarial Wills* 1965 McGill Law Journal Article at 102 (suggests that the affidavit of execution should be changed to the name of the notary public).

3. If after reasonable efforts none of the notary and witnesses can be found or are unavailable and no affidavit of execution can be obtained, attempt to obtain an affidavit of a person who can attest to the signature of the deceased. A likely candidate would be a bank staff person where the deceased had a bank account. A bank staff person's affidavit along with an affidavit outlining the reasonable efforts to locate the notary and/or witnesses would likely be sufficient. This is, in fact, the means by which I was able to obtain probate of a Quebec notarial will. The deceased had a Quebec notarial will prepared and executed while she was a resident of Quebec. Some years later, she moved to Ontario but did not have an Ontario will prepared. After her death, our attempts to locate either of the notaries involved were unsuccessful. See sample documents in the Appendix for both the Senior Account Manager's affidavit and an affidavit outlining our attempts to locate the notaries.
4. If absolutely no witness can be found, an affidavit explaining all reasonable attempts made as well as a draft order in support of a motion to dispense with the affidavit of execution could be filed. Such a motion would likely be decided upon the principles outlined in *Riva Estate* above. After it has been demonstrated that all reasonable attempts have been made to locate a witness but such attempts have failed, the court could apply the presumption of due execution.

To date, Ontario case law has provided little in the way of interpreting and/or applying these legislative provisions in the context of notarial wills. British Columbia case law, however, provides some insight. As the legislation surrounding notarial wills is quite similar as between British Columbia and Ontario (discussed below), legal commentators in Ontario have looked to British Columbia for guidance in that regard.

In the following cases, a notarial copy of a Quebec notarial will was presented to the court for probate. In each case, the court accepted the notarial copy and granted probate:

- *Re Brock Estate,* [1945] 2 WWR 528
- *Re Covone Estate,* [1989] BCJ No 2338 at para 5.

The most recent case which raises some interesting issues regarding the probate

of Quebec Notarial wills is *Morton v Christian,* 2014 BCSC 1303. In this case, John Christian executed a notarial will in 1991. The will was considered valid pursuant to the law of Quebec and as required by the Quebec Civil Code. Christian named his wife at the time, Lorraine Morton, as the sole beneficiary. In 2009, Christian and Morton separated.

Following Christian's death in 2011, "a search of his belongings and documents … revealed neither a copy of the will nor a newer will." Christian was survived by his mother and cousin, collectively the Defendants. His estate consisted of both real and personal property located in BC. Morton applied to the court seeking, among other things, a declaration that the will was valid, a grant of letters probate and an order requiring Christian's cousin to return the assets of the estate that were in his possession. The Defendants, in part, sought a declaration stating that Christian revoked the will when he, according to the defendants, tore up a true copy prior to his death. The defendants sought an order stating that Christian's estate passed on an intestacy.

The case shows that the Defendants incorrectly relied on the assertion that, pursuant to section 36 of the BC *Evidence Act* (which largely echoes section 39 of the Ontario *Evidence Act*), a true copy of a notarial will has the same force and effect as an original for the purposes of both evidentiary admissibility *and* revocation. The court rejected such an assertion. The court further rejected the "presumption of revocation", in part, on the basis that the original will could have been easily located by Christian (i.e., safely kept by the Quebec notary) prior to his death had he intended to revoke the will.

The court concluded that the way a will-maker deals with a copy of a will, for the sake of the presumption of revocation, cannot equate to handling of an original. For the presumption to apply to this case would be to equate the true copies with the original, something the court clearly refused to do. Therefore, in light of all the circumstances, in combination with the court's ultimate conclusion that the will was indeed valid, probate was granted.

Placing *Morton* in the context of Ontario, one commentator states:

> In British Columbia, as in most provinces, a Will may be revoked [s. 55, WESA (formerly s. 14, Wills Act) — companion provision to s. 15, SLRA] by (1) marriage; (2) executing a new Will; (3) executing a document declaring one's intent to revoke a Will; or, (4) by the testator burning, tearing or otherwise destroying the Will. It is the last method that was contentious in Morton [supra] . . . British Columbia's statutes on Notarial Wills and revocation of Wills are very similar to Ontario's and it is likely that a similar ruling would have been reached by an Ontario court as well. Quebec ex-patriots take heed: destroying your copy of your Notarial Will will not prevent La belle province's original from governing the administration and distribution of your estate.29

Similarly, another commentator provides as follows:

> Notarial Wills stem from the Quebec Civil Code. They are executed before a notary, who then registers the original with the provincial registry and stores the original as an officer of the court. The benefit of this process is that probate is not needed. The downside is that it cannot be revoked by the testator or testatrix by simply destroying a copy of the document, even where there is clear evidence that the copy was in fact destroyed by the testator or testatrix thereby signifying an intention that the destroyed Will should not operate . . . So if you have executed a notarial Will in Quebec and plan on leaving the province, don't forget to review your Will to make sure it reflects your intention and will operate effectively in your new home jurisdiction. Otherwise your estate may end up with unintended beneficiaries — like John Christian's estate [in Morton, supra] . . . A reminder to practitioners and clients alike — if you've moved from Quebec, get a new Will in place that will revoke the notarial Will and so advise the former notary.30

Again, Ontario courts have not yet provided clear direction with respect to notarial wills in the context of the legal issue posed in *Morton*. That said, it would appear that *Morton,* although technically non-binding, is, for the time being, a pertinent decision in that regard.

Probating a Lost Will

Sometimes a testator dies and his or her last will and testament cannot be found. Often, a copy of the will is available. Other times, the will has seemingly vanished altogether.

Where a testator took possession of his or her original will and, upon the testator's death, the original will cannot be located, the presumption is that the deceased

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[29] Hull, Ian, *Revoking a Notarial Will: Destruction of a Certified Copy is Not Enough,* 21 July 2014, https://hullandhull.com/revoking-a-notarial-will-destruction-of-a-certified-copy-is-not-enough/

[30] Weigl, Corina, *Leaving Quebec? Don't Forget to Pack Your Notarial Will*, 28 October 2014, http://www.allaboutestates.ca/family-conflict/leaving-quebec-dont-forget-pack-notarial-will/.

destroyed the will with the intention of revoking it. This presumption, known as the presumption of "*animo revocandi*", would result in the deceased's assets passing on intestacy.[31]

Where a prospective beneficiary believes that the will was never destroyed or revoked, but has simply gone missing, he or she can bring an application to prove the will (and thereby rebut the presumption of *animo revocandi*) pursuant to rule 75.02 of the *Rules of Civil Procedure*:

> PROOF OF LOST OR DESTROYED WILL
>
> 75.02 The validity and contents of a will that has been lost or destroyed may be proved on an application,
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> by affidavit evidence without appearance, where all persons who have a financial interest in the estate consent to the proof; or
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> in the manner provided by the court in an order giving directions made under rule 75.06. O. Reg. 484/94, s. 12.

In the case where our deceased client's will had been lost, likely during the packing and cleaning phase of moving the elderly couple to a retirement term residence, an electronic copy of the signed will was available from our office. The surviving spouse was the sole beneficiary under the will. The couple's son was named as estate trustee. We filed an application under r. 75.02 together with affidavit evidence and were successful in having the Court declare the will to be valid. No court appearance was required.[32]

However, if all those with a financial interest in an estate do not unanimously agree to a copy of a lost will being proven, the process will not be quite as simple. *Sorkos v. Cowderoy* sets out the legal test to determine whether a lost will can be proven in contested matters.[33] The party wishing to prove a will must:

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[31] See e.g. *Lefebvre v. Major*, [1930] SCR 252, 1930 CanLII 4 (SCC) at p. 253 [*Lefebvre*] and Sorkos v. Cowderoy, 2006 CanLII 31722 (ON CA) [Sorkos] at para 10.

[32] In *Re O'Reilly,* the Ontario Superior Court of Justice addresses the form of order that should be included with such an application: O'Reilly (Re), 2009 CanLII 60091 (ON SC).

[33] *Sorkos v. Cowderoy*, 2006 CanLII 31722 (ON CA) [*Sorkos*].

(i) establish due execution of the will;
(ii) trace possession of the will to the testator's date of death (and subsequently, if the will was lost after death);
(iii) rebut the presumption that the testator destroyed the will with the intention of revoking it; and
(iv) prove the contents of the lost will.

(i) Establishing due execution of the will

Establishing due execution of a will requires more than mere speculation. Ideally, the witnesses of the will should be located so that proper execution can be established. Additionally, someone with specific knowledge of the contents of the will (preferably the lawyer who drafted it) should be located.[34]

A copy of the signed will can be of great assistance in proving both the execution and contents of a lost will, particularly when both the deceased's named executor and the lawyer who prepared the document can provide supporting affidavits. However, some caution is warranted: there is an important distinction between a photocopy showing the signatures of the testator and witnesses, and a photocopy that merely has the names of the deceased and witnesses in quotes. This latter type, known as a "true copy", is normally insufficient proof that a will was duly executed.[35]

In *Whitehead Estate,* for example, the children of the deceased located a "true copy" of their mother's will in a briefcase beside her favourite chair. The copy of the will was "trued up" with the handwritten names of the deceased and two witnesses placed in quotation marks. The original will could not be located. The Court ruled that the execution of the will could not be established in the absence of evidence that would identify the witnesses to the execution of the will or establish that the copy of the will was indeed a "true copy". Consequently, the deceased died intestate.

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[34] *Whitehead Estate*, 2010 BCSC 348 (CanLII) at para 26.

[35] *Ibid,* at para 27.

(ii) Tracing possession of the will to the testator's date of death

The presumption that the deceased destroyed his or her will is only applicable where the original will can be traced to the possession of the testator. For example, if the original will was lost by the deceased's solicitor, as the court found was the case in *O'Donovan,*[36] then as a matter of logic, the presumption of *animo revocandi* does not apply.

In *Haider,* for example, the court found that if the testator had taken possession of the original will it would have been in his strong box, where a copy of the will was found along with the testator's other important documents.[37] Consequently, the presumption that the testator destroyed the will was rebutted.

(iii) Rebutting the presumption that the testator destroyed the will with the intention of revoking it

If possession of the original will is traced to the testator, those seeking to prove the will must rebut the presumption that the testator destroyed the will with the intention of revoking it on a balance of probabilities. In determining whether the will was destroyed with the intention to revoke it, a court will consider:

- the character of the testator;
- his relation to the beneficiaries;
- the contents of the purported will(s); and
- the possibility of loss by other than intentional destruction by the testator.[38]

Some examples may help to illustrate how a court might determine whether a testator revoked his or her will by destroying it:

- In *Jorsvick Estate,* the testator's original will was found several months after her death—torn to pieces. The original will was not with the testator's other papers. The Court found that there was insufficient evidence to demonstrate that the testator herself had destroyed the will with the purpose of revoking it, citing a

[36] *O'Donovan v. O'Donovan*, 2009 CanLII 64828 (ON SC) at 49-61 [*O'Donovan*]

[37] *Haider v. Kalugin*, 2008 BCSC 930 (CanLII) at 22.

[38] *Lefebvre v. Major*, [1930] SCR 252, 1930 CanLII 4 (SCC) at p. 253 [*Lefebvre*]. See also *O'Donovan* at para 64.

meeting between the testator and her lawyer the day before she died at which the testator did not report having destroyed her will.[39]

- In *O'Donovan*, the court found the presumption that the testator destroyed his will was rebutted based on the character of the testator, who told witnesses he did not wish to die intestate and had instructed his lawyer not to destroy prior wills until a new will was executed.[40] The court considered the possibility of loss by other than intentional destruction by the testator and ruled that it was more likely that the original will was lost when the testator's lawyer moved to a new firm. [41]

- In *Lefebvre*, the court found that the testator had a good relationship with the sole beneficiary under the purported will until the time of his death and that it was improbable that the testator (a man of "simple character") intentionally destroyed his will; rather, it was more likely that the original will was destroyed when the testator's personal effects were burned after his death.[42]

- In *Fennell,* the Court concluded that it was unlikely that the testator ever had a copy of her will because it would be unlikely for it to be kept at the nursing home where she resided. As such, the presumption that the testator destroyed the will was rebutted, notwithstanding the fact that the original will could not be located.[43]

(iv) Proving the contents of the lost will

If the preceding requirements are met, then all that remains is to prove the contents of the lost will. Here, again, a photocopy of the signed will can be of great assistance, particularly when the deceased's named executor and the lawyer who prepared the document can provide supporting affidavits.

In the event no copy of the will can be found, someone with specific knowledge of the contents of the will (such as the lawyer who drafted it) should be located.[44] A court may consider the evidence of other witnesses who previously read the will, but the

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[39] *Jorsvick Estate*, 2011 BCSC 528 (CanLII) at 21.

[40] *O'Donovan* at para 65.

[41] *O'Donovan* at para 58.

[42] *Lefebvre* at p. 261.

[43] *Fennell v. Crookshank Estate*, 2010 NSSC 442 (CanLII) at para 10.

[44] *Whitehead Estate*, 2010 BCSC 348 (CanLII) at para 26.

evidence of those who would seek to benefit under the will would be scrutinized carefully.

Appendix: Sample Documents

These sample documents are taken from my files as of the date that they were prepared and filed. Names, dates, etc. have been changed. The documents may not be accurate in terms of current filing requirements, legislative changes, or case law and, therefore, should be reviewed carefully if relying on these as precedents. I have left out back pages and documents that usually form part of an Application for a Certificate of Estate Trustee such as the Affidavit of Service, Notice of Application, etc.