

SUMMARY TRIAL - AN OPTION WORTH CONSIDERING

It is trite to say that estate litigation is often expensive. However, some relief may be found in Rule 76 (Simplified Procedure) and, in particular, the provisions set out in that Rule for a summary trial. Counsel often overlook Rule 76, but there is no obvious impediment to invoking this Rule in the estate litigation context. Moreover, Rule 76 may be an important mechanism to control costs and achieve a timely result.

Public policy considerations underlie Rule 76. Simply put, Rule 76 is an attempt to keep costs down by providing less procedure for modest claims of \$50,000 or less, exclusive of interest and costs, while still delivering a substantive result. Interestingly, the plaintiff can opt to proceed by way of simplified procedure for a claim exceeding \$50,000 as long as the defendant does not object. However, if the defendant voices opposition, the claim proceeds by the ordinary procedure (nothing ventured nothing gained, as the old adage goes). In his long-awaited Report of the Ontario Civil Justice Reform Project released in November 2007, Coulter Osborne in fact recommended that the monetary jurisdiction for Simplified Procedure actions be increased to \$100,000.

Examinations for discovery are not allowed for actions governed by Rule 76. The same is true for cross-examinations of a deponent on an affidavit filed on a motion. However, parties are required to include in their affidavit of documents a list of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences at issue in the action. This added requirement is designed to disclose information that the parties might otherwise have discovered during an examination for discovery.

Pursuant to Rule 76, the parties can agree to an ordinary trial or a summary trial. If the parties cannot agree, the pre-trial conference judge or master can decide what mode of trial is appropriate. As set out in Rule 76.12, the procedure for a summary trial is as follows:

1. Evidence-in-chief is to be adduced by affidavit, not orally. (Drafting skills are obviously critical.)
2. The opposing party may cross-examine the deponent orally, which can be followed by oral re-examination. Oral re-examination is limited to 10 minutes. (As a general rule, re-examination is better avoided.)
3. A party wishing to cross-examine the deponent of an affidavit must notify the party at least 10 days before the trial date. The party who filed the affidavit must arrange for the deponent's attendance at trial and no summons to witness is required (Rule 53).
4. All of a party's cross-examinations can take no more than 50 minutes.
5. With leave of the trial judge, the plaintiff may adduce any proper reply evidence.
6. Each party is entitled to make oral closing arguments of not more than 45 minutes. Opening arguments are not specifically referred to in the Rule, but will

likely be allowed by the trial judge who has the inherent jurisdiction to control the court process.

7. The trial judge may extend the time limits set out above.

In *McDougald Estate v. Gooderham*¹, the parties opted to proceed by way of summary trial. The testator, Headley Maude McDougald, was a grand dame of society, widow of Bud McDougald of Argus Corp. fame, and friend to the Queen Mother who stayed with Mrs. McDougald on several of her trips to Canada.

During her lifetime, Mrs. McDougald's attorneys for property sold 640 South Ocean Boulevard in Palm Beach, Florida pursuant to a power of attorney. In 1996, Mrs. McDougald had three attorneys managing her estate pursuant to her power of attorney. The Florida property was subject to a specific bequest in Mrs. McDougald's Will. The parties sought direction from the court as to whether the proceeds of that sale adeemed and became part of the residue at the date of death or whether section 36 (the anti-ademption section) of the *Substitute Decisions Act, 1992* applied to prevent ademption.

By way of a reminder, the doctrine of ademption is a common law rule dating back to the 18th century. Ademption occurs whenever a testator makes a bequest of a specific piece of property that is not found among the testator's assets at the time of his or her death. In such a case, the bequest is said to have adeemed and the bequest simply fails on the basis that "the thing meant to be given is gone". Any proceeds from a disposition of the property in question fall into the residue of the estate, unless the testator has indicated in his or her Will that the bequest includes any such proceeds.

According to section 36 of the *Substitute Decisions Act, 1992* if Mrs. McDougald was incapable of managing her financial affairs when the Florida property was sold, or if the attorneys reasonably believed she was incapable, the proceeds of the Florida property would not fall into the residue of the estate. When the case first began by way of application, Wilson J. raised a concern as to whether she was able to determine the contested factual issues regarding Mrs. McDougald's capacity and the reasonable belief of the attorneys based upon affidavit material alone. Counsel sought instructions as to whether their clients were prepared to consent to a hearing before Wilson J. in order to determine the issues on the written record alone.

Upon consideration, the parties expressed their desire to cross-examine on the contested factual issues. In the ordinary course, the entire application would have had to be adjourned. However, according to Wilson J., a practical solution was for the parties to opt for a summary trial. Ultimately, the parties agreed, in essence, to follow the format of the summary trial set out in Rule 76 regarding Mrs. McDougald's capacity and the reasonable beliefs of her attorneys. There was affidavit material already before the court. The parties agreed to exchange further affidavit material and file a consolidated record. The affidavit material constituted the evidence-in-chief. After reviewing the extent of the affidavit material before her and hearing from counsel, Wilson J. imposed reasonable time limits on the cross-examinations. The process resulted in significant cost savings for the parties.

¹ [2003] O.J. No. 3106 (S.C.J.), affirmed at [2005] O.J. No. 2432 (C.A.)

The issues of capacity and the reasonable beliefs of the attorneys were tried in two days. There was no delay as a result of the adjournment of the application for a trial of the issues and the parties obtained a more expeditious resolution from the court. The rights of the parties were protected as they were provided with an opportunity to prepare affidavits and conduct cross-examinations, albeit within reasonable time limits. While the case was ultimately appealed to the Ontario Court of Appeal, the mode of trial or procedure employed was not in issue.

McDougald Estate v. Gooderham demonstrates that in the estate context, parties should consider utilizing Rule 76 if they want a comparatively quick result and to control their legal costs. This is especially true where applications are converted to a trial of issues. An obvious corollary is that by reducing the overall costs of the litigation, the parties reduce the amount they may be ordered to pay by way of a cost award.

What was the ultimate outcome in *McDougald Estate v. Gooderham*? Far be it from me to spoil the surprise. The decision of Wilson J. makes for interesting reading.