Pecore v. Pecore[1] & _Madsen Estate v. Saylor_ [2] - The Presumption of Resulting Trust and Advancement

In *Pecore v. Pecore*, an ageing father gratuitously placed mutual funds, bank accounts, and income trusts in joint accounts with his adult daughter, Paula. The father was the only one to deposit money into the accounts. At the time of his death, there was still money in the accounts – almost $1,000,000.00 in total.

Paula was one of three children. Of the three of them, she was closest to her father. One of the other siblings was estranged from the father until shortly before his death.

The two other siblings were financial secure, but Paula was not. She worked at various-low paying jobs and took care of her then-husband, Michael, who was a quadriplegic. Her father had helped support her by, for example, buying her family a van, paying for improvements to their home, and paying her son's college tuition.

In the 1990s, the father's financial advisor told him that by placing assets in joint ownership he could avoid probate fees on his death. In a letter written to the bank purporting to deal with the tax implications of the transfer, he stated that he was the 100% owner of the assets and they were not being gifted to Paula.

In 1998, the father made a Will. By that time, the bulk of the assets had been transferred into the joint accounts. In the Will, he left specific bequests to Paula, Michael, and their children. The residue of the estate was to be divided equally between Paula and Michael.

In 1998, the father moved into Paula and Michael's home. He expressed to others that he was going to take care of Paula after his death but that the "system" would take care of Michael.

Background of Proceeding

Paula and Michael later divorced and, during the matrimonial property proceedings, a dispute arose between them as to who was entitled to the assets held in joint accounts between Paula and her father at the father's death.

At trial, the judge found that, given Paula's relationship with her father, the presumption of advancement applied. He concluded that the evidence failed to rebut the presumption of advancement and that the money in the joint-accounts therefore belonged to Paula.

The Ontario Court of Appeal dismissed Paula's ex-husband's appeal, finding that there was ample evidence to show that the father intended to give Paula beneficial interest in his investments when he placed them in joint ownership.

The ex-husband appealed the Court of Appeal's decision to the Supreme Court of Canada ("SCC").

Issues

1. Does the presumption of resulting trust and advancement continue to apply?

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[1] *Pecore v. Pecore*, [2007] S.C.J. No.17 (QL)
[2] *Madsen Estate v. Saylor*, [2007] S.C.J. No. 18 (QL)

2. On what standard will the presumption be rebutted?

3. How should courts treat survivorship in the context of a joint account?

4. What evidence may courts consider in determining the intent of a transferor?

Decision

The majority dismissed the appeal.

At the time of the transfers, Paula and her father were very close and, given their relationship and Paula's financial hardships, her father preferred her over her siblings.

The statements the father made while drafting his Will indicated that he was of the view the accounts had been dealt with and understood the assets would not form part of his estate.

The letters the father wrote to the bank were for the purpose of avoiding triggering capital gains tax.

Paula had adduced sufficient evidence to rebut the presumption of resulting trust.

1. Does the presumption of resulting trust and advancement continue to apply?

In certain circumstances, there will be a presumption of resulting trust or a presumption of advancement. Each is a rebuttable presumption of law.

The presumption of resulting trust is the general rule that applies to gratuitous transfers. Where a gratuitous transfer is made, the onus is placed on the transferee to demonstrate that a gift was intended.

Depending on the nature of the relationship between the transferor and transferee, the presumption of a resulting trust will not arise and there will be a presumption of advancement instead. In that case, it will fall on the party challenging the transfer to rebut the presumption of a gift.

The presumption of advancement applies to transfers of property by parents (both fathers and mothers) into joint-ownership with their minor children. It will not apply to transfer by parents to their adult children, irrespective of whether the children are independent or dependant.

In situations where a transfer to an adult child was intended as a gift, it's open to the party claiming that the transfer was a gift to rebut the presumption of resulting trust.

2. On what standard will the presumption be rebutted?

Civil standard (i.e. the balance of probabilities) is applicable to rebut the presumptions.

3. How should courts treat survivorship in the context of a joint account?

The right of survivorship, both legal and equitable, vest when the joint account is opened (rather than on death) and the gift of those rights is therefore *inter vivos* (rather than testamentary) in nature.

NB: the presumption of a resulting trust means it will fall to the surviving joint account holder to prove the transferor intended to gift the right of survivorship.

4. What evidence may courts consider in determining the intent of a transferor?

- Evidence contemporaneous with the transfer

This is the best type of evidence – and the type the court prefers.

- Evidence subsequent to the transfer

Evidence of intention that arises subsequent to a transfer should not automatically be excluded so long as it is relevant to the intention of the transferor at the time of the transfer.

- Bank documents

Generally, bank documents are evidence of legal title, rather than beneficial title – however, if there is anything in the documents that specifically suggests transferor's intent, the court should consider it.

- Control and use of funds in account

Evidence of use and control should not be ruled out – however, it will not be determinative.

- Granting of Power of Attorney

The court has the discretion of whether to consider it or not – at any rate, it should not be determinative.

- Tax treatment of joint accounts

The weight to be placed on tax-related evidence in determining a transferor's intent should be left to the discretion of the trial judge.

Abella J wrote a separate decision in which she said that the presumption of advancement should apply to both adult and minor children.

Madsen Estate v. Saylor

This case involved an account held jointly between a father and his daughter, Patricia. As at the date of death, the accounts totalled approximately $185,000.00.

Patricia was one of three children of the deceased.

In 1982 the father prepared a Will. In the event his spouse pre-deceased him, the estate was to be divided into two halves. One half was to be divided amongst the father's three children. The other was to be divided amongst his grandchildren.

In 1991, the father made Patricia a joint signatory on his bank accounts, which provided for a right of survivorship. He also executed a power of attorney in her favour.

In 1997 the accounts were closed and the funds were deposited into another bank account and an investment account – both were held jointly with Patricia with a right of survivorship.

While living, the father lived with Patricia's brother, then Patricia, and then went into a nursing home.

There was conflicting evidence as to the relationship the siblings had with their father. Patricia said she was the favoured child and her father's relationship with her siblings was strained. The siblings both claimed to have a good relationship with their father.

Background of Proceeding

Upon the father's death in 1998, the siblings commenced litigation against Patricia as the estate trustee because she was not including the joint accounts in the distribution of the estate.

The trial judge found that there was no evidence to support Patricia's position that a gift was intended. She said it was time for the presumption of advancement to be abandoned in favour of the presumption of resulting trust in all but the most limited cases.

The Ontario Court of Appeal said the trial judge was incorrect in applying the presumption of resulting trust and should have applied the presumption of advancement. However, given that she had carefully weighed the evidence, there was no reason to interfere with her finding that no gift was intended.

Patricia appealed to SCC.

Decision

The SCC dismissed the appeal.

A presumption of a resulting trust applies to the gratuitous transfer of assets. The presumption of advancement does not apply because Patricia was not a minor child. She therefore had the burden of rebutting the presumption of a resulting trust by showing that her father intended to gift the assets to her on the balance of probabilities.

The fact that a transferor maintains sole control over or use of funds will not be determinative of whether a transferee is entitled to the balance on the transferor's death.

Whether or not the transferor continues to pay tax is not determinative.

Banking documents may, in some cases, be detailed enough that they provide strong evidence of the intention of the transferor regarding how the balance in the accounts should be treated on his death. The weight given should depend on how clear the documents are regarding intention. In this case, beyond the fact that both accounts were designated as carrying the right of survivorship, they did not contain any express reference to beneficial entitlement.

Little weight was accorded to Patricia's evidence as the trial judge did not find her credible.

Abella J. dissented. Her Honour said that the presumption of advancement should apply to all gratuitous transfers from parents to their children, regardless of whether they are adult or minors. As such, the trial judge should not have assigned the burden of proof to Patricia and a new trial should be ordered.

Kurtz v. Nicholson[3] – A Cautionary Tale

Lack of testamentary capacity and undue influence are usually difficult to prove. However, too many clients are willing to advance such claims on the basis of a weak evidentiary record. This recent decision from the Alberta Court of Appeal sounds a note of caution.

Two sisters appealed a trial decision setting aside their father's Will on the basis of lack of testamentary capacity and undue influence.

The father's previous Will had divided the residue of his estate equally between his three children. However, in 1998, the father, who was 92 at the time, retained a lawyer to prepare a new Will ("1998 Will"). The lawyer asked his client a series of questions. Some of the responses were inaccurate, but the lawyer ultimately concluded his client had capacity. The 1998 Will specifically stated that the father wanted to exclude his son "because I believe if he receives any money he will use it for liquor". The son had been convicted of drinking and driving offences in 1987 and 1992.

The trial judge concluded that the father lacked capacity and was unduly influenced by his two daughters and set aside the 1998 Will. The Alberta Court of Appeal disagreed and reversed the trial judge's decision. The 1998 Will was declared valid.

According to the Appeal Court, there was no medical evidence suggesting the testator lacked capacity and there was no direct evidence that the daughters influenced their father's decision to exclude their brother. Moreover, the father's lawyer specifically questioned his client to gauge his capacity during their first two meetings. Their third meeting lasted two and a half hours and the lawyer had no reason to conclude that his client's capacity had changed. After reading the 1998 Will to his client, the lawyer was satisfied that it expressed his client's wishes.

According to the Appeal Court, the finding of undue influence could also not be sustained on the record. The father's reason for excluding his son was expressly articulated in the 1998 Will. There was also clear evidence that the father's wish to exclude his son arose several months before the 1998 Will was signed. The Appeal Court held that the trial judge simply failed to give any weight to this evidence. The trial judge also failed to give weight to the lawyer's evidence that he discussed the possibility of the daughters' influence with his client who expressly denied such influence.

Rose v. Rose[4]*– The Finality of an Irrevocable Trust*

Rose v. Rose is a recent Ontario case that deals with marriage breakdown, disillusioned children, and the finality of an irrevocable trust.

Brian and Janice were married and had two daughters. In 1992, Brian and Janice transferred a ski chalet and cottage into trust for the benefit of their daughters. Brian was the trustee for the

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[3] *Kurtz v. Nicholson* (2006), 26 E.T.R. (3d) 211 (A.B.C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 355

[4] *Rose v. Rose* (2006), 24 E.T.R. (3d) 217 (Ont. S.C.J.), decided June 19, 2006; (supplementary reasons released June 20, 2006: (2006), 24 E.T.R. (3d) 240 (Ont. S.C.J.)

trust. The trust was irrevocable. The family enjoyed the use of the chalet and cottage before and after the establishment of the trust.

Brian and Janice separated after the trust was established. Brian's relationship with his daughters also deteriorated. The daughters ultimately became frustrated with their father as trustee and commenced an application to have him removed. They also sought an order winding up the trust and distributing the capital income to them.

For his part, Brian wanted to continue to use and enjoy the chalet and cottage despite the separation from his wife. However, the court held that the trust deed, the foundation document for the trust, could not be interpreted as authorizing Brian (or Janice for that matter) to use and enjoy the two properties without the consent of his two daughters. Furthermore, the court was not prepared to rectify the trust deed to provide Brian with the use and enjoyment of the properties.

Brian also hoped to transfer the two properties back to him and his former wife. The court held that once the trust had been created, no such transfer could take place as Brian had failed to retain the power to revoke the trust.

However, the court did remove Brian as trustee. The court noted there was a great deal of hostility between Brian and his daughters. According to the court, it did not matter where the fault lay. The question to be asked when removing a trustee is whether it would be difficult for the trustee to act with impartiality, not whether in fact he would or would not do so. The court held that it would be impossible for Brian to act impartially in this situation.

Finally, the court held there was no basis for the claim by the daughters that they were entitled to call for the winding-up of the trust and for the distribution to them of the property of the trust.

Webster v. Webster[5]– Limitation Periods and Equalization Payments: When is it too Late?

Limitation provisions generally aim to strike the appropriate balance between an aggrieved party's right to seek redress and a potential defendant's right not to remain under the cloud of litigation indefinitely or to answer for a wrong where it has become difficult, if not impossible, to marshal the evidence.

The case of *Webster v. Webster Estate*, a recent decision of the Ontario Superior Court of Justice, attracted notoriety in the media, as the Webster family is well known in Montreal and the world of philanthropy. The case considers limitation periods in the estate context.

By way of background, Mr. & Mrs Webster were married for 29 years. It was a second marriage for both parties. Mrs. Webster was a devoted wife. Mr. & Mrs. Webster gave generously to their community. They lived happily ever after until Mr. Webster's death on October 11, 2003. Mr. Webster was 87 years old when he died. Mrs. Webster was then 81 years old.

Mr. Webster's estate was valued at around $24 million. Mrs. Webster was provided for under the terms of the Will, but the bulk of the Estate was left to the Eric T. Webster Foundation. Unfortunately, since the death of her husband, Mrs. Webster developed Alzheimer's disease,

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[5] *Webster v. Webster Estate* (2006), 25 E.T.R. (3d) 141 (Ont. S.C.J.). decided July 6, 2006; (supplementary reasons released February 1, 2007: (2007), 30 E.T.R. (3d) 165 (Ont. S.C.J.)

which had progressed to the point where she was unable to testify as a witness in the proceeding.

The Will appointed four Estate Trustees of the Estate including Mrs. Webster and her son by her first marriage, who was also Mrs. Webster's legal representative and the step-son of Mr. Webster.

In Ontario, when a spouse dies with a Will, the surviving spouse may elect to take the benefits bestowed under the Will, or seek the equalization of net family property from the estate as calculated under the provisions of the *Family Law Act*.

An application for an equalization payment must be brought within six months of the first spouse's death, otherwise the surviving spouse is deemed to have chosen to take under the Will.

Mrs. Webster did not file an election within the prescribed six months. This meant that she could no longer elect to equalize their net family property. However, Mrs. Webster and her son both alleged that they were unaware of any right to elect to receive an equalization payment under the *Family Law Act* in the six months following Mr. Webster's death. Mrs. Webster therefore sought an order extending the time within which she could file an election to make an equalization claim from the Estate of her deceased husband.

Unfortunately for Mrs. Webster, and her son who ultimately spearheaded the proceeding, they did not receive a sympathetic hearing from the court.

According to the court, while there was evidence to suggest that Mrs. Webster was content with her benefits under the Will during the life of Mr. Webster, the court nevertheless recognized that she was completely free to change her mind and seek an equalization payment within the prescribed time.

Section 2(8) of the *Family Law Act* provides that the court may, on a motion, extend the prescribed time if it is satisfied that: (1) there are apparent grounds for relief; (2) relief is unavailable because of delay that has been incurred in good faith; and (3) no person will suffer substantial prejudice by reason of the delay.

While courts have generally been liberal in extending the time limit, especially where there is any sign of ongoing negotiation prior to the limitation period lapsing, the court stated that was not the situation here.

For its part, the Estate submitted that a prenuptial agreement disentitled Mrs. Webster to request an equalization payment or alternatively, she and her son failed to safeguard her interest in a timely manner. Mr. & Mrs. Webster had signed a prenuptial agreement in Quebec in 1974. The agreement provided that Mrs. Webster and her husband would be separate as to property upon dissolution of the marriage by death. According to the court, the marriage contract did not bar the wife from an equalization claim because it did not expressly address election issues upon the death of one of the spouses.

Mrs. Webster and her son alleged that they were initially unaware of any right to make an election for equalization of the net family property. Six months after the expiration of the limitation period, the son learned otherwise, consulted a lawyer, and an application was brought a further six months later. No explanation was offered for the delay incurred after Mrs. Webster's son became aware of the right to make an election for equalization. While the court recognized that Mrs. Webster might have been in a state of emotional upset and had much

difficulty in dealing with Mr. Webster's death, it noted that the majority of surviving spouses would be in a similar state of grief. Moreover, the court held that there was an opportunity for Mrs. Webster and her son to obtain legal advice upon the death of Mr. Webster, which they did not do.

Given the above, Mrs. Webster did not meet the criteria for an extension of the prescribed time because the delay in filing an election was not incurred in good faith. The failure by Mrs. Webster and her son to make inquiries amounted to wilful blindness. There was no justifiable reason for not making such inquiries.

The court also held that Mrs. Webster's declining health during the delay substantially prejudiced the ability of the Estate to defend the motion. The court also held that this was not a case that warranted an exercise of judicial discretion in Mrs. Webster's favour, due to the clear expression of Mr. Webster's intention to redistribute his wealth to charity.

Finally, the courts held that the *Family Law Act* should not be used as a scheme to rewrite a Will and redistribute wealth contrary to the testator's intension. The sad reality was that Mrs. Webster, in her failing health, was now a custodian of wealth to be redistributed to a subsequent generation. Mrs. Webster's Will provided that her three sons were the sole beneficiaries of her estate. Accordingly, it would be seem as though it would be Mrs. Webster's sons, as opposed to Mrs. Webster, who would benefit from an order granting the extension of time, while Mr. Webster's children would be excluded altogether.

The court held that it was unjust and contrary to the objectives of the *Family Law Act* to use the extension provision to secure this result. Accordingly, the court declined to exercise its discretion and dismissed the motion.

McMullen v. McMullen[6] **- The Limits of a Power of Attorney**

In *McMullen v. McMullen*, an 86 year old widower commenced an application against two of his three daughters, who held his power of attorney. The application was to set aside the transfer of a 99% interest in the father's condominium property to the husbands of his two daughters. The daughters, in turn, brought an application for an order requiring their father to submit to a psychiatric assessment.

According to the medical evidence before the court, the father had some medical problems, but no documented cognitive problems. At worst, he suffered from depression. However, the two daughters alleged that their father's spending habits had changed and his investments had been depleted. The daughters claimed that their father was sending money to a new female acquaintance in the United States. The family contacted medical professionals and legal authorities with concerns that their father was being financially abused, but to no avail.

When the daughters confronted their father with respect to his worsening financial situation, he became angry and denied he was being financially exploited. He asked his one daughter to stop monitoring his bank account though she did not accede to his request, as she considered it her duty under the power of attorney. The two daughters then transferred the father's condominium property to preserve his only remaining asset and provide for his future care.

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[6] *McCullen v. McCullen* (2006), 27 E.T.R. (3d) 304 (B.C.S.C.)

However, the daughters did not immediately register the transfer of the condominium property, as they thought it would cause emotional distress. It was not until a year later that the daughters finally registered the transfer of the condominium without telling their father or providing consideration. The father commenced the application when he ultimately discovered the transfer.

The court allowed the application by the father and the condominium transfer was declared null and void. While the daughters acted in what they considered to be in their father's best interests, there was nevertheless no evidence to show that the father was incapable of managing his financial affairs. The daughters had therefore breached their duties as attorneys by acting contrary to their father's intentions. The court dismissed the daughters' application, as the father was not required to submit to a psychiatric assessment where his mental capacity was not an issue.

The case holds that even when a family fears that an elderly parent is being financially exploited, but mental incompentency is not an issue, a power of attorney does not give the family *carte blanche* to do what they think is in the best interests of that parent. A power of attorney for property has its limits even in the most egregious situations.

Hall v. McLaughlin Estate[7] - A Mutual Love Affair Gone Sour or When does a Contract Trump a Will?[8]

In a recent decision released on July 12, 2006, *Hall v. McLaughlin Estate*, the Ontario Superior Court of Justice considered the effect of an agreement made by a married couple regarding the disposition of their combined assets. Specifically, the court was asked to determine whether there had been a contract between the spouses to create mutual Wills and leave their combined assets to all their children, and if so, whether the contract was binding on the surviving spouse's estate.

Emily and John McLaughlin married late in life, when she was 80 years of age and he was 78 years of age. Their marriage was a second one for both, and each had children from previous relationships. After they married, they executed mutual Wills on June 12, 1992. The 1992 Wills essentially provided that the first spouse to die would leave their estate to the surviving spouse, and the last spouse to die would benefit the families of both partners. The two also executed identical codicils on February 4, 1994, changing their executors but otherwise confirming the 1992 Wills.

Due to Alzheimer's disease, Emily became incapable in or around 1997. Accordingly, she became unable to change her Will or consent to John changing his Will. After Emily lost testamentary capacity, John made two further Wills, one in 1998 and one in 2000. Both of these Wills left his estate to his own family. The evidence before the Court was that the two sets of children had very little contact with each other. John did have a warm relationship with Emily's family, while Emily appeared to dislike John's children.

Emily McLaughlin died first. Pursuant to the terms of her 1992 Will, her estate, worth approximately $322,000.00, passed to her husband, John. When John died, his estate, worth approximately $706,000.00, went to his own children pursuant to the terms of his 2000 Will.

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[7] *Hall v. McLaughlin Estate* (2006), 25 E.T.R. (3d) 198 (Ont. S.C.J.)
[8] Special thanks to Bianca La Neve for her assistance and insight

Accordingly, the couple's combined estate went to John's family and Emily's children received nothing from their mother's estate.

According to Emily's children, the couple had entered into an agreement during their marriage that the first partner to die would leave his/her estate to the survivor, and when the surviving partner died, he/she would benefit the families of both partners. They argued that the 1992 Wills evidenced this agreement. Accordingly, the understanding was that Emily's children would eventually receive an equal share of the couple's combined estate.

Emily's family commenced litigation against John's estate, for a determination as to the existence and validity of the contract. If it was determined that there was a binding contract, Emily's children wanted a declaration that one-half of John's estate was held in trust for them. Emily's children also sought additional relief, such as a tracing order and punitive damages against the executor of John's estate (one of John's children).

John's family argued that there had been no contract between the spouses to make mutual Wills. They argued further that each spouse had been free to revoke his or her Will, and that John in fact did so by making two subsequent Wills that left out Emily's children.

Madam Justice Pierce first outlined the doctrine of mutual Wills. She noted that the existence of mutual Wills was not enough to prove an agreement among parties as to the disposition of their property. Other independent evidence is also required. She referenced the decision of Mr. Justice Cullity in *Edell v. Sitzer* [2001] O.J. No. 2909 (Ont. S.C.J.), in which Justice Cullity held that an agreement proven upon clear and satisfactory evidence was a prerequisite for finding a binding contract. The contract had to include an agreement not to revoke the mutual Wills. Cullity J. concluded that where the evidence supported a binding agreement, the survivor would not be allowed to resile from the agreement after the first party's death. In such circumstances, a constructive trust could be imposed on the survivor's estate.

Madam Justice Pierce then reviewed the evidence regarding the agreement. She found that there was clear and satisfactory evidence that Emily and John McLaughlin intended to enter into an agreement and had in fact entered into a binding agreement, that the survivor of them would divide his or her estate into two equal shares to be divided among their beneficiaries, as set out in their 1992 Wills. John also mentioned their agreement in discussions with Emily's family and this evidence was not challenged on cross-examination. John repeatedly assured Emily's children that they would be looked after and that their mother's money was safe.

Madam Justice Pierce found that John's repeated assurances were evidence that he recognized and felt bound by the agreement he had made with Emily to divide their assets equally among their children. Given these repeated assurances, it is unclear why John made two new Wills in 1998 and 2000. Madam Justice Pierce outlined two possible explanations. The first possible explanation is that John expected to die first. The second possible explanation is that he intended to make an inter vivos gift to Emily's children.

In any event, Madam Justice Pierce determined that there was a breach by John of the contract with Emily to share their combined assets equally among their families. Her remedy was to impose a constructive trust on one-half of John's estate for the benefit of Emily's children. Given that almost all of the estate had been distributed, Madam Justice Pierce issued a tracing order in respect of the proceeds of the estate. She also granted an injunction to prevent John's children from dissipating assets attributable to the estate, pending satisfaction of her judgment. The claim for punitive damages against John's son and executor was denied, as there was no egregious conduct on his part to merit such an award.

In summary, the decision in McLaughlin Estate stands for the proposition that parties can make a binding agreement regarding the disposition of their combined assets. The agreement is not a testamentary document, but a contract. If one of the parties then breaches the contract, the other party will have the right to sue the estate in respect of the breach. As a practice tip, lawyers should encourage parties who enter into an agreement regarding the disposition of their estates to fully document it in writing, including a term not to revoke their mutual Wills. By entering into a written agreement, litigation can be more readily avoided.

Rudd v. Trossacs Investments Inc.[9] – Mediation/Confidentiality Preserved

Mediation is now widely regarded as an important tool in the arsenal of any litigator. There is some debate as to when the parties to an action should mediate. Many counsel believe that early mediation provides a golden opportunity to settle disputes in the initial stages without incurring significant legal fees. Other counsel believe that their client's position is compromised, and a mediated result next to impossible, if they have not first formally examined the opposing party.

Fairly recent changes to the mandatory mediation rules for civil actions in Ontario now largely leave the decision as to when to mediate in the hands of counsel. The expectation is that many mediations will take place after examinations for discovery have been completed.

However, the estate litigation world is somewhat unique. Many counsel, together with the courts, are proponents of early mediation. It seems obvious to many that very little good can come of families fighting over what could be considered a windfall and a mediated result brings the bloodletting to a relatively quick end. Moreover, mandatory mediation is often required and mediation is routinely conducted early on in many estate actions. Where mediation is not mandatory, counsel will often agree to early mediation.

However, where mediation takes place before examinations for discovery have been conducted, the parties should exchange affidavits of documents in advance so that they can at least familiarize themselves with the issues raised and the relevant documents. For example, and for obvious reasons, medical records should be reviewed beforehand where testamentary capacity is raised.

It is generally recognized that mediation is confidential and a mediator cannot be called as a witness, or his/her notes produced, at a later date. Parties are encouraged to speak freely in order to facilitate settlement and a mediation is conducted on a "without prejudice" basis. Communications made during mediation, including any settlement offers, remain confidential and cannot be used against or by a party to the mediation at a later date.

In the relatively recent *Rudd* decision, the Divisional Court considered the issue of whether a mediator could be called as a witness.

In *Rudd*, the parties entered into a settlement agreement following mandatory mediation. A dispute arose as to whether a particular party was a party to the settlement agreement. A motion was then brought to enforce the settlement. An interim order was sought to compel the mediator to testify about communications at the mediation.

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[9] *Rudd v. Trossacs Investments* (2006), 265 D.L.R. (4th) 718 (Ont. S.C.J. (Div. Ct.)

The motions judge ordered that the mediator could be examined as a witness on the pending motion to enforce the settlement. The motions judge discussed the common law principle that settlement discussions are privileged, but concluded that once a settlement had been reached and its interpretation is in question, it might be necessary to disclose mediation discussions to ensure “substantive justice”.

Not surprisingly, the decision was appealed to the Divisional Court, which ultimately allowed the appeal. The Ontario Bar Association had been granted intervenor status when leave to appeal was originally given. The Ontario Bar Association took the position that discussions with the mediator were privileged at common law, and the motions judge erred in ordering the mediator to testify.

According to the Divisional Court, the motions judge erred in dealing only with “without prejudice” settlement privilege and failing to consider whether there was a general mediation privilege or privilege protecting mediators from testifying based on the *Wigmore* principles.

In *Slavutych v. Baker*, [1976] 1 S.C.R. 254 [hereinafter “*Slavutych*”], the Supreme Court of Canada held that the four conditions from *Wigmore on Evidence* should be applied to determine whether communications are privileged in certain important societal relationships:

1. The communications must originate in a confidence that they will not be disclosed.

2. The element of confidentiality must be essential to the maintenance of the relationship in which the communications arose.

3. The relationship must be one which, in the opinion of the community, ought to be “sedulously fostered”.

4. The injury caused to the relationship by disclosure of the communications must be greater than the benefit gained for the correct disposal of the litigation.

The Supreme Court has subsequently reaffirmed the approach in *Slavutych*[10].

In *Rudd*, the Divisional Court held that communications at mediation between parties and the mediator originated in confidence and so should not be disclosed. In fact, all parties had signed a confidentiality agreement that expressly stated that the communications at the mediation were to be confidential and that the mediator’s notes and recollections could not be subpoenaed later in the litigation. The mediation was also conducted pursuant to Rule 24.1 (mandatory mediation in civil matters). Rule 24.1.14 states that all communications at mediation and the mediator’s notes and records are deemed to be without prejudice settlement discussions.

The Divisional Court was also satisfied that the confidentiality of communications during the mediation was essential to the functioning of the mediation process. The Court recognized the significant public interest in protecting the confidentiality of discussions at mediation in order to make the process as effective as possible. In fact, the Divisional Court commented that mandatory mediation was required in many civil disputes in order to assist the parties in arriving at a settlement.

[10] *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157

The Divisional Court noted that the ability of the parties to engage in full and frank disclosure was also fundamental to the mediation process and to the likelihood that it would lead to a resolution of the dispute. Parties would likely be less candid if they knew or were not assured that their discussions would remain confidential.

The Divisional Court also expressed concern that the mediator would lose the appearance of neutrality if required to testify in a proceeding between the parties. According to the Court, there was an important public interest in maintaining the confidentiality of the mediation process.

In conclusion, the Divisional Court was satisfied that the four conditions from *Wigmore on Evidence* were satisfied. The Court held that the mediator could not be compelled to be a witness on the pending motion. The confidentially of communications at mediation was therefore preserved. In the aftermath of the *Rudd* decision, mediation should continue to be embraced by counsel as an important alternative dispute mechanism.