

“NOT SO FAST”
Neuberger v. York, 2016 ONCA 191
 A look at some of the unique elements and considerations in probate litigation

Toolbox Seminar
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Judicial History

- On appeal from the Superior Court of Justice (Madame Justice Greer, as she then was)
- Application by Edie (estate trustee and beneficiary) to challenge will validity (“*Huh?*”)
- Motion to dismiss Application by Myra (co-trustee)
- Motion granted by Justice Greer in November 2014
- On appeal, decision of Justice Greer overturned by Justice of Appeals Gillese



The Facts

The Family

- Testator = Chaim Neuberger
- The Estate = \$100 Million +
- Family
 - Wife: Sarah (predeceases Chaim)
 - Daughters: Edie (Neuberger) and Myra (York)
 - Date of Death: September 25, 2012
 - Age at Death: 86

The Wills

- Primary and Secondary Wills in 2004
- Primary and Secondary Wills in 2010
- Similarities:
 - Myra and Edie = joint executors and trustees
 - Primary estate divides equally
 - Second Will creates voting control of separate company structures (one for Myra, one for Edie)

The Wills

- Change from 2004 to 2010 = Estate Freeze in 2010
 - Common shares of companies placed into trusts
 - Chaim retains preference shares (control)
 - Edie and children are beneficiaries of Trust A
 - Myra and children are beneficiaries of Trust B
- The Effect (according to Edie):
 - Capital stock organized differently:
 - Company B allegedly worth \$13 million more than Company A

Estate Administration and Will Challenge

- Prior to challenge, Edie acts as trustee under 2010 Wills, but some notable actions also not taken by Edie
- However:
 - Edie had taken prior litigation steps under 2010 Will
 - This caught the Court's attention
- Edie challenges 2010 Wills in December 2013
- Myra moves to dismiss application in Feb 2014

Superior Court of Justice

Motion Grounds

- Equitable doctrine of estoppel by representation
- Equitable doctrine of estoppel by convention
- In English:
 - Edie’s conduct consistent with 2010 Wills precludes her from challenging validity of 2010 Wills
 - “Too late to change your mind”
- Justice Greer: Delay in bringing challenge + taking steps as trustee estopped Edie
 - Adam (Edie’s son) called a “straw man”

Court of Appeal

Again, Not So Fast

- Justice Greer’s decision overturned on appeal
- Estoppel by Representation or Convention in Probate is unprecedented and unwise
- Policy Reasons:
 - Probate Court has a “duty to the public”
 - Probate Court has a duty to testator
 - Estate trustees must be given a reasonable timeframe to contemplate challenging a Will

Court of Appeal ...cont’d

“Straw Man Adam”

- No evidence upon which to base this finding
- If a motion judge rejects otherwise unchallenged evidence, that is a challenge to credibility
- Judge must give an explanation for rejecting evidence
- Being a “straw man” is not in itself grounds for disentitlement in any event

Obiter: No Automatic Right to Proof in Solemn Form

- SCJ and ONCA agree
- Adam argued that Rule 75.01 provides an automatic right to proof in solemn form
- Wrong.
 - Automatic right to request the Will be “proved in such manner as the court directs.”
 - The Court retains discretion as to mode of proof under Rule 75.06.

Conclusion

- Plenty of good reasons why Will challenge application is likely to ultimately fail.
- BUT, practicality has its limits
- Dismissal of application prior to trial requires real certainty as to merits.
