

CITATION: *In the Estate of William McGarry, deceased*, 2025 ONSC 3299
COURT FILE NO.: CV-24-96952
DATE: 2025-06-04

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE ESTATE OF BRIAN WILLIAM MCGARRY, Deceased

RE: Sheetza McGarry, Applicant

BEFORE: The Honourable Mr. Justice Marc Smith

COUNSEL: Kevin Caron and Sean Grassie, Counsel for Applicant

Miriam Vale Peters, Counsel for Daniel Nassrallah, Georges Nassrallah and
Nasrallah Law Offices P.C., non-parties

HEARD: April 14, 2025

REASONS FOR DECISION

M. SMITH J

OVERVIEW

[1] This Application seeks to appoint an interim Estate Trustee as well as directions to facilitate the determination of potential issues regarding a purported will and irrevocable life insurance beneficiary designations.

[2] The named Executors and Estate Trustees under the purported Last Will and Testament dated October 25, 2016 (“2016 Will”) have renounced. The Applicant requests the authority to investigate the validity of the 2016 Will and related issues on behalf of the Deceased.

[3] The non-parties were granted limited standing on the return of the Application by Justice Rees on November 21, 2024. Despite being permitted by Justice Rees to file materials in response to the Application, the non-parties have chosen not to present any evidence on the basis that they were constrained by solicitor-client privilege. Notwithstanding, they are taking the position that the Application should be dismissed with costs because of various procedural irregularities and mistakes.

[4] The non-parties have brought to my attention that Mary Ellen Schwerdfeger, the Deceased's sister, has prepared a Notice of Application and supporting affidavit. In the unissued Application, Ms. Schwerdfeger seeks an order appointing her as the Estate Trustee. She purports to be prepared to put forward the 2016 Will for probate. In her affidavit, Ms. Schwerdfeger points to a series of legal transactions completed by the Deceased which suggests that he may not have lacked legal capacity and that these should be investigated. Also, she deposes that she is concerned that the members of the Applicant's family may be exerting undue influence over her.

[5] The non-parties further position is that Ms. Schwerdfeger's Application should be heard first.

BRIEF FACTS

[6] Mr. Brian William McGarry (the "Deceased") died on January 27, 2024.

[7] The Deceased has three children: Sheetza McGarry ("Applicant"), Erin McGarry, and Brett McGarry.

[8] The Applicant's mother, Joan Sun, married the Deceased on February 14, 2000. They separated in or around September 2014, but they were never legally divorced.

[9] It is alleged that since 2012, the Deceased experienced cognitive difficulties.

[10] The Deceased was involved in litigation and his mental capacity was allegedly being raised as a concern. On March 21, 2014, his lawyers at the time, Brazeau Seller LLP referred him for a neuropsychological assessment. The assessor concluded that the Deceased was exhibiting signs of cognitive decline consistent with Alzheimer's disease.

[11] It is further alleged that three days after the assessment, the Deceased terminated his retainer with Brazeau Seller LLP and retained the services of the non-parties, Daniel Nassrallah, Georges Nassrallah and Nasrallah Law Offices P.C. (collectively the "Nasrallahs"). The relationship between the Deceased and non-parties soured leading Nasrallah Law Offices P.C. to commence legal proceedings on September 3, 2015 against the Deceased for breach of contract and unpaid legal services in the amount of \$125,042.60. The Deceased initially defended the action

with the assistance of new counsel, but on October 23, 2015, as a self-represented litigant, the Deceased filed an Amended Statement of Defence admitting to all allegations contained in the Statement of Claim.

[12] On October 25, 2016, three days after capitulating to the Nassrallahs' demands, the Deceased executed his 2016 Will, naming Daniel Nassrallah and Georges Nassrallah as sole Executors and Estate Trustees.

[13] On October 28, 2016, the Deceased made a change to his life insurance policy, which had been obtained on February 2, 2012 and designated the Estate as the sole beneficiary of the one million dollar life insurance policy. The irrevocable change included naming new beneficiaries and the sharing apportionment of the policy, as follows: 10% to the Applicant, 45% to Daniel Nassrallah and 45% to Georges Nassrallah, the latter two being described as "Lawyer/Friend".

[14] After the death of her father in January 2024, the Applicant discovered that the Deceased had executed two prior wills dated January 21, 2011 and May 14, 2012.

[15] In June 2024, Daniel Nassrallah and Georges Nassrallah renounced as Executors and Estate Trustees.

[16] On January 28, 2025, the Applicant commenced legal proceedings against the Nasrallahs in relation to the 2016 Will and the million dollar life insurance policy.

[17] The Applicant's mother and half siblings all have an interest in the Deceased's Estate because they are listed as potential beneficiaries in at least one of the Deceased's wills. The Applicant's mother and half siblings support this Application.

ISSUES

[18] The issues to be determined are as follows:

- i. Should the Application be dismissed?
- ii. In the negative, who should be appointed as Estate Trustee During Litigation ("ETDL")?

- iii. What directions should be given?

ANALYSIS

[19] Let me first address Ms. Schwerdfeger's unissued Application. This unissued Application is not before the Court, and it is unknown as to whether it will be issued in the future. I am not prepared to entertain a hypothetical scenario that is not properly before the Court, and in any event, based on the limited information provided by Ms. Schwerdfeger, I am not persuaded that she would be an appropriate Estate Trustee in these proceedings.

Issue #1 – Should the Application be dismissed?

[20] The short answer is no.

[21] The Nasrallahs submit that the Application should be dismissed because it is moot and is a result of the various procedural irregularities and mistakes:

- i. The Applicant has not filed a Notice of Objection in respect of the 2016 Will.
- ii. The Applicant is not willing to put the 2016 Will forward for probate.
- iii. Daniel Nassrallah and Georges Nassrallah have renounced their appointments as Executors and Estate Trustees, and nobody has applied to be Estate Trustee, which is a necessary first step pursuant to s. 29 of the *Estates Act*, R.S.O. 1990, c. E.21. That person would bring a new Application seeking appointment.
- iv. Because the Applicant is challenging the 2016 Will as well as the life insurance policy designation, she cannot apply to be the Estate Trustee.
- v. It is premature to appoint an ETDL without an Estate Trustee in place.

[22] I disagree with the Nassrallahs' position.

[23] First, I find the facts of this case to be highly suspicious requiring the Court to carefully exercise its broad and inherent inquisitive jurisdiction to supervise the management of estates and its own process.

[24] Second, the Applicant seeks the appointment of Estate Trustee, as set out in her Application. However, before being appointed permanently as Estate Trustee, she seeks directions regarding the purported 2016 Will and the Deceased's irrevocable life insurance beneficiary designations. This is a reasonable approach.

[25] Third, this Application arises because of the course of action elected by Daniel Nassrallah and Georges Nassrallah. Had they not renounced as Executors and Estate Trustees and put the purported 2016 Will up for probate, the Applicant would have filed a Notice of Objection, and a will challenge could have proceeded in the normal course.

[26] Fourth, the Application is made pursuant to r. 75.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*") which permits a person appearing to have a financial interest in the estate to make an application under r. 75.06 of the *Rules* to have a testamentary instrument proved in the manner as the Court directs.

[27] The Court has wide discretion under r. 75.06 of the *Rules* to shape the proceeding as it deems fit and ensure that the process provides a fair and just resolution to the disputes in question: *Seepa v. Seepa*, 2017 ONSC 5368, at paras. 38 and 39. A dismissal of the Application is contrary to these principles.

[28] In reading together r. 75.01 and r. 75.06 of the *Rules*, the Court has discretion in ordering that the testamentary instrument be proved and there is a minimum evidentiary threshold that must be met by an interested person requesting that a testamentary instrument be proved. Under r. 75.06 of the *Rules*, an applicant must adduce evidence that would call into question the testamentary instrument that is being propounded: *Neuberger v. York*, 2016 ONCA 191, at paras. 86 to 90. Considering the suspicious transactions surrounding the 2016 Will and the change to the life insurance policy designations, I find that the Applicant has met that burden.

[29] Fifth, it is not premature to appoint an ETDL without an Estate Trustee in place. Section 28 of the *Estates Act* provides that "pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration", the Court may appoint an "administrator of the property". In my view, while the action is pending, the ETDL fills the appropriate role to administer the estate.

[30] Sixth, given the unique and suspicious circumstances surrounding the Deceased's declining health and capacity, his litigious relationship with the Nassrallahs, the execution of the 2016 Will and the irrevocable life insurance beneficiary designation to Daniel Nassrallah and Georges Nassrallah, it is understandable that the Applicant does not wish to put the purported 2016 Will up for probate. Also, pursuant to s. 16(c) of the *Estates Act*, the Applicant would not have been able to apply as an Estate Trustee under the prior wills because of the existence of the 2016 Will. The Applicant's approach is not only reasonable but, in my view, it is the only approach that should be taken in this case. The Applicant needs to bring this Application to require proof of the purported 2016 Will under r. 75.01 of the *Rules*.

[31] Lastly, the Nassrallahs cite no persuasive authority for the proposition that the Application should be dismissed. Proceeding under r. 75.01 and 75.06 of the *Rules* is appropriate in the circumstances of this case, as the Court will provide the necessary directions to determine the validity of the estate instruments. For all these foregoing reasons, I reject the Nassrallahs' request that the Application be dismissed.

Issue #2 – Who should be appointed as ETDL?

[32] The Applicant seeks to be appointed as the ETDL. Alternatively, the Applicant proposes that Ian Warren and Dahlia Aeta of Warren Camacho LLP be appointed as the ETDLs.

[33] Rule 75.06(3)(f) of the *Rules* provides that on an application or motion for directions, the Court may direct that an ETDL be appointed. In exercising the discretion under this rule, the Court must be cognisant of r. 1.04(1) of the *Rules* of the duty to liberally construe the rules "to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

[34] The factors to consider in the appointment of an ETDL are: (i) whether a trustee may be a witness in the litigation; (ii) potential for conflict of interest; (iii) conflict between the interest of the trustees and/or beneficiaries; (iv) hostility between the trustee and/or beneficiaries; (v) lack of communication between the parties; and (vi) evidence of settlement discussions that exclude some of the parties: *Zarrin-Mehr v. Shokrai*, 2024 ONSC 6319, at para. 13.

[35] It is undisputed that all concerned members of the McGarry family support the Application. However, there is clear conflict between the Applicant and the non-parties, who are beneficiaries under the contested life insurance policy. The Applicant is troubled by the conduct of the Nassrallahs, not only in or around the signing of the 2016 Will and the change in the life insurance policy designations, but also shortly after the death of the Deceased. There appears to be hostility and distrust between the Applicant and the Nassrallah brothers, which could lead to a potential conflict of interest or at the very least, the appearance of a conflict of interest. I am not implying that the Applicant would act inappropriately if she was appointed as the ETDL, but there is sufficient potential for conflict that it would be inappropriate to appoint the Applicant as the ETDL.

[36] Although it is alleged that the estate may be insolvent and that additional expenses should not be incurred in the administration of the Deceased's estate, I nonetheless believe that the facts of this case militate in favour of appointing a neutral third party.

[37] In exercising my discretion, and to ensure procedural fairness for all interested persons, I am therefore appointing Ian Warren and Dahlia Aeta of Warren Camacho LLP. I am of the view that both these individuals possess the experience and expertise to act as the ETDLs, and as such, they are suitable and appropriate for that role.

Issue #3 – What directions should be given?

[38] The Applicant has provided me with a draft Order for Directions, setting out a robust process to be implemented. Given the circumstances of this case, I find that such a process is required.

[39] The Order for Directions shall be amended to reflect that Ian Warren and Dahlia Aeta of Warren Camacho LLP are appointed as the ETDLs.

[40] In terms of the order for the production of the legal files, the non-parties seek to be given an opportunity to consult with LawPro counsel to negotiate that order. I find this request to be reasonable. However, given the delay that has already occurred in this case, the negotiation of the order regarding the production of the legal files must be finalized within 30 days of these Reasons

for Decision. If an agreement cannot be reached on the wording, the Applicant or the non-parties may seek a special appointment before me through the trial coordinator's office.

[41] The other provisions of the Order for Directions are approved.

DISPOSITION

[42] For the foregoing reasons, I make the following orders:

- i. The Nassrallahs' request that the Application be dismissed is refused.
- ii. Ian Warren and Dahlia Aeta of Warren Camacho LLP are appointed as the ETDs.
- iii. The draft Order for Directions is approved, save and except the following: (i) it shall be amended to reflect the appointment of Ian Warren and Dahlia Aeta of Warren Camacho LLP as the ETDs; (ii) the terms of the order for the production of legal files shall be negotiated and finalized within 30 days of these Reasons for Decision, failing which the Applicant and non-parties shall return before me for my determination.

[43] In terms of costs of this appearance, in accordance with paragraph 13 of the draft Order for Directions, costs are reserved to the Judge hearing the final adjudication of this matter.

M. Smith J

Released: June 4, 2025

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Sheetza McGarry

Applicant

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