CITATION: Orde v. Foster, 2025 ONSC 4912
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DATE: 20250827

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE ESTATE OF WILLIAM WAYNE BROWN, deceased.

RE: Roger Orde et al. v. Christine Foster et al.

BEFORE: THE HON. MADAM JUSTICE A.A. CASULLO

COUNSEL: Kavina Nagrani, Shruthi Raman, for the Applicants

Nipuni Panamaldeniya, for the Respondents

HEARD: April 11, 2025 and May 1, 2025

ENDORSEMENT

Background

[1] The Applicants challenge the January 24, 2020 will ("2020 Will") of William Wayne Brown ("Wayne"), who passed away on April 19, 2021. They seek an order invalidating this will on the grounds of undue influence and testamentary incapacity.

[2] On April 5, 2022, Vallee J. ordered the production of Wayne's medical records, financial records, and the estate planning file of the lawyer who drafted the Will, Mr. Gary Ainsworth (the "2022 Order"). This motion was unopposed by the Respondents.

[3] The Applicants then moved before O'Connell J. on August 23, 2022, for further production including, *inter alia*, financial records, and the estate planning file of the lawyer who had drafted previous wills for Wayne, Mr. James Jordan.

[4] At the August 23, 2022 hearing, Christine and Gail argued that the Applicants' further request for disclosure should be denied because the Applicants did not meet the minimum evidentiary threshold ("MET") to request production of the records being sought.

[5] Because no material had been filed to support the MET issue, O'Connell J. directed the parties to bring a motion to determine whether the Applicants meet the MET. This is the motion before me.

[6] In other words, I am deciding the Respondents' MET motion, to which the Applicants are responding. If the Respondents are unsuccessful, then I am deciding the Applicants' motion for further production.

Overview

[7] To avoid confusion, I will use the given names of the parties throughout these reasons. No disrespect is intended.

[8] Wayne was married to Beverley Leone Brown, deceased February 2019. Wayne and Beverley both had children from previous relationships: Wayne had sons Shannon Brown and Billie Brown; Beverley had sons Roger Orde, Steve Orde, and daughter Kerrie McCrea.

[9] Kerrie passed in 2022. Her husband, Michael Brian McCrea, is estate trustee for Kerrie's estate.

[10] The Applicants are Roger, Steve, and Shannon.

[11] The Respondents are Christine Foster, Billie Brown, Gail Sharon Brown, the Estate of Kerrie McCrea, and the Canadian Diabetes Association.

[12] Wayne referred to Christine as his niece. Christine referred to Wayne and Beverley as her aunt and uncle. This was so, despite there being no biological connection between them. Christine knew Wayne and Beverley for decades, and for a period of time was married to Beverley's nephew, Larry Orde. She and Larry divorced in 2008.

[13] Gail is Wayne's sister.

[14] I note that while Billie, as well as counsel for Kerrie's Estate and the Canadian Diabetes Association, attended to observe the motions, neither party made submissions.

Catalogue of Wills

[15] On March 21, 2007, Beverley drafted a will leaving everything to Wayne if he survived her. If Wayne predeceased her, the residue of Beverley's estate, after bequests to grandchildren, would be divided equally between Billie, Steve, Roger, and Kerrie. Shannon received nothing.

[16] Beverley's will was prepared by James Crook, and held with solicitor Ross Pryde. The will contained no clause to indicate that it was a mutual will, thereby contractually binding Wayne to abide by specific terms after her death.

[17] There is no evidence Wayne drafted a will in 2007.

[18] On November 5, 2019, Wayne executed a will (the "2019 Will"), the relevant portions being:

a. Steve and Roger were named estate trustees;

b. Christine was bequeathed a life estate in Wayne's home;

c. Christine was bequeathed Wayne's dog;

d. Christine received 25% of the residue;

e. Steve, Roger, and Gail each received 25% of the residue; and

f. Shannon, Billie, and Kerrie received nothing.

[19] Mr. James Jordan, a solicitor, drafted the 2019 Will. Mr. Jordan was Steve's lawyer at the time, not Wayne's. Steve made the referral.

[20] On January 24, 2020, Wayne executed a second will (the "2020 Will"). Mr. Gary Ainsworth was the drafting solicitor. The relevant portions of the 2020 Will are as follows:

a. Christine and Shannon were named estate trustees, Billie as an alternate;

b. Christine received 30% of the residue;

c. Gail received 30% of the residue;

d. Kerrie received 25% of the residue; and

e. The Canadian Diabetes Association received 15% of the residue.

[21] The 2019 Will and 2020 Will may be collectively referred to as the "2019 and 2020 Wills."

[22] The Applicants speculate that Wayne drafted a will in May 2019. No such will has been produced. The Applicants base their theory on a two-page, handwritten document found among Wayne's papers. These notes were written by Mr. Jordan, with the notation "signed May 10, 2019."

[23] According to Mr. Jordan's notes, the terms of the theoretical will in May 2019 were:

a. Steve, Roger, and Shannon were named estate trustees;

b. Christine and Gail each received $5,000;

c. Christine to receive Wayne's dog;

d. Steve, Roger, Shannon, and Billie each received 25% of the residue.

[24] The Applicants wrote to Mr. Jordan, looking to confirm whether Wayne had in fact executed a will on May 10, 2019. Mr. Jordan advised he could not confirm whether Wayne signed a will on May 10, 2019. He did confirm that any prior will would have been destroyed upon Wayne executing the 2019 Will.

[25] The information from Mr. Jordan did not come in the form of an affidavit from him directly. Rather, his email was attached to Roger's supplementary affidavit sworn February 7, 2023. It is hearsay and carries no weight.

[26] I find as a fact that there are only two wills at issue: the 2019 Will and the 2020 Will. There is no evidence of a third will from 2019. Nor is there evidence of a 2007 will.

Status of Estate

[27] The value of the estate at death was approximately $550,000, consisting primarily of the value of Wayne's home.

[28] Christine and Shannon acted as estate trustees for the limited purpose of selling Wayne's home and vehicle. The proceeds of sale are held in trust by an independent lawyer, Mr. Joel S. Moldaver.

[29] Mr. Moldaver also holds in trust various other items which the Applicants seek access to, including Wayne's cell phone, tablet, land phone, phonebook, journals, and other paperwork.

Positions of the Parties

Christine's Perspective

[30] Following Beverley's death in 2019, Wayne found it difficult to live alone and manage his diabetes. Christine stepped in to assist him with his activities of daily living, including cleaning, taking him to medical appointments, and buying groceries. Wayne's family was initially appreciative of her efforts.

[31] While there was talk of Christine moving in with Wayne, this plan was abandoned due to the adverse reaction it provoked from some of the Applicants. Thus, while at times Christine stayed over at Wayne's when he needed extra help, Christine always maintained her own apartment.

[32] Christine submits that as time went on, the Ordes became progressively controlling with Wayne, which frustrated him. They insisted he move into a retirement home, which Wayne was vocally opposed to. The Ordes' actions led Wayne to revoke the 2019 Will and draft the 2020 Will.

[33] Wayne would give Christine money for helping him. Wayne also wanted to give Christine $20,000. When Christine demurred, he insisted, and drove her to his bank to take a $20,000 bank draft for her. Christine was transparent about this gift in her cross-examination.

[34] Christine had never seen Wayne's Will before his death.

[35] Christine's opinion is that the Applicants are disgruntled relatives who are bitter over being cut out of Wayne's 2020 Will. They have provided no evidence to support their allegations

beyond bald-faced lies and allegations. This is despite the fact that the Applicants received significant disclosure prior to bringing their motion for further production (which in turn resulted in the Respondents' MET application).

[36] The Respondents characterize the Applicants' request for further disclosure as a fishing expedition.

The Applicants' Perspective

[37] The Applicants believe that Wayne and Beverley executed both mirror wills and mutual wills, such that the survivor of the two of them would enjoy the benefits of their collective estate. Upon the death of the last of them, their children were to share equally in the remainder.

[38] The Applicants submit that following Beverley's death, Wayne made three wills under suspicious circumstances, in a short period of time, all of which demonstrated a marked departure from prior wills. These were procured by Christine, who took advantage of Wayne's lack of testamentary capacity and exerted undue influence on him. Christine's share of the estate increased with each new drafting. Thus, both the 2019 and 2020 Wills should be rendered invalid.

[39] Christine began inserting herself into Wayne's life following Beverley's death. Having become a widower after 40 years of marriage, Wayne was experiencing depression and anxiety, was on increased medication, and was having falling episodes.

[40] Christine convinced Wayne that his children did not care for him, and that they wanted to put him into a home. Christine played on Wayne's emotions, hoping to benefit under his will. The wills progressively disinherited Wayne's children and stepchildren, and increasingly benefited Christine, who was a stranger to the family for decades.

[41] Christine and Gail's refusal to consent to the Applicants' further production request has put the parties, and the court, to significant time and expense. The appropriate time to raise MET concerns is in the infancy of legal proceedings.

[42] The Applicants submit that the evidence they have gathered to date supports their allegations of suspicious circumstances and undue influence. Thus, they have satisfied their evidentiary burden and can challenge both the 2019 Will and the 2020 Will. However, without further production, the most judicious outcome cannot be achieved.

Legislation and Applicable Principles

[43] Rule 75 governs the procedures for contentious estates disputes.

[44] Rule 75.01 provides that:

> An estate trustee or any person appearing to have a financial interest in an estate may make an application under rule 75.06 to have a

testamentary instrument that is being put forward as the last will of the deceased proved in such manner as the court directs.

[45] Rule 75.06(1) provides that:

> Any person who appears to have a financial interest in an estate may apply for directions or move for directions in another proceeding under this rule, as to the procedure for bringing any matter before the court.

[46] The Court of Appeal in *Neuberger Estate v. York*, 2016 ONCA 191, 131 O.R. (3d) 143, leave to appeal refused, [2016] S.C.C.A. No. 207, set out the parameters under which a will challenge should operate, at para. 88:

> In my view, an interested person must meet some minimal evidentiary threshold before a court will accede to a request that a testamentary instrument be proved. In the absence of some minimal evidentiary threshold, estates would necessarily be exposed to needless expense and litigation. In the case of small estates, this could conceivably deplete the estate. Furthermore, it would be unfair to require an estate trustee to defend a testamentary instrument simply because a disgruntled relative or other potential beneficiary makes a request for proof in solemn form.

[47] Further, at para. 89:

> [A]n applicant or moving party under rule 75.06 must adduce, or point to, some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded. If the applicant or moving party fails in that regard or if the propounder of the testamentary instrument successfully answers the challenge, then the application or motion should be dismissed.

[48] In other words, there is no automatic right to challenge a will. An interested person must first meet the MET.

[49] In *Seepa v. Seepa*, 2017 ONSC 5368, at para. 35, Myers' J. considered the limits of the MET:

> At this preliminary stage, the issue is not whether the applicant has proven his or her case but whether he or she ought to be given tools, such as documentary discovery, that are ordinarily available to a litigant before he or she is subjected to a requirement to put a best foot forward on the merits. Normally a litigant must just plead facts that support a cause of action to become entitled to use the full panoply of fact-finding tools provided by the Rules. In estate cases, more is required. Some evidentiary basis to proceed is required in order to address the specific policy concerns that are addressed above.

[50] One such policy concern, elucidated in *Neuberger*, was described in *Seepa*, at para. 27:

> The Court of Appeal recognized that it is simple for a disgruntled relative to make an allegation. If that were enough to cause an estate to go through formal proof in solemn form, smaller estates could be wiped out just by the process alone. That outcome might well serve the goals of the disgruntled relative who can thereby scorch the earth for all of the real beneficiaries. But it is hardly just.

[51] Myers J. spoke to the special relationship the court owes to a testator, who is not present to express their own wishes: *Seepa*, at para. 38.

[52] The court was referred to the recent Court of Appeal decision in *Johnson v. Johnson*, 2022 ONCA 682, 81 E.T.R. (4th) 7, leave to appeal refused, [2022] S.C.C.A. No. 444, in which the panel held that the MET is low, and proof of the case on the merits or meeting the standard of a genuine issue requiring a trial is not required.

[53] What I take from *Neuberger*, *Seepa*, and *Johnson* (both the appeal decision and the lower court's decision: *Johnson v. Johnson*, 2021 ONSC 6451, 72 E.T.R. (4th) 160), is that the MET will only be established when there is a reliable and dependable foundation upon which to argue that the validity of the will is in peril. That foundation must be supported by more than supposition or conjecture.

[54] The two grounds upon which the Applicants seek to challenge the 2019 and 2020 Wills are incapacity and undue influence. I will address each ground below.

Wayne's Capacity

[55] In September 2019, Wayne's doctor referred him to the Geriatric Assessment and Intervention Network ("GAIN"). The reasons for the referral included complex medication regiment/polypharmacy, cognitive decline affecting hygiene, managing medication, falls, and recent physical or functional decline. The contact persons were Steve, identified as stepson, and Christine, identified as niece.

[56] Roger said that it was around this same time that Wayne began acting unusually hostile toward him and Steve. Roger thought this was the period that Christine's influence was starting to work. In other words, she was polluting Wayne's mind toward him and his siblings, all because Christine was after Wayne's estate.

[57] Christine accompanied Wayne to the GAIN assessment, which was held in February 2020. Christine is noted as being a "good historian" for Wayne. Dr. Oleg Veselskiy, the cognition and geriatric specialist who conducted the assessment, and who had conducted at least one other assessment in the past, made the following observations:

- Wayne's mini-mental state examination ("MMSE") in 2016 was around 25-28/30. Wayne's MMSE in 2020 had improved to 30/30.

- Wayne felt down after Beverley's passing, and went on extra medication, prescribed by his family physician, which helped him feel better.

- Wayne had no history of delusions or hallucinations, and there were no new behavioral changes or changes in personality.

- Wayne reported that his pain in 2020 was better than it had been in the preceding years.

- There had been a few falls in the previous six months, caused by tripping on the floor or getting caught up by his dog.

[58] Dr. Veselskiy concluded:

- Wayne had many years of chronic pain and impaired mood. While at some point a question was raised about the possibility of cognitive impairment, Dr. Veselskiy believed this was unfounded, finding that that the testing over the past four years "is quite reassuring, particularly that there is no decline in cognition as well as in function."

- Wayne still presented with very mild cognitive impairment, mostly driven by extensive polypharmacy including pain medications.

[59] Dr. Veselskiy believed that Wayne was still grieving the loss of Beverley, and recommended cognitive behavioural therapy, which Wayne was a good candidate for because "he [did] not have dementia."

[60] Given that Wayne performed better cognitively in 2020 than he had in 2016, Dr. Veselskiy did not deem it necessary to follow up with Wayne on a regular basis. I am satisfied, based on Dr. Veselskiy's assessment, that there were no concerns with Wayne's capacity in 2020.

Undue Influence

[61] The Applicants submit that Christine was a stranger to Wayne's family for decades. Roger was aware that his mother, Beverley, kept in touch with Christine after her divorce from Larry, but Christine was not family, and did not attend family events. Shannon and Steve's evidence is that they had never met Christine until Beverley's death/funeral.

[62] Following Beverley's death, Steve's wife, Lynn Orde, noticed that Christine began interjecting her way into Wayne's life, calling and visiting frequently.

[63] Roger, Steve, Lynn, and Shannon were all wary of Christine's motives. Their fears came to light when, according to Shannon's affidavit, Wayne told Shannon that Christine was abusing him, and that his medications were going missing. Wayne would not let Shannon call police to file a report.

[64] The Applicants submit that Christine found Mr. Ainsworth and took Wayne to his office to draft the 2020 Will. At the meeting Christine provided her version of the family background, not the reality, to Mr. Ainsworth.

[65] Finally, the Applicants submit that there was a physical altercation between Wayne and herself, in which Christine pinned Wayne to a chair and Wayne sustained an injury. Photographs were appended to Shannon's affidavit to support this allegation.

[66] On paper, these allegations might give a jurist pause. However, Christine has sufficiently answered all of the allegations raised.

[67] Christine met Wayne while working at a Dominion grocery store in the late 1970s, where Beverley also worked. Over the years she developed a close relationship with them, and they treated her like their daughter. Christine visited with them often, and they spent time together during holidays.

[68] Contrary to what the Applicants have collectively stated, Christine had a relationship with many of them over the years, and produced text messages to support this. Christine attended Kerrie's first wedding and remained in touch with her up to October 2020.

[69] Wayne would confide to Christine that he was becoming frustrated at the Ordes' efforts to control him. In the late fall of 2019, Wayne told Christine he was making her an estate trustee, and that she would be "looked after."

[70] Christine did not ask for particulars. She did not see a copy of the 2020 Will until after Wayne passed.

[71] Christine said that Wayne attended at Mr. Ainsworth's office alone.

[72] Christine maintained that Wayne was strong-willed and always spoke up for himself. She in no way influenced him.

[73] Christine said she was never physical with Wayne – him being over 6'0" and over 200 pounds, and her being 5'2" and weighing just 100 pounds.

[74] Wayne confided in Christine that Steve and Lynn were trying to take over and control him, which is what led Wayne to exclude Steve from the 2020 Will.

[75] As with the allegations of incapacity, the allegations of undue influence are simply that. Allegations. Much has been thrown at Christine to see what might stick. Christine's evidence satisfies me there was no undue influence.

Gary Ainsworth

[76] The court is in a unique position on this motion, as the notes of Mr. Ainsworth are part of the record by virtue of the 2022 Order. The court has the additional benefit of Mr. Ainsworth's out-of-court examination ("OOCE"), conducted prior to the hearing.

[77] The Applicants submit that there are certain portions of Mr. Ainsworth's notes that look to be "handwritten after the fact", which should raise questions about Mr. Ainsworth's accuracy of recall. I do not find favour with this argument. Mr. Ainsworth confirmed during the OOCE that his practice was to review his notes after a meeting, either that day or early the following day, and make additions and/or clarifications while the information was still fresh in his mind.

[78] Mr. Ainsworth is an independent witness in the true sense of the word. His records provide information that supports Christine's position in this litigation. I note Mr. Ainsworth expressed caution about Christine in his discussions with Wayne, further boosting his credibility in the court's eyes. For example, he recommended that if Christine were to move in, Wayne should have her sign an agreement beforehand acknowledging that she would not become a dependant of Wayne's by virtue of living with him and providing assistance.

Records of Meetings

[79] Mr. Ainsworth received and documented the following information from Wayne at their January 14, 2020 meeting:

- Christine was Wayne's niece, and he had known her for 40 years.
- Lynn Orde was demanding that Wayne move into a retirement home.
- Roger went ballistic and has not talked to Wayne since he found out that Christine would be moving in with him.
- James Jordan was the Orde's family lawyer for many years, which is how Wayne was introduced to him.
- In light of the "conflict and disagreement among family members," Wayne wanted his documents (will and powers of attorney) prepared by another lawyer.
- Wayne had a very estranged relationship with his son Billie and had no contact with him for almost 10 years.

[80] Notes from Mr. Ainsworth's January 24, 2020 meeting with Wayne document the following information:

- Wayne did not want to leave anything to Shannon and Billie. They were raised by their mother and kept away from him. When their mother died, the boys were 12 and 11, and they moved in with Beverley and Wayne. They left six years later.
- Christine's mother and Beverley's first husband were brother and sister.
- Beverley was closer to Christine than her own daughter, Kerrie.

- Kerrie was a difficult person.

Information Gleaned from the Out of Court Examination

[81] For forty years, Mr. Ainsworth has practiced, *inter alia*, wills and estates, estate planning, and succession planning. For a number of years, Mr. Ainsworth was the Chair of the Consent and Capacity Board of Ontario, where he received significant training in respect of capacity issues. During his tenure, he authored over 1000 consent and capacity decisions.

[82] Mr. Ainsworth charged Wayne his standard fixed fee for drafting the 2020 Will, yet he spent considerably more time with Wayne than he typically would have. This was owing to Wayne's description of the family dynamics during their first meeting, which raised flags for Mr. Ainsworth. He wanted to ensure Wayne was acting of his own free will.

[83] Mr. Ainsworth's notes indicate that Wayne found his name in the phone book, and Wayne came to him as a cold call. He met Wayne at his office twice. Each time Wayne arrived alone, having driven himself there. On both occasions, Mr. Ainsworth assessed Wayne from the moment they met until their meeting was over.

[84] At the first meeting, Wayne told him that he had no contact with Billie for 10 years, and he had minimal contact with Shannon. The fact that Shannon had a criminal record for robbery and assault, and had spent time in jail, did not sit well with Wayne.

[85] Christine was Wayne's number one choice as executor, as he trusted her the most. He included Shannon as a co-executor, and Billie as an alternate, because they were his own sons. Despite their appointments, Wayne did not want them to benefit from his estate.

[86] Mr. Ainsworth did not meet Christine prior to Wayne's death.

[87] During the OOCE, Mr. Ainsworth was asked whether he thought Wayne was being pressured to make changes to the 2020 Will. Mr. Ainsworth answered that the only indica of undue influence was in respect of the 2019 Will drafted by Mr. Jordan. To wit, Mr. Jordan was Steve's lawyer, not Wayne's. Wayne expressed his concern that once the powers of attorney were signed, Lynn pushed Mr. Jordan to receive a copy immediately. Mr. Ainsworth thought it was unusual for a lawyer in a small-town practice to release the powers of attorney so quickly pursuant to a direction.

[88] Further, once the Ordes received the powers of attorney they began to take aggressive steps to control Wayne, demanding he sell his home and move into a retirement home. Using Mr. Ainsworth's words, "there seemed to be a significant amount of pressure put on Mr. Brown in regard to the preparation of his will and powers of attorney in November of 2019."

Analysis

[89] The Applicants have not satisfied their burden to prove that they meet the MET. They have not adduced any evidence which, if accepted, would call into question the validity of either the 2019 or 2020 Wills.

[90] There is no evidence to support a decline in Wayne's cognition, such that his capacity to draft either the 2019 or 2020 Will was impaired. The two wills were executed barely two months apart. Dr. Veselskiy's contemporaneous medical evidence is that Wayne did not suffer from dementia. In fact, the record before the court points to Wayne being fully cognitive in November 2019 and February 2020. He was not "malleable" as the Applicants contend.

[91] I find that the changes Wayne made to the 2020 Will are simply reflective of the circumstances he was experiencing at the time the will was drafted. Not a cognitive decline, but rather a dissatisfaction with the actions of his children and stepchildren.

[92] Likewise, there is no evidence that Wayne was vulnerable and thus easy prey for Christine's undue influence.

[93] Undue influence is "the ability of one person to dominate the will of another, whether through manipulation, coercion or outright but subtle abuse of power.": *Geffen v. Goodman Estate,* [1991] 2 S.C.R. 353, at p. 377.

[94] The Applicants' submission that Christine unduly influenced Wayne is based solely on supposition and speculation. There is simply no evidence that Christine exerted such domination that she overpowered Wayne's will. Neither Mr. Jordan nor Mr. Ainsworth noted that Christine was involved in the drafting of the 2019 and 2020 Wills.

[95] In *Johnson,* the Court of Appeal dismissed the applicant's appeal to set aside the dismissal of her action before medical, financial, and legal documents were produced. As the court held, at para. 17:

> This is not a motion for summary judgment requiring proof of the case on the merits or meeting the standard of a genuine issue requiring a trial. As Myers J. also succinctly stated in *Seepa*, at para. 35, "[a]t this preliminary stage, the issue is not whether the applicant has proven his or her case but whether he or she ought to be given tools, such as documentary discovery, that are ordinarily available to a litigant before he or she is subjected to a requirement to put a best foot forward on the merits". In other words, a claimant should not be able to put an estate to the needless expense of steps, such as documentary discovery, unless he or she meets the minimal evidential threshold prescribed in *Neuberger*.

[96] The MET is a low bar. As Doyle J. held in *Troy v. Troy*, 2024 ONSC 5767, at para. 74:

> The minimum evidentiary threshold is not a very high bar as it is a preliminary assessment before all information is exchanged.

[97] Here, the Applicants have already been given the tools they require to establish the MET. Information has already been exchanged (with the exception of the financial records, discussed more fully below). Disclosure received to date does not support a claim of either incapacity or undue influence. The Applicants are now doubling down in their efforts to uncover some evidence upon which they can ground their arguments.

[98] The Applicants seek the following additional disclosure:

- Production of any and all solicitor files relating to estate planning of Wayne and Beverley, namely solicitors Bill Fox, John Crook, and Ross Pryde);
- Release of Wayne's cell phone, tablet, land phone, phonebook, journals, and other private papers for examination; and
- Production of any and all financial records relating to Wayne.

[99] Let the record be clear. The 2022 Order, unopposed by the Respondents, authorized the Applicants to obtain medical, financial, and legal records.

[100] The Applicants have obtained extensive medical records relating to Wayne.

[101] The Applicants once again seek financial disclosure. The 2022 Order gave them the authority to do so over three years ago. When asked why they had not yet taken steps to obtain the financial records, the court was advised, and I paraphrase: "the order did not define a timeframe, so the Applicants did not seek the financial records." The order was drafted by the Applicants.

[102] Regarding the legal records, the 2022 Order limited production to Mr. Ainsworth's files. However, without colour of right, the Applicants improperly obtained Mr. Jordan's files relating to the 2019 Will.[1]

[103] When I asked what authority the Applicants relied upon to make their request, counsel replied (and again I paraphrase): "if the 2020 Will was invalid, Roger and Steve would have been the estate trustees of the 2019 Will and entitled to make that request."

[104] The Applicants now seek the court's permission to delve back to 2007 and scrutinize not only Wayne's estate planning, but Beverley's as well.

[105] Without the documentation they request, the Applicants submit that their ability to put their best foot forward on the will challenge will be prejudiced. In other words, they cannot prove their case without full disclosure. Yet the 2022 Order permitted the Applicants to obtain full disclosure. Unlike the applicants in any of the cases relied on by counsel where

[1] I asked to be provided the request letter to Mr. Jordan. The Authorization and Direction was signed by both by Roger and Steve as "Estate Trustee(s) named under the May 2019 will of William Wayne Brown."

the court found the MET was established, the Applicants here already have the benefit of a full evidentiary record.

[106] The policy rationale requiring an applicant to meet the MET is writ large in this case. This is a modest estate. The legal fees, estimated to be 27% of the estate's value, are already exorbitant. There is simply nothing to be gained by ordering further disclosure. As Myers J. held in *Seepa*, at para. 49:

> The court should be very reluctant to consign estates and beneficiaries to intrusive, expansive, expensive, slow, standard form fishing expeditions that do not seem to be planned to achieve the goals of civil justice for the parties.

[107] The Applicants argue the MET requirement was raised too late in the litigation. I am satisfied that the Respondents did not raise the MET earlier because they were content to agree to production and allow the records to speak for themselves. In these particular circumstances, given the Applicants' sustained attack, this was a reasonable juncture for the Respondents to raise the MET argument.

[108] Wayne passed away over four years ago, and the estate's administration has stalled because the Applicants are convinced Christine manipulated Wayne to her advantage. Surely if there was something to this theory, Christine would have come away with the lion's share of the estate. Yet Christine, along with Gail, share in just over half of the estate – 60%. The remaining 40% was devised elsewhere.

[109] I queried why the litigation was focused on Christine and not Gail. While the Applicants believe Christine and Gail colluded (this theory is based on a very generic thank-you card which they say demonstrates closeness between them), they chose not to attack Gail because she is Wayne's sister.

[110] At para. 45 of Shannon's affidavit sworn July 11, 2022, he states that Christine and Gail offered him 10% of their respective shares of the estate if he did not participate in the will challenge. This conversation took place in the presence of Mr. Ainsworth.

[111] The Applicants argue that because Shannon was not cross-examined on his affidavit, I must take his evidence as true. However, a trier is entitled to believe some, none, or all of a witnesses' evidence. This includes evidence in a sworn affidavit.

[112] It is hard to fathom that Christine and Gail, with Mr. Ainsworth present, offered Shannon money to back away from the will challenge. I queried whether this line of questioning was put to Mr. Ainsworth during the OOCE. Apparently it was, but the lawyer from LawPRO representing Mr. Ainsworth refused to allow Mr. Ainsworth to answer any questions about an offer from Christine and Gail. Unfortunate.

[113] In any event, even if I were to accept Shannon's evidence, this one factor would have had no bearing on my ultimate determination.

Conclusion

[114] The Applicants have not met the minimum evidentiary threshold. There is no evidence which, if accepted, would call into question the validity of Wayne's 2019 or 2020 Wills.

[115] Christine's motion is granted, and the Applicants' motion for further production is dismissed.

Costs

[116] At the conclusion of submissions, I asked each party for their positions on costs.

[117] If they were the successful party, the Applicants would have sought costs on a substantial indemnity basis of $73,368.13, or $48,912.09 on a partial indemnity basis.

[118] If the Applicants were unsuccessful, they would ask that costs be borne by the estate given that the litigation only arose due to Wayne's actions.

[119] If they were the successful party, the Respondents would have sought costs on a substantial indemnity basis in the amount of $74,692.74, or $49,992.86 on a partial indemnity basis.

[120] Mr. O'Brien did not make costs submissions but spoke to what he viewed as the outrageous status of the litigation. To wit, after three years, the parties are still litigating over disclosure.

[121] Mr. Ayotte, on behalf of Gail, asked that his client's right to make costs submissions be reserved.

[122] The best course of action is to reserve costs to the jurist hearing the Application, with one caveat. In the event my decision leads the Applicants to abandon their will challenge, I will decide the costs of the within motions.

[123] Should this eventuality come to pass, counsel are to reach out to the trial co-ordinator to arrange a two-hour costs hearing, before me, via Zoom.

CASULLO J.

Date: August 27, 2025