Trusts & Estates

"Standing must be established to challenge a trust interest – even in family law."

What should you know about 2023?

The open court principle prevails – even over solicitor client privilege on a settlement approval.

2023 furthered the open court principle that was reinforced in the 2021 SCC decision in *Sherman Estate v Donovan*.

The presumptive open court principle is engaged by all judicial proceedings. In *SEC v MP*, the Court of Appeal confirmed that the open court principle applies to proceedings in writing, such as settlement approvals for a party under disability under Rule 7.08.

The importance of this principle is not eroded by solicitor client privilege on a Rule 7.08 approval motion. The court wants balance. If there is information that genuinely warrants protection, this should be isolated for specific sealing or by the use of initials to anonymize the minors. Blanket sealing will not be ordered.

Litigators should also be mindful that, consistent with the historical conservative approach of our courts validating wills, the exercise of discretion under 21.1 of the SLRA has focused on execution irregularities.

The courts have signalled that they are acutely sensitive about the potential for section 21.1 to trigger wide-ranging arguments about documents that may be alleged to have testamentary effect.

In *White v White*, Justice Myers granted a production order under section 9 of the *Estates Act* to produce a draft will in the custody of the testator's former solicitor in the context of a claim under section 21.1 of the *Succession Law Reform Act*. Justice Myers specifically cautioned that the order was granted in the very limited factual circumstances of the case. His Honour expressly rejected the use section 21.1 to trigger a hunt for documents based on the mere hope that they could support an argument under section 21.1.

What should the Trusts & Estates Bar look out for in 2024?

In 2024, "minimal evidentiary threshold" cases will continue to highlight important issues for the courts and for counsel.

Courts are still struggling with calibrating the "minimal evidentiary threshold", as raised in *Neuberger v York*, *Seepa v Seepa*, and *Johnson v Johnson*. The purpose of the test is to establish when a court is justified in dismissing out-right, on a preliminary basis, a challenge to a testamentary instrument.

In 2023, Justice Myers ruled on this issue in four cases: *Giann v Giannopoulos* (under appeal), *Carinci v Carinci*, *Dinally v Dinally*, *White v White* ONSC 3740 and ONSC 7286. These cases raise the following issues:

- **For the Courts** – The approach to minimal evidentiary threshold cases risks opening the door to early summary judgment in will challenge applications. Given the high importance of these preliminary challenges, these motions involve full evidentiary records, including responding affidavits and cross-examination.
- **For Counsel** – The courts are looking for "some evidence" in support of the application. A good case theory is not sufficient.

We will also continue to see important trust challenges before the Family Courts.

The alleged sham trust, in family law, is putting legitimate estate planning at risk.

Estate freezes and family trusts arise in multiple situations, including family trusts protecting generations of family assets, estate planning and trusts settled long before a marriage (often before a second marriage), or a family trust settled by a parent to pass wealth generated during the marriage to children.

Even if the trust is not set aside as a sham, some value for the trust interest may be included in the net family property calculation. Caution though, standing must be established to challenge a trust interest – even in family law.

In *Karatzoglou v Commisso*, the Court ruled that the "use" of the trust property was not enough to create a proprietary in the trust asset, or to establish a constructive trust. Further, the wife's equalization claim against the former husband did not establish any right or standing for the wife to pursue an interest in the trust property, on behalf of the former husband.

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Lenczner Slaght zeroes in on the heart of the dispute, finding the remedy, and strongly advocating for its clients' best interests. We know that our courtroom expertise isn't enough in trusts and estates cases; strength, sensitivity, and fairness are important too. That's why we not only provide stellar advocacy, but we also know how to manage a case with with care and respect for all involved.