

“SETTLEMENT AND ADR IN ESTATE LITIGATION”

“GETTING THE DUCKS IN ORDER”

Ian M. Hull

**Hull & Hull
Barristers and Solicitors
Suite 770, 141 Adelaide Street West
Toronto, Ontario M5H 3L5**

Tel: 416-369-7826

**Email: ianhull@inforamp.net
Web Site: <http://www.aposoft.com/estatelaw>**

TABLE OF CONTENTS

1. Introduction	3
2. Financial Interest.....	4
3. One Will At A Time.....	10
4. Settlement	13
5. ADR/Mediation	20
(a) Know Your Mediator	20
(b) What Is The Purpose Of The Mediation	22
(c) Documentary Preparation for Mediation.....	23
(d) Preparing Your Client	24
6. Costs.....	27
7. Summary	29
SCHEDULE "A"	30
Complex Order Giving Directions	30
SCHEDULE "B"	41
Minutes of Settlement – Will Challenge	41
SCHEDULE "C"	42
Minutes of Settlement – Power of Attorney.....	42
SCHEDULE "D"	49
Notice of Motion – Implementing and Approving Minutes of Settlement.....	49
SCHEDULE "E"	52
Judgment – Approving Minutes of Settlement	52
SCHEDULE "F"	54
Minutes of Settlement - Checklist.....	54
Schedule "G"	55
ADR Brief	55
Schedule "H"	60
Memorandum of Compromise and Family Settlement.....	60
Schedule "I"	63
In Terrorem Clause	63

**“SETTLEMENT AND ADR IN ESTATE LITIGATION”
“GETTING THE DUCKS IN ORDER ”**

Ian M. Hull

**Hull & Hull
Barristers and Solicitors
Suite 770, 141 Adelaide Street West
Toronto, Ontario M5H 3L5
416-369-7826**

Email: ianhull@inforamp.net
Web site: <http://www.aposoft.com/estatelaw>

1. Introduction

When challenging the validity of a will, anyone who has a financial interest in the estate must be given notice of the proceedings.

This includes all persons named as executors and beneficiaries in all wills and codicils of the deceased and those entitled on an intestacy.¹

In Ontario, in non-contentious proceedings, pursuant to Rule 74.04 of the Rules of Civil Procedure a Notice of the Application for a Certificate of Appointment of Estate Trustee must be mailed to all persons entitled to share in the distribution of the estate, including charities and the Public Guardian and Trustee if charities are named, and contingent beneficiaries.

When challenging a will in Ontario, and when a Certificate of Appointment has not yet been granted, the initial step taken is the filing of a Notice of Objection with

¹ See Part II of the Succession Law Reform Act, R.S.O. 1990 as amended, c.S.26.
gabi hd:users:gabi:desktop:article.doc

the court. When a Certificate of Appointment has been obtained, one must seek an order bringing in the Certificate of Appointment of Estate Trustee. Rule 75.03(1) provides that at any time before a Certificate of Appointment of Estate Trustee has been issued, any person who has a financial interest in the estate may give notice of an objection by filing a Notice of Objection. Furthermore, pursuant to Rule 75.04, on the Application of any person having a financial interest in an estate, the court may revoke the Certificate of Appointment of Estate Trustee.

The next procedural step to consider after the time for filing notices of appearances has expired is the obtaining of an order for directions and it is at this stage in the proceedings that all necessary parties must be advised of the will challenge and served with the Notice of Motion.

Pursuant to Rule 75.06(2) of the Rules of Civil Procedure, the Application or Motion for Directions must be served 10 days prior to the hearing date. If a Notice of Objection has been filed then pursuant to Rule 16.01 of the Rules of Civil Procedure, this Motion or Application is not an originating process, and as such can be served by regular lettermail.

2. Financial Interest

A recent decision of the Divisional Court in *Vance and Moore v. Smith*², has now considered the term “financial interest in an estate” and as such there is some

² Unreported, February 6, 1997, Boland, Keenan, Sills JJ., Court File No. D774/96 (Ont.Ct.Gen.Div.)
gabi hd:users:gabi:desktop:article.doc

guidance to the profession with respect to the requirement to advise all parties of the proceedings.

In *Vance and Moore v. Smith*, the court dealt with an appeal from an Order vacating the appellant's Notice of Objection and the Notice of Appearance filed.

At first instance the court dealt with the issue of whether or not the appellant had a "financial interest" in the estate as required pursuant to Rule 75.03 of the Rules of Civil Procedure. The court considered whether or not the appellants had standing to file the Notice of Objection and for the first time since the new Estates Rules have been in place, the court provided a judicial interpretation of the words "financial interest", as set out in Rule 75.03(1).

Rule 75.03 (1) provides:

At any time before a certificate of appointment of estate trustee has been issued, any person who has a financial interest in the estate may give notice of an objection by filing with the registrar or the Estate Registrar for Ontario a notice of objection (Form 75.1) signed by the person or the person's solicitor, stating the nature of the interest and of the objection.

In *Vance and Moore v. Smith*, the deceased left a will which contained a specific bequest to one of the named executors. The residue was to be paid to a charity and a Notice of Objection was filed by, lack of testamentary capacity.

The claimants in this case were proceeding on the basis that they had a financial interest in a prior will. In addition, the deceased had written a letter to the claimants advising them that they "both will be mainsharers of my estate".

The Divisional Court considered s. 23 of the *Estates Act*³ which provides for the filing of Caveats in estate proceedings and states as follows:

Where a proceeding is commenced for proving a will in solemn form or for revoking the probate of a will on the ground of the invalidity thereof or where in any other contentious cause or matter the validity of a will is disputed, all persons having or pretending to have an interest in the property affected by the will may, subject to this Act and to the rules of court, be summoned to see the proceedings and may be permitted to become parties, subject to such rules and to the discretion of the court.

³ R.S.O. 1990, c.E. 21 as amended.
gabi hd:users:gabi:desktop:article.doc

In *Vance and Moore v. Smith*, the Divisional Court held that the will challenge proceeding fell within the meaning of s. 23 of the *Estates Act* and accordingly that the claimants should be added as parties.

The Divisional Court also considered the question of what “a financial interest” meant as it was used in Rule 75.03(1) of the Rules of Civil Procedure.

The Divisional Court indicated that in order to meet the threshold test to justify inclusion as a party to the proceedings, the claimants must present sufficient evidence of a genuine interest. The court indicated that if the evidence offered by an objector is capable of supporting an inference that the claim raises a genuine issue and thus is one that should be heard, the objector is entitled to standing and should be granted permission to be added as a party. Furthermore, claimants passing that threshold test, should not be denied status simply because they cannot produce a copy of the will under which they claim to be a beneficiary.⁴

In a more recent decision relating to the question of financial interest and parties to estate proceedings, Justice Sheard in *Re Weinstein*⁵, dealt with the question of notice to parties.

⁴ *Supra* note 2 at p. 7 of the Reasons for Judgment.

⁵ (1997) 35 O.R. (3d) 229 (Ont.Ct.Gen.Div.)(Leave to Appeal Granted Hartt, J; [1997] O.J. No. 5262)
gabi hd:users:gabi:desktop:article.doc

In *Re Weinstein*, the court considered a motion brought by certain parties who were affected by a judgment and were not given notice of the proceedings. The court considered the meaning of the phrase “persons affected by the judgment.”

In *Re Weinstein*⁶, the court considered a motion brought by two of the five grandchildren of Wallace and Betty Weinstein. The two grandchildren sought an order setting aside two previous orders of the court made in 1992.

The motion was brought in September of 1995, and the two grandchildren alleged that following the death of their grandfather Wallace, in April 1995, they became aware of two orders having been made, without notice to them, which provided for the transfer of approximately \$2.5 million to Wallace out of what was known as the Betty S. Weinstein Trust. The result was that Betty’s estate was reduced by one-half and the five grandchildren were beneficiaries, in equal shares, of the residue of Betty’s estate, under the terms of her will.

In August, 1992, without notice to the five grandchildren, Wallace applied for an order equalizing the net family assets of himself and his wife, Betty. A Litigation Guardian was appointed for Betty because she was suffering from Alzheimer’s Disease at the time and was mentally incompetent. At the time of the order equalizing the net family assets, the Litigation Guardian for Betty did not oppose Wallace’s application and it was granted on August 12, 1992.

In 1997, when this matter came before the court, Sheard J. ordered that the transfer of trust assets pursuant to the previous orders of the court, were to be set aside and the assets were to be returned to the estate of Betty. His Honour⁷ made reference to some of the arguments that could have been presented by the grandchildren, had they been given notice of the original proceedings and held that the grandchildren should have had the opportunity to assert their interest at the time that the original application was brought, without notice to them.

It appears that in Justice Sheard's view, in circumstances where one is mentally incompetent and therefore no longer has an ability to change or alter her will, the beneficiaries to her estate, practically speaking, have a vested interest and as such, should be given notice of the proceedings.

⁶ *ibid.* at p. 231

⁷ *ibid.* at pp. 239-240

3. One Will At A Time

Given the wide range of persons who may have a financial interest in the estate, after notice has been given to all necessary parties some consideration must be given to how one proceeds with the litigation.

Traditionally, when the validity of a will is challenged, the court considers the validity of several succeeding wills or codicils in the context of “one will at a time”. That is, the validity of the most recent will is first fully adjudicated and if it is held not to be valid then the validity of the prior will or testamentary document is then considered by the court.

Notwithstanding this traditional position, practically speaking, the evidence led in will challenge proceedings is sometimes presented in the context of the deceased’s overall historical dealings with his or her estate.

In the event that the testator has made a series of wills, late in life, and within a few years of each other, one should consider abandoning the “one will at a time” tradition and proceed with the will challenge by dealing with all of the wills in question, in one trial especially if the evidence relating to all the wills in question can be conveniently presented to the Court so that the Judge can determine which will shall prevail. At the order for directions stage of the proceedings, you may wish to obtain a complex order dealing with all of the legal issues surrounding all of the wills.

I attach, as Schedule "A", a precedent for an order for directions which includes multiple wills and a challenge to an inter vivos gift.

Where there are numerous wills being challenged, which are close in time, there is good reason for the court to allow the evidence to be led all at the same time provided that it can be properly considered and assimilated by the Judge.

The difficulty is that if the challenge to the will relates to a will that was prepared, for example in 1995, and the previous will dates back some fifteen years, the evidence on issues such as testamentary capacity and undue influence and the factual circumstances relating to those issues, may be very different when there is such a significant gap in time and an order for directions to determine the validity of both wills would be inappropriate.

For example, an elderly testatrix may be suffering from the early stages of Alzheimer's Disease when the 1980 will was drawn and the medical records may have some reference to that medical condition. However, if that same testatrix draws a will fifteen years later, changing the distributions dramatically, the evidence of Alzheimer's Disease at that later time may be much more compelling and may have a more dramatic impact on the will-makers ability to understand the nature and effect of her dispositions.

If you are proceeding on issues relating to testamentary capacity, with a gap of many years, you may have a separate set of doctors and even a different solicitor who

prepared the will. In cases where you have an elderly testator, her circle of friends may have died off and the third party "lay" witnesses may not be accessible.

In such circumstances, it is usually best to proceed with a separate trial challenging the validity of the most recent will and have the validity of that will fully determined, without encumbering the will challenge proceedings with a great deal of evidence that may not have any relevance to the testator's testamentary capacity many years earlier.

When the most recent will challenge trial is completed, you may wish to either continue to the next trial or merely wait for the decision and determine whether or not it will be necessary to proceed with the challenge as to the validity of the will prepared fifteen years ago.

One of the difficulties with the most recent will challenge trial, is that the judicial decision will probably not be rendered at the completion of the trial and a reserved decision may take some months. Furthermore, the decision is of course, subject to appeal which can take several years.

The parties who take on an intestacy and who are challenging both the most recent will and the fifteen year old will are faced with a very difficult problem.

A practical solution to this may be to proceed to obtain an order having the fifteen year old will challenge heard immediately after the most recent will challenge.

This can be done in the order for directions in the proceedings, which is well before the investigation steps have been completed.

This suggestion, of course, allows for the parties to undertake the necessary investigation into both relevant time periods.

From a practical standpoint this makes a lot of sense as it is probably more cost effective to collect together all of the relevant medical records of the deceased for both time periods, at one time. It is also probably more cost effective to collect together all of the other necessary evidence, such as solicitor's notes and records and witness statements.

Although there is a fifteen year gap in time, there is likely to be some overlap that will assist all parties to the will challenge.

Furthermore, from a practical standpoint, as most contested matters settle, you can deal with all of the potential claims against the assets of the estate in one proceeding rather than a step by step approach, which is no doubt more costly and time consuming.

4. Settlement

Probably the most important consideration, that encourages all parties to be before the court in one proceeding is the possibility of settlement. The person or

institution taking on the role as executor, will want to ensure that everyone who has a financial interest in the estate, and who may possibly make a claim against the assets of the estate, has notice of the proceedings and has decided whether or not they wish to take part in the proceedings.

If you are acting for the executor and a matter does settle, you will want to ensure that any settlement monies that are to be paid, are paid in full satisfaction of all the claims that could be made against the assets of the estate including any further will challenges. This can only be achieved if all of the necessary parties are given notice of the proceedings and are given the chance to be before the court.

An analogy to the necessity to have all of the parties before the court can be made with cases involving construction law issues and construction liens. In such cases, an owner (i.e. executor) must be careful to ensure that all of the lien claimants (i.e. potential beneficiaries and beneficiaries in prior wills and those entitled on an intestacy) are notified of the proceedings and are before the court if they choose. For example, a solicitor acting for an owner in a construction lien case would not recommend that a lien claimant be paid out to the exclusion of the other lien claimants without notice to of the proceedings having been given all lien claimants.

In estate matters, the executor should ensure that all beneficiaries, potential beneficiaries or those with a “financial interest” in the estate have notice of what is the final distribution of the assets of the estate. Furthermore, before a final settlement

distribution is made, the Executor should advertise for creditors and pay any outstanding expenses.

When all the parties with a financial interest in the estate have been determined and all of their claims have been dealt with, there are of course various ways to finalize matters.

For example, all of the parties can enter into a mutual release or enter into minutes of settlement. Both options can be equally effective; however, minutes of settlement can serve as a more detailed summary of the terms of the settlement and the considerations entered into prior to their execution. In the minutes of settlement you may want to recite some of the details of the claims that were made in the litigation and deal with their resolution.

In circumstances where you act on behalf of the executor of the last will of the deceased, you may want to consider preparing comprehensive detailed minutes of settlement to ensure that a permanent record of the considerations, both legal and factual, exist. For a precedent of minutes of settlement for Will Challenge and Power of Attorney Litigation, see Schedules "B" and "C" attached.

You may also wish to insist that each of the different claimants, groups of claimants, potential claimants and groups of potential claimants obtain independent legal advice. You may also consider having the estate pay for such independent legal advice. In the minutes of settlement themselves, you may want to recite the fact that

all the parties acknowledge and warrant that they have retained independent legal advice, and you may want to attach the various solicitors' certificates to the minutes of settlement themselves.

In circumstances where litigation has been commenced and there is a file opened by the court, the executed minutes of settlement are often filed and the more detailed they are, the more protection you are providing to the executor and the recipients of the assets of the estate.

In the appropriate circumstances, you may want to consider reciting in the Minutes of Settlement the fact that a claim by a dependant has been made and briefly recite the details of that claim and its resolution.

In circumstances where there are numerous wills, you may want to recite each of the wills in the body of the minutes of settlement to confirm that all necessary parties have been made parties to the proceedings and have been given notice, and been considered. Obviously, anybody named in any prior will, could have a financial interest in the assets of the estate and acknowledging the fact that you have considered this possibility in the minutes of settlement is a further precautionary step that can be taken.

As to the legal issues themselves, it is probably not necessary to recite the fact that you have considered issues such as testamentary capacity, undue influence and due execution in the minutes of settlement. It may be that a recital of such legal

issues is not necessary. Furthermore, a properly drafted order for directions will often serve as a permanent record in the court file of the legal considerations that were reviewed in the course of the dispute.

Another practical point to consider is that all persons with a financial interest in the assets of this estate should be signatories to the minutes of settlement.

In some situations, a former spouse may also have to be given notice of the proceedings. In such circumstances the minutes of settlement should clearly set out that the former spouse has no intention of pursuing any claims against the assets of the estate. For the protection of all the parties concerned, some consideration should be given to insisting that a former spouse retain independent legal advice and be a signatory to the minutes of settlement themselves. Again, while claims of this nature may be remote, there is no sense in resolving an issue and leaving even minor problems unresolved, especially in circumstances where those potential claims are known to the parties to the litigation.

In the proper circumstances, careful drafting should include a clear and effective confidentiality and non-disclosure clause.

In circumstances where the minutes of settlement will involve ongoing negotiations, an arbitration or mediation clause is a useful tool.

Where there is a possibility that if one of the parties changes his will subsequent to the signing of the Minutes of Settlement and such change will financially impact upon the other parties to the minutes of settlement, you should consider including a clause restricting that person's right to change his will in the future.

In circumstances where the parties feel that it is necessary to ensure both effective and binding implementation of the minutes settlement, an order implementing and improving the minutes of settlement by the court may be effective. Included as Schedule "D" is a copy of a draft Notice of Motion and attached as Schedule "E" is a precedent of a judgment of the court approving minutes of settlement.

Whenever you are preparing minutes of settlement always keep in mind that there is little doubt that the executor to the last will is potentially personally liable for improperly distributed assets.⁸

In addition, in circumstances where the facts of the case may give rise to a claim for negligence, the solicitor in question may want to do his or her best to be a party to the minutes of settlement. For example, if the facts of the case are that the solicitor of the deceased should have drawn a new will pursuant to instructions given, and did not do so prior to the testatrix's death, there may be a claim that could be made by the

disappointed beneficiaries.⁹ Again, even if the claim is remote, if a solicitor is aware of litigation surrounding the assets of the estate of his former client, he may want to consider playing a role in the litigation at the time of executing the minutes of settlement, subject to proper disclosure of such a role and LPIC'S involvement.

A Minutes of Settlement Checklist is attached as Schedule "F".

⁸ See Cullity, M.C., "Trustees' Duties, Powers and Discretions – Exercise of Discretionary Powers", Law Society of Upper Canada Special Lectures, (DeBoor 1980), also see Cullity, M.C. "Personal Liability of Trustees and Rights of Indemnification" 16 E.T.J. 115.

⁹ See *White v. Jones*, [1995] 1 All E.R. 691 (H.L.)
gabi hd:users:gabi:desktop:article.doc

5. ADR/Mediation

To date, there is no compulsory mediation in estate litigation matters; however, there is little doubt that this process will be imposed upon the estate bar in the near future.

Furthermore, there is very good reason to insist on compulsory mediation in estate matters as most of the issues can be more readily resolved in this area of litigation than others.

The foundation of estate litigation problems are often based on problems surrounding the family and the emotional aspects of the matter can, in some cases, over-ride the practical legal aspects of the dispute. It is this type of litigation that is well suited for mediation. The purpose of this portion of the paper is to explore the mediation process from the advocate's perspective, and not to deal with it from the mediator's viewpoint.

(a) Know Your Mediator

Before proceeding to mediation, it is always helpful to understand with whom you are negotiating. The approach that your mediator will most likely be taking is something upon which you should have a general understanding before you enter into the mediation.

Often, depending on who is the mediator, what the issues are, and what order they are dealt with, knowing the mediator's likely approach can be a crucial aspect of the mediation itself.

For example, when selecting a mediator, one might consider whether or not you wish to select a specialist, a generalist, or a former judge.

A specialist who is an experienced lawyer practicing in the area of Estate litigation or who has a great deal of background in this area of the law, can provide specific knowledge and may be helpful in the right circumstances. For example, if your case involves the issue of testamentary capacity, it may be helpful to have a specialist who understands the basic framework of the tests that a judge should consider to ascertain whether or not the deceased had testamentary capacity. A specialist may be useful when considering issues surrounding very narrow points of law, such as, the proof of a lost will and the presumptions that surround that legal question.

A generalist, who has basic background and knowledge of various areas of law, can be equally helpful and useful in the right circumstances. If the matter is truly a family dispute, the legal issues themselves may not be the most important aspect of the litigation and a generalist mediator may be able to impress upon the parties his or her general background knowledge and induce the parties to use common sense and dignity to bring together a resolution.

The various ADR facilities are excellent sources for mediation. These mediation centres includes retired judges who are particularly well qualified to obtain a settlement as a result of their judicial experience. Mediation is most often structured like a “pre-trial” and, eventually, the mediator will give his or her opinion as to the outcome of the litigation. A retired judge can often be very effective in impressing upon the parties his or her experience with regard to the likelihood of success or failure of a case.

(b) What Is The Purpose Of The Mediation

Before entering into the mediation, you should ascertain from your client, and determine through the other party’s conduct, what is the real purpose of the mediation. For example, is the mediation something that the parties are prepared to seriously pursue and is there truly going to be a serious attempt to settle the case or do the parties want to use this step in the proceedings to make further inquiry into the nature of their opponent’s case.

At trial, cross-examination of a witness can provide you with the necessary evidence to succeed or fail in your case. At mediation, you may not be able to assess what the litigation dynamics are or assess the strengths or weaknesses of your opponent’s witnesses.

For example, at a mediation, you will probably be able to determine whether or not the lawyer is controlling the case or the client is really putting forward the

litigation. You may or may not be able to determine whether or not you have a strong opponent who is a solicitor or a strong opponent who is the client. It may also be that the lawyer and client are working as a team and you may take from that knowledge a certain strategic approach to either the mediation or, if mediation fails, the remainder of the litigation itself.

The type of client or lawyer that you are dealing with can also give you an idea as to whether or not the mediation process itself will provide you with an opportunity to test a “low ball” offer and walk away or whether or not the parties truly do want to settle the case.

It is also important to know and understand your own style and techniques as well as that of your opponent. You should determine whether or not you can be flexible. Before you enter into the mediation, you should carefully consider your techniques and negotiation tactics.

(c) Documentary Preparation for Mediation

A full and comprehensive mediation brief should be prepared and sent to opposing counsel and the mediator well in advance of the mediation. At most private mediation centres, the mediator will expect a copy of the mediation brief well in advance of the date of hearing.

In the mediation brief, the materials for the mediator should be similar to that of a pre-trial memorandum.

I often use an opening statement which sets out the theory of the case in strong and precise language. I then set out the theory of the case in some detail and often include a chronology of events as a schedule to the mediation brief itself.

I include in the mediation brief, copies of all of the relevant documents. Often, in estate litigation matters, the wills in question are included and particular excerpts from relevant doctors' and solicitors' notes are set out. For a precedent of an ADR brief, see Schedule "G" attached.

(d) Preparing Your Client

When preparing your client for the mediation, you must, of course, familiarize and review with your client the process that they are entering into.

Remember that clients are not always practiced negotiators and can sometimes get caught up on a low ball or high ball or other unrealistic approach to the mediation.

Preparing the client in advance of the mediation and preparing a comprehensive ADR brief will maximize your presentation at the ADR hearing.

Mediation is much like courtroom advocacy and if you are weak on the facts then you may wish to emphasize the law and if you are weak on the law you may wish to emphasize the facts.

You should be aware of counsel who impose a rigid approach to the negotiations. Some counsel assess the economic value of the case and then will not budge from his or her position. In contrast, some counsel want to “horse trade” and the negotiations tend to be based on a range of numbers rather than a specific value. I describe the former type of negotiator a “real value” opponent and the latter as a “horse trader”.

One must remember that estate litigation is usually personal family litigation and, in most circumstances the legal fees cannot be deducted. This can, of course, have an impact on the overall result as it, usually, has an influence on the minds of the parties and is not always foremost in the minds of the counsel. When doing the calculations, the tax reality and consequences of your client must also be considered.

Another aspect of the litigation process, which should be reviewed carefully with your client, is the time that should be involved in the mediation itself.

I find that a whole day is usually required for most meaningful mediation sessions. Sometimes, even more than one day is necessary, depending on the issues involved.

One must be aware of the physical limits on counsel, your clients and the mediator. While it is often helpful to “burn the midnight oil” to get a deal, it may not be appropriate in every situation. Sometimes, letting the parties consider their case overnight, can be fatal; however, in certain circumstances it may be just too much to resolve complicated litigation in a one-day mediation session.

In any event, if there is a settlement, some form of minutes of settlement should be signed at the hearing to ensure that the deal is properly and formally documented. The clients should not leave before they have signed the minutes of settlement.

If necessary, a cooling off period of twenty-four to forty-eight hours may be considered. However, that too can complicate matters and may be unnecessary.

Before entering the mediation, you may also wish to review with your client whether or not they wish to bring a friend, relation or someone upon whom they rely who may be helpful to your client in making decisions during the mediation itself.

In estate litigation matters, you may not want to proceed to mediation too quickly. It may be necessary for the parties to have enough time to “heal the wound” or grieve and get over the death, before they enter into serious negotiations.

Proceeding to mediation after discoveries are completed is often helpful in settling as most issues and evidence has been explored.

At this stage, you will probably have completed most of the investigation and the “healing time” will probably be substantially completed.

Strategically, you may want to carefully assess your client’s expectations before you enter into mediation. For example, if your client is immediately expecting money from the estate and clearly qualifies as a dependant, under Part V of the *Succession Law Reform Act* it may be strategically better to obtain an interim order for support before you proceed to mediation.

It is important to note that preparing for mediation is a combination of trial preparation, pre-trial preparation and appeal preparation. You are expected to use all of your advocacy skills in the context of each of those steps all at once at the mediation itself.

6. Costs

The question of costs is an important factor in the entire settlement process. In estate litigation matters, the role that costs play can be complicated and crucial to a settlement as in most cases these costs must be either deducted from the estate or the settlement proceeds.

The Rules of Civil Procedure are not usually helpful in the mediation process. In commercial litigation matters, the cost consequences offers of settlement

pursuant to Rule 49 of the Rules of Civil Procedure is generally understood and is an effective tool to use in that type of litigation.

In estate litigation matters, it is more difficult to effectively use the strength and sanctions of Rule 49 as the nature of the litigation is “winner takes all” or costs may be payable to a party notwithstanding failure of his case.

Thus, if you are challenging the validity of a will and you succeed in setting aside the will then of course the result brings with it an absolute determination and usually a favourable disposition of costs. However, if you have good reason to challenge the validity of the will and do not succeed, it may be appropriate that you receive your costs out of the assets of the estate.¹⁰

The traditional view that costs of the litigation should generally be paid out of the assets of the estate has come under scrutiny by the courts in the past few years. The courts tend to be moving toward an approach that is more like the conventional commercial litigation view on costs. Thus, parties may well have to bear their own costs or that cost sanctions will be imposed against a party who is unsuccessful.¹¹

In my view, given the uncertainty as to the impact of Rule 49 of the Rules of Civil Procedure and the growing trend away from costs being paid out of the assets of the estate, it is best to use the formal Offer to Settle procedure in the Rules. There does

¹⁰ see Schnurr, B.A., “Estate Litigation – Who Pays the Costs”, [1991] 11 E.T.J. 52, Hull, Ian “Costs in Estate Litigation”, 18 E.T.R. (2d) 218. See also Re Marshall (1998) 17 C.P.C. (4th) 46 (Ont.Ct.Gen.Div.).

not appear to be any meaningful downside to serving an Offer to Settle in estate litigation and such a strategy can be particularly helpful as the litigation proceeds to trial.

7. **Summary**

In summary, while the above discussion is not exhaustive, it serves as an illustration of some of the considerations that parties to estate litigation should review, both when the matter proceeds to trial and/or settlement or mediation.

Furthermore, if the matter settles, given the wide range of potential claimants, it is sound practice to proceed to prepare comprehensive minutes of settlement between the parties as opposed to a standard form of release executed by some or all of the parties.

¹¹ Ibid.
gabi hd:users:gabi:desktop:article.doc

SCHEDULE "A"

Complex Order Giving Directions

Court File No. 1332/99
126232/99

ONTARIO COURT (GENERAL DIVISION)

IN THE MATTER OF THE ESTATE of ALICE CLASH, deceased

THE HONOURABLE) **THURSDAY, THE 23RD**
)
JUSTICE SMITH) **DAY OF JUNE, 1999**

B E T W E E N:

WILLIAM CLASH

Moving Party

- and -

MICHELE CLASH

Respondent

ORDER GIVING DIRECTIONS

THIS MOTION made by the moving party for directions was heard this day at the Court House, Market, Ontario, in the presence of counsel for William Clash, Michelle Clash.

UPON READING the Affidavit of William Clash, the consent to act as Estate Trustee During Litigation of the Trust Company and on hearing submissions made,

1. **THIS COURT ORDERS** that the parties to the proceedings and the issues to be tried as follows:

- (a) With respect to a Codicil of Alice Clash, deceased, (the “deceased”) dated April 30, 1993 (the “Codicil”) to the Will of the deceased dated June 22, 1992;
 - (i) William Clash affirms and Michelle Clash denies that the Codicil was duly executed by the deceased;
 - (ii) William Clash affirms and Michelle Clash denies that the deceased had testamentary capacity at the date of execution of the Codicil;
 - (iii) William Clash affirms and Michelle Clash denies that the deceased had knowledge of and approved the contents of the Codicil; and
 - (iv) Michelle Clash affirms and William Clash denies that the making of the Codicil was procured by undue influence.
- (b) With respect to a Will of the deceased dated June 22, 1992 (the “Will”) Michelle Clash denies that the original of the Will was destroyed with the intention to revoke the Will.
- (c) With respect to the Will:
 - (i) William Clash affirms and Michelle Clash denies that the Will was duly executed by the deceased;
 - (ii) William Clash affirms and Michelle Clash denies that the deceased had testamentary capacity at the date of the execution of the Will;

- (iii) William Clash affirms and Michelle Clash denies that the deceased had knowledge of and approved the contents of the Will; and
 - (iv) Michelle Clash affirms and William Clash denies that the making of the Will was procured by undue influence.
- (d) Michele Clash affirms and William Clash denies that at the time of execution of a transfer registered in the Registry Office for the Regional Municipality of New York, Instrument No. 0634 between the deceased, Alice Clash, as transferor and Michele Clash as transferee, the deceased, Alice Clash had capacity and knew and approved of the nature and effect of her actions when making the said inter vivos transfer;
- (e) William Clash affirms and Michele Clash denies that the transfer registered on February 25, 1993 as Instrument 0634, registered in the Registry Office for the Regional Municipality of New York, between the deceased Alice Clash and Michele Clash was procured by undue influence.
- (f) With respect to the bank accounts of the deceased, at the Bank of Big Bucks (Main/Front Branch) and any other bank accounts, GICs and financial instruments of the deceased, hereinafter referred to as “the Bank Accounts”, Michelle Clash affirms and William Clash denies that in or about the Spring of 1992, on the day of making the said transfer or conversion of the deceased’s

funds from the Bank Accounts, into the joint names of the deceased and Michelle Clash, the deceased had capacity and knew and approved of the nature and effect of her actions when making the said transfer or conversion;

- (g) William Clash affirms and Michele Clash denies that with respect to the Bank Accounts of the deceased, in or about the Spring of 1992, on the day of the making of the transfer or conversion of the deceased's funds from the Bank Accounts, into the joint names of the deceased and Michele Clash, the transfer or conversion was procured by undue influence;
- (h) William Clash affirms and Michele Clash denies that when the deceased subsequently transferred her Bank Accounts out of the joint names of Michele Clash and the deceased, the deceased knew and approved of the nature and effect of her actions when making the said transfer or conversion.
- (i) Michelle Clash affirms and William Clash denies that when the deceased subsequently transferred her Bank Accounts out of the joint names of Michele Clash and the deceased that such transfer or conversion was procured with undue influence.
- (j) William Clash shall bring in and pass his accounts with respect to his activities as attorney for Alice Clash from January 13, 1992 to the date of death.

- (k) William Clash affirms and Michele Clash denies the enforceability of the promissory note for \$150,000.00 signed by Michele Clash in favour of Alice Clash dated June 28, 1993.

2. **THIS COURT ORDERS** that each party shall serve and file an Affidavit of Documents and attend and submit to examinations for discovery in accordance with the Rules of Civil Procedure.

3. **THIS COURT ORDERS** that the issues be tried without a jury at Market at a date to be fixed by the Registrar and the Record shall consist of this Order Giving Directions and any other Order for Directions made by this court.

4. **THIS COURT ORDERS** that the Trust Company be and hereby is appointed Estate Trustee During Litigation without security, of all singular property of the Estate of Alice Clash, pending the final distribution or settlement of the litigation herein and that a Certificate of Appointment of Estate Trustee During Litigation be issued to the Trust Company subject to the filing of the necessary supporting Application.

5. **THIS COURT ORDERS** that the Trust Company be and hereby is authorized to exercise those powers given by law to an Administrator including such powers under the *Estates Act*, R.S.O. 1990, c.E.21 as amended and without limiting the generality of the foregoing, the Trust Company is hereby specifically authorized to do the following:

- a) to obtain an appraisal of any real property comprising an asset of the estate and to sell any such real property;
- b) to sell any articles of personal, domestic or household use or ornament comprising the assets of the estate, including consumable stores and all automobiles and accessories thereto;

6. **THIS COURT ORDERS** that the Trust Company shall be at liberty to appoint an agent or agents and seek such assistance from time to time as they may consider for the purpose of performing their duties hereunder.

7. **THIS COURT ORDERS** that, subject to further review by this Court if necessary, the Trust Company, as Estate Trustee During Litigation, shall receive out of the assets of the estate of the deceased reasonable remuneration for its administration which remuneration shall be calculated as follows:

- a) fees for administration services: 2.5% on the value of the assets under administration to be calculated as follows: 2.5% on the value of the capital assets realized, as realized and 2.5% on the value of any capital assets not realized at the termination of the appointment of the Trust Company as Estate Trustee During Litigation based on the fair market value of the assets at that time;
- b) fees for tax services: payable in accordance with the Trust Company's scale of fees and effect from time to time;
- c) disbursements incurred in the administration.

8. **THIS COURT ORDERS** that on consent of the parties the Trust Company as Estate Trustee During Litigation is entitled to compel production of all medical

records and files relating to the deceased from any person or institution in possession of such medical records, in the same manner and to the same extent as the deceased would have been able, if she were alive, and that all productions received be produced to the other parties and to be made available on request. The charges for the production of the records and files shall be paid from the estate by the Trust Company as Estate Trustee During Litigation, and that the final determination as to payment of such costs and expenses shall be reserved to the trial judge.

9. **THIS COURT ORDERS** that on consent of the parties the Trust Company is entitled to compel production of all solicitor's records, notes and files relating to the deceased from any solicitor or law firm in possession of such legal records in the same manner and to the same extent as the deceased would have been able, if she were alive, and that all productions received be produced to the other parties and made available on request. The charges for the production of the records and files shall be paid from the estate by the Trust Company as Estate Trustee During Litigation, and that the final determination as to payment of such costs and expenses shall be reserved to the trial judge.

10. **THIS COURT ORDERS** that on consent of the parties the Trust Company is entitled to compel production of all financial records and files relating to assets held either solely or jointly by the deceased from any financial or banking institution or agency whether in Canada or the United States, including without limiting the generality thereof, the Mary Bank in New York, New York, in the same manner and to

the same extent as the deceased would have been able if she were alive and that the productions received be produced to the other parties and to be made available on request. The charges for the production of the records and files shall be paid from the estate by the Trust Company as Estate Trustee During Litigation, and that the final determination as to payment of such costs and expenses shall be reserved to the trial judge.

12 **THIS COURT ORDERS** that this Order Giving Directions shall be served by regular lettermail on the following person:

John Clash
222 Betty Street
New York, Ontario
H0H 0H0

12. **THIS COURT ORDERS** that the Trust Company be at liberty to obtain a Certificate of Pending Litigation for registration against the lands and premises referred to in Schedule "1" hereto.

13. **THIS COURT ORDERS** that the parties are hereby granted leave pursuant to Rule 31.10, to examine for discovery the solicitor who prepared the will and codicil, Wayne Jones, Barrister and Solicitor and that the costs of the examination shall be reserved to the trial judge.

14. **THIS COURT ORDERS** that the parties are hereby granted leave to move for further directions as may appear advisable or necessary.

16. **THIS COURT ORDERS** that the Trust Company and Estate Trustee During Litigation, shall pay to Betty Coal the sum of \$5,000.00.

17. **THIS COURT ORDERS** that the costs of this motion shall be reserved to the trial judge.

SCHEDULE "1"

Lot 555, Plan 5555, Town of Ham, Regional Municipality of New York, in the County of Yes, municipally known as 55 Betty Drive, Ham, Ontario.

SCHEDULE "B"

MINUTES OF SETTLEMENT – WILL CHALLENGE

**REPRINTED BY PERMISSION OF CARSWELL, a
division of THOMSON CANADA LIMITED.**

SCHEDULE "C"

Minutes of Settlement – Power of Attorney

Court File No. 001-002

**ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)**

IN THE MATTER OF a Power of Attorney of Betty Smith
AND IN THE MATTER OF the *Substitute Decisions Act*, S.O. 1992, c.30

B E T W E E N:

JANE SMITH AND JIM SMITH

Applicants

- and -

ALEX SMITH JAKE LINTER AND BETTY SMITH

Respondents

APPLICATION UNDER rules 1.04(2), 14.05(3)(a), (d) and (h) of the
Rules of Civil Procedure, sections 11 and 146 of the *Courts of Justice Act*,
R.S.O. 1990, c.C.43 and section 39 of the *Substitute Decisions Act*, S.O. 1992, c.30

MINUTES OF SETTLEMENT

WHEREAS the Applicants Jane Smith ("Jane") and Jim Smith ("Jim") hold a power of attorney for property from Betty Smith ("Betty") dated April 10, 1996 (the "April Power of Attorney") the continued efficacy of which has been put into question;

AND WHEREAS Alex Smith ("Alex") purpose to hold a power of attorney dated November 18, 1996 (the "November Power of Attorney");

AND WHEREAS the Applicants have sought the opinion, advice and direction of the court as to the sufficiency of and validity of the November Power of Attorney;

AND WHEREAS it is agreed among all parties hereto that it is in the best interests of Betty that the question as to the competing Powers be resolved;

AND WHEREAS Betty married her first husband Don Jones, and such marriage having ended by divorce judgment on August 3, 1962;

AND WHEREAS Betty in 1994 married Jake Linter and they have no children from this relationship;

AND WHEREAS Betty and Don had 3 children, Jane, Jim and Alex;

AND WHEREAS all of the parties to these Minutes of Settlement covenant and agree that they have each obtained independent legal advice with respect to these Minutes of Settlement and the provisions thereof;

AND WHEREAS all differences among the parties have now been resolved as set out herein.

NOW THEREFORE for and in consideration of the sum of TWO DOLLARS (\$2.00) of lawful money of Canada, now paid by each party and each signatory to the other, the receipt whereof is hereby by each party and signatory acknowledged, and the covenants and agreements herein contained, the parties and signatories hereto hereby covenants and agree as follows:

1. Betty hereby agrees to revoke all outstanding continuing powers of attorney for property given by her to any person or persons prior to the date hereof, and to execute and deliver the following continuing power of attorney for property:

- (a) a continuing power of attorney for property in favour of the Trust Company, in the form attached hereto as Schedule B. The Trust Company shall be entitled compensation to be calculated in accordance with the fee schedule prescribed

from time to time in accordance with the *Substitute Decisions Act*, R.S.O. 1990, as amended, payable monthly on an interim basis provided always that the amount of compensation so claimed and taken by the Trust Company shall be subject to an adjustment on the passing of accounts, if required.

2. Betty hereby covenants and agrees that she shall not be entitled to revoke the power of attorney referred to in paragraph 1, hereof.

3. The Trust Company will manage all other matters relating to property owned by Betty, and Betty shall delegate to the Trust Company all decision making powers so far as her financial property and investments are concerned, and the parties and signatories hereto agree that none of them shall interfere in any way with the management of such property by the Trust Company. Based upon the current needs and expenses of Betty listed in Schedule C appended hereto, the parties hereto anticipate the after tax payment to Betty will be in the amount of \$60,000 per year. It is recognized that this does not cover exceptional or extraordinary expenses including legal and accounting fees nor does it cover unanticipated future medical, nursing or home-care needs as may be required, all of which would be in addition to the foregoing monthly payments.

4. Alex, Jane and Jim hereby renounce any right which they may have, jointly or severally, to act as attorney for Betty pursuant to any power of attorney issued to them by Betty. The parties hereto agree that, if the power of attorney referred to in paragraph 1 is set aside or declared invalid for any reason, the Trust Company may continue to act as agent for Betty and he shall be empowered with the rights and obligations set out in the power of attorney attached as Schedule A hereto, as if it were in full force and effect and the parties and signatories hereto agree to execute and deliver to the Trust Company consents to its appointment as Guardian of the property.

5. Betty hereby covenants and agrees not to alter the dispositive clauses in her last existing Will dated the 13th day of June, 1989.

6. The parties hereto respectively covenant and agree to keep the terms of these Minutes of Settlement confidential between the parties and signatories hereto, that they will not disclose the nature of the settlement evidenced by the within Minutes of Settlement and that they will not use, disclose, or reveal any information or knowledge obtained in this proceeding for any other purpose.

7. The parties hereto covenant and agree that all right, title and interest in the 1962 Wicker Chair (the "Chair") currently in Alex's possession, and as referred to in the letter of Betty dated April 18, 1990, was given to Alex and that all right, title and interest has and shall remain with Alex personally.

8. The parties hereto covenant and agree that Betty holds in trust for Alex all right, title and interest in the two Toronto Raptors exhibition, regular season and if applicable playoff tickets (Grey H 11-12). Further the parties agree that Betty shall be entitled to purchase such number of said tickets for said games as she requires for the duration of his lifetime.

9. Each of the parties shall bear their own costs of the within Application.

10. The parties each agree that they will execute and deliver any documents and do all things that may be reasonably required from time to time to give effect to the terms of these Minutes of Settlement.

11. The parties and signatories hereto consent to an Order dismissing the within application without costs.

12. The parties and signatories hereto consent to an Order implementing and approving these Minutes of Settlement.

13. The terms of these Minutes of Settlement are binding and will enure to the benefit of each of the parties hereto and their heirs, successors, administrators, executors, estate trustees and assigns.

DATE: October , 1998)
)
)
_____)
Witness to the Signature of Jim Smith)

_____)
JIM SMITH

DATE: October , 1998)
)
)
_____)
Witness to the Signature of Betty Smith)

_____)
BETTY SMITH

DATE: October , 1998)
)
)
_____)
Witness to the Signature of Jake Linter)

_____)
JAKE LINTER

SCHEDULE

LIST OF EXPENSES

	ANNUAL
Food	\$
Clothing	
Heat	
Hydro	
House Repairs	
Medical (Prescriptions)	
Medical (Non-Prescriptions) 52 X30	
Auto	
• Gas	
• Insurance	
• Repair	
• Renewal	
Travel	
Entertainment	
Florida	
• Condo Fees	
• Hydro	
• Utilities	
Boat	
Cars (Antique)	
• Maintenance	
• Insurance	
Gifts	
• Charity	
• Family	
• Friends	
(AFTER TAX TOTAL) TOTAL	

SCHEDULE "D"

Notice of Motion – Implementing and Approving Minutes of Settlement

Court File No. 03-99/97

ONTARIO COURT (GENERAL DIVISION)
at Toronto

THE HONOURABLE MR.) MONDAY, THE 15th
)
JUSTICE SMITH) DAY OF October, 1998

IN THE MATTER OF a Power of Attorney of Gavin Jones
AND IN THE MATTER OF the *Substitute Decisions Act*, S.O. 1992, c.30

B E T W E E N:

JACK JONES)
)
) Applicant

- and -

KIRSTEN JONES, MELANIE JONES)
and LORI JONES) Respondents

APPLICATION UNDER rules 1.04(2), 14.05(3)(a), (d) and (h) of the Rules of Civil Procedure, sections 11 and 146 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and section 39 of the *Substitute Decisions Act*, S.O. 1992, c.30

NOTICE OF MOTION

JACK JONES will make a motion to the court on _____ day, the ____ day of October, 1998 at 10:00 am in the forenoon or as soon after that time as the motion can be heard at the Court House, 393 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard (*choose appropriate option*)

- in writing under subrule 37.12.1(1) because it is (*insert one of* on consent, unopposed *or* made without notice);
- in writing as an opposed motion under subrule 37.12.1(1) because it is made without notice;
- orally.

THE MOTION IS FOR AN ORDER:

- (1) approving and implementing the Minutes of Settlement signed by Jack Jones, attached as Exhibit "A" to the Affidavit of Jack Jones;
- (2) otherwise dismissing the within Application without costs; and
- (3) abridging the time for service of this motion, if necessary.

THE GROUNDS FOR THE MOTION ARE:

- 1. The proceedings have been settled in accordance with the terms of the Minutes of Settlement attached hereto and marked as Exhibit "A" to the Affidavit of Jack Jones and all parties with a financial interest in the Estate of Gavin Jones have been served with this Motion Record.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of this motion:

- 1. The Affidavit of Jack Jones;
- 2. Such further and other documents as the Court permits.

Date: May 28, 1998

Hull & Hull
Barristers and Solicitors
Suite 770

141 Adelaide Street West
Toronto, Ontario
M5H 3L5

Ian M. Hull

Tel: (416) 369-7826

Fax: (416) 369-1517

Solicitors for Jack Jones

TO: Get Them & Got Them
Barristers and Solicitors
2 Bay Street, Suite 10
Toronto, Ontario M5H 2R7

Solicitors for Kirsten Jones, Melanie Jones and Lori Jones

AND

TO: The Office of the Public Guardian and Trustee
595 Bay Street, Suite 800
Toronto, Ontario

1. **THIS COURT ORDERS AND ADJUDGES** that judgment be and is hereby made in accordance with the terms of the Minutes of Settlement contained hereto and marked as Schedule "A".
-

SCHEDULE "F"
Minutes of Settlement - Checklist

- All parties with a financial interest have been given notice;
- Full details of the steps taken in the administration and the litigation are set out;
- Independent legal advice certificate obtained;
- Spouse and/or former spouse is a signatory or has been given notice of proceedings;
- All parties named in all testamentary documents are signatories or have given notice of proceedings;
- All persons who take on an intestacy are signatories or been given notice of the proceedings;
- All defendants are signatories or have been given notice of the proceedings;
- Solicitor who drew the will – signatory to Minutes of Settlement;
- Advertised for creditors;
- Confidentiality clause;
- Contract not to contest the will clause;
- Arbitration clause;
- Order approving Minutes of Settlement.

Schedule "G"

ADR BRIEF

OPENING STATEMENT

The theory of the Propounder of the Will's ("the Propounder") case is twofold:

- (a) *Larry Wally Wells ("Wells") is propounding the Last Wills and Testaments of both his parents, Larry Wally Wells, Sr. ("Wally") and Alice Wells ("Alice") dated April 21, 1992. Wells will show that both of his parents had testamentary capacity, knew and approved of the nature and effect of their dispositions and were not compelled or unduly influenced to sign their wills. There will be extensive evidence from Wally and Alice's personal solicitor that he took careful notes and considered the question of testamentary capacity. There will be considerable medical evidence to support testamentary capacity and there will be independent evidence from the witnesses to the will that Wally and Alice both knew what they were doing when they signed their wills. Discoveries have been completed and it is clear that the challenger of the will has only a few pieces of medical evidence to attempt to refute the overwhelming evidence of testamentary capacity from those professionals present at the time of execution of the wills.*
- (b) *Wells denies that his brother David Wells ("David") is entitled to an accounting of the assets of Wally and Alice. If Wells succeeds and propounds the will then David is only entitled to that specific amount set out in the will and is not entitled to any further information with respect to the assets.*

THEORY OF WELLS' CASE

Wally died on January 10, 1995. Alice died on February 22, 1997.

The Wills that are in dispute are dated April 21, 1992. On that day, Wally and Alice's solicitor, Robert Good, attended at their nursing home and witnessed the signing of mirror Wills (the "April Wills"). Attached at tab 1, is a copy of both April Wills.

The April Wills provided that Wells would be the sole executor of both of their estates. Each was to obtain a life interest in each other's assets and on both of their deaths the assets of the estate would be distributed on the basis that their one son, David, was to receive \$20,000.00 and the residue of the estate was to go to Wells. David is challenging the validity of the April Wills.

Family Background

Wally and Alice were married for fifty years and had two children, Wells and David.

In 1942, Wally and Alice purchased a home at 16 Tilson Road in New York, Ontario. At the date of death of Wally, the home was valued at approximately \$200,000.00.

Over the years, Wally and Alice executed a series of Wills. Generally, the Wills provided that their respective estates would go to each other and then to their two children equally.

However, the relationship between Wells and his parents was very different than the relationship between David and his parents. Wells had spent almost twenty years of his life exclusively attending to his parents' day to day needs, whereas, David's relationship was much more distant and certainly not as intense with respect to issues of care giving.

In or about October, 1981, Wells moved into the family home at approximately age 40.

When Wells moved into the family home, Wally and Alice advised him that they required his day-to-day assistance with respect to their ongoing care and advised him at that time that he would be properly compensated for assisting them. In particular, they advised him that he would receive the family home, to the exclusion of their son, David.

From that day, until their deaths, Wells continued to provide daily care and assistance for his mother and father.

It appears from the evidence obtained at the examinations for discovery of both Wells and Donald that the issue of testamentary capacity for Wally and Alice really becomes relevant commencing in the spring of 1991.

On July 25, 1991, Wally was admitted to Sunnybrook Hospital as the result of a fall that he suffered at his home. On August 29, 1991, the Sunnybrook medical records

indicate that Wally's "participation in social rituals was entirely appropriate and he was cheerful, warm and appropriately trusting.

There is a medical record pertaining to Alice dated June 17, 1992 from the Sunnybrook Hospital Geriatric Outreach Team which indicates that a mini mental status test was administered and that she scored 29 out of 30.

In addition, with respect to Alice's mental capacity in the summer of 1992, confirming that Alice did not have any short term memory problems.

Based on the medical evidence and the evidence of Wally & Alice's solicitor, there is really no dispute as to the testamentary capacity.

Notwithstanding the clear evidence of their solicitor that Wally and Alice had testamentary capacity when they signed their Wills, David has attempted to bring Alice's capacity into question on the basis of some very limited and questionable medical documents.

Wally and Alice's solicitor made extensive notes and prepared extensive memoranda with respect to the testamentary capacity of each of them.

There is no dispute that later in life Alice suffered from Alzheimer's and very poor eyesight.

There is no evidence in the voluminous medical records to indicate that this Alzheimer's condition was a problem when the Will was signed.

ISSUES TO BE DETERMINED

1. Are the April 21, 1992 Wills of Wally and Alice valid?
2. Does Wells owe a duty to account to David?

DATE: _____

HULL & HULL
Barristers and Solicitors
Suite 770, 141 Adelaide Street West
Toronto, Ontario
M5H 3L5

Ian M. Hull,
Tel: (416) 369-7826
Fax: (416) 369-1517

Solicitor for Wells

Schedule "H"
Memorandum of Compromise and Family Settlement
Re: Contact Not to Contest the Will

MEMORANDUM OF COMPROMISE AND FAMILY SETTLEMENT

BETWEEN;

Able, (hereinafter referred to as ("Able"),
Of the first part

and

Baker, (hereinafter referred to as ("Baker"),
Of the second part

and

Charlie, (hereinafter referred to as ("Charlie")
Of the third part

WITNESSETH THAT:

WHEREAS Able, Baker and Charlie are all of the children of Blank (" Father") who is living and is the widower of Blank (here insert Mother's name) who predeceased Father ; and

WHEREAS Father is possessed of considerable wealth, the extent of which none of Able, Baker or Charlie is aware, however, that wealth is estimated by each of Able, Baker and Charlie to be in excess of \$ _____ ; and

WHEREAS the extent of the assets of Father does not affect the terms of these minutes of settlement as between the parties hereto; and

WHEREAS Father has recently been consulting separately with Able, Baker and Charlie as to the disposition of his assets on death; and

WHEREAS these consultations by Father aforesaid are matters of concern between Able, Baker and Charlie and they wish to end these matters of concern between themselves so as to alleviate family tensions ; and

WHEREAS in order to resolve all family problems between these parties, Able, Baker and Charlie have agreed to settle all matters between themselves as hereinafter set out;

Now therefore, for and in consideration of the sum of Two Dollars (\$2.00) paid by each of the parties hereto to each other (the receipt whereof is hereby by each party acknowledged) and other good and valuable consideration and the covenants and agreements hereinafter contained, the parties hereto hereby covenant and agree as follows:

1. Upon the death of Father, all of the assets of the estate of Father, after deducting all bequests made to persons other than the parties hereto, all proper administrative, legal or similar charges properly chargeable against the assets of Father's estate, payable under Father's will to any or all of the parties hereto shall be paid equally to all of the parties hereto, notwithstanding the terms of his will.

2. In the event that Father has made any inter vivos gift or gifts to any of the parties hereto or to any member of the family of any party hereto within six months of the date of this agreement, such gift or gifts shall be included in calculating the share of the party who or whose family has received such inter vivos gift or gifts and the amount payable to such party shall abate accordingly so as to comply with the provisions of clause 2 above.

3. The parties hereto shall authorize and direct the personal representative of Father to make all payments provided for herein in accordance with the terms of these minutes of compromise and family settlement and shall provide such personal representative with all appropriate releases and indemnities as are reasonable.

4. This agreement shall bind the heirs, executors, successors, assigns and personal representatives of the parties hereto.

In witness whereof the parties hereto have affixed their hands and seals as of the _____ day of _____, 1997.

**SIGNED SEALED AND DELIVERED
IN THE PRESENCE OF**

ABLE (seal)

BAKER (seal)

{N.B. SEALS ARE IMPORTANT}

CHARLIE (seal)

While the observation that seals are important should be noted, it is also important to ensure that these minutes of compromise and family settlement are made for valuable consideration as if they are made only under seal, any claim for breach of contract can only result in an award of damages, whereas if made for valuable consideration the remedy of specific performance is also available.

Clause to be added in Minutes of Settlement:

William Jones hereby covenants and agrees not to alter the dispositive clauses in his existing will dated the day of , 19__, and hereby covenants and agrees not to change any dispositive clauses to the detriment of any of the parties and signatories hereto or their respective issue.

Schedule "I"
In Terrorem Clause

**REPRINTED BY PERMISSION OF CARSWELL, a
division of THOMSON CANADA LIMITED.**