

## LITIGATION

— ESTATE ALERT

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### ***Can You Believe It? The Role of Corroboration in Estates Litigation***

*By Kristi Collins*

The Ontario Court of Appeal recently admitted statements made by a deceased to family members prior to his death as evidence of his insurer's mistaken cancellation of one of the deceased's accidental death policies in *Brisco Estate v. Canadian Premier Life Insurance Co.*, 2012 ONCA 854. In its decision, the Court clarified the scope of the corroboration requirement of section 13 of the *Evidence Act* as well as the role corroboration can play in admitting hearsay evidence.

#### **Facts**

Robert Brisco ("Brisco") died in a plane crash in 2004. Previously, Brisco had purchased two insurance policies through Canadian Premier Life Insurance Company ("Canadian Premier") in January 1998: an accidental death policy and a hospital benefits policy. Canadian Premier contended that Brisco had cancelled the accidental death policy in August 1998. Brisco's estate argued that Brisco had meant to cancel the hospital benefits policy, but that Canadian Premier had cancelled the accidental death policy by mistake. If the accidental death policy was in effect, Brisco's estate would be entitled to \$1,000,000. Brisco had also held another \$1,000,000 accidental death policy with a different insurer.

As evidence of the mistake, Brisco's brother (as estate trustee) and Brisco's three children each gave evidence that Brisco had made statements to them at various times subsequent to 1998 that indicated he believed he held two million-dollar policies. Although these statements were hearsay, the trial judge admitted the evidence under the "state of mind" exception. Canadian Premier appealed, claiming that Brisco's statements were inadmissible or, in any event, not corroborated pursuant to section 13 of the *Evidence Act*.

The Court of Appeal dismissed the appeal. Although the trial judge had erred in admitting the statements under the "state of mind" exception, the statements were admissible under the principled approach to hearsay. As well, the statements made by the deceased to his children did not require corroboration (as explained below) but in any event were sufficiently corroborated to meet the section 13 requirement.

#### **Section 13 of the *Evidence Act***

Section 13 provides as follows:

In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision on his or her own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

After quoting extensively from *Wigmore on Evidence* and its criticisms of such survivor disqualification statutes, of which few remain, Rosenberg J.A., writing for the Court, wrote:

Given its anomalous place in the modern law of evidence, especially in a case such as this, I see no reason to give s. 13 a broad interpretation when considering its application nor a narrow interpretation when considering the scope of evidence capable of corroborating the evidence of the interested party.

The Court clarified that section 13 only applies to interested parties who make the claim in their capacity as next of kin, executor, administrator or assignee and not simply because, coincidentally, the person happens to fall within one of those categories. Thus, in this case section 13 only applied to Brisco's brother as estate executor and not to Brisco's children because, even though they were estate beneficiaries, they were bringing the suit under a contractual right as beneficiaries of an insurance policy.

In any event, the Court found that the evidence of Brisco's brother and his children corroborated each other. Importantly, the court confirmed that several pieces of circumstantial evidence, even if not sufficient on their own, when viewed cumulatively can corroborate the evidence of an interested party. In this case, the Court accepted that evidence such as the fact that no letter was sent by the insurer confirming the cancellation of the accidental death policy, together with the improbability that Brisco would have chosen to cancel the accidental death policy given the other policies he maintained, the recorded discussions about those policies and that he had just purchased the policy months before, as cumulatively corroborating the evidence of Brisco's brother (and his children, if need be) sufficient to meet the section 13 requirement.

## Hearsay Evidence

The Court held that Brisco's statements were inadmissible under the "state of mind" exception because evidence of present intentions or present beliefs are not admissible to establish past acts.

However, the Court admitted the evidence as necessary and reliable under the principled approach to hearsay. Necessity was established because Brisco was deceased. As sufficient indicia of reliability, the Court pointed to the consistency of the various statements, that there was no obvious motive for Brisco to have lied when he made the statements, at least one statement was made under circumstances of solemnity, and that it was unlikely that Brisco would have forgotten he cancelled a million-dollar policy.

The Court also explained that reliability can be bolstered where there is evidence to confirm or corroborate the accuracy of the statements. As such, the Court looked to the same corroborating evidence discussed in its section 13 analysis in finding the hearsay statements reliable, and therefore admissible under the principled approach.

If you are involved in estates litigation, you must consider whether section 13 applies to your evidence and if so, whether your evidence is sufficiently corroborated. Brisco is now a good starting point in this analysis.

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