

Focus WILLS, ESTATES, CHARITIES & TRUSTS

Tactical summons barrage leads to big indemnity



Caroline Abela

The case of *Opara v. Opara* [2014] O.J. No. 4555 provides an example of hotly contested estate litigation involving a disappointed family member who will take the matter to a disproportionate level in an attempt to avoid dismissal of his litigation.

In a motion in September, Justice Laurence Pattillo quashed summonses to witness served by this beneficiary on all opposing counsel and ordered substantial indemnity costs against him, personally, as opposed to the estate. The beneficiary sought to cross-examine opposing counsel in support of his outstanding motion seeking to set aside a settlement and consent orders on the grounds of judicial duress.

This unfortunate estate matter involves one asset—a vacant house—jointly held by two estates, the value of which does not justify the relentless litigation being pursued by one beneficiary against the other beneficiaries of the two estates. The house was jointly owned by two sisters, each of whom had children. The underlying dispute is driven by one of the children—a beneficiary—pursuing a right of first refusal to purchase the house.

In March, the dispute was resolved. Minutes of settlement were signed to facilitate the sale of the home, subject to court approval. On consent, Justice David Brown approved various court orders reflecting the terms of the settlement.

The settlement was subsequently challenged. The bene-



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Justice Frank Newbould
Ontario Superior Court of Justice

fiary served a motion to set aside the consent orders on the grounds of judicial duress.

Initially, the judicial duress motion came before Justice Susan Greer (who has since retired from the bench) in June. At the outset, the moving beneficiary sought an adjournment of the motion for his new lawyer to review the case and

to file new evidence. The adjournment was opposed. In [2014] O.J. No. 3391, Justice Greer agreed to adjourn the judicial duress motion in the two estate matters, and ordered costs of the adjournment to be paid personally by the moving beneficiary.

Following the adjournment, the beneficiary served summonses on

all opposing counsel to cross-examine them in support of the outstanding judicial duress motion. In support of his motion, the beneficiary filed a lengthy affidavit setting out in detail what occurred inside and outside the courtroom, as well as a transcript and audio recording of the relevant proceeding which the beneficiary was putting at issue. The lawyers moved to quash the summonses.

On the motion to quash, Justice Pattillo upheld the well-established test of necessity and material relevance to require counsel to testify against their own client. The court found that the evidence sought was not relevant, let alone highly material (it was also not necessary in the circumstances, especially in light of the transcript and audio recording of the beneficiary). The court was also troubled by the impact the summonses would have on the status of litigation counsel if these lawyers were compelled to be fact witnesses on the judicial duress motion. The result would be that the other parties would have to retain new counsel, again. This beneficiary previously brought in former counsel as parties to the proceedings, causing the other party beneficiaries to have to retain new counsel at least once before. One party is on her third set of counsel due to allegations raised by the beneficiary against her former lawyers.

Justice Pattillo expressed concern with the beneficiary's plan that the cross-examination of counsel “may also necessitate a change in the representation of other parties.” That statement, coupled with the beneficiary's prior history of “icing” the other parties' lawyers, led the judge to conclude that “the serving of the summonses was more tactical than necessary.” Justice Pattillo ruled that the administration of justice “demands” that the summons be quashed.

In awarding substantial indemnity costs of \$20,000, personally, against the beneficiary, the court described the service of the summonses as “ill-conceived” and motivated “to cause delay and expenses to the other parties.”

The judicial duress motion was on Oct. 17 dismissed by Justice Frank Newbould, and the settlement reinstated. Again, costs were ordered against the moving beneficiary in the amount of \$30,704.42. If the costs are not paid, Justice Newbould directed the costs to be paid from the proceeds of the sale of the house that would otherwise be payable to the beneficiary.

Similar to the sentiment expressed by Justice Pattillo, Justice Newbould condemned the beneficiary's ongoing pursuit of litigation: “I cannot leave this motion without expressing dismay at the legal costs incurred in all of these proceedings over a house said to be valued at \$1 million and the amount in dispute apparently \$50,000. All of the litigation should have ended with the minutes of settlement. Unfortunately it has not.”

Despite three personal costs awards against the beneficiary, on November 17, 2014, the beneficiary brought a motion for a stay of the Order of Justice Newbould. Justice Robert Sharpe of the Court of Appeal dismissed the motion and awarded costs of \$10,000 to be paid from this beneficiary's share of the proceeds of the house. The estate trustee was awarded costs of \$4,000 to be paid from the estate. The next day, Justice Michael Penny approved the sale of the house.

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Dependent: Judge turned a promise to bequeath into a promise to convey

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etary estoppel finding, yet overturned the remedy awarded. This case involved a dispute between the grandchildren of the deceased's first spouse (whom he treated like his own grandchildren) and the deceased's second spouse. The grandchildren argued that in 1985 they had entered into an agreement with the deceased that if they worked without pay on his farm and cottage properties the deceased would leave them the properties in his will. The grandchildren provided the free work but the deceased failed to leave them the

properties as promised.

The trial judge concluded that the grandchildren had made out a claim for proprietary estoppel on the evidence and ordered the estate to convey the farm and the cottage properties to the grandchildren, with any property transfer expenses to be borne by the estate.

Notably, the deceased's spouse had also brought a dependent's support claim under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, which the trial judge refused to consolidate with the grandchildren's proprietary estoppel claim. On appeal, the spouse argued that

the trial judge erred by not consolidating the claims. She also sought, and was granted leave to produce new evidence on the value of certain estate assets, which significantly reduced the overall value of the estate. The estate trustee argued that if the farm and cottage properties were transferred to the grandchildren, the estate's liabilities would exceed its assets by about \$500,000, making it impossible to provide the spouse with the support awarded by the trial judge. The estate trustee also argued that the trial judge erred in finding proprietary estoppel.

The Court of Appeal concluded that the trial judge erred in not consolidating the two claims and erred by ordering that the properties be transferred directly to the grandchildren. The court found that the trial judge's remedy incorrectly turned a promise to bequeath into a promise to convey. The properties should have formed part of the estate, subject to the term that they are bequeathed to the grandchildren. This is significant, as s. 71 of the SLRA states that where a deceased has entered into a contract to bequeath property, the property

will not form part of a dependent support order *unless* the value of the property exceeds the consideration. In other words, if the value of the farm and cottage properties exceeded the value of the work of the grandchildren, any excess amount could be used to satisfy the spouse's dependent's support order. The Court of Appeal reluctantly ordered a new trial to determine the dependent support claim, the outcome of which is unknown.

Kimberly Whaley is the principal and founder of Whaley Estate Litigation.