O'SULLIVAN

ESTATE LAWYERS

CASE COMMENTARY

The original will is not available

In some jurisdictions, the original will cannot be released for any reason. How to proceed?

Folk wisdom, such as "Hindsight is 20/20," applies to many aspects of trust and estate administration. Other jurisdictions may have very different laws than those in Ontario that affect the will, as well as executors and beneficiaries.

Typically, these differences add costs and delay to the administration of an estate with cross-border connections.

The Situation

Mister Bull was a U.K. citizen resident in France at the time of his death. He made a French will appointing a French resident as his executor, Madame Curie, which disposed of all of his worldwide property, including a modest Ontario bank account that he owned at his death.

The will was administered in France according to French legal process by the French Notary, Monsieur Lupin. M. Lupin, among other tasks, verified the deceased's will and provided a "déclaration de succession."

As part of this process, M. Lupin was given Mr. Bull's original will, which cannot be released for any reason under the applicable French legal rules.

Ontario court rules, however, require the original will be filed with the court for an original probate application.

If the will has been probated in another jurisdiction, an ancillary or resealing probate application is made to the Ontario court, which does not require the original will.

Ontario probate is typically required by financial institutions where the deceased account holder's executor is not a resident of Canada.

Mr. Bull's Canadian financial institution confirmed that Mme. Curie would need an Ontario probate certificate to provide her with the authority to deal with his bank account, even though the account was not large.

The Problem

'An international impasse'

Because there was no French probate (nor was this available), Mme. Curie cannot obtain an ancillary grant of probate in Ontario in the usual way.

However, she also cannot obtain an original Ontario grant of probate in the usual way because the original will cannot be released by M. Lupin.

The Solution

In order to deal with this impasse, it was necessary to make an Ontario court application for "proof in solemn form" of Mr. Bull's will.

"Proof in solemn form" requires the executor to provide formal evidence of the validity of the will, often in open court, and any interested parties are included in the process. This is opposed to "proof in common form," the usual probate process in Ontario, where only certain formalities must be proved.

Fortunately, all of Mr. Bull's beneficiaries under his will and on any potential intestacy were capable adults and agreed to cooperate with Mme. Curie and consented to the court order granting "proof in solemn form."

The court application was therefore completed "over the counter," (i.e. without the necessity for a formal court hearing).

Once the court order allowing a notarial copy of the will provided by M. Lupin was issued, Mme. Curie was able to proceed with the probate application without the original will.

Lessons Learned

1. Mme. Curie would have avoided the entire problem if Mr. Bull had closed his Ontario bank account before death.

   He had kept it open because he periodically travelled to Ontario, and also had his Canada Pension Plan benefits deposited into it, but in fact these reasons did not necessitate an Ontario bank account.

2. If Mr. Bull had owned an asset which could not be easily and efficiently disposed of (i.e. a cottage or a RRIF), a separate will dealing just with his Ontario property would have saved significant legal fees, time, and Estate Administration Tax.

   Mme. Curie was, however, grateful and relieved that her Ontario counsel advised her of the most efficient legal solution possible, given the financial institution's refusal to consider other options (such as Mme. Cure providing an indemnity to the financial institution).

Many estate administration problems can be avoided by getting the right advice upfront when preparing an estate plan and by seeking the advice of trust and estate planning lawyers with cross-border and multijurisdictional expertise and experience.