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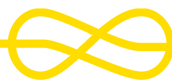
ESTATE LAWYERS

CASE COMMENTARY

Beware of the Unsigned Will: the Court of Appeal says "Prove it!"



March 2026 | ***Hejno v. Hejno*, 2025 ONCA 876**

On January 1, 2022, section 21.1 of Ontario's *Succession Law Reform Act* (the "SLRA") was enacted, providing the Superior Court of Justice (the "Superior Court") with the authority to declare that a testator's will that does not otherwise comply with the formalities under section 4(2) of the SLRA (which include that the will is in writing and signed at the end by the testator in the presence of two witnesses, both of whom sign in the presence of the testator and of each other), is valid, if the Court is satisfied on a balance of probabilities that the will reflects the testator's intention.

Ontario has followed most of the Canadian provinces and territories which all have substantial compliance legislation, except for Newfoundland and Labrador, and Northwest Territories which require strict compliance for will formalities, in transitioning from a valid will needing to strictly comply with the formalities under section 4(2) of the SLRA, to a valid will needing only to reflect the testator's *deliberate or fixed and final expression of intention* [emphasis added].

New 2-Part Test Under the SLRA

Since 2022, the Superior Court has made several decisions on applications under section 21.1 of the SLRA. At present, the Court applies a 2-part test in determining the validity of a will which does not otherwise comply with the formalities under section 4(2) of the SLRA, as follows:

1) is the will authentic?; and

2) does the will set out the testator's deliberate or fixed and final expression of intention?

On September 29, 2025, Section 21.1 of the SLRA was considered by the Ontario Court of Appeal, in the case of ***Hejno v. Hejno*, 2025 ONCA 876** ("*Hejno v. Hejno*").

Case Overview of *Hejno v. Hejno*

Hejno v. Hejno involved an appeal of the decision of Justice Parayeski of the Superior Court, validating unsigned primary and secondary wills under section 21.1 of the SLRA.

John Hejno (the "Deceased") died on May 6, 2024. The Deceased was survived by his common law spouse, Jennifer Hejno ("Jennifer"), his children from his previous marriage with Irene Hejno ("Irene"), Jeffrey Hejno ("Jeffrey") and David Hejno ("David"), and his grandson and David's son, Shawn Hejno ("Shawn"). The Deceased was estranged from David; however, he maintained a close relationship with his grandson, Shawn.

In 2018, the Deceased executed a will, which created a spousal trust for Jennifer, which was largely funded by the Deceased's shares in one of his property development corporations, York Plaza Developments Limited ("YPDL"). The will also created a family trust, primarily for the benefit of Shawn, funded by the Deceased's shares of another corporation, 244135 Realty Limited. The will provided that the residue of the Deceased's estate was to be divided in equal shares between Jeffrey and Shawn.

In 2022, the Deceased, with his long-time accountant Mr. Lepore, executed primary and secondary wills; the secondary will was created to minimize estate administration tax primarily on the Deceased's shares in private corporations. The 2022 wills similarly created a spousal trust for Jennifer, however, they no longer provided for the creation of a family trust.

In the 2022 wills, following Jennifer's death, any remaining capital in the spousal trust and undistributed income was to be divided in equal shares between Jeffrey and Shawn. The 2022 wills were not executed in accordance with the formalities under section 4(2) of the SLRA, as there was only one witness.

In 2024, the Deceased consulted a lawyer, David Simpson ("Mr. Simpson"), with the intention of updating the 2022 wills. Mr. Simpson prepared draft primary and secondary wills, based on the 2022 wills, and included "slip sheets" which provided a different percentage amount than the 2022 wills, as to the Deceased's ownership interest in YPDL. The "slip sheets" were never signed, or initialled by the Deceased.

It is acknowledged and agreed that the "slip sheets" overstated the percentage amount of the Deceased's ownership interest in YPDL, and that the percentage amount in both the 2018 will and 2022 wills was accurate. The 2024 draft wills were otherwise virtually identical to the 2022 wills. The Deceased died, without ever having finalized and signed the 2024 draft wills.

Following the Deceased's death, Jennifer brought an application (the "Application") under section 21.1 of the SLRA, to validate the 2024 draft wills or alternatively, the 2022 wills. The Application did not include reference to the 2018 will, which the respondents to the Application (the "Respondents") namely Jeffrey, David, Shawn, and Irene, otherwise had no knowledge of at that time. The Application was unopposed.

On November 26, 2024, Justice Parayeski declared the validity of the 2024 draft wills. The Judge

provided no reasons for his decision (the "Decision"), perhaps because the Application was unopposed. Thereafter, the Respondents (hereinafter the "Appellants") appealed the Decision (the "Appeal"), on the basis that the 2024 draft wills did not reflect the Deceased's true testamentary intentions. After commencing the Appeal, the Appellants discovered the existence of the 2018 will.

Court of Appeal's Analysis

The Court allowed the Appeal, and in doing so, they 1) admitted the 2018 will as fresh evidence; 2) reversed the Decision and declared the 2024 draft wills as invalid; and 3) remitted the issue of the validity of the 2022 wills to the Superior Court of Justice for redetermination.

1. **Admission of 2018 Will as Fresh Evidence**

   The Court applied the test set out in ***Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759,** and in admitting the 2018 will as fresh evidence, found that the will was relevant, credible and may affect whether the Superior Court will validate the not fully executed 2022 wills, certainly if there is not a reasonable explanation for the change to the dispositive provisions from the 2018 will.

2. **Invalidity of the 2024 Draft Wills**

   The Court held that Justice Parayeski should have provided reasons for his decision, even if the Application was unopposed; Justice Parayeski is still required to satisfy himself that the 2024 draft wills reflect the Deceased's deliberate or fixed and final expression of intention, before declaring them to be valid under section 21.1 of the SLRA. Given the absence of reasons, the Court did not feel it was appropriate for them to consider the 2-part test which governs applications brought under section 21.1 of the SLRA.

   The Court noted that the 2024 draft wills did not comply with the formalities under section 4(2) of the SLRA, and were not even executed in an imperfect manner, like the 2022 wills. Further, the "slip sheets" were not signed, or even initialled, and they included information which was inconsistent with Mr. Lepore's evidence in relation to the Deceased's ownership interest in YPDL.

   Lastly, the Court found that the 2024 draft wills did not necessarily reflect the Deceased's fixed and final expression of intention, as Mr. Simpson's evidence was that, as late as April 2024, the Deceased remained undecided on aspects of his estate planning.

3. **Validity of 2022 Wills Remitted to Superior Court**

   Jennifer proposed that the Court decide on the validity of the 2022 wills. However, the Court was unwilling to do so, finding that the validation of the 2022 wills required a fact-intensive inquiry which turned on extrinsic evidence. Further, this inquiry would require the Court to make findings of fact on an issue not addressed by Justice Parayeski, and which involved conflicting evidence. The Court ultimately held that the most efficient way forward was to remit the issue as to the validity of the 2022 wills to the Superior Court, which would have the benefit of discovery evidence before them, which may mitigate against inconsistent findings of fact.

Key Takeaways

The key takeaways from *Hejno v. Hejno* for trust professionals are as follows:

1) Whether an application under section 21.1 of the SLRA is on consent or is unopposed, the application record must include clear and reliable evidence of the testator's deliberate or fixed and final expression of intention.

Moreover, there should not be much, if any, evidence such as Mr. Simpson's, of the testator being undecided on the provisions of his will, particularly provisions which relate to the distribution of his or her estate;

2) Any and all (prior) testamentary documents should be included in an application under section 21.1 of the SLRA;

3) The Court, in deciding whether to validate a will under section 21.1 of the SLRA, must undertake a fact-intensive inquiry that often turns on extrinsic evidence;

4) The Court places significant weight on the evidence of the drafting solicitor. As such, the drafting solicitor's evidence, above all else, should suggest that the testator made up his or her mind and that the will in question reflects the testator's deliberate or fixed and final expression of intention; and,

5) Caution should be exercised when seeking to validate a completely unsigned will, which does not even partially comply with the formalities under section 4(2) of the SLRA; the evidentiary threshold is undoubtedly higher.

Case Summary

Hejno v. Hejno illustrates that while Ontario has adopted substantial compliance legislation for the validity of wills, estate planning and trust professionals should remain diligent in ensuring that wills are executed properly and comply with the formalities under section 4(2) of the SLRA.

Following the testator's death, if it is discovered that his or her will does not comply with these formalities, legal advice should be obtained as to whether to bring an application under section 21.1 of the SLRA, seeking to validate the will.

The Court of Appeal has told us that the burden is high to do so, and even if any such application is on consent or unopposed, the presiding application judge must undertake an intensive fact-finding inquiry and to validate a will be satisfied that the will reflects the testator's deliberate or fixed and final expression of intention and provide his or her reasons for doing so.

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The comments offered in this Case Commentary are meant to be general in nature, are limited to the law of Ontario, Canada, and are not intended to provide legal or tax advice on any individual situation. In particular, they are not intended to provide legal or tax advice. Before taking any action involving your individual situation, you should seek legal advice to ensure it is appropriate to your personal circumstances.

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