**Order Giving Directions – Estates List Proceedings - Dependant's Support (Sample Terms)**

| **Issue** | **Sample Clause** | **Annotation/Comments** |
| --- | --- | --- |
| ***Description of Parties, Issues*** | | |
| Description of Issues to be Tried: Dependant's Support | THIS COURT ORDERS that the parties to the proceedings and the issues to be tried are as follows:  a) With respect to the Dependant Support Claim of the applicant, ⚫:  (i) Is ⚫ a dependant of the deceased and a person to whom the deceased was under legal obligation to provide adequate and proper support immediately before his/her death or a person whom the deceased was actually providing support immediately before his/her death?  (ii) If the answer to (i) is ‘yes’, did the deceased in his/her Last Will & Testament (and Codicil) make adequate and proper provision for the support of ⚫?  (iii) If the answer to (ii) is ‘no’, then what provision, if any, should the Court make out of the Estate of the deceased for the proper and adequate support of ⚫?  (iv) If the answer to (i) is 'yes' and the answer to (ii) is no, what assets shall be clawed back in pursuant to s. 72 of the *Succession Law Reform Act* RSO 1990, c S. 26 (the "SLRA") for the adequate and proper support of ⚫ a dependant? |  |
| Description of Issues (continued): Interim Support of Dependants | (x) affirms and the (y) deny that the (x) is entitled to support and interim support pursuant to Part V of the *Succession Law Reform Act*, and a determination of the quantum thereof. | A motion for interim support is governed by section 64 of the *Succession Law Reform Act*. The Applicant on such an application must establish on an evidentiary record that he or she is both in need of and entitled to support; see *Zavet v Herzog*, 2018 ONSC 3398 at paras. 17-18. |
| Description of Issues (continued): Constructive Trust, Unjust Enrichment, and/or Resulting Trust | (x) affirms and (y) deny that (x) is entitled to relief from the estate of the deceased for unjust enrichment, constructive or resulting trust, trust, and/or quantum meruit, such relief claimed to be equal to the value of (x) contribution to the real property owned by the deceased, including household property, and to be calculated either in the form of damages, or the transfer of any said remaining properties, and/or from the estate of the deceased to (x). | Under Rule 75.06 of the *Rules of Civil Procedure*, the Court may direct on an application or motion the issues to be decided in a proceeding, including the procedures for the bringing the matter before the court in a summary fashion where appropriate. Where seeking substantive relief, parties should determine if the matter can be brought by way of application, in which case laying out the issues to be tried can be expedient. On the other hand, where there is conflicting evidence that requires credibility determinations on central issues, the application should be converted into an action; see *Maurice v Alles*, 2016 ONCA 287 at para. 32. |
| ***Procedural*** | | |
| Consolidation of Proceedings | THIS COURT ORDERS that the application brought by ⚫, bearing Court File No. ⚫ in the Ontario Superior Court of Justice, is hereby consolidated and joined with the within proceedings and that the hearings of said applications shall take place at the same time or one after the other. | Rule 6.01 of the *Rules of Civil Procedure* encompasses consolidation. See *Couls v Pinto*, 2007 CarswellOnt 7050 (SCJ) concerning the Court's discretion in deciding whether to consolidate proceedings. |
| Litigation Guardian (if application is made on behalf of a minor or other person under legal disability) | THIS COURT ORDERS that ⚫ be and is hereby appointed as Litigation Guardian for and on behalf of ⚫ for the purposes of this proceeding. | Rule 7.01 of the *Rules of Civil Procedure* requires the appointment of a litigation guardian to commence or respond to a proceeding on behalf of a party under disability. If an application for dependant's support is made on behalf of a minor or incapable person, the applicant should file, as part of the application materials, an affidavit containing the required statements set out at Rule 7.02(2). |
| Application is not Statute Barred | THIS COURT ORDERS AND DECLARES that, pursuant to s. 6 of the *Limitations Act, 2002*, R.S.O. 2002, c. 24, as amended, this claim is not barred by s. 61 of the *Succession Law Reform Act*, R.S.O. 1990, c. S-26, as amended ("SLRA"). | Section 61 of the *Succession Law Reform Act* provides that an application for dependant's support shall not be made more than six months after a Certificate of Appointment of Estate Trustee has been issued, unless the Court considers it proper to allow such application at any time as to the undistributed assets of the estate. |
| Extension of Time to Make Dependant's Support Application | THIS COURT DECLARES that the claim for support by the applicant, ⚫, in accordance with Part V of the *Succession Law Reform Act* shall be preserved, and that any time limitation in particularizing such claim, shall be abandoned by virtue of these proceedings, and in any event, any such claim shall be brought within six (6) months of the date of determination of ⚫ the Will challenge ⚫ define date ⚫ interpretation etc. | It may be appropriate to defer the issue of dependant's support until after a determination of validity of the deceased's will and/or interpretation of its terms has been made. |
| ***Substantive Relief*** | | |
| Declaration | THIS COURT ORDERS AND DECLARES that ⚫ is a dependant of the Deceased within the meaning of s. 57 of Part V of the *Succession Law Reform Act*. |  |
| Estate Trustee During Litigation ("ETDL") | THIS COURT ORDERS that ⚫ be and is hereby appointed Estate Trustee During Litigation without security, of all singular property of the Estate of ⚫, pending the final resolution or settlement of the litigation herein and that a Certificate of Appointment of Estate Trustee During Litigation be issued to ⚫ in accordance with the *Rules of Civil Procedure* subject to the filing of the necessary supporting application. | See section 28 of the *Estates Act* for the Court’s jurisdiction to appoint an ETDL where there is a will challenge. See *Mayer v Rubin*, 2018 ONSC 3498, outlining the Court’s jurisdiction to appoint an ETDL where there is no will challenge on the basis of its inherent jurisdiction to oversee the governance of an estate or trust. |
| ETDL Fee Agreement and Consent | THIS COURT ORDERS that subject to further review by the Court, if necessary, the Estate Trustee During Litigation, shall receive out of the assets of the Estate of ⚫ reasonable remuneration, which shall be calculated on the basis of the consent and fee schedule attached hereto as Schedule “A”. |  |
| ETDL Powers | THIS COURT ORDERS that the Estate Trustee During Litigation be and is hereby 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 Estate Trustee During Litigation 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) subject to any list or memorandum of ⚫, to sell any articles of personal, domestic or household use or ornament comprising of the assets of the Estate including consumable stores and all automobiles and accessories thereto; and  (c) that the Estate Trustee During Litigation shall be at liberty to appoint an agent or agents and pay such agent or agents from the Estate, and seek such assistance from time to time as they may consider necessary, for the purpose of performing their duties hereunder. |  |
| Preservation of Rights under the *Family Law Act* | THIS COURT ORDERS that the time period within which ⚫ is entitled to file an election pursuant to s. 6(10) of the *Family Law Act* in the office of the Estate Registrar for Ontario or elsewhere shall be and is hereby extended to sixty (60) days from the date of the determination by the Court respecting the validity of the Last Will and Testament of the Deceased dated ⚫.  THIS COURT ORDERS that the time period after which ⚫ shall be deemed to have elected to take under any Last Will and Testament of the Deceased pursuant to s. 6(11) of the *Family Law Act* shall be and is hereby extended to sixty (60) days from the date of the determination by the Court respecting the validity of the Last Will and Testament of the Deceased dated ⚫.  THIS COURT ORDERS that the time period set out in s. 7(3)(c) of the *Family Law Act* with respect to the commencement of an application by ⚫ pursuant to s. 5(2) of the said Act shall be and is hereby extended to sixty (60) days from the date of the determination by the Court respecting the validity of the Last Will and Testament of the Deceased dated ⚫. | See *Aquilina v Aquilina*, 2018 ONSC 3607, outlining what factors the Court is to consider when deciding whether to grant an extension of time under the FLA for an election. The decision also depicts the four different limitation periods that need to be extended. |
| ***Preservation of Assets*** | | |
| Asset Valuation | THIS COURT ORDERS that the Respondent provide the Applicant with a statement, setting out the nature and value of all assets owned by the deceased at the time of death, including all assets which may be available for charging pursuant to s. 72 of the *Succession Law Reform Act*, within thirty (30) days of the date of this Order. |  |
| Non-Dissipation and Injunction Clauses | THIS COURT ORDERS that none of the assets of the Estate or the Deceased shall be invested, expended or dissipated or otherwise dealt with except with the prior written consent of all of the parties by their lawyers. ⚫ shall not transfer funds from, draw cheques on, direct payment from or withdraw funds from, bank account no ⚫ without the prior written consent of the Parties by their lawyers. Investment of the assets of the estate of the deceased shall be determined by the Parties, jointly, failing which, said assets shall be invested in Guaranteed Investment Certificates or Term Deposits, cashable after 30 days on the written instructions of the lawyer(s) for the Parties.  THIS COURT ORDERS AND DECLARES that all property owned by the Deceased which passed to the Respondent(s) or others, whether *inter vivos* in contemplation of death or after death, and whether as designated beneficiaries or joint account holders, or otherwise by operation of law, including all assets, real property and personal property, are deemed to form part of the Estate of the deceased pursuant to section 72 of the *Succession Law Reform Act* and are available to satisfy an order of the Court for support and shall not on an interim basis be disposed of by the Respondent(s).  THIS COURT ORDERS that ⚫ shall be restrained from dissipating, selling, transferring, disposing of, or encumbering, any real or personal property that was once the property of the deceased, or that can be traced from property which was originally or previously owned by the deceased, including any assets that may have passed to ⚫ in his/her personal capacity and which forms part of the deceased's estate pursuant to section 72 of the *Succession Law Reform Act* until such time as the within issues have been finally resolved or determined and until further order of this Court, or as otherwise agreed to by the Parties in writing.  THIS COURT ORDERS that ⚫ in his/her capacity as Estate Trustee of the Estate of the deceased, and the Estate shall not encumber, sell, transfer, or dispose of the ⚫, with the Municipal address ⚫, until such time as the within issues have been finally resolved or determined and until further order of this Court.  THIS COURT ORDERS that ⚫ in his/her capacity as Estate Trustee of the Estate of the deceased, and the Estate shall not distribute any of the property or assets of the Estate of the deceased to the beneficiaries, until such time as the within issues have been finally resolved or determined and until further order of this Court. | Section 101 of the *Courts of Justice Act* and Rule 45 of the *Rules of Civil Procedure* are the enumerative provisions dealing with injunctive relief and the Court’s jurisdiction for granting such relief. See the Supreme Court of Canada jurisprudence on mandatory interlocutory injunctions in *R v Canadian Broadcasting Corp*., 2018 SCC 5, at para. 18. |
| Accounting | THIS COURT ORDERS that the Respondent file accounts of the Estate of ⚫ and commence an Application to pass accounts, in accordance with Rules 74.17 and 74.18 of the *Rules of Civil Procedure*, in the Court office within sixty (60) days of the date of this Order. | The beneficiary of a trust or an estate has the right to hold the trustee to account for the administration of the trust property and to enforce the terms of the trust; See *Valard Construction Ltd. v Bird Construction Co.*, 2018 SCC 8 at para.18. The Court may order that a dependant be served with an application to pass accounts, despite uncertainty surrounding their entitlements in the assets of the estate. |
| Certificate of Pending Litigation | THIS COURT ORDERS the local registrar for the County of ⚫ in the Province of Ontario to issue a Certificate of Pending Litigation against the real property known municipally as ⚫ and having a legal description of ⚫ registered in the name of ⚫.  THIS COURT ORDERS that a Certificate of Pending Litigation be and is hereby granted, subject only to the filing of the required documents giving effect to the registration of the same, and such Certificate of Pending Litigation shall be registered against title to the property municipally known as ⚫, legally described as ⚫ and defined herein as (identify property) and the costs of effecting the same shall be borne by ⚫ person ⚫ estate ⚫ attorney. | See section 103 of the *Courts of Justice Act*, Rule 42.01 of the *Rules of Civil Procedure* and the decision of Master Glustein (as he then was) in  *Perruzza v Spatone*, 2010 ONSC 841 at para. 20 for the principles surrounding the jurisdiction and discretion of granting leave for a CPL.  A beneficial interest in a trust or an estate that holds land is not a specific interest in the land for a beneficiary; See *Spencer v Reisberry*, 2012 ONCA 418. |
| ***Productions*** | | |
| Testamentary Documents | THIS COURT ORDERS that a copy of any Last Will and Testament or other testamentary document of the Deceased, including, without limitation, any beneficiary designation or joint account agreement, be delivered to the lawyer for the Applicant forthwith. | Under Section 9 of the *Estates Act*, the Court has the jurisdiction to order the production of any testamentary documents of the deceased. |
| Production of Financial Records | THIS COURT ORDERS that the ⚫ be and is hereby entitled to compel production of all financial records, banking records, tax records, and any and all records regarding the assets, liabilities, income and expenses relating to ⚫ prior to death or while under attorneyship, either solely or jointly by ⚫ with another, for the period commencing ⚫ and concluding ⚫, from any financial advisor, corporation, bank, trust company, insurance company, accountant, or other authority in possession, power, or control of such records, and any predecessors or successors in interest, whether in Canada, or the United States, or elsewhere, in the same manner and to the same extent as ⚫ would have been able, if he/she were alive, including but not limited to records to which ⚫ was entitled to inspect as a shareholder pursuant to sections 140, 140.1, and 145 of the *Business Corporations Act*, R.S.O. 1990, c B. 16. The ⚫ will, upon receipt of any such documents, produce copies to the lawyer(s) for the Parties, with the cost incurred in relation to the production and copying of said documents to be paid from the assets of the estate by ⚫ and with the final determination as to payment of such costs and expenses to be reserved to the Trial Judge, unless otherwise agreed upon by the Parties. | Production orders should be limited in scope. If applicable, consider the "3/2 period", which commences three years prior to the date of execution of the will and concludes the earlier of (i) two years from the date of execution of the will or (ii) the date of death.  Section 32(6) of the *Substitute Decisions Act, 1992*, creates a fiduciary obligation on an attorney or guardian to keep accounts of all transactions. In addition, the addition of an adult child to an elderly parent’s account is sufficient to create a fiduciary duty in relation to the parent’s account. See *Borges v Borges*, 2018 ONSC 3451 at para. 27. |
| Production of Lawyer’s Records | THIS COURT ORDERS that the ⚫ be and is hereby entitled to compel production of all lawyer records, notes and files relating to ⚫, for the period commencing ⚫ and concluding ⚫, from any lawyer or law firm in possession of such relevant legal records in the same manner and to the same extent as ⚫ would have been able, if he/she was alive, and that all productions received be produced to the other parties on request. The charges for the production of the records and files shall be paid from the Estate by ⚫, and the final determination as to payment of such cost and expenses shall be reserved to the Trial Judge. | See *Ballard Estate*, [1994] CarswellOnt 579 (ON SC), as to the joint interest principle in privilege as between beneficiaries and trustees concerning the legal opinions given about the administration of the trust to a trustee.  NOTE: ensure the scope of the order for production of lawyers’ records is limited to the lawyers’ records that may be required to adjudicate the proceeding. |
| Production of Lawyer's Real Estate File | THIS COURT ORDERS that the lawyers involved in the transfer of (property) on or about (date), forthwith provide all files, documentation, and information to the lawyers for the applicants/respondents, respecting matters relating to the deceased during the period commencing ⚫ and concluding ⚫. |  |
| Privilege | THIS COURT ORDERS that any claim in respect of the deceased, of lawyer/client privilege, financial advisor/client privilege, or any other professional privilege, including medical privilege, or the duty of confidentiality relating to the instructions for, making of, or execution of, any of the deceased’s testamentary or personal documentation, financial documentation, or documentation relating to property, real estate, or a corporation of the deceased, inclusive of any privacy regulations and legislation which may prohibit the obtaining of such information, including personal; health information in respect of the deceased, documentation in respect of the deceased governed by the *Personal Information Protection and Electronic Documents Act* (the “PIPEDA”), and the *Personal Health Information Protection Act* (the “PHIPA”), shall be and hereby is waived by the Order Giving Directions herein. | The general policy that supports the exception of the privilege that normally attaches where there is a will challenge is that the interests of the deceased client are furthered in the sense that the purpose of allowing evidence of the drafting lawyer’s notes and testimony about the execution of the will allows the Court to ascertain what the deceased’s true intentions are. See *Goodman Estate v Geffen*, [1991] 2 SCR 353 and *Hope v Martin,* 2011 ONSC 5447 at paras 19-20 for a review of the wills exception to privilege. |
| ***(Scheduling of) Next Steps in Litigation*** | | |
| Scheduling | THIS COURT ORDERS that the parties hereto shall adhere to the following schedule:  (a) responding affidavits to be served by (date);  (b) defence where statement of claim is to be served by (date);  (c) return of motion date is to be (date);  (d) affidavit of documents to be exchanged on/by (date);  (e) mediation to be conducted on/by (date);  (f) examinations for discovery to be conducted of ⚫ (persons) on/by (date);  (g) examinations of non-party witnesses to be conducted of ⚫ on/by (date);  (h) the *de bene esse* examination of ⚫ to be conducted on/by (date);  (i) the pre-trial of this matter to be conducted on/by (date);  (j) the issues to be mediated are those set out in the within Order Giving Directions. |  |
| Responding Materials | THIS COURT ORDERS that the Respondents filing Notices of Appearance shall have 30 days from the date of this Order to file responding materials. |  |
| Reply and/or Supplementary Materials | THIS COURT ORDERSthat the Applicant shall have 30 days from the date of service of the responding materials to serve and file reply materials, if necessary.  THIS COURT ORDERS that the Applicant shall deliver a Supplementary Application Record within sixty (60) days of the date of this Order, containing:  (a) the Applicant's Financial Statement executed in Form 13.1 under the *Family Law Act*;  … |  |
| Mediation | THIS COURT ORDERS that the parties attend for a Mediation before a Mediator pursuant to Rule 75.1 of the *Rules of Civil Procedure* and makes the following Directions:  (a) the issues to be mediated are those set out in the Order Giving Directions herein;  (b) the Moving Parties and the Respondent are designated parties with the Moving Parties having carriage of the Mediation and the Respondent responding to it;  (c) the Notice of Mediator giving the date, place, and time of the Mediation shall be served on the designated parties by an alternative to personal service pursuant to Rule 16.03 of the *Rules of Civil Procedure*;  (d) the fees of the Mediator shall be paid out of the Estate of ⚫; and  (e) any matters arising out of the mediation requiring further direction of the Court shall be referred to me or such other Judge who is available.  THIS COURT ORDERS that the parties referred to herein, within ⚫ days of the date of the Order herein, or in the alternative, within ⚫ days of the parties obtaining copies of all medical, financial, lawyer’s records and report, shall attend for mediation before ⚫, pursuant to Rule 75.1 of the *Rules of Civil Procedure* and the following directions apply to such Order [include judicial directions sought regarding mediation]:  or in the alternative, within 60 days of the parties obtaining copies of all medical, financial, lawyer’s records and reports, shall be required to attend a mediation, prior to Examinations for Discovery, and in accordance with Rules 75.1 of the *Rules of Civil Procedure* and the following directions apply to such Order [include judicial directions sought regarding mediation]: |  |
| Examinations for Discovery | THIS COURT ORDERS that the Moving Parties and the Respondent shall serve and file Affidavits of Documents and attend and submit to Examinations for Discovery in accordance with the *Rules of Civil Procedure*. |  |
| Deemed Undertaking | THIS COURT ORDERS that Rule 30.1.01(3) of the *Rules of Civil Procedure* shall not apply to the use of evidence, or information obtained, by the parties in the within Application.  THIS COURT DECLARES that Rule 30.1.01(3) of the *Rules of Civil Procedure* does not apply to the evidence obtained pursuant to this Order Giving Directions herein. | *Juman v Doucette*, [2008] 1 SCR 157, sets out the rationale for the implied and deemed undertaking rule.  While the public interest in getting at the truth in a civil action outweighs the examinee’s privacy interest, the privacy interest is nevertheless entitled to a measure of protection.  In para. 26, the Supreme Court says that litigants who get this protection that certain documents and answers will not be used for collateral purposes or ulterior purposes, will be “encouraged to provide a more complete and candid discovery.” |
| Examination of Non-parties | THIS COURT ORDERS that the parties are hereby granted leave pursuant to Rule 31.10 to examine for discovery the lawyer who prepared the Will of ⚫, the costs of the examination to be reserved to the Trial Judge.  THIS COURT ORDERS that the parties are hereby granted leave pursuant to Rule 31.10 of the *Rules of Civil Procedure* to examine for discovery the lawyer who prepared the Will of ⚫, and that ⚫ shall be entitled to payment for his/her attendance at his/her regular hourly rate, at first instance out of the assets of the Estate, with the final determination as to the payment of such costs and expenses reserved to the trial Judge or as this Court may further order.  THIS COURT ORDERS that the parties are hereby granted leave to apply to the Court on proper notice pursuant to Rule 31.10 to examine for discovery the lawyer or such other individual, who prepared the Will of ⚫ whose identity is unknown as of the date of this Order, and the costs of the examinations shall be reserved to the Trial Judge. | See *Magna Hotels (Toronto) Inc. v GE Canada Equipment Financing G.P.* , 2014 ONSC 2699 at para 2 (Brown J as he then was): The test under Rule 31.10 of the *Rules of Civil Procedure* contains two basic components. First, a finding under Rule 31.10(1) that there is reason to believe that a person has information relevant to a material issue in the action.  Second, the conjunctive factors enumerated in Rule 31.10(2) must be met. |
| Hearing/Trial | THIS COURT ORDERS that the issues be tried without a Jury in Toronto, Ontario at a date to be fixed by the Registrar, and the Trial Record shall consist of this Order Giving Directions and any other Order For Directions made by this Court. Following the mediation in this proceeding, any party shall be at liberty to set this proceeding down for trial without the consent of the other party. | Under Section 108(2) of the *Courts of Justice Act*, the issues of fact and the assessment of damages in an action shall be tried without a jury in respect of a claim for, *inter alia*, declaratory relief and the execution of a trust. |
| Further Directions | THIS COURT ORDERS that the parties are hereby granted leave to move for further directions as may appear advisable or necessary. |  |
| ***Ancillary Orders*** | | |
| Service by Email | THIS COURT ORDERS that service of all documents in this proceeding on a lawyer of record, other than documents that must be served by personal or alternative to personal service, may be served in accordance with Rule 16.05(1)(f) of the *Rules of Civil Procedure*. |  |
| Service within Ontario | THIS COURT ORDERS that service of this Order shall be effected upon all Parties with a known or discovered financial interest in the Estate, other than the Respondents, by personal service or by an alternative to personal service.  THIS COURT ORDERS that this Order Giving Directions shall be served by regular mail on the following persons: [name individuals]. |  |
| Validation of Service | THIS COURT ORDERS that service upon ⚫ of the application record, motion record returnable ⚫ is hereby validated pursuant to Rule 16.08 of the *Rules of Civil Procedure*, because copies of these documents were left with ⚫ (person) at ⚫ (address) on ⚫ (date). |  |
| Third Party Rights | THIS COURT ORDERS that any person affected by this Order, if they object, can make submissions to the Court. | Particularly where an order that is made may affect the rights of third parties, such as drafting lawyers, through production orders or other relief, it is essential that those third parties are able to move to vary or set aside orders that are not made on notice to them. |
| ***Costs*** | | |
| Costs | THIS COURT ORDERS that the costs of and incidental to the (applicants) in the bringing of this application, shall be paid on a full indemnity, lawyer and client basis by (person ⚫estate of the deceased ⚫ Estate Trustee ⚫ Attorney ).  THIS COURT ORDERS that costs of this attendance are reserved to the Judge hearing the final adjudication of this matter, or as the Court may further Order. | Where public policy considerations are at play in estates litigation, including (1) where the difficulties or ambiguities that gave rise to the litigation are caused, in whole or in part, by the testator, and (2) the need to ensure that estates are properly administered, the Court can order blended costs awards in which a portion of the costs is payable by the losing party and the balance is payable out of the estate where one or more of the relevant public policy factors are engaged; see *Neuberger v York*, 2016 ONCA 303 at para. 24-25.  Otherwise, in circumstances where public policy considerations are not involved, the "loser pays" principle is likely to apply (as it does in other civil litigation proceedings); see *McDougald Estate v Gooderham*, 2005 CanLII 21091 (ONCA). |

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