**Order Giving Directions – Estates List Proceedings – Will Challenge (Sample Terms)**

| **Issue** | **Sample Clause** | **Annotation/Comments** |
| --- | --- | --- |
| ***Description of Parties, Issues*** | | |
| Description of Issues to be Tried: Will Challenge | THIS COURT ORDERS that the parties to the proceedings and the issues to be tried are as follows:  (a) (Propounder) affirms, and (Challengers) deny that (deceased) had testamentary capacity on the date of execution (or giving of instructions for) of the Will;  (b) (Propounder) affirms, and (Challengers) deny that (deceased) had knowledge of and approved the contents of the Will;  (c) (Challengers) affirm, and (propounder) denies that the making of the Will was procured by undue influence;  (d) (Challengers) affirm, and (propounder) denies that the Will was made under suspicious circumstances; and  (e) (Propounder) affirms, and (Challengers) deny that the Will was duly executed by ⚫. | See *Neuberger v York*, 2016 ONCA 191 at para. 77 surrounding the issues to tried where a will is being proven in solemn form. An Applicant should consider a specific order in their notice of application seeking to have the will proven in solemn form. |
| Application for Opinion, Advice and Direction | THIS COURT ADVISES AND DIRECTS that the interpretation of the following words and phrases used in the Last Will and Testament of the deceased, dated ⚫: | Section 60 of the *Trustee Act* provides that a trustee, guardian or personal representative may, without the institution of an action, apply to the Superior Court of Justice for the opinion, advice or direction of the Court on any question respecting the management or administration of the trust property or the assets of the ward or a testate or intestate. |
| 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 the (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 the (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. |
| ***Substantive Relief*** | | |
| Removal of Estate Trustee | THIS COURT ORDERS that the Respondent, ⚫, be and is hereby removed as Estate Trustee of the Estate of ⚫ (the "Estate"), effective as of the date of this Order. | The Court has an inherent jurisdiction to remove a trustee, as well as statutory authority to do so under section 37 of the *Trustee Act*. For a great summary of the principles involved in the removal of a trustee, see *Radford v Wilkins*, 2008 CanLII 45548 (ONSC-Quinn J). |
| 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 ⚫ 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*** | | |
| 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 lawyer/lawyers. [name of executor] 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 lawyer/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/lawyers for the Parties.  THIS COURT ORDERS that (x) 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 and the within Order shall be filed with any relevant entity to enforce the terms of the within Order.  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.  THIS COURT ORDERS that ⚫ Defendant shall provide to the lawyer/lawyers for the Estate Trustee any and all papers and property which belonged to the deceased and which now belong to the Estate within twenty (20) days of the date of this Order Giving Directions and in advance of the within ordered mediation. | 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. |
| 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 hereby is granted, subject only to the filing of the required papers giving effect to the registration of the same, and such Certificate of Pending Litigation shall be filed against title on the property referred to ⚫ 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/lawyers 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 Ontario Business Corporations Act. The ⚫ will, upon receipt of any such documents, produce copies to the lawyer/lawyers 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. | In determining whether to order the production of relevant financial, medical, and lawyer’s records, the Court may first take steps to satisfy itself the party challenging the will has met a minimal evidentiary threshold beyond simply pleading facts in support of the cause of action; see *Seepa v Seepa*, [2017] OJ No 4649 (SCJ), *Martin v Martin*, 2018 ONSC 1840 (CanLII).  Production orders should be limited in scope. 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 Medical Records | THIS COURT ORDERS that the ⚫ be and is hereby entitled to compel production of all medical records and files relating to ⚫, for the period commencing ⚫ and concluding ⚫, from any person or institution in possession of such medical records, in the same manner and to the same extent as ⚫ would have been able, if he/she were 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 costs and expenses shall be reserved to the Trial Judge. | There is case law in the context of the *Substitute Decisions Act, 1992*, that the Court may not have the jurisdiction, contrary to the patient’s wishes, to order the production of medical records. See Justice Penny’s decision in *Beretta v Beretta*, 2014 ONSC 7178, at para. 73. However, in *Borges v Borges*, 2018 ONSC 3451, at para. 25 the Court ordered the production of the medical records where the capacity of the alleged incapable person is in issue in an SDA proceeding. |
| 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 that the scope of this production order, regarding lawyer’s records, is limited only to the lawyer/lawyers’ files which may be necessary to adjudicate the will challenge. |
| Production of Lawyer's Real Estate File | THIS COURT ORDERS that the lawyer/lawyers involved in the transfer of (property) on in or about (date), forthwith provide all files, documentation, and information to the lawyer/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. |  |
| 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/lawyers’ 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 here particular directions sought for mediation]  or in the alternative, within 60 days of the parties obtaining copies of all medical, financial, lawyer/lawyers’ 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 here particular directions sought for 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 on/by (date). | Particularly where an order that is made may affect the rights of third parties, such as drafting lawyer/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 to 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). |

#1767931