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# **Practice Gems: Administration of Estates**

Avoiding Limitations – related Claims in Estate Administration

Written and presented by:

**Marshall Swadron**

*Swadron Associates*

Written by:

**Arooba Shakeel**

*Swadron Associates*

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## **Avoiding Limitation-related Claims in Estate Administration**

Arooba Shakeel and Marshall Swadron<sup>1</sup>

### **1. Introduction**

Lawyers advising estate trustees and beneficiaries in estate administration matters might be excused for lacking a sense of urgency. By the time they are consulted, the climactic event has already occurred. Yet time marches on and so do limitation periods, except when they don't. The following paper provides a brief discussion of topics such as rules respecting discoverability of claims, the timing of dependant relief claims, the applicability of limitation periods to estate accounts and the limitation periods applicable to claims by and against estates.

While LawPRO attributes about 8% of claims involving wills and estates law to problems with time management (which presumably encompasses missed limitation periods), the largest source of claims (33%) is inadequate investigation.<sup>2</sup> A number of these claims will relate to a failure during administration to identify the limitation periods applicable to the claims of those having an interest in the estate. While the estate trustee is primarily responsible for addressing such claims, the "second suit" arises when estate trustees seek compensation from their lawyers for negligent advice. Finally, as a matter of terminology, the terms probate and certificate of appointment of estate trustee are used in this paper interchangeably as both terms are used in the case law.

### **2. Provisions governing Commencement of Limitation Periods**

The limitation period of two years applicable to most claims in Ontario is set out in section 4 of the *Limitations Act, 2002 (LA)*.<sup>3</sup> The provision governing the discoverability of a claim is section 5(1), which provides that a claim is discovered on the earlier of,

- (a) the day on which the person with the claim first knew,
  - (i) that the injury, loss or damage had occurred,
  - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
  - (iii) that the act or omission was that of the person against whom the claim is made, and
  - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to remedy it; and
- (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).<sup>4</sup>

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<sup>1</sup> Arooba Shakeel and Marshall Swadron practice at Swadron Associates in Toronto: [www.swadron.com](http://www.swadron.com). This paper was prepared for the Law Society of Ontario's Practice Gems: Administration of Estates 2019 program held September 10, 2019. The authors wish to thank Tim Grieve and Sarah Macaluso for their comments and contributions.

<sup>2</sup> LawPro Wills and Estates Claims Malpractice Fact Sheet updated to August 2019 <https://www.practicepro.ca/wp-content/uploads/2019/08/Wills-Claims-Fact-Sheet-.pdf>

<sup>3</sup> *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

<sup>4</sup> *Ibid* at s. 5(1).

It is important to note that there are special rules governing claims brought by minors and incapable persons. In respect of minors, section 6 provides,

The limitation period established by section 4 does not run during any time in which the person with the claim,

(a) is a minor; and

(b) is not represented by a litigation guardian in relation to the claim.

Similarly, in respect of incapable persons, section 7(1) of the *LA* states that the general limitation period established by section 4 does not run during any time in which the person with the claim,

(a) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and

(b) is not represented by a litigation guardian in relation to the claim.<sup>5</sup>

### **3. Limitation period for challenging a Will**

The recent decision of *Shannon v. Hrabovsky*<sup>6</sup> considered key issues pertaining to the timeliness of a will challenge based on claims of testamentary incapacity and undue influence.

In *Shannon v. Hrabovsky*, the deceased's daughter brought an application for a declaration of invalidity of the last will and testament of the deceased on the grounds of lack of testamentary capacity or undue influence by her brother.<sup>7</sup> Justice Wilton-Siegel noted that section 5(2) of the *Limitations Act*<sup>8</sup> creates a presumption that an applicant has knowledge of the contents of the will on the date on which the act or omission forming the basis of the claim took place.<sup>9</sup> "Given this presumption, an applicant with knowledge at the date of death of a will, and its contents, together with all other facts upon which a claim for lack of testamentary capacity would be based would therefore be fixed with all necessary knowledge as of that date".<sup>10</sup> Thus, the limitation period of two years in cases challenging the validity of a Will commences on the date of the death of the testator. The same principles apply to any claim for undue influence.<sup>11</sup>

However, the presumption in s. 5(2) can be rebutted through the operation of the discoverability principle. The applicant would have to establish that he or she did not know of the matters referred to in s. 5(1)(a) on the date of death.<sup>12</sup> In *Shannon v. Hrabovsky*, while the applicant had knowledge of the facts respecting lack of testamentary capacity and undue influence before the death of the testator in November 2015, she did not have knowledge of the existence and contents of the Will in question until January 2015. Thus, her application commenced in December 2016 was not statute-barred by virtue of sections 4 and 5 of the *Limitations Act*.<sup>13</sup>

<sup>5</sup> *Ibid* at s. 7(1).

<sup>6</sup> *Shannon v. Hrabovsky*, 2018 ONSC 6593

<sup>7</sup> *Ibid* at para 1.

<sup>8</sup> *Limitations Act*, *supra* note 3 at s. 5(2).

<sup>9</sup> *Shannon v. Hrabovsky*, *supra* note 6 at para 63.

<sup>10</sup> *Ibid*.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid* at para 64.

<sup>13</sup> *Ibid* at paras 69-70.

#### **4. Limitation period for Dependant Relief Claims**

Investigation of potential claims against an estate includes consideration of the claims of dependants of the deceased, which can include persons not named as beneficiaries in the will. Failure to address potential dependant relief claims could result in an estate being distributed prematurely and/or a failure to take into consideration assets that often fall outside of the estate, such as life insurance proceeds, leading to a shortfall in the assets available to satisfy the claim.

Dependant relief claims are governed by Part V of the *Succession Law Reform Act*.<sup>14</sup> Section 58 provides that where a deceased, whether testate or intestate, has not made adequate provision for the proper support of his dependants or any of them, the court, on application, may order that such provision as it considers adequate be made out of the estate of the deceased.<sup>15</sup> Pursuant to section 61(1) of the *SLRA*, no application for an order under section 58 may be made after six months from the grant of letters of probate of the will or of letters of administration.<sup>16</sup> This section is subject to subsection (2) which states that the court, if it considers it proper, may allow an application to be made as to any portion of the estate remaining undistributed at the date of the application.<sup>17</sup>

The case of *Gefen v. Gefen*<sup>18</sup> provides helpful guidance for lawyers advising estate trustees whether probate is required. In that case, the deceased Elias Gefen made both a primary and a secondary will. His spouse, Henia, was named as estate trustee under both wills and was the sole beneficiary of the estate. However, she never applied for a certificate of appointment of estate trustee following Elias' death in 2011. In 2015, one of the deceased's sons, Yehuda, brought an application for dependant relief and sought an order for support on an interim basis.<sup>19</sup>

The motion was heard before Justice Mesbur, who first considered whether Yehuda was a dependant. Since Yehuda was a child of the deceased and the deceased was providing support to him immediately before his death, this requirement was satisfied.<sup>20</sup> Second, the court considered whether the will made adequate provision for Yehuda as a dependant. The answer to this question was negative.<sup>21</sup> Third, the court considered whether an appropriate level of temporary support existed and what the appropriate amount of support should be. The court considered Yehuda's current assets and means as well as his likelihood of acquiring additional assets if he succeeded in his claims in other litigation.<sup>22</sup>

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<sup>14</sup> *Succession Law Reform Act*, R.S.O. 1990, c. S. 26, s. 58.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid* at s. 61(1).

<sup>17</sup> *Ibid* at ss. 61(2).

<sup>18</sup> *Gefen v. Gefen*, 2015 ONSC 7577.

<sup>19</sup> *Ibid* at paras 1-5.

<sup>20</sup> *Ibid* at para 19.

<sup>21</sup> *Ibid* at paras 24-25.

<sup>22</sup> *Ibid* at para 45.

Fourth, the court considered whether Yehuda's claim was limitation-barred. The court held that since Henia never applied for probate, the limitation period had not yet begun to run. It was noted that "there is no provision in the *SLRA* that creates any other limitation period for the dependant's claim, other than from the grant of probate".<sup>23</sup> The court noted in this regard that "it would have been an easy matter for the statute to have created another or additional limitation period where probate was not granted" but it did not<sup>24</sup> and that Henia had the option to take the necessary steps to commence the limitation period running but she failed to do so.<sup>25</sup> The court then answered the question of who should pay temporary support. The court found that since Yehuda's claim was not statute-barred, it could be made against the entire estate, whether distributed or not.<sup>26</sup> Henia was ordered to pay temporary monthly support to Yehuda on the basis that since she "distributed the estate to herself at her peril", she must now "bear the responsibility of making the payments that otherwise would have been payable out of the estate itself, had she not made those distributions".<sup>27</sup>

The last question the court considered in *Gefen* was how potential prejudice could be avoided in case the judge hearing the application came to the conclusion, based on a full evidentiary record, that Yehuda was not a dependant or order lower support.<sup>28</sup> This issue was resolved by registering the order against Yehuda's interest in property to secure any potential repayment.<sup>29</sup> An important takeaway from this case is that the extinguishing of potential dependant relief claims can be an important consideration in determining whether to advise an estate trustee to apply for probate. Conversely, as noted by Mesbur J., estate trustees who distribute estates without a certificate of appointment (and without waiting six-months after the certificate is issued) do so at their peril.

In *Blatchford (Litigation guardian of) v. Blatchford Estate*,<sup>30</sup> the deceased, who passed away in 1994, had a child born in Grenada in 1983. The deceased's sister, Jean, was the executrix and trustee of his estate and one of the beneficiaries of the residue. Jean was not aware that the deceased had a child in Grenada and the deceased did not make any provisions under his will for this child. The Office of the Children's Lawyer (OCL) notified Jean that a claim was being made on the residue of the estate. Jean stopped distributing the estate further. The OCL brought an application for support under the *SLRA* in January 1999 when the child was 16 years old. Jean raised the preliminary issue of whether the six-month limitation period prescribed by s. 61 of the *SLRA* applied to bar the claim.<sup>31</sup>

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<sup>23</sup> *Ibid* at para 50.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* at para 52.

<sup>27</sup> *Ibid* at para 60.

<sup>28</sup> *Ibid* at para 61.

<sup>29</sup> *Ibid* at paras 63-64.

<sup>30</sup> *Blatchford (Litigation guardian of) v. Blatchford Estate*, 45 O.R. (3d) 784 (S.C.J.).

<sup>31</sup> *Ibid* at paras 1-7.

Justice Himel noted (prior to the coming into force of the *Limitations Act, 2002*) that in cases dealing with minors and other parties under disability, the period within which an action may be brought shall be reckoned from the date when such person became of full age or of sound mind.<sup>32</sup> Alternatively, she held that if the application was statute barred, the court ought to exercise its discretion under s. 61(2) of the *SLRA* to allow the application to be made where it considers it to be proper to do so.<sup>33</sup> The court considered that the “applicant has been living an isolated existence in a foreign jurisdiction, unaware of the Canadian law and his rights” and the respondent has not demonstrated that the assets will be prejudicially affected by remaining undistributed pending the disposition of the application on the merits.<sup>34</sup> Thus, the court deemed it proper to allow the motion.<sup>35</sup>

#### *Dependants under Disability and the Limitations Act, 2002*

The six-month limitation period for dependant relief claims appears to be subordinate to the provisions in the *Limitations Act, 2002* that stop the running of limitation periods against parties under legal disability until a litigation guardian is appointed. Rarely are litigation guardians appointed at large, however. Rather litigation guardians are usually appointed coincident with the commencement of the claim in which they act. Where a litigation guardian is appointed in relation to a claim but the claim has not been commenced, section 8 of *LA* provides that section 5 (discoverability) applies as if the litigation guardian were the person with the claim. This means that the same discoverability rules apply to litigation guardians as they would to a capable claimant.<sup>36</sup>

#### *Children and dependant relief claims*

In *Re Serban Estate*,<sup>37</sup> the deceased died intestate in June 2007. In January of 2008, his wife obtained an appointment as estate trustee without a will. In October 2008, the Office of the Children’s Lawyer (OCL) applied on behalf of the deceased’s six-year-old child asking to be appointed as litigation guardian. OCL also sought an order to make adequate provision for child’s support out of the deceased’s estate pursuant to s. 58 of the *SLRA* and for an order that proceeds from the deceased’s life insurance policy be included in the value of the estate and be available to satisfy claim for support. The deceased’s brother, and beneficiary of the life insurance policy, argued that OCL had knowledge of the claim for support for over one year and since it took no action within the six-month limitation period, the claim was statute barred according to section 6 of the *LA*.<sup>38</sup> That section provides that limitation period does not run during any time when person with a claim is a minor and is not represented by a litigation guardian.<sup>39</sup>

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<sup>32</sup> *Ibid* at para 15.

<sup>33</sup> *Ibid* at para 33.

<sup>34</sup> *Ibid* at para 31.

<sup>35</sup> *Ibid* at para 32.

<sup>36</sup> *Limitations Act, 2002, supra*, s. 8.

<sup>37</sup> *Serban Estate, Re*, 2009 CarswellOnt 797.

<sup>38</sup> *Ibid* at paras 1-9.

<sup>39</sup> *Limitations Act, 2002, supra*, s. 6.

Strathy J., as he then was, disagreed with this interpretation of the *LA*, which would have carved out an exception to the suspension of the limitation periods under s. 6 of the *LA* where the person appointed as litigation guardian (the OCL in this case) knew or ought to have known of the claim.<sup>40</sup> He held that this interpretation would “lead to chaos, impose an intolerable burden on the OCL and would defeat the entire purpose of s. 6 of the *LA* – to protect minors”.<sup>41</sup> Thus, lawyers advising estate trustees in similar circumstances must be cognizant that limitation periods do not run against minor dependants until a litigation guardian is appointed by the court.<sup>42</sup>

### *Incapable persons and dependant relief claims*

In *Shaw v. Barber*,<sup>43</sup> Regional Senior Justice McNamara held that the six-month limitation period in s. 61(1) of the *Succession Law Reform Act* did not run while a dependant was incapable of commencing proceeding due to a mental condition and was not represented by a litigation guardian in relation to the claim.<sup>44</sup> In that case, a certificate of appointment of estate trustee was granted in February 2015. Coincidentally, later that month, the Office of Public Guardian and Trustee (PGT) was appointed statutory guardian of property for the applicant, Ms. Shaw. Although the *Rules of Civil Procedure* direct that a guardian of property shall act as litigation guardian,<sup>45</sup> the court held that the commencement of the running of the limitation period as of the PGT’s appointment as statutory guardian of property for Ms. Shaw did not meet the wording of the *LA*.<sup>46</sup> Instead, section 7 of the *LA* was interpreted to distinguish between guardians of property and litigation guardians. Similar to the ruling of Strathy J. in *Serban Estate*, McNamara R.S.J. held that any contrary interpretation would create impossible timelines, with the potential for injustice to vulnerable individuals.<sup>47</sup> The court noted that the respondent estate trustee was not prejudiced by any delay because he was aware that the PGT was looking into Ms. Shaw’s claim against the estate from shortly after its appointment as statutory guardian. Further, it was noted that the estate trustee had been at liberty in the circumstances to bring application under s. 9(1) of *LA* to have a litigation guardian appointed for Ms. Shaw sooner.<sup>48</sup>

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<sup>40</sup> *Serban Estate, supra*, para 13.

<sup>41</sup> *Ibid* at para 14.

<sup>42</sup> As the appointment of a litigation guardian generally occurs coincident with the commencement of a proceeding, children are, in effect, protected from the running of limitation periods against them.

<sup>43</sup> *Shaw v. Barber*, 2017 ONSC 2155.

<sup>44</sup> *Ibid* at paras 15-16.

<sup>45</sup> *Ibid* at para 22.

<sup>46</sup> *Ibid* at para 24.

<sup>47</sup> *Ibid*.

<sup>48</sup> *Ibid* at para 26.

## 5. Limitation period for Spousal elections

Under section 6(1) of the *Family Law Act*, when a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to trigger an equalization of net family property under section 5 of the *FLA* within six months of the death.<sup>49</sup> Similarly, upon intestacy, the surviving spouse shall within six months of death elect between receiving under Part II of the *Succession Law Reform Act* and section 5 of the *FLA*.<sup>50</sup> No distribution may be made within the six-month period,<sup>51</sup> or once the personal representative has received notice of the surviving spouse's application<sup>52</sup> without the written consent of the surviving spouse or an order of the court.<sup>53</sup> If a personal representative makes a distribution that contravenes these rules and the undistributed portion of the estate is insufficient to satisfy an order, the personal representative is personally liable.<sup>54</sup>

A surviving spouse may move under s. 2(8) of the *FLA* to extend the six-month limitation period (found in section 7(3)(c) of the *FLA*). The criteria for extending time are that the court be satisfied that there are apparent grounds for relief, relief is unavailable because of delay that has been incurred in good faith, and that no person shall suffer prejudice by reason of the delay.<sup>55</sup>

Operation of the limitation and its extension were recently considered in *Aquilina v. Aquilina*.<sup>56</sup> In that case, the deceased died intestate leaving a spouse and three adult children.<sup>57</sup> The surviving spouse applied to extend the time for her election to take under *SLRA* regime or to seek equalization.<sup>58</sup> The application was granted by Justice Dunphy on the grounds that the complex and international nature of the deceased's business interests would take more time to understand and evaluate;<sup>59</sup> it would be irresponsible for the surviving spouse to make an election based upon the limited information regarding the value presently available;<sup>60</sup> any delay in bringing the application was both explainable and incurred in good faith;<sup>61</sup> other beneficiaries did not oppose the application;<sup>62</sup> and an administrator for the estate had not yet been appointed.<sup>63</sup>

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<sup>49</sup> *Family Law Act*, R.S.O. 1990, c. F.3, ss. 6(1) and 7(3).

<sup>50</sup> *Ibid* at s. 6(2).

<sup>51</sup> *Ibid* at s. 6(14).

<sup>52</sup> *Ibid* at s. 6(15).

<sup>53</sup> *Ibid* at ss. 6(14) and (15).

<sup>54</sup> *Ibid* at s. 6(19).

<sup>55</sup> *Ibid* at s. 2(8).

<sup>56</sup> *Aquilina v. Aquilina*, 2018 ONSC 3607.

<sup>57</sup> *Ibid* at para 4.

<sup>58</sup> *Ibid* at para 1.

<sup>59</sup> *Ibid* at para 27.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid* at para 30.

<sup>62</sup> *Ibid* at para 35.

<sup>63</sup> *Ibid*.

## **6. Limitation periods and Passings of Accounts**

The time periods for raising objections to estate trustee accounts and for asserting claims for estate trustee compensation have recently been addressed by the Court of Appeal in two recent cases, which are discussed below.<sup>64</sup> The conclusion from these cases is that because “[n]o Ontario law imposes an obligation on an estate trustee to pass accounts at fixed periods of time”,<sup>65</sup> it is open for beneficiaries to raise objections and for estate trustees to claim compensation until the accounts covering the period in question have been passed.

As to the duty to maintain accounts, the Court of Appeal in *Wall v. Shaw* notes “it is the duty of all estate trustees, executors, administrators and guardians of property (as well as all trustees) to keep proper books of account and to be ready at all times to account for the trust property that they are bound to administer.”<sup>66</sup> While there is “no statutory requirement to pass accounts” and estate trustees “may choose not to pass accounts unless compelled to do so by the court at the instance of or on behalf of a person with an interest”,<sup>67</sup> section 49(2) of the *Estates Act* empowers a judge to “enter into and make full inquiry and accounting of and concerning the whole property that the deceased was possessed of or entitled to, and its administration and disbursement”.<sup>68</sup> If the judge finds misconduct, neglect or default on the part of the executor, administrator or trustee resulting in financial loss to the estate, the judge may order that the liable party pay such sum by way of damages or otherwise.<sup>69</sup>

In order to have the administration of an estate approved and be discharged, estate trustees generally secure releases from beneficiaries. The threshold for setting aside a release is high and will require the commencement of a proceeding within the two-year limitation period in section 4 of the *LA* following the execution of the release.<sup>70</sup> In cases where a release is not available or where one or more beneficiary is incapable of providing a release, estate trustees may apply to pass their accounts.

In *Armitage v. Salvation Army*, the Court of Appeal considered an appeal from an application by an estate trustee to pass her accounts as attorney for property and as estate trustee of the deceased. A beneficiary respondent to the application asserted that the compensation claim in respect of the power of attorney accounts under section 40(1) of the *Substitute Decisions Act, 1992 (SDA)* was statute-barred.<sup>71</sup> The Court of Appeal disagreed and held that there is no limitation period for applying to pass accounts and therefore no limitation period applicable to any claim for compensation contained in those accounts.<sup>72</sup>

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<sup>64</sup> *Armitage v. The Salvation Army*, 2016 ONCA 971; *Wall v. Shaw*, 2018 ONCA 929.

<sup>65</sup> *Wall v. Shaw*, *supra*, para 48.

<sup>66</sup> *Ibid* at para 23.

<sup>67</sup> *Ibid*; *Estates Act*, R.S.O. 1990, c. E.21, s. 49(2).

<sup>68</sup> *Ibid* at para 24; *Estates Act*, *supra*, s. 49(3).

<sup>69</sup> *Ibid*.

<sup>70</sup> *Sheard Estate*, 2013 ONSC 7729 (discussed further below).

<sup>71</sup> *Armitage*, *supra*, paras 1-5.

<sup>72</sup> *Ibid* at para 29 (Note that the application judge, Justice Ray, would have imposed a limitation period of two years commencing on the date of the deceased’s death for an attorney for property to bring an application to pass accounts seeking compensation. The Court of Appeal disagreed at paras. 18 and 19.)

In his analysis, Hourigan J.A. noted that a passing of accounts does not fit within the definition of a claim under the *Limitations Act, 2002*.<sup>73</sup> In seeking court approval of accounts, an attorney for property is not seeking “redress for any loss, injury, or damage” and “no remedy is necessary with respect to the accounts”.<sup>74</sup> Further, the reference to “act or omission” in the definition of claim in the *LA* “must surely refer to an action taken or not taken by a third party that has the effect of causing loss, injury, or damage”.<sup>75</sup> A request of compensation does not fit within this definition because “it would be a strange result if a limitation period could not be triggered until the party asserting the claim took an action or omitted to do something”.<sup>76</sup> The court further held that the wording of s. 40(1) of the *SDA*<sup>77</sup> that an attorney for property may take “annual compensation”<sup>78</sup> also did not trigger the running of a limitation period.

In *Wall v. Shaw*, a lawyer acting as an estate trustee brought an application to pass his estate accounts covering the first eight years of his administration of an estate. Periodic reporting to the beneficiaries had taken place but no releases were obtained. Objections raised to the accounts included objections to transactions and compensation taken going back to the beginning of the administration. The estate trustee brought a motion to strike out the objections to the accounts that fell outside of the two-year limitation period in section 4 of the *Limitations Act, 2002*. The motion was dismissed by Mulligan J. in the Superior Court. The estate trustee appealed to the Ontario Court of Appeal.<sup>79</sup> In dismissing the appeal, the Court of Appeal held that the filing of a notice of objection to accounts under R. 74.18(7) of *Rules of Civil Procedure* in response to application to pass accounts initiated by an estate trustee was not captured by s. 4 of *LA*, as a notice of objection to accounts does not constitute a proceeding. Writing for the panel, Brown J.A. noted that section 49 of the *Estates Act* and Rules 74.17 and 74.18 of the *Rules of Civil Procedure* created the passing of accounts procedure in which estate trustee, not the beneficiary, is the applicant who commences a proceeding. Section 4 of *LA* does not limit the ability of a person to respond or to participate in proceeding commenced by another.<sup>80</sup> Further, the court noted that the policy and practical implications of limiting objections to the last two years of an accounting period weighed against accepting the position advanced by the estate trustee.<sup>81</sup>

### *The effect of releases*

In *Sheard Estate*, the deceased’s grandchildren who were the beneficiaries of one quarter of the residue of an estate periodically signed formal releases in connection with their receipt of interim distributions from the estate. The estate trustees made a third distribution but the grandchildren did not execute the requested releases. The estate trustees then brought an application to pass accounts. The grandchildren brought a motion for an order setting aside their earlier releases and

<sup>73</sup> *Ibid* at para 27; See also: *Limitations Act, 2002, supra*, s. 1.

<sup>74</sup> *Ibid* at para 27.

<sup>75</sup> *Ibid* at para 28.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, s. 40(1).

<sup>78</sup> *Armitage, supra*, para. 11.

<sup>79</sup> *Wall v. Shaw, supra*, paras 1-2.

<sup>80</sup> *Ibid* at paras 29-30.

<sup>81</sup> *Ibid* at para 46.

to require the executors to pass accounts for the period covered by releases and for the period that had not been released.<sup>82</sup> Justice Mesbur found that the “grandchildren knew, or should have known, before they signed the releases that they might have cause to complain about what the executors had done up to that point”.<sup>83</sup> The court found the grandchildren’s claims for relief to be limitation-barred, applying the two-year limitation in section 4 of the *Limitations Act, 2002*, and noted they should not be permitted to assert them “under the guise of a motion” in the application to pass accounts.<sup>84</sup>

The court further held that even if the claim to set aside releases was not statute-barred, there would have been no legal basis on which to set aside the releases. First, since the releases were properly executed under seal, there was consideration.<sup>85</sup> Second, there was no evidence that the beneficiaries did not intend to be legally bound by the releases.<sup>86</sup> Third, no authority was presented to support the argument that accounts were “incomplete or contained substantial errors” so as to negate the effectiveness of a release.<sup>87</sup> Fourth, failure of the estate trustees’ lawyer to suggest that the beneficiaries obtain independent legal advice before signing the releases was not fatal. Fifth, there was no evidence to suggest that the grandchildren were not aware of their right to consult with counsel, and their failure to ask appropriate questions would not make the releases void.<sup>88</sup> Sixth, there was no evidence of duress.<sup>89</sup> Thus, the motion to set aside the releases was dismissed.

## **7. Claims by or against Estates**

Section 38 of the *Trustee Act* governs actions brought by and against executors and administrators of an estate.<sup>90</sup> Section 38(1) provides:

Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but if death results from such injuries no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the *Family Law Act*.<sup>91</sup>

Correspondingly, section 38(2) of the *Estates Act* provides that “except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of

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<sup>82</sup> *Sheard Estate, supra*, paras 1-15.

<sup>83</sup> *Ibid* at para 24.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Ibid* at para 28.

<sup>86</sup> *Ibid* at para 29.

<sup>87</sup> *Ibid* at para 30.

<sup>88</sup> *Ibid* at paras 32-33.

<sup>89</sup> *Ibid* at paras 34-36.

<sup>90</sup> *Trustee Act*, R.S.O. 1990, c. T.23, s 38.

<sup>91</sup> *Ibid* at s. 38(1).

his or her person or to another person's property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong".<sup>92</sup> The actions that these provisions encompass include tort, contract, and breach of fiduciary duties and actions that have caused injury to the person<sup>93</sup> as well as purely economic losses.<sup>94</sup> Pursuant to section 38(3), an action under this section shall not be brought after the expiration of two years from the death of the deceased.<sup>95</sup>

In *Waschkowski v. Hopkinson Estate*,<sup>96</sup> the Court of Appeal held that given the clear wording of section 38(3), "regardless of when the injuries occurred or matured into an actionable wrong", the claim must be brought within the fixed period prescribed in the section.<sup>97</sup> While the discoverability exception is not applicable in these cases, the equitable principle of fraudulent concealment can be used to toll the limitation period prescribed under s. 38(3).<sup>98</sup> Other exceptions to s. 38(3) may exist such as in the case of sexual assault where s. 16(1)(h) of the *LA* provides that there is no limitation,<sup>99</sup> and those related to persons under a legal disability.<sup>100</sup>

### *Probate and Limitation Periods*

Estate trustees are obligated to act with "reasonable promptness and prudence" in bringing an application for probate.<sup>101</sup> The case of *Gefen* mentioned above illustrates the importance of acting promptly in such matters. Similarly, in *Loveman*,<sup>102</sup> in considering the issue of delay in application for probate, the court found that if the trustees acted with reasonable promptness and prudence, the letters probate would likely have been granted earlier and the six month limitation period for dependant relief claims would have expired well before the dependant in that case raised her claim.<sup>103</sup> "Thus the delay exposed the estate to a claim that would likely have been time limited had the Trustees acted with prudence".<sup>104</sup> The delay caused by the trustees also "delayed the beneficiaries' access to the use of their inheritance, and incurred additional carrying

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<sup>92</sup> *Ibid* at s. 38(2).

<sup>93</sup> *Lafrance Estate v. Canada (Attorney General)*, [2003] O.J. No. 1046 at para 54-55.

<sup>94</sup> *Wagg Estate v. First Associates Investments Inc.*, 2016 ONSC 3774 at para 17.

<sup>95</sup> *Trustee Act*, *supra*, s. 38(3).

<sup>96</sup> *Waschkowski v. Hopkinson Estate*, [2000] O.J. No. 470.

<sup>97</sup> *Ibid* at para 8.

<sup>98</sup> Fraudulent concealment requires a plaintiff to prove a special relationship with the defendant and that the "defendant [...] fraudulently concealed a material fact in order to toll the limitation period". See *Reid v. Crest Support Services (Meadowcrest) Inc.*, 2013 ONSC 6264 at paras 18-21.

<sup>99</sup> *Limitations Act*, *supra*, s. 16(1)(h); See also: *Lewis v. Bangma Estate*, 2010 ONSC 3614 at para 19; *B. (G.) v. Fortin*. 2011 ONSC 3197 at para 29.

<sup>100</sup> *B. (G.) v. Fortin*, 2011 ONSC 3197, *supra*.

<sup>101</sup> *Ibid* at para 43.

<sup>102</sup> *The Estate of Ingrid Loveman, Deceased*, 2016 ONSC 2687 (CanLII).

<sup>103</sup> *Ibid*.

<sup>104</sup> *Ibid*.

charges regarding delayed transfer of the house".<sup>105</sup> The trustees were held personally responsible for legal fees and disbursements related to litigation brought by the dependant.<sup>106</sup>

### *Standing to Sue*

One issue that can compound issues surrounding limitation periods is the question of who has standing to bring a claim on behalf of an estate and who may be sued in respect of an estate in the absence of the appointment of an estate trustee. This issue can arise where an application for the appointment of an estate trustee is contested. It can also arise during the several-month waiting period between when an application for a certificate of appointment of estate trustee is submitted to the court and when it is granted.

While the limitation period in section 38(3) of the *Estates Act* is generally inflexible, several potential solutions are available. The first is the appointment of an estate trustee during litigation authorized to pursue claims on behalf of the estate, which may be done under the *Estates Act* and the *Rules of Civil Procedure*.<sup>107</sup> Secondly, a limitation tolling agreement can be entered into pursuant to section 22(3) of the *Limitations Act, 2002* (which can be convenient when all parties to the proposed litigation are parties to the proceedings surrounding a contested will).<sup>108</sup>

Thirdly, a proceeding may be commenced prior to the obtaining of a certificate of appointment of estate trustee and then regularized once the certificate of appointment is obtained. This is on the strength of the remedial provisions in Rule 9.03 of the *Rules of Civil Procedure*, which permit the bringing of claims by or against estates in the absence of a certificate of appointment of estate trustee and address cases involving the misnomer of the estate trustee. Rule 9.02 provides for the appointment of a litigation administrator for an estate that is a defendant in a proceeding but for which no estate trustee has been appointed.<sup>109</sup>

## **8. Conclusion**

At the risk of being categorical in circumstances where the solutions can be nuanced, some general suggestions do come out of the limitation periods discussion: 1) it is prudent to make application for a certificate of appointment of estate trustee in a timely manner; 2) it is prudent to make exhaustive inquiries respecting the circumstances of the deceased early on in administration in order to identify potential claims by or against the estate; 3) while the rules respecting the claims of parties under disability are forgiving of those who need or who would act as litigation guardians, this can extend the length of time in which there is a risk of a claim against the estate; and 4) it is prudent for estate trustees to obtain releases or to apply to pass accounts in close proximity to the time period covered by their accounts.

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<sup>105</sup> *Ibid* at para 98.

<sup>106</sup> *Ibid* at para 58.

<sup>107</sup> *Estates Act*, R.S.O. 1990, c. E.21, s. 28 and *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 75.06(3)(f)

<sup>108</sup> *Limitations Act, 2002*, *supra*, s. 22(3)

<sup>109</sup> *Rules of Civil Procedure*, *supra*, Rule 9.02