LAW360™ Canada

Law360 Canada | 111 Gordon Baker Road, Suite 900 | Toronto, ON M2H 3R1 | www.law360.ca

Wills, Trusts & Estates

Pre-litigation third-party discovery order disallowed in estate case

By **David Rosenbaum**

David Rosenbaum

(September 18, 2023, 2:09 PM EDT) -- In a recent Ontario case *White v. White Estate,* 2023 ONSC 3740, the court was faced with an unusual question: should a person who has not challenged a will be allowed to inspect the deceased's lawyer's files — to see if they have a reason to challenge the will?

In a will made in 2014, a mother had left 10 per cent of her estate to one son and 90 per cent to another. There was evidence that in 2021, the mother had consulted a lawyer about her will. The mother then suffered a stroke, and asked the lawyer to meet with her at the hospital — but died before the meeting could take place. The son who was to receive the 10 per cent applied to the court for an order allowing him to inspect his late mother's lawyer's files.

The son's reason for wanting to see the files was based on section 21.1 of the *Succession Law Reform Act* (SLRA). This section, enacted in 2021 and in force as of Jan. 1, 2022, empowers the court to validate a document changing or revoking a will where that document was not properly executed or made under the Act. The son submitted that the draft will being prepared by the lawyer, as set out in her notes, might be an expression of his mother's testamentary intention to revoke or alter her 2014 will; if that was so, the court might recognize the draft will under s. 21.1. (The court was skeptical that s. 21.1 could apply on the facts before it, but did not determine the issue.) The son also relied on s. 9 of the *Estates Act*, R.S.O. 1990, which permits the production of "any paper or writing being or purporting to be testamentary." (The court was skeptical that s. 9 could bear this broad interpretation, writing (at para. 28) "I do not readily accept that is the usage intended by s. 9 however absent case law showing that such a broad interpretation has been adopted.")

However, the son was not yet actually challenging the 2014 will. This is because the 2014 will contained a clause disinheriting any beneficiary who challenged it. (The court was careful to state that it was not ruling whether the disinheritance clause was valid and effective for all purposes.) As a result, the son was reluctant to challenge the will before seeing what was in his mother's lawyer's files. Nor did he want to wait for the 2014 will to be probated, at which point the estate trustee could see the lawyer's file.

The son's application for production of the lawyer's file was not opposed by either the mother's estate trustee, or the mother's lawyer's insurer. However, the court was reluctant to grant the requested relief.

The court was troubled by the prospect of discovery without the ordinary procedures attendant to existing litigation. It wrote that the son sought "discovery without asserting a cause of action," potentially "creating a pond that [would be] ripe for fishing expeditions." More fundamentally, the court was concerned with the son's request to invade the mother's lawyer-client privilege — particularly in circumstances where the mother had included a clause disinheriting will challengers and had not confided in the son the substance of any proposed changes to the 2014 will.

The court wrote: "Can anyone who is or might be a beneficiary rummage through a deceased person's most confidential material to see if there is something there that might be a basis to ask a court to recognize a testamentary intention under s. 21.1 of the SLRA?"

Not anticipating significant pushback from the court, the son had made his request during a 15-minute uncontested case conference. However, the court concluded that whether it was appropriate to grant the order sought, which it framed as "a pre-lawsuit discovery order," should be adjourned for more thorough argument based on research — potentially with input from the legal profession more broadly.

A key takeaway from *White v. White* is that pre-litigation discovery is unusual in our justice system, and litigants who seek to push such boundaries on limited argument, even when on consent, may face resistance from the court.

David Rosenbaum is a partner in the Toronto office of Fasken Martineau DuMoulin LLP. He can be reached at (416) 868-3516 or drosenbaum@fasken.com. David practises commercial litigation and estates and trust litigation. His estates and trust litigation experience includes all manner of disputes including will challenges, contested passings of accounts and dependant relief claims. He has written and spoken extensively on topics related to estates and trusts law.

Photo credit / ANNVIPS ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437-828-6772.
