

Four important 2023 court of appeal estate decisions, and 'Case of the Year'

By **Michael G. von Keitz**

Law360 Canada (February 15, 2024, 2:59 PM EST) -- Now that we are well and truly into calendar 2024, we have the benefit of hindsight. Here are four important Ontario Court of Appeal decisions on trust and estate matters as well as the 2023 "Case of the Year."

While the Supreme Court of Canada heard no cases strictly falling within the area of wills, estates, and trusts during 2023, the Ontario Court of Appeal heard several, including the following:

1. *Algra v. Comrie Estate*, 2023 ONCA 811

The appeal arises from the findings of the motion judge in the lower court. The underlying incident was a fatal boating accident at a breakwater south of the Leamington Harbour. The Court of Appeal did not reverse the motion judge's findings that:

- Two (2) parties were solely liable for the accident, with no liability attracting to either the municipal, provincial, or federal governments;
- The *Marine Liability Act*, SC 2001, c-6, "limits claims for death or injury arising from maritime accidents to \$1,000,000, exclusive of costs and interest;" and,
- Costs payable from the summary judgment motions in this matter should be payable at a particular fixed amount — a cross-appeal by the Comrie Estate was allowed on the narrow issue of joint liability for these costs.



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2. *Javid Estate v. Watson*, 2023 ONCA 665



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A motion for an extension of time to appeal and for leave to add a party to the appeal was denied, owing to "a significant pattern of delay and obfuscation on the part of the moving parties. The responding party has been frustrated and delayed in the administration of the estate and has had to take steps and incur costs to address problems created by the moving parties, both leading up to and in the course of the litigation." Here, the moving parties in question were the former lawyer for the estate trustee and that lawyer's professional corporation.

3. *Di Santo v. Di Santo Estate*, 2023 ONCA 464

The appeal arises from the findings of the motion judge in the lower court. The Court of Appeal refused to reinstate removed trustees, or to admit new evidence as to the appropriateness of their removal. The trustees had not exercised their discretion to pay any additional amounts to the deceased's third child since the deceased's death, resulting in a finding that the trustees were in a position of conflict, acted unilaterally or could not objectively exercise their discretion. The Court of Appeal was not convinced by arguments that the removal was anything other than permanent in nature; the proposed new evidence would not have affected the disposition of the appeal.

4. *Bitaxis Estate v. Bitaxis*, 2023 ONCA 66

The appeal arises from the findings of the application judge in the lower court. A Notice of Objection to the appointment of an estate trustee was vacated, as upheld by the Court of Appeal, citing *Neuberger v. York*, 2016 ONCA 191, 129 OR (3d) 721, at paragraphs 88 and 89:

...an interested person must meet some minimal evidentiary threshold before a court will accede to a request that a testamentary instrument be proved. To meet the evidentiary threshold, the person seeking to challenge a will must adduce, or point to, some evidence which, if accepted, would call into question the validity of the testamentary instrument that is being propounded.

Estate of Aretha Franklin: 2023 "Case of the Year"

As discussed in a previous article, effective Jan. 1, 2022, the *Succession Law Reform Act* (SLRA) was amended to include s. 21.1, permitting court-ordered validity of an otherwise deficient will. Since that time, a developing body of case law in Ontario has made this new section of the SLRA a hot topic of discussion.

This brings us to the estate of Aretha Franklin. Although the late "Queen of Soul" died on Aug. 16, 2018, it may come as no surprise that her estate remained subject to litigation in 2023. Aretha Franklin was originally thought to have died intestate, until three handwritten wills were discovered in her home, including the contents of a spiral-bound notebook found in a couch in her living room.

Pursuant to s. 700.2502(2) of Michigan's *Estates and Protected Individuals Code* (EPIC), a holographic (i.e., handwritten) will is valid if:

- It is dated;
- The testator's signature is in the testator's handwriting; and,
- The will's material portions are in the testator's handwriting.

No witnesses are required.

In Ontario, a similar provision is set out under s. 6 of the SLRA:

A testator may make a valid will wholly by his or her own handwriting and signature, without formality, and without the presence, attestation or signature of a witness.

Much like s. 21.1 of the SLRA, however, EPIC has s. 700.2503, which came into effect on April 1, 2000, and which provides a mechanism for saving a will that fails to otherwise adhere to the formalities set out in s. 700.2502. This section reads as follows:

Although a document or writing added upon a document was not executed in compliance with section 2502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute any of the following:

- a. The decedent's will.
- b. A partial or complete revocation of the decedent's will.
- c. An addition to or an alteration of the decedent's will.
- d. A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the decedent's will.

On this basis, a six-person jury found the document discovered in Franklin's living room couch as her valid last will. Among other arguments raised in court: "Why would anyone sign a document if it was just a draft?"

Unlike another formidable recording artist, Prince, who died on April 21, 2016, Franklin's estate will enjoy the benefits of a finding that a valid testamentary instrument now governs. The substantial cost of obtaining that order, however, could have been avoided with proper planning prior to her passing.

Synonymous with "Respect," Franklin perhaps should have heeded the words of her contemporaries, The Staple Singers. "Respect Yourself" and implement a tailored estate plan developed with the guidance of an experienced estate lawyer.

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