The Law Society of Manitoba

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WILLS AND ESTATES

Chapter 5

Estate Litigation

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A. INTRODUCTION

Estate litigation, like all litigation, demands a thorough mastery of the skills of civil litigation, including knowledge of *The Court of King's Bench Act*, C.C.S.M. c. C280 and Rules. This chapter assumes that you are acquainted with the general concepts of civil litigation and those King's Bench Rules in the civil litigation section not specifically related to surrogate practice.

This chapter focusses on those areas of estate litigation not dealt with elsewhere in Law Society resource materials. Therefore, while various proceedings under *The Intestate Succession Act,* C.C.S.M. c. I85, *The Child and Family Services Act,* C.C.S.M. c. C80, *The Homesteads Act,* C.C.S.M. c. H80, and *The Family Property Act,* C.C.S.M c. F25 can all be considered as part of estate litigation, they are dealt with elsewhere and therefore will not be considered here.

Practising estate lawyers draw or review hundreds of wills. However, estate practitioners do not often get involved in contentious proceedings. Only a small fraction of the hundreds of wills presented for probate in Manitoba involve contentious matters.

> If a contentious matter does arise, it is important to note that virtually all contested surrogate proceedings are initiated by way of Notice of Application (King's Bench *Form 14B*).

Unless otherwise indicated in these materials, one should assume the way to initiate a contested proceeding is by way of this kind of application.

B. CONTENTIOUS PROCEEDINGS

1. Proof in Solemn Form

Sometimes it is apparent that there is going to be a dispute between a client who applies for probate, and someone who challenges the validity of the will and the right to probate it. There are many reasons for such disputes, but the challenger often contends that:

- the will has been improperly executed;
- the testator lacked testamentary capacity;
- suspicious circumstances exist surrounding the preparation and execution of the will; or
- undue influence or fraud caused the execution of the will.

In such cases, you may be compelled to file a notice of application to prove the will in solemn form; that is, go before the court in a formal proceeding with notice to all interested parties. Further, Rule 74.02(17) provides that the court on its own accord can require proof in solemn form. It is rare for the court to require this. This can arise where the court questions the integrity of the documents filed to prove the will in common form. "Proof in common form" simply refers to the request for probate or administration in accordance with Rule 74**.**

An executor may also apply for proof in solemn form (if certainty of such proof is desired). This may be necessary, for example, where several wills were apparently authored around the same time by the deceased. By giving notice and proving the will in solemn form at the outset the client may avoid a proponent of a different will later seeking revocation of a grant of probate.

Proof in solemn form often occurs as a result of someone challenging the will by filing a caveat as provided for in section 38 of *The Court of King's Bench Surrogate Practice Act* C.C.S.M. c. C290 (the "*SPA*") and Rule 75. When applying to prove a will in solemn form, consider the issues later in this chapter under the heading of "Challenging the Validity of Wills". Further, one must be aware that a caveat cannot be filed if probate has already issued (see Rule 75.03(1)).

2. Caveats

Rule 75.03(1) provides that:

> *A person intending to oppose the issuance of a grant of probate or letters of administration may file a caveat in Form 75A in any judicial centre at any time before the grant is issued.*

A caveat is a notice in writing requesting that the registrar not allow anything further to be done in the estate without the party filing the caveat being given notice of further proceedings.

Rule 75.03(3) provides that:

> *Despite the filing of a caveat, a request for a grant of probate or letters of administration may be made, but no further action may be taken in relation to the request without notice to the party who filed the caveat unless*
>
> *(a) the caveat has expired; or*
>
> *(b) the caveat has been vacated or withdrawn.*

The caveat remains in force for 12 months, but a new one may be filed (see Rule 75.03(2)). When a request for probate or letters of administration is filed, the registrar will serve notice in *Form 75B* requiring the caveator, within 30 days after service, to make a contested probate application, otherwise the caveat will be cancelled.

Anyone who may have an interest in an estate and who wishes to ensure that nothing is done without first receiving notice can file a caveat. The caveator may voluntarily withdraw the caveat after being given notice by filing a withdrawal of caveat.

Caveats can be used effectively to:

- give notice of an intention to contest the validity of a will or the right of someone to receive a grant of probate or letters of administration;
- provide the caveator with time to decide whether there are grounds to oppose probate; and
- provide the caveator with an opportunity to raise questions in respect of a request for probate before a judge.

Form 75A of the King's Bench Rules requires the person filing a caveat to declare the interests and the grounds upon which the caveat is filed. The caveator must also file an affidavit declaring that the caveat is not being filed to delay or embarrass any person.

The King's Bench Rules provide for removal of caveats by way of an application (see Rule 75.03(5)). The affidavit in support of such an application to remove a caveat should include evidence of:

- the identity of the applicant;
- why the caveat should be removed; and
- what prejudice the applicant is suffering.

3. Common Estate Applications

a) Application for Order to Accept or Refuse Probate/ Administration

Occasionally an executor in possession of a will fails to present the will to the court for probate. This may happen because the executor is unsure whether to take on the responsibilities of being an executor. Any interested person (including a creditor) may compel the executor to either accept or refuse probate. This is helpful to ensure the estate administration at least gets started.

Rule 74.02(21*)* further provides as follows:

> *If an executor fails to request probate, any interested person may apply for an order to accept or refuse probate (Form 74I) that requires the executor to either accept or refuse probate or establish why letters of administration with will annexed should not be granted to the applicant or another willing person.*

The affidavit in support of this application should include evidence of:

- applicant's interest in the estate;
- a copy of the will, if available; and
- the steps the applicant has taken to have the executor to act.

See King's Bench *Form 74I* for the form of order to accept or refuse probate.

Similarly, in circumstances where there is no will or no executor named in a will, any interested person, including a creditor, can apply pursuant to Rule 74.04(3) which provides:

> *If a person having an equal or superior right to administration has not nominated or renounced under subrule (2), any interested person may apply to have an order in Form 74P issued that calls upon those having prior or equal right to accept or refuse administration. If those persons fail to do so, the interested person may file a request for letters of administration.*

It is important to remember that in the case of letters of administration the order must go to persons with an equal or superior right to appointment over the applicant. If someone comes forward who has a superior right, there can be no contention. If two or more people have an equal right to apply come forward, the court will decide which request shall prevail. See King's Bench *Form 74P* for form of order.

b) Application for Order to Bring in Testamentary Paper

As the executor or administrator does not always have possession of the original will, it may be necessary to compel production of the will or other testamentary paper.

The *SPA,* in section 11, provides:

> ***11(1)*** *Whether an action or proceeding regarding the estate of a deceased person is pending before it or not, the court may, in a summary way, order a person to produce and bring before the court, or deposit in the court office or otherwise as the court directs, any paper or document made or signed by the deceased and being or purporting to be testamentary in nature, any document or evidence of title relating to the securities contracts or assets of the deceased, or any personal property of the deceased that is shown to its satisfaction to be in the possession or under the control of the person.*
>
> ***11(2)*** *Where it is not shown that a paper, document or personal property mentioned in subsection (1) is in the possession or under the control of a person, but it appears that there are reasonable grounds for believing that the person has knowledge thereof, the court may, whether an action or proceeding regarding the estate of the deceased person is pending before it or not, direct the person to attend for the purpose of being examined in open court or before the registrar or a deputy registrar or before such other*

person as the court directs or upon interrogatories and, if so ordered to produce and bring the paper, document or property before the court or to deposit it with the deputy registrar.

11(3) *Where a person fails to comply with an order or direction made under subsection (1) or (2), the person is subject to the like process and penalty that a person who is a party to an action in the court would be subject to upon failing to comply with a similar order or direction of the court in an action or proceeding, and the costs of the proceedings are in the discretion of the court.*

The affidavit in support of the application for this type of order should include evidence of:

- the applicant's interest in the estate;
- who currently has the will; and
- steps the applicant has taken to deal with the will to date.

See King's Bench *Form 74H* for the form of order. While it is titled an "order to bring in will", the definition of "will" in Rule 74.01(1) includes codicils and other testamentary dispositions.

c) Application for Order to Bring in a Grant for Revocation

Once a grant of probate issues, one can still apply for revocation of the grant. This usually occurs in one of three situations:

- it is alleged the grant of probate or letters of administration has gone to someone not entitled;
- another will has been discovered; or
- the validity of the will is in question, and the application is to force the proposed executor to prove the will in solemn form.

Pursuant to section 40 of the *SPA*, any person having an interest in upholding or disputing the validity of the will may be permitted to become a party. Pursuant to Rule 75.04(3) any such person must be joined as a party, unless the court orders otherwise.

The affidavit in support of this application should include evidence of:

- the applicant's interest in the estate;
- details of the will and grant of probate; and
- why the grant of probate is being questioned.

d) Application for Order to Account for the Deceased's Property

Section 41 of the *SPA* provides that an executor or administrator, who is or was also a trustee, may be required to render an account of the property of the deceased for their trusteeship in the same manner as they are required to account in respect of the executorship or administration. The affidavit in support of this application for an accounting of the deceased's property should include evidence of:

- the applicant's interest in the estate;
- details of the will and grant of probate; and
- steps the applicant has taken to date.

e) Application for an Order Compelling Passing of Accounts

An interested party, a creditor, or a surety for the due administration of the estate may compel the passing of accounts by way of notice of application under Rule 14.05(2)(c)(ii) and section 44 of the *SPA*.

The affidavit in support of this application should include evidence of:

- the applicant's interest in the estate;
- details of the will and grant of probate;
- why the applicant believes there should be a passing of accounts; and
- steps the applicant has taken to date.

This rule can be used in an estate or in conjunction with *The Trustee Act*, C.C.S.M. c. T160 to request an accounting of monies that may have been dissipated prior to the date of death. While it is usually not relevant if the deceased dissipated the estate, it may be relevant where someone else dissipated the estate pursuant to a power of attorney and did not use the funds for the benefit of the deceased. In this way, the holder of the power of attorney may be compelled to account for the missing funds.

One can also use section 24(1) of *The Powers of Attorney Act*, C.C.S.M., c.P97 to compel an attorney to account.

f) Application by Executor or Administrator - Uncontested Passing of Accounts

The King's Bench forms provide a useful guide for the preparation of the documents required for an uncontested passing of accounts. Refer to *Form 74Z* for the form of application. *Form 74AA* provides the form of affidavit verifying application and accounts. *Form 74BB* provides the form of the appointment to pass accounts and *Form 74CC* sets out the required notice to beneficiaries. Finally, *Form 74DD* provides the form of order on passing accounts.

C. REMEDIES UNDER *THE TRUSTEE ACT*

This section does not contain an exhaustive listing of all remedies under *The Trustee Act*. As estate litigation is such a broad topic, this chapter attempts only to deal with the more common applications in contentious proceedings.

1. Appointment of Replacement and Additional Executors; Removal of Executors

a) Practical Considerations

An estate practitioner is likely to be visited by a client who, either as a beneficiary of an estate or as a co-executor of an estate, wishes to remove an executor from the grant. These situations arise when people the testator believed would be able to work together are unable to do so.

In appropriate circumstances, one can use *The Trustee Act* to appoint additional executors or to replace or remove executors. Section 1 of *The Trustee Act* defines a personal representative as "an executor, an administrator and an administrator with the will annexed."

b) Procedure

Section 9(1) of *The Trustee Act* allows the court to make an order appointing a new trustee either in substitution for, or in addition to, any existing trustee or trustees, or where there is no trustee, in the following situations:

> *(a) in any case where it is found inexpedient, difficult, or impracticable, so to do without the assistance of the court, in particular and without limiting the generality of the foregoing, in case of a trustee who is convicted of a crime, or is a mentally incompetent person, or is a bankrupt, or has made an authorized assignment, or is a corporation that is in liquidation or has been dissolved; or*
>
> *(b) in case of a personal representative desiring to be relieved from the duties of his office, or guilty of any misconduct in his office, or who refuses or is unfit to act therein, or incapable of acting therein, or who remains out of the province for more than 12 months.*

Section 9(2) of *The Trustee Act* gives the court the power to make an order removing a trustee without appointing a replacement.

These orders require a notice of application and supporting affidavit material. A beneficiary, co-executor, or an interested party, such as a creditor, with the leave of the court, can make the application.

The affidavit in support of an application to remove a trustee should include evidence of:

- the identity of the applicant;
- details of the will and probate;
- chronological details of how the estate has been administered to date;
- steps the applicant has taken to date;
- who should be removed;
- who should replace the person(s) proposed to be removed; and
- the agreement of the proposed replacement trustee(s) to act.

c) Reasons for Removal

The court has considerable discretionary power to remove a trustee. The court will consider removal in the following situations:

- where there has been some positive misconduct such as the trustee abusing the trust;
- where the trustee has endangered the trust property or has exhibited an inability to execute the duties of the position due to a lack of honesty; or
- where the continuance of a trust would be detrimental to the execution of the trust and the trustee refuses to execute the trust.

The exercise of discretion to remove an executor and appoint a new one, flows from section 9(1) of *The Trustee Act*. In *Tapper v. Sair-Segev,* 2003 MBQB 243 (CanLII), Darichuk J. explained at para. 24 that section 9(1) of *The Trustee Act* is based upon the Privy Council's decision in *Letterstedt v. Broers* (1884), 9 App. Cas. 371, the leading case on the court's discretionary power to order the removal and substitution of a trustee. As a general rule, the court considers what is best for the estate and the beneficiaries. See *Kushnier v. Kushnier,* 2014 MBQB 45 (CanLII).

The power to remove is largely discretionary, and each case is particular to its own facts. Not every mistake or neglect of duty or inappropriate conduct will be sufficient grounds for removal. In some circumstances, the court will consider suspending a trustee until certain conditions are met. See *Bereskin Estate, Re v. Salvation Army*, 2014 MBCA 15 (CanLII) and *Stern v. Stern*, 2010 MBQB 68 (CanLII).

It is rare to find a situation where it is necessary to seek removal of the trustee for dishonesty or abuse of position. Applications typically arise as a result of friction or hostility between the trustee and a beneficiary, or among the trustees themselves. A thorough analysis of this area would require more space and time than this chapter allows. As a starting point for research, consider the following case law:

- Friction or hostility between the trustee and the beneficiaries:

  Re Joss, 1973 CanLII 573 (ON SC), (1973), 33 D.L.R. (3d) 152 (Ont. H.C.)

  Conroy v. Stokes, 1952 CanLII 227 (BC CA), (1952), 4 D.L.R. 124 (BCCA)

  Re Christie Estate, 1944 CanLII 539 (MB CA), 1943), 3 W.W.R. 272; aff'd. (1944) 1 W.W.R. 528 (Man.C.A.)

  Kushnier v. Kushnier, 2014 MBQB 45 (CanLII)

- Hopeless disagreement/misunderstanding between trustees:

  Shepard v. *Shepard* (1911), 20 O.W.R. 810

  Re Consiglio Trusts, 1973 CanLII 681 (ON CA), (No. 1) (1973), 36 D.L.R. (3d) 658 (Ont. C.A.)

  Bartel Estate, Re, 2006 MBCA 139 (CanLII)

D. VARIATION OF TRUSTS

Section 59 of *The Trustee Act* allows the terms of the trust to be varied under certain circumstances.

If a beneficiary needs immediate access to the capital of the funds, a trustee may apply to encroach on capital despite language forbidding that in the trust. Or, beneficiaries who have special medical needs might want to vary the trust to encroach on the capital, even though the amount of capital required is outside the powers of the trust.

The affidavit in support of this application should include evidence of:

- the applicant's relation to the trust;
- the trust document or will and probate;
- the parties involved and their current circumstances; and
- why the trust needs to be varied.

The courts broadly interpret their powers under this section. As an example, the courts have varied the terms of an insurance trust created by a testamentary document in *Re Goldstein Estate*, 1988 CanLII 7367 (MBQB), to allow the trust to be used for persons other than the named beneficiaries, where the estate was so large that to use the money only for the named beneficiaries would create inequities between the infant beneficiaries and their siblings (non-beneficiaries) by adoption.

The court felt that in order to allow the trustees to create an atmosphere where all children within the home were treated in an equal manner, some of the trust monies could be used to benefit the other children. In this way, all the children and not just the beneficiary children could go to private school, wear similar clothes, etc.

A variation can also include a breaking of the trust in appropriate circumstances, such as when the trust is no longer serving a useful purpose.

E. ADVICE AND DIRECTION

Sometimes the will or *The Trustee Act* do not make it clear whether a trustee has the power to do something, or sometimes extra caution is warranted before acting. In that case an application to court for advice and direction might provide the answer or security needed.

Section 84(1) of *The Trustee Act* provides that a trustee, guardian or personal representative may apply to the court for the advice or direction of the court on any question respecting the management or administration of the trust property or the assets of his ward, his testator, or intestate. The affidavit in support of this application should include evidence of the applicant's relationship to the trust and the background that gives rise to the request for advice and direction.

> You will need to outline your position in an application brief. Be sure you are clear in setting out the issue or question on which you want the court's advice and direction.

The court is willing to construe a discretionary power but will not advise whether a particular power should be exercised. As an example, in *Re Fulford*, 1913 CanLII 515 (ON SC), [1913], 14 D.L.R. 844, the Supreme Court of Ontario was asked whether a trustee could invest in certain stock. The court advised that it could, but refused to advise the trustee whether it should.

Generally, the court will only answer questions that apply to the facts of a particular case. The court should not be asked, by way of application, to consider matters which are academic or hypothetical in nature, nor to answer questions where the answers are obvious.

Similarly, the court will not generally give an opinion whether particular litigation should be pursued. (See *Re Pearce Estate v. Guaranty Trust Co.*, 1967 CanLII 787 (MB QB), (1967), 61 W.W.R. 346 (Man.Q.B.)). Further, a question that may or may not be a problem, depending on the outcome of future events, should not be put to the court.

The court will be reluctant to approve the sale of an asset if the estate trustees cannot agree amongst themselves to such a sale.

Section 84(2) of *The Trustee Act* provides that the trustee acting pursuant to the opinion, advice, or direction given will be deemed to have properly discharged the duties so long as the trustee is not guilty of fraud, concealment or misrepresentation in obtaining same.

F. DEPENDANTS' RELIEF LEGISLATION

Testators are not absolutely free to dispose of their estates as they see fit. There are certain overriding considerations and rights given to spouses and/or common-law partners pursuant to *The Homesteads Act*, *The Family Property Act* and *The Dependants Relief Act*, C.C.S.M. c. D37.

As a result, if someone claims to have been dependent on the deceased and entitled to part of the estate, there may be recourse. Section 2(1) of *The Dependants Relief Act* states that:

> *If it appears to the court that a dependant is in financial need, the court, on application by or on behalf of the dependant, may order that reasonable provision be made out of the estate of the deceased for the maintenance and support of the dependant.*

The two most common examples of this kind of application involve a child or a spouse or common-law partner.

An affidavit in support of a child making an application pursuant to this legislation should include evidence of:

- the child's background;
- the child's financial circumstances;
- support the child has received prior to the death of the testator; and
- why this support is still required.

In connection with the above, note King's Bench Rule 7, which provides for the appointment of a litigation guardian on behalf of a minor.

The affidavit in support of a spouse or common-law partner making an application pursuant to this legislation should include evidence of:

- the provisions of the will relating to this applicant, if any;
- the applicant's relationship to the testator;
- the dependent's financial circumstances; and
- why the dependant still requires support.

A dependant is defined in section 1 of *The Dependants Relief Act*. The definition includes a common-law partner of the deceased. A common-law partner means a person who, with the deceased, registered a common-law relationship under section 13.1 of *The Vital Statistics Act*, C.C.S.M. c. V60 the dissolution of which had not been registered under section 13.2 of *The Vital Statistics Act* before the death of the deceased, or a person who, not being married to the deceased, cohabited with them in a conjugal relationship:

(a) for a period of at least three years; or

(b) for a period of at least one year and they are, together, the parents of a child.

The class of dependants under *The Dependants Relief Act* includes a common-law partner where:

(a) cohabitation was subsisting at the deceased's death;

(b) cohabitation was not subsisting, but had ceased within three years of the deceased's death; or

(c) the common-law partner was being paid or was entitled to be paid maintenance and support by the deceased under an agreement or a court order at the time of the deceased's death.

The class of dependants continues to include spouses, former spouses, children under the age of 18, children over the age of 18 who, by reason of illness or disability are unable to withdraw themselves from the charge of the deceased or children who are substantially dependent on the deceased, or the following persons, who were dependent on the deceased at the time of death:

(a) a grandchild;

(b) a parent;

(c) a grandparent; and

(d) a brother or sister, including a sibling of half-blood.

Section 6(1) of *The Dependants Relief Act* contains a limitation of six months from the grant of letters of probate of a will or letters of administration within which an application must be brought.

Pursuant to section 6(3) of *The Dependants Relief Act*, this limitation can be expanded under certain circumstances. See the Court of Appeal's comments in *Zenyk v. Kowalyk*, 2007 MBCA 57, which contemplates a need arising after the six-month limitation period set out in the act.

Section 8(1) of *The Dependants Relief Act* lists factors that the court will take into account in addition to the primary one of the financial needs of the dependant. These factors include:

(a) the size and nature of the deceased's estate;

(b) the assets and financial resources the dependant has or is likely to have;

(c) the measures available for the dependant to become financially independent and the length of time and the costs involved to enable the dependant to take such measures;

(d) the age and the physical and mental health of the dependant;

(e) the capacity of the dependant to self-support;

(f) any distribution pursuant to *The Homesteads Act* or *The Family Property Act*;

(g) the assets the dependant is entitled to receive from the estate;

(h) the claims that any other dependant, or any other person, has upon the estate;

(i) the provisions made by the deceased, while living, for the dependant and for any other dependants;

(j) if the dependant is a child, the child's aptitude for and reasonable prospects of obtaining an education; and

(k) if the deceased stood in *loco parentis* to the child, the primary obligation of the child's parents to maintain the child and whether the parents have discharged that obligation.

The court has broad inquisitorial powers to ask for evidence as set out in section 8(2). It can (after hearing all the evidence) either dismiss the application or make an order under section 9(2) of *The Dependants Relief Act*.

It is often possible to sit down with the opposing side and settle the case. If a beneficiary sees significant risk to a portion of the estate, settlement becomes even more likely when you consult the other beneficiaries to get their consent.

G. CHALLENGING THE VALIDITY OF WILLS

1. Introduction

A will is usually challenged on one or more of four grounds:

1. the testator lacked the capacity to make a valid will (**capacity**);
2. the testator's lack of knowledge and approval of the contents of the will or nature and magnitude of their assets (**knowledge and approval**);
3. the testator had been a victim of undue influence (**undue influence**); and
4. fraud, in connection with misleading the testator, or in connection with the preparation of the will itself (**fraud**).

The role played by the doctrine of suspicious circumstances in challenging the validity of wills has confused practitioners and the courts for many years. The doctrine of suspicious circumstances is one of the most misunderstood concepts in testamentary law. In *Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876, Sopinka J., referring to earlier commentary, stated:

> *The interrelation of suspicious circumstances, testamentary capacity and undue influence has perplexed both the courts and litigants since the leading case of Barry v. Butlin (1838), 2 Moo. P.C. 480, 12 E.R. 1089. Writing a case comment in the Canadian Bar Review in 1938 (Vol. XVI, at p. 405) entitled "Wills – Testamentary Capacity – 'Suspicious Circumstances' – Burden of Proof", Dr. Cecil A. Wright observed, at p. 406:*
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> > *Although superficially simple, problems involved in litigation concerning the establishment of a deceased person's will against attacks of lack of testamentary capacity, fraud and undue influence, are, in the writer's opinion, second to none in difficulty. While the Chief Justice of Canada has recently said in an appeal involving these questions that "the law is well established and well known" [Riach v. Ferris, [1934] S.C.R. 725, at p. 726], the fact remains that judgments dealing with litigation of this kind abound in language that is hazy, obscure, and extremely difficult to reconcile. While paragraphs can be taken from judgments setting out in convenient form an exposition of the existing law, it is an altogether different matter to apply that law to a given set of facts.*

The doctrine of suspicious circumstances will be discussed further below.

2. Capacity

The starting point in determining the validity of a will is the establishment of testamentary capacity. Surprisingly, little has changed in this area since the leading case of *Banks v. Goodfellow* (1870), L.R. 5 Q.B. 549 was decided well over a century ago.

Banks v. Goodfellow laid down the definitive test for capacity in a testamentary context, which can be distilled as follows:

- the testator must understand the nature of what they are doing i.e., that they are giving property by a will to others;
- the testator must understand the scope and extent of their assets;
- the testator must understand the persons they might be expected to benefit in their will; and
- the testator must not be suffering from any "disorder of the mind," which would prevent the exercise of their natural faculties.

Laskin J.A. (as he then was) put a helpful gloss on the *Goodfellow* test in *Re Schwartz*, 1970 CanLII 32 (ON CA), [1970] 2 O.R. 61 (C.A.), where he noted that while capacity is certainly a matter of degree:

> *...there can be no question of want of capacity if there is merely forgetfulness or mistake or prejudice, or even eccentricity; and, of course, age alone is not a disqualifying consideration.*

On a more practical level, Justice Laskin suggested three types of evidence which may be brought to bear on the issue of capacity:

- observable matters respecting the conduct and condition of the testator;
- expert opinion evidence as to the testator's competency; and
- the nature of the dispositions made by the testator.

The relevant time for the determination of capacity is typically the time the will is signed.

A Manitoba case that dealt squarely with the issue of testamentary capacity was *Friesen and Holmberg v. Friesen Estate*, 1985 CanLII 3778 (MB QB), (1985), 33 Man. R. (2d) 98 (Q.B.). The elderly testator was in the hospital and, as Kroft J. recounted, "on death's door." Notwithstanding that he had executed a will just a month earlier, the testator expressed his wish to make a new will. Between the hours of 2:00 a.m. and 5:00 a.m. he drafted not one, but two new wills. The two new wills differed substantially from the one which he had executed one month earlier. All three were propounded for probate.

Kroft J. had little difficulty in finding that the testator lacked testamentary capacity at the time of executing the second and third wills. He was weak, exhausted, agitated and, as evidenced by the disparity between the wills, unable to appreciate the nature of his actions. Accordingly, the first will, which Kroft J. held to be "a valid and enforceable expression of [the testator's] testamentary wishes," was accepted for probate.

3. Knowledge and Approval

Beyond the capacity requirement, the testator must also have known and approved of the will. The testator cannot be ignorant of the contents of the will, nor can they be unaware of its effects. Ordinarily, presumptions of capacity, knowledge and approval arise upon presentation of evidence that the will was properly executed and the testator appeared to have understood the will.

Mr. Justice Sopinka noted in *Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 SCR 876, (1995), 125 D.L.R. (4th) 431 (S.C.C.) that:

> *Upon proof that the will was duly executed with the requisite formalities, after having been read over to or by a testator who appeared to understand it, it will generally be presumed that the testator knew and approved of the contents and had the necessary testamentary capacity.*

Also see, *Garwood v. Garwood Estate*, 2016 MBQB 113 affirmed *Garwood et al v. Garwood et al*, 2017 MBCA 67, wherein the Court of Appeal states at paragraph 19:

> *Demonstrating that a testator read the Will or had the Will read to him is not necessary to prove knowledge and approval of the Will if there is other satisfactory evidence available. See, for example, Barry v Butlin, [1838], 12 ER 1089 where the Court explained (at pp 485-86).*
>
> *Nor can it be necessary, that in all such cases, even if the Testator's capacity is doubtful, the precise species of evidence of the deceased's knowledge of the Will is to be in the shape of instructions for, or reading over the instrument. They form, no doubt, the most satisfactory, but they are not the only satisfactory description of proof, by which the cognizance of the contents of the Will, may be brought home to the deceased. The Court would naturally look for such evidence; in some cases it might be impossible to establish a Will without it, but it has no right in every case to require it.*

In *Garwood et al v. Garwood et al*, 2017 MBCA 67 leMaistre JA writes:

> *In my view, proof of a verbatim reading of a Will is not a prerequisite to establishing knowledge and approval. In many cases, it will be sufficient to show that the lawyer summarized and explained the contents of the Will to the testator prior to execution. Ultimately, it is a question of fact as to whether the particular words in question were brought to the attention of the testator and adopted by him as his words.*

Just as parties to a contract must know its terms and conditions, testators must similarly appreciate and understand their wills.

4. Undue Influence

Undue influence in a testamentary context is never presumed. The situation is different from an *inter vivos* gift situation where, in certain circumstances, there is a presumption of undue influence. Undue influence comes into play in a testamentary situation only when a party contesting a will directly alleges it, in which case the challenger must prove undue influence, unaided by any presumption. Sopinka J. explained in *Vout*, "*the burden of proof with respect to…undue influence remains with those attacking the will*."

The policy reason for the distinction between *inter vivos* gifts and testamentary dispositions is clear. It would be inappropriate to allocate to the propounder of a will the burden of disproving undue influence, since to do so would sometimes frustrate the wishes of a testator. As stated in the *Vout* case:

> *To disallow probate by reason of circumstances merely raising a suspicion of fraud or undue influence would tend to defeat the wishes of the testator in many cases where in fact no fraud or undue influence existed, but the propounder simply failed to discharge the legal burden.*

What constitutes undue influence? In *Craig v. Lamoureux*, 1919 CanLII 416 (UK JCPC), (1919), 50 D.L.R. 10 (P.C.), Viscount Haldane put the matter this way:

> *Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he really did not mean.*

A similar, and perhaps more memorable, sentiment was expressed by Sir James Hannen in his charge to the jury in *Wingrove v. Wingrove* (1885), 11 P.D. 81 at 83 when he described that a testator overborne by undue influence would say: "This is not my wish, but I must do it."

In *Geffen v. Goodman Estate*, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353 the court held (at p. 377):

> *What then is the nature of the relationship that must exist in order to give rise to a presumption of undue influence? Bearing in mind the decision in Morgan, its critics*

and the divergence in the jurisprudence which it spawned, it is my opinion that concepts such as "confidence" and "reliance" do not adequately capture the essence of relationships which may give rise to the presumption. I would respectfully agree with Lord Scarman that there are many confidential relationships that do not give rise to the presumption just as there are many non-confidential relationships that do. It seems to me rather that when one speaks of "influence" one is really referring to the ability of one person to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power. I disagree with the Court of Appeal's decision in Goldsworthy v. Brickell, supra, that it runs contrary to human experience to characterize relationships of trust or confidence as relationships of dominance. To dominate the will of another simply means to exercise a persuasive influence over him or her. The ability to exercise such influence may arise from a relationship of trust or confidence but it may arise from other relationships as well. The point is that there is nothing per se reprehensible about persons in a relationship of trust or confidence exerting influence, even undue influence, over their beneficiaries. It depends on their motivation and the objective they seek to achieve thereby.

In *Estate of Walter Konyk*, 2022 MBKB 192, Suche J. quotes Beard J. (as she then was) in *Ronald v. Ronald*, 2003 MBQB 133 at para. 19 when she summarised the relevant principles*:*

(n) The party who alleges undue influence has the burden of proving that the mind of the testator was overborne by the influence exerted by another person such that there was no voluntary approval of the contents of the will.

(o) The burden is the civil burden of proof on a balance of probabilities.

(p) The degree of influence required to constitute undue influence is that which is so great and overpowering that the testator is forced or coerced into doing that which he or she does not want to do.

(q) It is not improper for any potential beneficiary to attempt to influence the decision of the testator, and a person may act towards a testator in a way that will induce him or her to provide a benefit, provided the influence does not amount to coercion such that the testator cannot act as a free agent.

(r) It is not sufficient to establish that the benefiting party had the power to coerce the testator; it must be shown that the overbearing power was actually exercised and that it was because of its exercise that the will or disposition was made.

To constitute undue influence there must be some element of coercion capable of destroying the testator's free will. Moreover, to constitute a valid challenge to a will, there must have been an actual exercise of undue influence – a mere opportunity to exercise undue influence will not suffice.

5. Fraud

It is a rare to see allegations of fraud succeed in estate litigation. However, if there is evidence of false representations that were calculated to mislead the testator and affect how the will was drafted, the will may be overturned for fraud.

Fraud also arises, albeit infrequently, where the will itself or signature of the testator is forged. Such wills are usually holographic (no witness required), and may require expert evidence analyzing the testator's handwriting before they can be successfully attacked.

The burden of proof with respect to fraud rests upon those attacking the testamentary document. See *Vout v. Hay*, 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876 (S.C.C.).

6. Suspicious Circumstances

Suspicious circumstances are those that:

- tend to call into question the mental capacity of the testator;
- tend to show the testator did not know (understand) the contents of the will and the effect of the wording of the dispositions in the will; and
- tend to show the testator's free will was overborne by actions of coercion or fraud.

Some factors to consider in determining whether suspicious circumstances exist include the following:

- mental impairment including the rate of deterioration;
- physical impairment due to age or disease including the rate of deterioration;
- a significant change from a disposition in a former will;
- potential beneficiary making the testator's appointment to make a new will, and that appointment being with the beneficiary's own lawyer;
- the presence of a potential beneficiary on the way to the testator's appointment with their lawyer, or during that appointment;
- potential beneficiary interpreting the testator's wishes;
- will is prepared on the instructions of the potential beneficiary;
- factual circumstances surrounding the actual execution of the will;
- numerous wills made within a short period of time; and
- will favours person most instrumental in having the testator make the will (over other people in the same class).

The relevant period for establishing suspicious circumstances is the time from the forming of the intention to give instructions for a will through to its preparation and execution.

Some examples where suspicious circumstances have been found are where:

- the testator is bedridden and suffers from memory lapses at the time the will was to be executed. See *Re Carvell Estate* 1977 CanLII 2387 (NB QB), (1977), 21 N.B.R. (2d) 642;
- a second will is made shortly after the first is executed, which substantially alters the bequests and legacies of the first will. See *Eady v. Waring*, 1974 CanLII 492 (ON CA), (1974), 2 O.R. (2d) 627 (C.A.);
- instructions in respect of drafting the will are given by someone other than the testator. See *Stark v. Dennison*, 1972 ALTASCAD 83 (CanLII), [1973] 1 W.W.R. 368 (Alta. C.A.);
- a party benefitting from the will is instrumental in its preparation. See *Doherty v. Doherty*, 1997 CanLII 9556 (NB CA), [1997] N.B.J. No. 319 (C.A.); and
- numerous wills are made in a short period of time. See *McCardell Estate v. Cushman*, 1988 ABCA 353 (CanLII), (1988), 94 A.R. 262 (C.A.).

In *Estate of Bonin, Tardiff and Mongrain*, 2005 MBQB 62, the court found suspicious circumstances in the preparation of the will that called the testator's capacity into question, and that raised concerns of undue influence or fraud.

7. Burden of Proof

The standard of proof in testamentary situations is always the civil standard on a balance of probabilities.

The propounder of the will has the legal onus or burden of proof on a balance of probabilities to present evidence to the court to prove the five basic requirements for a will to be admitted to probate. These are:

1. intent;
2. capacity;
3. knowledge and approval;
4. due form (testamentary document); and
5. due execution.

Propounders show the five basic requirements when they apply for probate with a duly executed testamentary document and an affidavit of execution attesting to the sound mind, memory and understanding of the testator at the time the will was signed. This form of proof is known as "proof in common form."

When a will is proved in common form, the propounder is aided by a rebuttable presumption that the testator knew and approved of the contents of the will and had the necessary testamentary capacity. The presumption arises upon proof that the will was duly executed with the requisite formalities after having been read over to, or read over by, the testator who appeared to understand it.

The presumption places an evidentiary burden on those attacking the will. The challengers meet the burden by adducing or pointing to some evidence (suspicious circumstances) which, if accepted, would tend to negate knowledge and approval or testamentary capacity. In this event, the evidentiary burden reverts to the propounder.

Evidence of suspicious circumstances does not impose a higher standard of proof on the propounder than the civil standard. The presumption that aids the propounder of the will is simply spent if suspicious circumstances are shown. The propounder then reassumes the burden of establishing knowledge and approval or testamentary capacity depending on the nature of the challenge.

The more suspicious the circumstances, the more compelling the evidence must be to discharge the propounder's burden of proving capacity and knowledge and approval. But, in all cases and at all points, the standard of proof remains the civil standard of a balance of probabilities.

When the attacker establishes suspicious circumstances that rebut the presumption of capacity or knowledge and approval and the propounder then fails to discharge the onus of proving those elements on a balance of probabilities, the will will fail.

There are no presumptions in the testamentary situation to aid the attacker alleging undue influence. The burden of proof for undue influence or fraud always remains with those attacking the will. The standard of proof remains the civil standard on a balance of probabilities.

Vout v. Hay, 1995 CanLII 105 (SCC), [1995] 2 S.C.R. 876, (1995), 125 D.L.R. (4th) 431 (S.C.C.), is still the leading case in this area and your starting point for researching case law.

A solicitor is obliged to make detailed notes when taking instructions in situations where suspicious circumstances could exist. The lawyer needs to ask probing questions and record the facts upon which the lawyer concluded that a person had the requisite capacity, etc., as opposed to just recording a conclusion. The notes and facts will be very important if a challenge subsequently arises. See *Slobodianik v. Podlasiewicz*, 2003 MBCA 74 (CanLII).

8. Getting Into Court

If you have facts that lead you to consider a will challenge:

1. Search the court registry for an application or grant of probate.
2. Review *The Court of King's Bench Surrogate Practice Act* and the King's Bench Rules, particularly Rules 9, 10, 14 and 75.
3. If there is no application for probate, file a caveat under Rule 75 to ensure you will receive notice if someone applies for probate. The caveat is good for 12 months. A new one may be filed, if necessary, just before the one-year ends.
4. The caveator receives notice from the court when it receives an application for probate. The caveator has 30 days after the service of the notice to bring an application to court.
5. A challenger should then file a notice of application under Rules 14.05(2)(c)(i) to (iv), as may be applicable, as soon as possible.

6. When bringing an application seeking the advice and direction of the court, it is very important to identify and serve all persons having an interest in the estate. This allows all potential parties to have an opportunity to come before the court to state their position. See *Jobin v. Jobin Estate*, 1992 CanLII 12836 (MB QB), [1992] 6 W.W.R. 668 (Man. Q.B.).
7. All the potential issues affecting the administration of the estate (i.e., capacity, knowledge and approval, undue influence) should be identified when the application and parties are before the court. There probably will not be a second or better opportunity to do so. Take the time consider and set out all the potential issues so the court can adjudicate all the issues. Initially, frame the issues broadly to allow for unexpected developments. See *Zimbel Estate Re*, 1992 CanLII 12850 (MB QB), (1992), 80 Man. R. (2d) 142 (Q.B.).

8. Where a will challenge involves allegations of lack of capacity, lack of knowledge and approval, or undue influence, the judge will most likely order proof of the will in solemn form through a trial of the issues formulated.
9. Ordering a trial of the issues will likely involve the preparation and filing of pleadings which will invoke all the procedures available in King's Bench for civil actions and the matter will proceed accordingly thereafter.
10. King's Bench Rule 75.05 allows the court, on the first appearance in a contested probate application, to add or remove parties; and to give directions as the court sees fit, including a direction that the application proceed to a pre-trial conference and thereafter be treated as an action.

H. SECTION 23 APPLICATIONS

The Wills Act, C.C.S.M. c. W150 provides for very stringent and technical requirements for the execution of a will. Generally speaking, if those requirements are not met, the will is considered to be invalid. Section 23 of *The Wills Act*, however, gives the court the power, in certain circumstances, to dispense with its formal requirements.

This section of *The Wills Act* reads:

> *23 Where, upon application, if the court is satisfied that a document or any writing on a document embodies*
>
> *(a) the testamentary intentions of a deceased; or*
>
> *(b) the intention of a deceased to revoke, alter or revive a will of the deceased or the testamentary intentions of the deceased embodied in a document other than a will;*
>
> *the court may, notwithstanding that the document or writing was not executed in compliance with any or all of the formal requirements imposed by this Act, order that the document or writing, as the case may be, be fully effective as though it had been executed in compliance with all the formal requirements imposed by this Act as the will of the deceased or as the revocation, alteration or revival of the will of the deceased or of the testamentary intention embodied in that other document, as the case may be.*

In *George v. Daily*, 1997 CanLII 17825 (MB CA), (1997), 115 Man. R. (2d) 27 (C.A.), the Court of Appeal considered the meaning of "testamentary intention":

> *The term 'testamentary intention' means much more than a person's expression of how he would like his/her property to be disposed of after death. The essential quality of the term is that there must be a deliberate or fixed and final expression of intention as to the disposal of his/her property on death.*

An application for an order under section 23 of *The Wills Act* would be made before applying for probate. The notice of application and supporting affidavit should be served on all interested parties. The affidavit evidence must clearly identify the interested parties. These parties might be the executors or beneficiaries under an earlier will, those who would be entitled to the estate in the event of an intestacy, etc.

Most section 23 matters are dealt with on affidavit evidence. However, the Court of Appeal indicated in *George v. Daily* that *viva voce* evidence may be more appropriate when there are contentious issues. Helper J.A. wrote:

> *In a case such as the present, where the document presented to the court has little or no direct connection to the deceased, where the deceased has not written or signed or initialed the document and the evidence does not establish with certainty that he even saw the document, an applicant should normally present oral evidence to support an application under s. 23 of The Wills Act. Oral evidence may not be necessary in all cases involving s. 23 applications. But clearly, the farther removed the subject document appears to be from a document which in some way conforms with the formal requirements of The Wills Act, the more difficult the task of the applicant in meeting the onus under s. 23.*

A trial of issues will be more likely if there are also allegations of fraud or undue influence. Once the section 23 order issues, one can file an application for probate in the usual manner.

I. ACTIONS BY OR AGAINST THE ESTATE

1. Actions Prior to Administration or Probate Being Granted

Where no personal representative of the estate has been named either by grant of probate or letters of administration, the Public Trustee may be named as representative of the estate pursuant to section 55 of the *SPA*.

2. Defence of *Plene Administravit*

Where a suit is being launched against an estate, if the estate has no assets to satisfy a debt or claim upon which the action is brought, it is necessary to plead that the assets have been fully administered (*plene administravit)* or that assets have been fully administered with certain exceptions (*plene administravit praeter*). Failure to plead is considered an admission by the administrator that there are enough assets to satisfy the debt or claim. The administrator can be held personally liable for the debts and costs of the judgment. See *Brown v. Fox*, 1921 CanLII 750 (MB KB), (1921), 3 W.W.R. 565 (Man.KB).

The failure to plead is also considered a conclusive admission that the administrator has sufficient assets should the judgment be recovered against the estate and a writ of execution returned by the Sheriff's Office without collection. At this time, a second action can be taken by the judgment creditor against the personal representative.

Examples of pleas of a defence of *plene administravit* and *plene administravit praeter*:

Defence of *Plene Administravit*: The defendant has fully administered all the personal estate credits and effects of the said John Doe (the deceased) which have ever come to the hands of the defendant as executor (or, administrator) to be administered, and the defendant had not at the commencement of this action, or at any time afterwards, nor has he now any such personal estate credits or effects in his hands as executor (or, administrator) to be administered.

Defence of *Plene Administravit Praeter*: The defendant has fully administered all the personal estate credits and effects of the said Tom Smith (the deceased) which have ever come to the hands of the defendant as executor (or administratrix) to be administered except the stock-in-trade now in the shop formerly occupied by the said Tom Smith, which is of the value of $_____, and, with that exception, the defendant had not at the commencement of this action, or at any time afterwards, nor has she now, any personal estate or effects of Tom Smith in her hands as executor (or administrator) to be administered.

3. Deficiency of Assets

In situations where the estate is not large enough to pay even creditors of the estate fully, section 63 of *The Trustee Act* permits an executor or administrator to plead deficiency of assets to prevent judgment creditors from issuing writs of execution against the estate of the deceased and recovering more than their *pari passu* shares.

4. Additional Evidentiary Points

Estate litigation can be amongst the most difficult litigation in that the principal witness, i.e., the testator, is no longer available to give evidence. Accordingly, the evidence of interested parties usually requires some form of corroboration either through family, friends, past counsel or family physicians. Brian Schnurr's article, "Estate Litigation - Requirement of Corroboration" (1975) 5 E.T.Q. 42 may be of some assistance in determining the type of corroborating evidence required.

5. Privilege

One of the best pieces of evidence on capacity is the evidence of the solicitor who drafted the will. The court may waive privilege and confidentiality and admit the solicitor's notes to determine the testator's intentions. See *Re Ott*, 1972 CanLII 694 (ON SC), (1972), 2 O.R. 5 (Surr.Ct.) and *Geffen v Goodman Estate*, 1991 CanLII 69 (SCC).

6. Costs

The traditional approach towards the ordering of costs in estate litigation cases was to award costs out of the estate, often on a solicitor and client basis. However, the current approach of the court is to award costs in the same way that they are treated in other civil litigation proceedings.

In *Penner v. Brandon et al.*, 2016 MBQB 64 (CanLII), the Court cited *Johnson Estate, Re*, 2007 MBQB 302 (CanLII), for the principle that the court has made it clear that costs unjustifiably incurred in estate actions will be payable by the parties and not from the estate. The principles relating to the issue of costs were set out by the Court of Appeal in *Balan's Estate, Re*, 1992 CanLII 8579 (MB CA), (1992), 76 Man.R. (2d) 241, where the court held, in paragraphs 12 - 18:

> *(i) Solicitor-client costs will be awarded only in rare and exceptional cases (a principle applied in some estate proceedings);*
>
> *(ii) An executor is to be indemnified against all reasonable costs and expenses incurred by him/her in the course of the administration of the estate, including solicitor-client costs in proceedings in which some question or matter in the course of the administration is raised as to which the trustee has acted prudently and properly;*

(iii) The costs of all parties to estate proceedings have been ordered to be paid out of an estate when it was necessary to apply to the court to construe a testamentary document;

(iv) Costs unjustifiably incurred in estate actions will be payable by the parties. "An estate should not be eaten up with costs in proceedings which have no substantial merit".

The decision to award costs is always in the court's discretion. There are several factors that courts consider in deciding on an award of costs in estate litigation proceedings:

1. Can it be said that the testator caused the litigation (i.e., created some ambiguity in the testamentary document that needed resolution by the court)?
2. Did circumstances lead reasonably to an investigation about a propounded document?
3. The degree of merit to the position that was advanced. (i.e., What was the actual evidence to support allegations, such as lack of testamentary capacity, knowledge and approval, undue influence or improper execution?)
4. For whose benefit was the litigation undertaken? (i.e., for the estate? for the executor personally? for a residual beneficiary? on behalf of a class of beneficiaries?)
5. The size of the estate and the effect an award of costs would have on the quantitative distribution of the estate.
6. Did the conduct of the executor(s) or litigant(s) warrant an award of costs against either (or both) of them personally?
7. Did a party unsuccessfully raise issues of fraud or undue influence?
8. The extent of efforts made to resolve matters in issue prior to trial.
9. Were the issues raised in the litigation proper issues to have been placed before the court? See the following cases:
    - *Re Ballen's Estate*, 1992 CanLII 8579 (MB CA), (1992), 76 Man. R. (2d) 241 (C.A.);
    - *Re Clark Estate*, 1992 CanLII 13154 (MB CA), (1992), 83 Man. R. (2d) 20 (C.A.);
    - *Jumelle v. Soloway Estate*, 1999 CanLII 18794 (MB CA), (1999), 142 Man. R. (2d) 119 (C.A.);
    - *Re Hall Estate*, 1999 CanLII 14225 (MB QB), (1999), 140 Man. R. (2d) 146 (Q.B.), aff'd (2000), 148 Man. R. (2d) 128 (C.A.);
    - *Ronald v. Ronald and Ronald*, 2004 MBQB 82 (CanLII);
    - *Tapper v. Sair-Segev*, 2004 MBQB 25 (CanLII);

- *The Estate of Eduard Bullert*, 2006 MBQB 210 (CanLII);
- *Weiss Estate v. Weiss; Weiss v. Weiss Estate*, 2022 MBQB 55.

Where the estate receives a ruling from the court on a matter in issue, an executor should not bring an appeal unless the executor is prepared to risk payment of costs personally for an unsuccessful appeal. See *Re Beck*, [1976] 4 W.W.R. 670 (Man. C.A.).

The normal level of costs in current estate litigation should not be assumed to be solicitor/client costs, as was often the case in the past. Today, the standard for an award of solicitor/client costs (to mark the court's disapproval of the conduct of a party to the litigation) is the same as in any other civil action, being that of exceptional circumstances. See *Re Clark Estate,* 1992 CanLII 13154 (MB CA), (1992), 83 Man. R. (2d) 20 (C.A.).

The use of formal offers to settle under the provisions of King's Bench Rule 49 should be considered by litigants to resolve appropriate cases. The costs consequences for failure to accept a Rule 49 offer to settle can then be advanced in argument at the appropriate time.