

“The Argentine Adventure” - A Sordid Scenario for New WSA Cases and Enduring Power of Attorney Issues

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Top Wills & Estates Law Cases

Presented by:
Benjamin Kormos
Walsh LLP
Calgary, Alberta

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Benjamin Kormos

Estate, Wills & Trust Litigation Group

Walsh LLP

I. INTRODUCTION

This “Argentine Adventure” scenario is written with the goal of discussing how practitioners may apply the newest or leading *Wills and Success Act (WSA)* cases, and also the applicable Enduring Power of Attorney (EPA) accounting law, to the fairly common adventures our clients take in estate matters.

Executive Summary - The Juiciest WSA and EPA cases & how they may help you!

The Wills and Succession Procession - 2015 Update

Since the *WSA* came into force for deaths post-February 1, 2012, the Surrogate Court Justices have provided us with many hours of interesting reading. They have entertained us on topics including these following selections that I will be reviewing here:

- Rectification of Wills (plugging gaps and interpreting hieroglyphic stray markings).
- Intestacy Proceedings under the *WSA*.
- Obscure (Interesting) Litigation Issues.

Rectification: Since the *WSA* came into force, there have been many interesting decisions, involving everything from holograph Wills (even ‘holograph’ Wills written by the executor and *signed* by the testator!), to slips or circumstantial repairs, to professionally drafted Wills, and also right smack in between those two (i.e. professionally drafted Will, plus holograph changes, additions, or codicils).

The test for rectification under the *WSA* is evolving, but so far is set out in the *Re Lubberts* and *Re Warren* cases reviewed below. The common *theme* when the Court grants rectification appears to be an overwhelming *combination of* evidence from several corroborated sources that confirm a *final* fixed intent in relation to disposition of property, regardless of how it is set out in the Will (assuming it meets the one sacrosanct formality that all cases still require: a “*signature*” by the testator...).

Intestacy Proceedings Under the WSA: The WSA has helpfully clarified threshold entitlement and has also significantly altered the flow of entitlement, in intestate estates in Alberta. Very brief comment on this is below, on the facts presented in this scenario. Some of the interesting changes include:

- Increases to the spousal charge, and of its nature and effect.
- Clarification of classes of “descendants” (beneficiaries) under intestate estate distributions.
- Changes to the commorancy provisions (see section 5 on “survivorship”) for commorant estates post-WSA.

Obscure (Interesting) Litigation Issues: An interesting trend in the case law has begun in estate litigation cases, and will likely grow. Courts are now accepting more modern forms of “signature” evidence, including email signatures on testamentary documents, instruments, declarations, and designations. Quite likely, email signatures will be sufficient where the document includes the requisite detail, intent, and effect. This issue is reviewed.

The Perennial Issue - Enduring Power of Attorney Review (2015 Update)

Familial love and trust are the glue that binds us together, and impels our desire to ‘pay it forward’. These are also the foundation on which aging parents decide to whom they will entrust their finances when they can no longer make those decisions. And yet, this appears frequently to be forgotten when family members believe that they have cause for mistrust. This remains the common theme of Enduring Power of Attorney (EPA) disputes in 2015.

Attorneys acting “in pursuance of” an EPA have a fiduciary obligation (and at the higher end of that spectrum), to be “ready with their accounts.” They must account to *any* “interested person”¹ *at any time upon request*.

If they fail to do so on request, section 10 of the *Powers of Attorney Act* provides that the Court may compel the Attorney to do so. The standards of the accounting itself are not explicitly stated. Practically, the Courts will look for an accounting that complies with the *Surrogate Rules*, r. 98 (in greater or lesser degrees, as the case requires). For a detailed discussion of EPA accounting, see: “*The Greek Tragedy - A Case Study for Compelling an Accounting (Enduring Power of Attorney & Estate Accounting)*,”² and several other quite excellent discussions from LESA’s recent (2015) Estate Accounting seminar.³

What is the trend in 2015? The Court is requiring an even higher standard of accounting than in an estate accounting. This is because the Court is concerned for the Donor’s security and financial safety, and to prevent financial abuse of Donors by an Attorney with present power over the Donor (this applies whether the Donor is alive at the date of the application or not).

¹ This is construed very broadly. It clearly includes the Donor, and also the Donor’s ‘ultimate beneficiaries’, but I suggest it includes any family member of sufficient relational connection to the Donor to be interested in the broader sense, in ensuring that the Donor’s interests are protected.

² See **Appendix 1:** *The Greek Tragedy - A Case Study for Compelling an Accounting (Enduring Power of Attorney & Estate Accounting)*.

³ Legal Education Society of Alberta (LESA), *Estate Accounting*, September 29 & October 1, 2015. Including, *Duties to Account* (Wanda Fawcett), *Acceptable Accounting* (Malkit Atwal), *Court Processes and Procedures* (Benjamin Kormos), and *Issues Before the Court* (Ted Crane).

“The Greek Tragedy” - A Case Study for Compelling an Accounting Estate Litigation – Enduring Power of Attorney & Estate Accounting

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Presented by:
Benjamin Kormos
Walsh LLP
Calgary, Alberta

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**“THE GREEK TRAGEDY” - A CASE STUDY FOR COMPELLING AN ACCOUNTING ESTATE LITIGATION –
ENDURING POWER OF ATTORNEY & ESTATE ACCOUNTING**

I. INTRODUCTION

This “Greek Tragedy” scenario is written with the goal of helping you understand how accounting issues usually arise in power of attorney matters and estate matters (these latter two often come as a ‘package deal’).

The goal will be to give you an overview of some of the useful tools to compel an accounting for the property, expenditures, and debts of the Donor or Deceased about whom your client is calling you. The scenario also tries to demonstrate ways to maximize value for your client.

That Friday afternoon “short” call-back before the weekend starts.

Imagine! You get a call from a prospective client, named *Paola Salonika*. She levels her scatter gun of facts at you - you take that instinctive extra breath because it will be *that* sort of call and you likely need the extra oxygen. Or extra time to think. Or both. You glance at your phone timer (yes, you always do this just to be sure you get the amount of time correct, when you tell your girl/boy-friend or spouse your excuse for dragging your carcass late to dinner).

Bang! Paola suddenly pulls the trigger. And this shrapnel pings through the line, like so many wasps vibrating their way into your office:

- Her mum, *Thessa Nikké Salonika*, has recently passed. She was 83 years old.
- She was not informed until she read the obituary in the Thessaloniki Times. Her mum hailed from that region just after the Great Fire in 1917 and before the outbreak of the Olive Wars in the 1930s (her grand’pa *Tzipouro Salonika* had fled early, to Canada, but the family always maintained ties to the old country).
- Her siblings kept her out of the funeral planning. She cannot believe they would do this. What a betrayal! She was angry at first, but now is just sad and suspicious of her siblings.
- She has no idea where her mum’s money (her ‘inheritance’ that was ‘promised’ to her back in 1996) is, how much there is, or how to find out.

- She has always been close to mum, because mum wanted her to care for her when grand'pa *Tzipouro* died (she doesn't really know much about grand'ma *Viktoria Tzipouro*; just that she remembers her baking Baklava when she was 5, maybe).
- Did *Thessa* make a Will? “Oh, yes. I think so. I think my oldest brother took the lawyer to the hospice when mum was all doped up and about to die. That’s his way of controlling things. He’s always had this entitlement.” When? “Oh, I was told by my sister, who always supports my brother and shares things selectively with me, that it was a 3 days before Mum died.”
- Who else in the family? Paola is the youngest, at 44. Her other siblings are:
 - *Pietre Vinnē Salonika*, her oldest brother (he is 53, has a ‘nest of children’ (in Paola’s words), and she doesn't like his wife, Petra).
 - *Ophelia Hekatē Salonika*, her conniving sister (she is 51, never married, and only loves *money* more than herself).
 - *Alexander Īremía Salonika*, her “avoidant” brother (he is 46, divorced with children, and never seems to have money, drinks a ‘bit’ and apologetically asked mum for money all the time).
- Oh yes, **What is the Estate is worth?** Is it worth your \$3,500 retainer? Paola believes so! It’s a good case, isn't it? Value: about \$850,000, after listing out what she can remember was there at one time:
 - Thessa’s house (Calgary average: \$450,000).
 - Some GICs mum invested from old grand'pa *Tzipouro*’s proceeds of the lands in Thessaloniki (\$50,000).
 - A \$50,000 account with CIBC that Ophelia tells you Pietre accessed “jointly” with mum for her medical bills, and groceries and utilities, and that now Pietre is “spending away.”
 - RRSPs Thessa got from her dead second husband (*Čzengis Goluk*) (about \$200,000).
 - About \$100,000 in family treasure. Mum Thessa’s collection of Hellenic amphorae from the old country (Paola: “They’re priceless, and I was specifically promised the black and yellow one from the ancient site of the Battle of Thermopylae, after mum’s