

A Review of Some of the Evidentiary Issues in Estate Litigation

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Presented by:

Bruce Comba

Emery Jamieson LLP

Edmonton, Alberta

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INTRODUCTION

Many of the disputes giving rise to litigation regarding estates labour under an evidentiary impediment that is absent in most disputes in other areas of the law. This impediment is that the best evidence by which the dispute might be settled or adjudicated is unavailable because the witness, usually the testator, is dead.

The absence of what might be the best evidence gives rise to a variety of evidentiary presumptions, the relaxation of the general bar to reliance on hearsay evidence, and practical difficulties in identifying alternate sources of evidence to establish what a litigant seeks to prove.

This paper discusses some of the evidentiary rules and presumptions that apply to litigation relating to estates and discusses some of the sources of evidence to be sought out and adduced to support a litigant's arguments in light of the evidentiary rules and the absence of the best evidence.

SOME COMMENTS ON THE LAW OF EVIDENCE

A. Hearsay Evidence

The general rule is that hearsay evidence is inadmissible at the trial or other hearing of a matter. The authors of *The Law of Evidence in Canada* provide this "working definition" of hearsay evidence and the rule against its inadmissibility:

Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.¹

The dangers of reliance of hearsay evidence are that it is not made under oath, cannot be tested by cross-examination, and the demeanor of the original statement maker cannot be observed by the trier of fact.

However, a number of exceptions to the bar against hearsay evidence have been made because the particular type of hearsay evidence is considered sufficiently reliable to be admissible, and because it is reasonably necessary to allow admission to avoid significant inconvenience or injustice or both.

¹ *The Law of Evidence in Canada*, 3rd ed., LexisNexis 2009 at page 229.

For evidence to fall within an exclusion to the rule against the admissibility of hearsay evidence, these criteria are usually required:

- (a) It must be impossible or difficult to procure the factual content of the evidence otherwise;
- (b) The author of the statement must be disinterested, meaning the statement is not a statement in the author's own favour;
- (c) The statement was made before the dispute at bar arose;
- (d) The author of the statement has a demonstrable and unique knowledge of the facts within the statement.

Statements made by testators and other deceased witnesses will often meet these criteria and therefore hearsay evidence is admissible in various circumstances in the context of estate litigation.

In some instances, statutory provisions specifically allow hearsay evidence to be admitted.²

However, just because some hearsay evidence is sufficiently necessary and reliable to be admitted does not make it sufficiently reliable to establish the fact for which it is proffered as proof, and the weight that is to be given to the evidence may still limit its effectiveness in proving a litigant's case.

B. Presumptions

The designation "presumption" is used with respect to two different types of legal principles.

The first type is a presumption "without basic facts" and such presumptions are really "rules of substantive law in relation to the burden of proof".³ An example is the presumption of innocence in

² An example is contained in s. 109(3) of the *Wills and Succession Act*, SA 2010, c.W-12.2 which specifically allows admission of oral or written statements by the deceased respecting the nature of transfers that might be advances.

³ *The Law of Evidence in Canada*, supra, at page 134.