Is section 28 of the *Estates Act* the sole authority for the appointment of an ETDL? A case comment on *Mayer v. Rubin*[1]

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Didn't Justice Greer,[2] Justice McEwen[3] and Justice Price[4] already definitively deal with this issue? Didn't these respected judges already decide that whether by reason of its inherent jurisdiction or pursuant to the Rules of Civil Procedure the courts could appoint an estate trustee during litigation (ETDL) without there being a will challenge? Apparently not.

There are still those making the argument that an ETDL can only be appointed in the context of a will challenge. In *Mayer v. Rubin* it was argued that s. 28 of the *Estates Act* R.S.O. 1990, c. E.21[5] was the sole and

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[1] *Mayer v. Rubin* (2017), 2017 CarswellOnt 8889, 2017 ONSC 3498, 30 E.T.R. (4th) 239 (Ont. S.C.J.[Estates List]); additional reasons at *Mayer v. Rubin* (2017), 2017 CarswellOnt 10235, 30 E.T.R. (4th) 250 (Ont. S.C.J.[Estates List]) [*Mayer v Rubin*].

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[2] See *McColl v. McColl*, 2013 CarswellOnt 13589 (Ont. S.C.J.); Unreported Decision *Dietrich v. Playfair* (June 24, 2013), Court file no. 2012-272 (Ont. S.C.J.).

[3] *Kalman v. Pick*, 2014 CarswellOnt 5584 (Ont. S.C.J.); *McColl v. McColl*, 2013 CarswellOnt 13589, 93 E.T.R. (3d) 116 (Ont. S.C.J.).

[4] *Potrzebowski v Potrzebowski*, 2016 ONSC 6981 (Ont. S.C.J.).

[5] The section reads as follows:

> **28** *Pending an action touching the validity of the will of a deceased person, or for obtaining, recalling or revoking any probate or grant of administration*, the Superior Court of Justice has jurisdiction to grant administration in the case of intestacy and may appoint an administrator of the property of the deceased person, and the administrator so appointed has all the rights and powers of a general adminis-

exclusive source of authority for the court to appoint an ETDL. Let's review the facts of the case and see what Justice Myers decided.

Jay Rubin made a will appointing his wife (Ida) and three children Annie, Morris and Sarah as executors and trustees. He also set up a spousal trust for Ida. At some point after Jay's death, Ida lost the capacity to manage her property and the people who *de facto* managed Jay Rubin's estate and the spousal trust were Morris and Sarah. The Applicant wanted an accounting.

In law, Annie, as a co-executor, was entitled to an accounting. In response to Annie's lawyer's request for an accounting, Morris and Sarah's lawyer demanded to see proof that the lawyer representing Annie was retained. Some material was later provided but fell far short of what was required. During their examinations, Morris and Sarah's lawyer objected to many proper questions put to his clients. Not all the documents were produced in a timely fashion. Moreover, when documents were eventually produced it only underscored that for years Morris and Sarah seemed to be hiding relevant information from Annie. In the words of Justice Myers,

> While it did not have to be so, the respondents have chosen by their conduct to put the estate and the spousal trust in need of neutral stewardship to immunize the assets from the parties' adversity and animosity while they fight out their battles.

After four years the applicants agreed to provide a proper accounting, but suggested that they needed an additional six months to do so. Neither Annie nor Justice Myers were impressed. It should not have taken 4 years and being at the precipice of the court house steps to inspire Morris and Sarah to volunteer an accounting.

Now let's turn to Annie's request that an ETDL be appointed. Morris and Sarah hired an estate litigator and opposed the appointment. They argued that the authority to appoint an ETDL comes from s. 28 of the *Estates Act*, which provides that an ETDL may be appointed in a pending action touching the validity of the will of a deceased person, or for obtaining,

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> trator, other than the right of distributing the residue of the property, and every such administrator is subject to the immediate control and direction of the court, and the court may direct that such administrator shall receive out of the property of the deceased such reasonable remuneration as the court considers proper.(emphasis added).

recalling or revoking any probate or grant of administration. Since there is no issue as to the validity of Jay Rubin's will or probate in this action, Morris and Sarah's lawyer argued that the court did not have jurisdiction to appoint an ETDL. Justice Myers disagreed with Sarah's and Morris' argument and appointed an ETDL.

Justice Myer's analysis of the law

Justice Myer's review of the law and detailed reasoning is most helpful to those considering this Issue. Here are some key takeaways.

1. ***The Court has inherent jurisdiction.*** The court's inherent jurisdiction exists in parallel with the court's statutory powers. The court has broad and inherent powers to supervise the management of estates and to control its own processes. In part the court uses these powers to fill gaps where the legislature has not provided an answer such as when it is appropriate to appoint an officer of the court to preserve an estate at risk. The legislation is not a complete code.
2. ***Rule 75.06(3) (f).*** This rule specifically provides for the appointment of an ETDL and does not point to any specific source for that authority. It is likely based on the court's inherent jurisdiction.[6]
3. ***The purpose of an ETDL.*** His Honour said, "*The purpose of an estate trustee during litigation is to ensure that the playing field is kept level*". What was not said, but which we infer from the deci-

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[6] In paragraph 25 of Justice Greer's decision in *McColl v. McColl*, 2013 CarswellOnt 13589, 93 E.T.R. (3d) 116 (Ont. S.C.J.) she states:

> [25] S.28 of the *Estates Act* R.S.O. 1990, c. E.21, gives the Court the authority to appoint, "an administrator of the property of the deceased person." That administrator is given all the rights and powers of a general administrator, other than the right to make distributions under the Will or on an intestacy. The Court may direct that such administrator shall receive such reasonable remuneration as the Court considers proper. In addition, the Court has the power under subrule 75 .06(3)(f) of the *Rules of Civil Procedure* R.R.O. 1990. Reg. 194 to appoint an estate trustee during litigation, and file such security as the court directs.

sion, was that it is not about a technical application of the statute — it's about the court using its inherent jurisdiction to keep the playing field level until the litigation is resolved. His Honour noted that executors and trustees may need to stand aside for a period of time so as to allow them to exercise full throated adversarialism. To do so places their duty as fiduciaries in conflict with advocacy of their positions. It is difficult to be loyal and selfless to each other while they are adverse in interest in litigation[7].

4. **Removal of a Trustee is a different test than appointment of an ETDL.** To permanently remove trustees and executors requires proof of significant wrongdoing or risk to the estate. That is not so with an ETDL. Something much less intrusive is involved. While litigants are fighting it is appropriate for an ETDL to be appointed when the estate needs someone neutral as between the participants in the litigation. As Justice Myer's said, "Properly instructed, the estate should want to be left alone. Its assets should be administered to maximally benefit the interests of the beneficiaries and to be neutral in regard to positions of the parties in the litigation."[8]

5. **Threshold for appointment of an ETDL.** In appointing an estate trustee during litigation, the court will consider the balance of convenience, the necessity to protect the estate from the trustee's animosity and that that the court will favour appointment in the vast majority of cases unless the administration of the estate involved is particularly straightforward or simple. Simple prudence calls for the appointment of an ETDL when there is a trustee who is in an adversarial position with a co-trustee or a beneficiary.[9]

6. **Sometimes a judge has to protect the estate by appointing an ETDL.** In dealing with this case it is very important to remember that a central figure in this case was the incapable vulnerable mother Ida. The questionable behaviour of the adult children battling over control of the estate may also have had an impact on

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[7] See paragraph 30 of *Mayer v. Rubin*.

[8] See paragraph 30 of *Mayer v. Rubin*.

[9] See paragraph 38 of *Mayer v. Rubin*.

Justice Myer's decision to appoint an ETDL. In paragraphs 13 and 22 Justice Myers states:

> [13] The taking of gifts of trust funds by trustees who have an unfit beneficiary sign her funds over to them and leave the trust account depleted would seem to raise some rather rudimentary issues of conflict of interest and breach of fiduciary duty. The depletion of Ida's funds by gifts to her trustees who have no legal right to the funds seems to be acceptable to the children however, as they know that they do not intend to leave their mother at risk. Such is the insidiousness of conflict of interest that people with no doubt as to their own *bona fides* can allow themselves to commit significant wrongdoing without thinking that they are doing anything wrong.
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> [22] The fact that the two operating trustees would have the temerity to remove $1.9 million from the mother's corporate trust account while the prehearing motion steps were playing out is surprising. The fact that they then took their "shares" of the money while making good on their threat to refuse distributions to the applicant while the litigation is ongoing, establishes beyond doubt that the trustees are incapable of maintaining even hands during the litigation. They are using their control over their mother's cheque writing and their control over the estate's assets to favour themselves while punishing the plaintiff for suing them. Morris was clear as to his intention in this regard in his affidavit filed in a prior motion.

Conclusion — is the issue now settled?

We imagine that there are still academics, senior lawyers and others who are unhappy with this decision. They will argue that this decision of Justice Myers, and likeminded decisions that preceded them are wrong. They will rely primarily on the wording of the statute and one case, *Forbes v. Gauthier Estate*, which suggests that s. 28 only authorizes a court to appoint an ETDL where there is a challenge as to the validity of the Last Will and Testament[10]. We respectfully disagree. There are too

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[10] *Forbes v. Gauthier Estate*, 2008 CarswellOnt 4912, 43 E.T.R. (3d) 143 (Ont. S.C.J.). In *Forbes v. Gauthier Estate* the deceased's last will and testament divided the residue into four equal shares between beneficiaries. The deceased's sister sought a declaration that the estate trustee held one-half of the residue of

many court decisions which stand for the proposition that an ETDL can be appointed outside the context of a will challenge.

From our perspective, we view Justice Myer's decision and reasoning in this case to accurately and fully set out the current state of the law. There are going to be times where those in charge of an estate need to be temporally removed so that the estate can be administered in a neutral fair manner. Otherwise there might be mismanagement of funds, taxes unpaid, interest and penalties accruing and a dissipation of the estate. Freezing the estate would only partially address the concerns because there are things that an estate trustee must do to administer the estate. The need is there and when there is such a gap in the legislation it only makes sense for the court to exercise its inherent jurisdiction. Absent specific language in the statute to the contrary one may not presume a change to the common law or restriction of the inherent jurisdiction of the court. To say otherwise would suggest that ajudge would have his/her hands tied while a rogue or ne'er do well prolongs the litigation for years with no interim remedy available to protect the assets of the estate and the disadvantaged vulnerable party.

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the estate by way of constructive trust or resulting trust. She also sought the appointment of an ETDL. The respondent opposed the appointment of an ETDL on the grounds that there was no ". . . applicability of this rule and/or other Rule 74 and 75 sub-rules." The position of the court was obiter, but it referenced a case which dealt with and relied on Justice Haley's analysis in *Belz v. Mernick Estate*. It is worth repeating.

> ***When one examines the structure of Rule 74 and 75 which pertain to estates one sees that Rule 74 is concerned with application for probate of wills and estate administration where there is no will and to that end provides for a person having, or appearing to have, a financial interest in a estate to, inter alia, oblige an executor to probate or renounce probate of a will, produce information about estate assets and to account. There is nothing which allows the court to interfere and make directions about the administration of the estate until there is a passing of accounts. Rule 75 is directed at attacks on the validity of a will or a probate document put forward as a last will. It does not deal with the administration of the estate by the estate trustee. The issues which are referred to under rule 75.06 relate to issues concerning the validity of the will and not to determination offinancial interests under the will.***