Challenging the Wills of the Living

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> "The court should not, I think, close its eyes to the fact that litigation among expectant heirs is no longer deferred as a matter of course until the death of an incapable person."
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> Mr. Justice Maurice Cullity,
> *Stern* v. *Stern*, 2003 CanLII 6193 (ON SC) at para. 28

The traditional rule in Ontario is that one cannot challenge a will while the testator is still alive. However, in recent years, there have been some cases in which judges have expressed a willingness to adjudicate upon the validity of a will prior to the testator's death. These cases might be mere anomalies or they might be signs that the general rule is weakening.

This paper offers readers a non-exhaustive review of the jurisprudence on the subject. Readers are strongly encouraged to explore these additional publications[1] and to conduct their own further research.

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[1] B. Schnurr, *Estate Litigation*, 2nd Ed., SchnurrLit 1F14, Memorandum by D. A. Rosenberg; Trudelle, Paul, *Challenging A Will Before Death* (Hull & Hull LLP), 26 September 2008, http:// estatelaw.hullandhull.com/2008/09/articles/topics/litigation/challenging-a-will-before-death/;
P.M. Annino, *You are Challenging My Will: But Wait . . . I'm Not Dead Yet!* 21 June 2012,
http://www.cpa2biz.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2012/ Wealth/challenging_my_will.jsp#.U5j77iihBlJ;
J. Eisen, *Estate Litigation for the Living* (Hull & Hull LLP), 18 March 2014, http://estatelaw. hullandhull.com/2014/03/articles/ uncategorized/estate-litigation-for-the-living/;
B. Arkin, *Is there a Tort of Tortious Interference with Inheritance Rights?* http:// whaleyestatelitigation.com/blog/2014/02/is-there-a-tort-of-tortious-interference-with-inheritance- rights/

Introduction: the waste paper rule

Will a court in Ontario set aside the last will and testament of a testator who is still alive? For the short answer to this question, we can turn to some of the well-loved Victorian eloquence of Lord Chancellor Hardwicke in the case of *Duke of Marlborough* v. *Lord Godolphin*:[2]

> "[T]he law says that a testamentary act is only inchoate during the life of the testator from whose death only it receives perfection, being until then ambulatory and mutable, vesting nothing, like a piece of waste paper …"[3]

In other words, no. As a piece of waste paper, a will is immune to challenge prior to death. The logic is simple to follow: the court should not be called upon to determine the validity of a document that could, at least in theory, be revoked by a new will the very next day.

Andruchow (Trustee of) v. *Seniuk* provides a stern warning to anyone who would ignore the waste paper rule.[4] The case involved the Albertan equivalent of a Rule 21 motion to strike a claim for disclosing no reasonable cause of action.[5] The statement of claim sought to set aside the last will and testament of Mr. Andruchow, who was living at an extended care hospital in Mundare, Alberta, at the time.[6] Madam Justice Veit pulled the following cases herself:[7] *Duke of Marlborough* v. *Lord Godolphin*, [1750] 28 All E.R. 41 (H.L.); *Westminster's Deed of Appointment, Re*, [1959] Ch. 265 (Eng. Ch. Div.); *Schroeder, Re* (1965), 8 C.B.R. (N.S.) 156 (Ont. S.C.);[8] *Smith* v. *Smith and Others* (June 18, 2001, High Court); and *Minister of National Revenue* v. *J. Colford Contracting Co*., [1960] Ex. C.R. 433 (Can. Ex. Ct.).[9] Justice Veit then reached the following conclusion on the law:

> "In summary, the reason why virtually no cases can be found of the type that would help to elucidate the issue before this court is that, for nearly 500 years, the English common law has held that, during the life of the testator, a will is no more than a piece of waste paper. It then becomes obvious why courts will not make entertain costs about waste paper — whether the answer is framed in mootness or in excessive expense relative to the potential benefit, to litigate over a piece of waste paper is a poor use of personal and state resources."[10]

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[2] *Duke of Marlborough* v. *Lord Godolphin*, [1750] 28 All E.R. 41 (H.L.).

[3] It is better that we remember the Lord Chancellor for his decision in *Marlborough* than for his efforts to prohibit Scottish Highlanders from wearing tartans: *Abolition and Proscription of the Highland Dress* 19 George II, Chap. 39, Sec. 17, 1746.

[4] *S.A. (Dependent Adult)* v. *M.S.*, 2005 ABQB 549 (CanLII), also cited as *Andruchow (Trustee of)* v. *Seniuk*.

[5] An application under *Alberta Rules of Court*, Alta. Reg. 390/68, r. 129(1)(a).

[6] *S.A. (Dependent Adult)* v. *M.S.*, 2005 ABQB 549 (CanLII) at para. 11.

[7] *S.A. (Dependent Adult)* v. *M.S.*, 2005 ABQB 549 (CanLII) at para. 10.

[8] *Schroeder, Re* (1965), 8 C.B.R. (N.S.) 156 (Ont. S.C.) is instructive even if not entirely on point. It involved a trustee in bankruptcy who sought an order forcing the Public Guardian and Trustee to disclose the contents of the will of a debtor's wife. Justice McDermott was incredulous: "I find it difficult, if not impossible, to believe that the inchoate rights of a debtor under the will of his wife, who is said to have made a will in his favour while competent and who is still alive and now incompetent, are of such substance that they form part of his 'property' and as such vest in the trustee for the benefit of the creditors of the bankrupt husband." The opposite result was reached in *Re Jenset*, 1986 CanLII 2574 (S.C. Bankruptcy) where the testator was dead.

[9] Admittedly, the case of *Minister of National Revenue* v. *J. Colford Contracting Co*., [1960] Ex. C.R. 433 (Can. Ex. Ct.) did not involve litigation over an estate. The court merely observed *in obiter* at para. 21: "'[R]eceivable' defined as something 'capable of being received.' This definition is so wide that it contributes little towards a solution. It envisages a receivable as anything that can be transmitted to anyone capable of receiving it. It might be said to apply to a legacy bestowed in the will of a living testator, but nobody would regard such a legacy as an amount receivable in the hands of a potential legatee."

[10] *S.A. (Dependent Adult)* v. *M.S.*, 2005 ABQB 549 (CanLII) at para. 28.

The statement of claim was struck in its entirety. Justice Veit even went so far as to order costs against the trustees personally, writing:

> "Trustees must act prudentially. In the circumstances here, it was neither necessary nor prudential for the trustees [to] embark upon litigation over what amounts, in law, to a 'piece of scrap paper.'"[11]

And yet, there are rumblings in the case law and some budding exceptions.

The permanent will of an incapable person

The waste paper rule draws strength from the idea that a living person can always execute a new will, thus rendering a dispute over the validity of his old will moot. But this idea is not true to life. In fact, many people, either through disease, disability or advanced age, have lost testamentary capacity and will never regain it again. This leads us to what might be the considered the first and foremost "exception" to the waste paper rule.

In *Andruchow*, Justice Veit said the following in *obiter*:

> "Despite the clarity of the law on the status of a will during a testator's lifetime, *if there were evidence before a court that the dependent adult who executed a will would absolutely never be able to validly execute another will*, and if there were a risk that those who had a contingent duty to prove the will would lose available evidence, a court might be persuaded to have a hearing into the validity of a piece of paper that might escape the designation 'waste paper'."[12]

Is this truly an exception? If so, it would seem to be fairly narrow. The evidence needed to demonstrate that an incapable person will "absolutely never" be able to validly execute another will would need to be very convincing.[13] Yet these types of determinations are not unheard of. Sometimes, the permanence of incapacity is conceded;[14] in other situations, it must be argued on a balance of probabilities, just like any other fact.[15] As we shall see below, Canadian courts have accepted permanent testamentary incapacity in certain related contexts. Thus, while there is no appellate authority on point, it might be that a court in Ontario would entertain a pre-death will challenge if it was shown, or conceded, that the testator would never be capable of making another will. We will review the case of *Gironda* v. *Gironda* in greater detail below.

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[11] *S.A. (Dependent Adult)* v. *M.S.*, 2005 ABQB 549 (CanLII) at paras. 3 and 5.

[12] *S.A. (Dependent Adult)* v. *M.S.*, 2005 ABQB 549 (CanLII) at para. 30.

[13] It is hard to ignore the nagging thought behind Justice McDermott's remark in his oral judgment in *Schroeder, Re*, 1965 CarswellOnt 47 (S.C. Bankruptcy) at para. 6:

> "The testatrix might recover. I have no knowledge of what her mental problem is. There are now wonder drugs being discovered by chemists and experts, some of which might possibly restore her mental capabilities. If the health of this woman changes completely she might alter her mind about the dispositions under her will before she dies."

[14] *Weinstein* v. *Weinstein (Litigation Guardian of)*, (1997), 19 E.T.R. (2d) 52 (Ont. Gen. Div.) at para. 14.

[15] In the recent case of *Rasouli (Litigation Guardian of)* v. *Sunnybrook Health Sciences Centre*, 2013 CarswellOnt 14113 (S.C.C.) at para. 9, Mr. Rasouli's physicians cross-appealed to the Supreme Court of Canada for a declaration that Mr. Rasouli was in a permanent vegetative state.

The interest conferred by a will before the death of the testator

It is sometimes said that the named beneficiary in the will of a living person receives no rights whatsoever – until the testator dies, he or she holds only a *spes successionis*, a mere expectancy.[16] However, where the testator has lost the mental capacity to change his or her will, the beneficiaries are said to hold "an interest."[17] For example, in *Weinstein* v. *Weinstein (Litigation Guardian of)*, the testatrix lost testamentary capacity as a result of her advanced Alzheimer's disease. The court reasoned as follows:

> "[T]he fact that Betty Weinstein did not have the mental competence to change her will meant that the second (and last) codicil to her will, in which she divided the residue among her five grandchildren, in practical terms conferred on them what amounted to a vested interest. The grandchildren's entitlement was not a mere hope of succession. The result of Betty becoming afflicted by Alzheimer's disease was that the entitlement of her grandchildren was the same as if they were entitled to a remainder interest after life interests."[18]

The significance of this interest seems to vary with the context. In the *Weinstein* case, it meant that the named beneficiaries ought to have been given notice of an application to appoint a litigation guardian and equalize net family property.[19] In *Nystrom* v. *Nystrom*, which followed *Weinstein*, the interest meant that the named beneficiary had standing to apply for a declaration that the incapable person was without capacity or was subject to undue influence or pressure when she executed a Royal Bank investment account application.[20]

The *Weinstein* and *Nystrom* cases are not just examples of circumstances where the court will treat the will of an incapable person as permanent. They also cast their own shade of doubt upon the waste paper rule. If the will of an incapable person confers "an interest," it is arguable that it should not be immune to challenge while the testator is still alive.

The will as evidence in pre-death litigation

If the will is an important piece of evidence, should the court not determine its validity prior to the death of the testator? This was the problem faced by the Manitoba Court of Appeal in *Perzan* v. *Struk*.[21] The case did not involve a will challenge, but was instead the Manitoban equivalent of a contested guardianship application.[22] Jeremy Perzan, the grandson of the incapable Mildred Struk, had sworn an affidavit in support of his application in which he attached the last will and testament of Mrs. Struk at Exhibit "B". The document named Jeremy as the executor and sole beneficiary of Mrs. Struk's estate.[23] Not surprisingly, Jeremy argued that Exhibit "B" was

[16] *Kidd* v. *Canada Life Assurance Co*., 2010 CarswellOnt 911 (S.C.) at para. 48, citing *Wolfson Estate* v. *Wolfson* (2005), 22 E.T.R. (3d) 255 (Ont. S.C.J.) at paras. 29-32; *Del Grande (Litigation Guardian of)* v. *Sebastian* (1999), 27 E.T.R. (2d) 295 (Ont. S.C.J.) at para. 16.
[17] *Kidd* v. *Canada Life Assurance Co*., 2010 CarswellOnt 911 (S.C.) at para. 49.
[18] *Weinstein* v. *Weinstein (Litigation Guardian of)*, (1997), 19 E.T.R. (2d) 52 (Ont. Gen. Div.) at para. 12.
[19] *Weinstein* v. *Weinstein (Litigation Guardian of)*, (1997), 19 E.T.R. (2d) 52 (Ont. Gen. Div.) at para. 14.
[20] *Nystrom* v. *Nystrom* (2006), 25 E.T.R. (3d) 297 (Ont. S.C.J.) at paras. 17-19.
[21] *Perzan* v. *Struk*, 2006 CarswellMan 86 (C.A.).
[22] Competing applications to be appointed as committee of the property and personal care of Mildred Ina Struk.
[23] *Perzan* v. *Struk*, 2006 CarswellMan 86 (C.A.) at para. 8.

relevant and admissible. His mother Yvonne Perzan, who was the competing applicant, argued that Exhibit "B" was just a piece of waste paper and therefore inadmissible.[24]

The Manitoba Court of Appeal started with the well-loved quote of Lord Chancellor Hardwicke, then reviewed a number of cases including *Andruchow*. In the end, the court arrived at two conclusions. First:

> "There is, in my opinion, no general rule that the will of a person who is still alive cannot, under any circumstances, be tendered as an exhibit in a legal proceeding. The cases from which such a principle might be drawn simply make the obvious point that such a document gives rise to no legal rights for any named beneficiary or executor."[25]

But then, second:

> "Turning to the present dispute, I think the will should be excluded. In this case, if the will remains as an exhibit, there is a very real danger that the committeeship hearing will be diverted into a hearing to establish the validity of the will. I have remarked that the will is likely of tenuous relevance to the issue of whether Jeremy Perzan or Yvonne Perzan should be appointed Committee (or whether the Public Trustee should continue in that function). Its probative value at this stage is virtually nil."[26]

Although the will was not admitted in *Perzan*, the Manitoba Court of Appeal was quite clear that it could have been admitted on different facts.[27] That being the case, it seems likely that a will challenge could erupt in this context.

The obligation of a guardian to ascertain whether or not the will is valid

The provisions of a person's last will and testament are an important concern in the context of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (the "SDA"). Under section 33.1 of the SDA, a guardian of property must make reasonable efforts to determine whether or not the incapable person has a will and, if so, what the will contains.[28] Subsection 35.1(1) then requires the guardian of property not to dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will.[29] (Notice that sections 33.1 and 35.1 apply with necessary modifications to an attorney under a continuing power of attorney.[30])

[24] *Perzan* v. *Struk*, 2006 CarswellMan 86 (C.A.) at para. 15.
[25] *Perzan* v. *Struk*, 2006 CarswellMan 86 (C.A.) at para. 34.
[26] *Perzan* v. *Struk*, 2006 CarswellMan 86 (C.A.) at para. 36.
[27] The court cited *Petrykanyn* v. *Shwaluk* (1996), 108 Man. R. (2d) 65 (Man. Q.B.), *Del Grande (Litigation Guardian of)* v. *Sebastian* (1999), 27 E.T.R. (2d) 295 (Ont. S.C.J.) and *Todosichuk* v. *Daviduik Estate*, 2004 MBCA 191 (Man. C.A.) as examples of cases where wills were apparently admitted into evidence without much discussion.
[28] Section 33.2(2) makes clear that the guardian of property is entitled to have the incapable person's will.
[29] Provided that the gift is authorized by section 37. Despite subsection 35.1(1), subparagraph 35.1(3)(b) permits the guardian to make a gift of property from the incapable person to a person who would be entitled to it under the will.
[30] Section 38.

In *Weinstein*, the court wrote that section 33.1 of the SDA:

> "… can be construed as indicative of the importance the legislators attach, appropriately, to the will of an incapable person, in view of the permanent character of the will if the incapable person does not regain capacity."[31]

As the guardian has a fiduciary (and arguably ethical) obligation to comply with sections 33.1 and 35.1, the guardian must know if the document purporting to be the last will and testament is valid. Would a court truly refuse to adjudicate upon the validity of the will in this context? If so, it could put the guardian into a quagmire.

Ethical issues for further study

The lawyer who acts for a guardian or attorney under a power of attorney may be faced with a variety of ethical issues. This is because the clients in these situations often have mixed motives. For instance, what if:

(a) The goal of the guardian in ascertaining the validity of a will of the incapable person is to determine what assets have been bequeathed to others and to manage the property so as to maximize the guardian's own inheritance? For instance, if the incapable person owns House A and House B, and the will bequeaths House A to the guardian and House B to the sibling, the guardian may choose to renovate House A and/or liquidate House B.[32]

(b) The goal of the guardian in ascertaining the validity of a will of the incapable person is not to comply with section 35.1 of the SDA, but merely to determine his or her inheritance and receive a gift under subsection 35.1(3)? As described above, subsection 35.1(1) requires the guardian of property not to dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will. Subsection 35.1(3) permits the guardian to make a gift of property to the person who would be entitled to it under the will.

Is it unethical for the lawyer to implement a strategy where, as in the examples above, the attorney is only acting for personal gain? Does the lawyer owe any kind of duty toward the incapable person or to disappointed beneficiaries if determining the validity of a will permits the attorney to act on an inappropriate course of action?[33]

[31] *Weinstein* v. *Weinstein (Litigation Guardian of)*, (1997), 19 E.T.R. (2d) 52 (Ont. Gen. Div.) at para. 18.

[32] The sibling should be aware of section 36 of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, which provides that the doctrine of ademption does not apply to property that is the subject of a specific testamentary gift and that a guardian disposes of under the legislation. The anti-ademption provision gives the sibling a corresponding right in the proceeds of the disposition of the property out of the residue. This may be cold comfort if the guardian has spent the residue in caring for the incapable person.

[33] For an in-depth look at ethical issues in estates and capacity litigation, see M. O'Sullivan, "Integrity in Estates Practice" available at: http://www.lsuc.on.ca/media/osullivanintegrityestatespracticecombined.pdf

The tort of intentional interference with inheritance rights

At the end of this list of considerations is the tort of intentional interference with inheritance rights. In the United States, the tort is codified as follows by the *Restatement of the Law (2nd) Torts*:

> "One who by fraud or other tortious means intentionally prevents another from receiving from a third person an inheritance or gifts that he would otherwise have received is subject to liability to others for the loss of the inheritance or gift."[34]

The tort was made infamous by the litigation surrounding the Marshall Estate, which somehow made its way to the Supreme Court of the United States twice.[35] One of the parties in that litigation was Vickie Lynn Marshall, better known as Anna Nicole Smith, the actress and 1993 Playmate of the Year. In 1991, Vickie was performing at a Houston strip club called Gigi's, where she caught the eye of the 89-year-old oil tycoon J. Howard Marshall II.[36] The couple married and Howard promised Vickie the growth of his assets during the time of their marriage. Shortly before Howard's death in 1995, Vickie filed a lawsuit against his son Pierce Marshall in a Texas state court for tortious interference with her inheritance rights.[37] The litigation became extremely convoluted, but the law of tortious interference with inheritance rights was clearly delineated in the judgment of the U.S. Court of Appeals for the Ninth Circuit in 2009 *In re Marshall*:

> "[A] plaintiff must prove (1) the existence of an expectancy, (2) a reasonable certainty that the expectancy would have been realized but for the interference, (3) intentional interference with that expectancy, (4) tortious conduct involved with the interference, and (5) damages."[38]

Significantly, the plaintiff need not wait until the death of the testator to pursue the claim.

The tort has been pleaded in Ontario, albeit so far unsuccessfully. In *Dryden* v. *Dryden*, the plaintiff George was disinherited by his uncle, who had set up a trust to benefit George's mother, younger brother and father. George pleaded the tort of interference with inheritance rights alongside the tort of interference with economic relations. The defendants moved under Rule 21.01(1)(b) to have the claim struck on the basis that it: (a) did not exist in law, (b) had no application to the facts pleaded, or (c) would be properly asserted in another existing proceeding or form of proceeding.[39] The court dealt with both the interference with inheritance rights tort and the interference with economic relations tort in the same breath:

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[34] *Restatement of the Law (2nd) Torts* §774 (B) (1979)
[35] *Marshall* v. *Marshall*, 547 U.S. 293; 126 S. Ct. 1735 (2006); and *Marshall* v. *Marshall*, 564 U.S. (2011)
[36] http://en.wikipedia.org/wiki/Anna_Nicole_Smith
[37] *Marshall* v. *Marshall*, 564 U.S. (2011), p. 3. Pierce filed a complaint in a related bankruptcy proceeding in the Central District of California, saying that Vickie had defamed him.
[38] *In re Marshall*, p. 11. See also Gaslowitz Frankel LLC, "Tortious interference with expectancy: a new solution to an age old problem?" (Atlanta Bar Association, Estate Planning Section Breakfast, August, 1999) http://www.gaslowitzfrankel.com/news/tortious-interference-with-expectancy-a-new-solution-to-an-age-old-problem/
[39] *Dryden v. Dryden* (2012), 210 A.C.W.S. (3d) 174 (Ont. S.C.) at para. 6.

> "George's pleadings are insufficient to form the basis of this tort. While George alleges being disadvantaged with respect to family inheritances as a result of Mr. Dryden's domineering conduct, he pleads no facts to support a business relationship with Mr. Dryden. I agree with Mr. Dryden's submission that being disinherited from family wealth does not constitute interference in business relations or livelihood. Further, George does not allege that Mr. Dryden engaged in unlawful conduct toward a third party that could give rise to an action by that third party against Mr. Dryden. Moreover, there are no facts pleaded as to the precise economic injury he sustained. He in fact admits in the pleadings 'to living a normal and productive life.'"[40]

The tort of interference with inheritance rights was also pleaded in *Catford v. Catford*, but was dismissed on a motion for summary judgment due to lack of evidence.[41]

The longest sustained discussion of the tort of interference with inheritance rights in Ontario appears in the decision of Master Haberman in *Settecase* v. *Settecase*.[42] The case began with a claim for breach of contract and unjust enrichment by Agostino Settecase against his mother Agata Settecase. After commencing his claim, Agostino discovered that his mother had purportedly made a new will in 2008, reducing his inheritance to a $10,000 bequest. Agostino brought a motion to amend his claim to include the tort of interference with inheritance rights. The motion was denied on the basis that the proposed new pleading was statute-barred[43] and lacking in particularity.[44] On the subject of the tort itself, Master Haberman wrote:

> "In view of my other findings I am not required to decide this issue but I point out that as a result of the other problems with this aspect of the proposed claim that I raise in these reasons, this is certainly not the case for introduction of such a novel approach in Ontario."[45]

This would appear to leave the door open for an Ontario court to adopt the tort of interference with inheritance rights.

Gironda v. *Gironda*

Gironda v. *Gironda* is the only case the writers could find where an Ontario court has entertained a full-blown will challenge during the lifetime of the testatrix.[46] Caterina Gironda was 92 years old at the time of trial. Her sons Frank and John Gironda were challenging her will, her powers of attorney and certain *inter vivos* transfers of her property. They were also seeking a declaration that she was incapable, as well as an order appointing them as her guardians. Their younger brother Vito Gironda opposed the relief.

[40] *Dryden* v. *Dryden* (2012), 210 A.C.W.S. (3d) 174 (Ont. S.C.) at para. 51.
[41] *Catford* v. *Catford*, 2012 CarswellOnt 12177 (Ont. S.C.).
[42] *Settecase* v. *Settecase*, 2014 CarswellOnt 529 (Master).
[43] *Settecase* v. *Settecase*, 2014 CarswellOnt 529 (Master) at paras. 94-96.
[44] *Settecase* v. *Settecase*, 2014 CarswellOnt 529 (Master) at para. 99.
[45] *Settecase* v. *Settecase*, 2014 CarswellOnt 529 (Master) at para. 107.
[46] *Gironda* v. *Gironda*, 2013 CarswellOnt 8612 (S.C.)

The judgment of Mr. Justice Michael Penny does not address the waste paper rule. His Honour simply wrote at paragraph 49 of the decision that: "The validity of this will is in issue." This was accompanied by a footnote stating: "The issue is not moot because, as discussed later in these reasons, Caterina does not and it unlikely ever to have current capacity to make or change a will."[47] This sparse treatment might lead one to think that the issues surrounding a pre-death will challenge were not before the court, and that Justice Penny made his decision in a jurisprudential vacuum. In fact, these issues were explored in argument at trial.[48]

In *Gironda*, counsel for Frank and John Gironda made the following argument:

> "Under the SDA, the guardians of property need to know which is the proper will to manage the property of the deceased. Under section 33.1 of the SDA, a guardian of property shall make reasonable efforts to determine,
>
> (a) whether the incapable person has a will; and
> (b) if the incapable person has a will, what the provisions of the will are.
>
> The reason this is necessary is because under section 35.1(1), a guardian of property shall not dispose of property that the guardian knows is subject to a specific testamentary gift in the incapable person's will."[49]

It is not known whether Justice Penny found this argument persuasive or not. What is known is that the court adjudicated upon the validity of the will while Caterina was still alive. When combined with the other cases cited herein, *Gironda* makes it appear as if the waste paper rule is losing ground. Perhaps one day it will end up in the waste paper bin.

[47] *Gironda* v. *Gironda*, 2013 CarswellOnt 8612 (S.C.) at para. 49 and footnote 1.
[48] The book of authorities of the applicants contained *Catford*, *Nystrom*, *Weinstein* and even the U.S. case *In re Marshall*.
[49] Applicants' Amended Memorandum of Legal Argument at para. 54.

Limitation period issues

If Ontario begins to see more pre-death will challenges, there will likely be some interesting questions for our courts to address. In particular, does the limitation period start to run if a person knows or ought to known about a questionable will while the incapable person is alive?

In the recent case of *Leibel* v. *Leibel*, Justice Greer held that a post-death will challenge was barred by the *Limitations Act, 2002*.[50] She observed, *inter alia*, that two years before commencing his claim, the claimant:

(a) knew that the testatrix had brain cancer;
(b) knew that the testatrix had died;
(c) had a sense of the value of the estate;
(d) had communicated with a lawyer about his concerns; and
(e) had a copy of the impugned wills.[51]

Based on *Leibel*, it is arguable that the limitation period for a pre-death will challenge could begin once the claimant:

(a) knows or ought to know the basis for the will challenge, *e.g.*, brain cancer affecting the testator's capacity at the time the will was executed;
(b) knows or ought to know that the testator has become permanently incapable of executing another will;
(c) has a sense of the value of the estate; and
(d) has a copy of the impugned will.

[50] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, s. 4.
[51] *Leibel* v. *Leibel*, 2014 ONSC 4516 (CanLII) at para. 39.

APPENDIX "A"

Duke of Marlborough v. *Lord Godolphin*, [1750] 28 All E.R. 41 (H.L.)

S.A. (Dependent Adult) v. *M.S.*, 2005 ABQB 549 (CanLII)

Schroeder, Re (1965), 8 C.B.R. (N.S.) 156 (Ont. S.C.)

Re Jenset, 1986 CanLII 2574 (S.C. Bankruptcy)

Minister of National Revenue v. *J. Colford Contracting Co.*, [1960] Ex. C.R. 433 (Can. Ex. Ct.)

Weinstein v. *Weinstein (Litigation Guardian of)*, (1997), 19 E.T.R. (2d) 52 (Ont. Gen. Div.)

Rasouli (Litigation Guardian of) v. *Sunnybrook Health Sciences Centre*, 2013 CarswellOnt 14113 (S.C.C.)

Kidd v. *Canada Life Assurance Co*., 2010 CarswellOnt 911 (S.C.)

Wolfson Estate v. *Wolfson* (2005), 22 E.T.R. (3d) 255 (Ont. S.C.J.)

Del Grande (Litigation Guardian of) v. *Sebastian* (1999), 27 E.T.R. (2d) 295 (Ont. S.C.J.)

Nystrom v. *Nystrom* (2006), 25 E.T.R. (3d) 297 (Ont. S.C.J.)

Perzan v. *Struk*, 2006 CarswellMan 86 (C.A.)

Petrykanyn v. *Shwaluk* (1996), 108 Man. R. (2d) 65 (Man. Q.B.)

Del Grande (Litigation Guardian of) v. *Sebastian* (1999), 27 E.T.R. (2d) 295 (Ont. S.C.J.)

Todosichuk v. *Daviduik Estate*, 2004 MBCA 191 (Man. C.A.)

Marshall v. *Marshall*, 547 U.S. 293; 126 S. Ct. 1735 (2006)

Marshall v. *Marshall*, 564 U.S. (2011)

Dryden v. Dryden (2012), 210 A.C.W.S. (3d) 174 (Ont. S.C.)

Catford v. *Catford*, 2012 CarswellOnt 12177 (Ont. S.C.)

Settecase v. *Settecase*, 2014 CarswellOnt 529 (Master)

Gironda v. *Gironda*, 2013 CarswellOnt 8612 (S.C.)

Leibel v. *Leibel*, 2014 ONSC 4516 (CanLII)