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Phone: (800) 668-6481 | Fax: (905) 479-3758 | John.Carson@lexisnexis.ca

Wills, Trusts & Estates

The Sherman estate case reaches the Supreme Court: Part two

By **James Dunphy**

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(October 16, 2020, 8:55 AM EDT) -- On Oct. 6, 2020, the case of *Donovan v. Sherman Estate* 2019 ONCA 376 reached the Supreme Court of Canada where arguments were heard on whether or not to unseal the probate applications. In this, the second article in a two-part series, I will continue the discussion of select cases dealing with sealing orders in estates and trusts context.

In *Doe Estate, Re* 2003 ABQB 793, the testator's death had attracted significant media attention. The beneficiary was mentally handicapped, unable to manage his financial affairs and the estate was large. The personal representative's application for an order sealing the probate file was granted. The court found that the order was necessary to prevent a serious risk to the proper administration of justice. It was found that various people might try to take advantage of the beneficiary if the facts were known, and that a publication ban would be ineffective because the probate file would still be available to the public. In balancing the rights of the parties, the court stated at para. 8: "This probate matter is quintessentially a private law matter that does not affect the public in any tangible way, whereas the salutary benefits of a sealing order for Mr. Doe are significant."

The Sherman litigation, and previous cases, have highlighted that where harm to an individual is perceived and a sealing order sought on that basis, evidence of the perceived threat must be provided. In *J.B. Trust (Trustees of) v. B. (J.) (Litigation Guardian of)* 2009, 97 O.R. (3d) 544, the applicant mother's two sons received money from a compensation fund after their father was killed in the terrorist attack on the World Trade Center. A 2006 court order directed that the money be placed in two trusts, that the trustees pass their accounts every three years, that the proceeding be treated as confidential and that the court file be sealed and not form part of the public record. On the trustees' application for a first passing of accounts, they sought an order to seal the court file and to treat the pending application and all future proceedings to pass accounts as confidential. The motion was dismissed.

The trustees contended that there was financial or other harm to the boys taking into account the sizeable amounts awarded to them, but the evidence was not persuasive that there was either an important interest to protect or a risk of serious harm to that interest. The courts stated at para. 15: "As to any risk of serious harm to the financial interests of these minors, the evidence does not offer any details about what sort of harm might occur should a sealing order not be granted. Given that the trustees control the assets in the trust, I have some difficulty envisaging the nature of the harm that might occur."

The court held that the risk of publicity to the minor children could be dealt with by permitting the style of cause, any affidavit materials, and any accounts filed on the proposed application to pass accounts to use the initials of the trustees, the trusts, and the two minors instead of their full legal names.

In *Foss v. Foss* 2013 ONSC 1345, the plaintiff applied to be appointed as the guardian for the person and property of her father. She successfully brought a motion to have the court file sealed. The order was not opposed by the other parties in proceeding. Justice Paul Perell viewed the order to be

appropriate in the circumstances as the proceedings put in issue the subject's medical history and mental capacity as well as his personal financial circumstances. The court held that the proceeding would disclose commercially sensitive records of various businesses in which the subject had an interest.

Conclusion

Counsel should be aware that the courts will interfere with public accessibility to court records only with the greatest reluctance. The task is no less challenging where all parties agree to the sealing order. The consent of the parties is not, and has never been, a proper consideration in such an application: see *Scott v. Scott* [1913] A.C. 417 at p. 436 (H.L.). Counsel should be prepared to state why a sealing order is required in the public interest and why no lesser protective measure would be appropriate. When such an order is sought *ex parte*, the court will be especially protective of the open court principle. Whether the sealing orders will be reinstated over the Sherman probate applications remains to be seen.

This is the second of a two-part series. Read the first article: The Sherman Estate case reaches the Supreme Court: Part one.

James Dunphy is a member of Wagner Sidlofsky LLP's *estate and commercial litigation groups.*

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