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TRUSTS AND ESTATES LAW

Administration of Estates: Who has an interest in an intestacy and How Do You Prove It?

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Administration of Estates: Who has an interest in an intestacy and how do you prove it

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Introduction

Imagine finding out that you had a distant unknown relative who died and as a result you inherit a significant amount. It happens more often than you would think. Years ago, a man died intestate. In searching for information about the deceased's life and family, the estate trustee sought a copy of the deceased's military enrolment papers. The package received included, to everyone's surprise, a 1945 military will, which is mandatory for all recruits. This appeared to be the only will that the deceased ever executed, and he had remained single all his life so there was no evidence of any deliberate or statutory revocation. The named beneficiary was his then fiancée but they had never married. She was found to be still alive, married, living in British Columbia. She was delighted to inherit over $600,000.

I spent over 20 years as an Estates Counsel at the OPGT, where windfall stories were a common occurrence. With an average of over 200 new estates per year, most of them intestacies, I have had the opportunity to handle some very unusual situations and family formations which allowed me to delve into rather esoteric corners of estates administration.

While there are numerous complexities in dealing with an intestacy generally, this paper focusses on two aspects: (a) who can apply to administer an estate and (b) who are the legal heirs to an estate. The answers to these two questions are distinct. Lawyers need to be aware of the potential pitfalls and consequences of dying intestate, and also to manage client expectations about reasonable timelines to complete the legal requirements. This paper will address some common concerns and odd quirks.

This paper focuses strictly on the law of Ontario. The rules on intestate distribution can and do vary significantly from one province to the next.

I also need to draw your attention to the recent passage of the *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016 SO c 23 (hereinafter *AFAE Act*). Bill 28 received Royal Assent on December 5, 2016 and many if not most of its provisions were proclaimed into force as of January 1, 2017. The Act repeals or amends a number of definitions in, amongst other a long list of statutes, the *Children's Law Reform Act,* the *Child and Family Services Act* and the *Succession Law Reform Act*. Most of these changes attempt to address the issues affecting children born via assisted reproduction, and to same sex families. Terms such as "father" and "mother" have been replaced by the gender neutral "parent." The changes are vast and certainly deserving of a separate, detailed presentation. In the SLRA, the definitions of "child", "issue", "parent", "spouse" have been changed and may now include descendants and relatives conceived and born alive after the death of the deceased.

I have attempted to keep the changes in mind in relevant parts of this paper and I apologize if not all the references have been updated accordingly.

A. APPLICATIONS FOR A CERTIFICATE OF APPOINTMENT AS ESTATE TRUSTEE IN AN INTESTACY

1. Entitlement to apply – general[2]

In order to administer an intestate estate, an applicant must apply to the Court to for a Certificate of Appointment of Estate Trustee, which is governed by sections 5 and 29 of the *Estates Act.*[3] These provisions outline the conditions required of an applicant to administer an estate in Ontario. First, the applicant must be a resident of Ontario.[4] Second, the applicant must be listed in or a nominee of someone in the hierarchy outlined in section 29 of the *Estates Act*.[5] Estate administrators are also usually required to give a bond to the Court, to prevent fraud in the administration of the estate.

Priority in an application is normally given to the surviving spouse or the person with whom the deceased was living in a conjugal relationship.[6] However, the common law spouse is not an heir to the estate, and will be expected to administer the estate on behalf of and for the benefit of the legal heirs, which are usually the children of the deceased. Counsel should clearly advise a common law spouse of their legal obligation. He or she cannot simply take the estate. If the appointment of a common law spouse would be a conflict of interest with his or her duty to

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[2] For more information on the documents required to accompany an application and on the procedures of the Courts staff on applications generally, please refer to the *Estates Procedures Manual* produced by the Ministry of the Attorney General. It is available upon request by emailing: CSDmanual@ontario.ca.
[3] *Estates Act*, RSO, 1990, c E 21.
[4] *Ibid*, s 5.
[5] *Ibid*, s 29.
[6] *Ibid*, s 29(1)(a). This paper does not address the topic of who will be recognized as a common law spouse.

administer the estate,[7] (i.e. using estate funds to assist their own financial support or that of the children of the deceased), then the Court can decide against appointing a common law spouse as an estate administrator, and canvass other potential estate trustees.

If the deceased did not have a surviving legal or common law spouse or that person is considered to be unsuitable, the Court has the authority to consider an application by other persons. The hierarchy of applicants in this group are determined in accordance with the rules of entitlement of intestate succession.[8] In brief, this would be the deceased's children and later lineal descendants. Next would be parents, siblings, and grandparents followed by more distant relatives.

If someone further down the chain of hierarchy is applying, the Court will look for renunciation forms and/or consent forms as appropriate from those with a prior right to administer, pursuant to the *Rules of Civil Procedure*.[9] Applicants must also submit an affidavit with an appropriate explanation. Individuals who do not reside in Ontario and have a higher or equal right to inherit as the applicant, are not required to sign a renunciation form. If they have not signed a consent to the application, an explanation should be provided.

Finally, a trust company or a creditor of the deceased, or a nominee of a creditor may apply to be appointed, pursuant to section 29(3) of the *Estates Act*.[10] Like all estate administrators, the

[7] Objections to the appointment of a common law spouse can be raised by the deceased's relatives or by the Office of the Children's Lawyer.
[8] *Succession Law Reform Act*, RSO, 1990, c S 26, s 44 to 49.
[9] *Rules of Civil Procedure*, RRO,1990, Reg 194.
[10] *Supra* note 3 at 29(3).

creditor will be expected to administer on behalf of all the deceased's creditors and is also accountable to the legal heirs.

Ultimately, the Court has full discretion in deciding who is the appropriate estate trustee in the event of a challenge.

2. Role of the Public Guardian and Trustee and Notices under s. 3(1) of the *Crown Administration of Estates Act*

The Public Guardian and Trustee's authority to apply for a Certificate of Appointment of Estate Trustee ("CAET") is found in section 1 of the *Crown Administration of Estates Act.*[11] The Public Guardian and Trustee ("PGT") *may* apply for a certificate if the following conditions are met:[12]

1. The person dies in Ontario, or is a resident of Ontario but dies elsewhere.
2. The person dies intestate as to some or all of his or her property, or dies leaving a Will without naming an executor or estate trustee who is willing and able to administer the estate.
3. There are no known next of kin who are residents of Ontario and are willing and able to administer the estate, or the only known next of kin are minors and there is no other near relative who is a resident of Ontario and is willing and able to administer the estate or to nominate another person to do so.

The PGT has discretion in deciding whether or not to intervene in the administration of an estate. The PGT's office will first investigate an estate to confirm that they are the "last resort" administrator. Furthermore, the PGT also investigates the adequacy of the assets. This requires

[11] *Crown Administration of Estates Act*, RSO, 1990, c C 47.
[12] *Ibid*, s 1.

analyzing if the estate can pay for the expenses of administration and there are assets worth safeguarding for the benefit of the eventual legal heirs.[13]

The PGT will not administer insolvent estates, and currently will only agree to administer estates with assets with a confirmed minimum value of $10,000 net of liabilities (including funeral expenses).

Pursuant to subsection 7(1.1) of the *Public Guardian and Trustee Act*[14] the consent of the PGT is required, either by way of submitting an application for a CAET or expressly, e.g. in a proceeding. The requirement for the consent of the PGT has stood the test of time. In a recent 2016 decision, the Ontario Superior Court affirmed that consent is required and the PGT cannot be compelled to act as an estate trustee.[15]

The overarching combined effect of the *Estates Act* and the *Crown Administration of Estates Act* is that absent any consents from the appropriate entitled persons, or of the "special circumstances" set out in section 29(3) of the *Estates Act*¸ the PGT is the only entity with the legal authority to apply to administer the intestate estates of deceased persons in Ontario who have no competent adult next of kin in Ontario.

In order to protect vulnerable estates from potential abuse by unauthorized persons, the courts are required to send a notice to the PGT of every application for the estate "of a person who had

[13] Office of The Public Guardian and Trustee, Ministry of the Attorney General, *Estates Administration: The Role of the Public Guardian and Trustee* (Toronto: Queen's Printer, 2006.)
[14] *Public Guardian and Trustee Act,* RSO, 1990, c P 51.
[15] *Potrzebowski v. Potrzebowski Estate*, 2016 ONSC 6981

died in Ontario intestate and without leaving any known adult next of kin living in Ontario."[16] This includes cases where the heirs are minor children and the applicant is the deceased's common law spouse. This notice is sent by court staff to the Team Leader, Estates at the PGT. Within 30 days of receipt of notice the PGT may either apply for appointment as estate trustee without a Will, or send a letter consenting to the applicant's appointment as estate trustee without a Will. The application must be held pending a response from the Public Guardian and Trustee.

Rarely will the PGT mandate taking over the administration of an estate; however in some cases, it is necessary. Examples from my experience include:

- When the person applying is unaware that they are not entitled to inherit (the most common scenario);
- When the applicant has a financial interest which is in conflict with the heirs;
- When the estate would appear to require considerable genealogical or tracking searches and the applicant and their counsel have little or no experience in such matters, thus increasing the risk of unnecessary expenses or poor quality work;
- where the estate is likely to escheat and the applicant may apply for relief from forfeiture.

In the case of creditors applying to administer an estate, and there are no identified heirs with the authority to scrutinize their accounts, the PGT may request an undertaking to report after a year or so.

B. THE LEGAL HEIRS ON INTESTACY

In an intestate succession, the hierarchy of entitlement of the legal heirs is set out in sections 44 to 47 of the *Succession Law Reform Act (SLRA)*.[17] The final net value of the estate may be reduced

[16] *Supra* note 12 at s 3.
[17] *Supra*, note 8 at s 44-47.

by dependent relief claims under sections 57 and following of the *SLRA*, which are available to a different group of persons: a sibling, parent, grandparent, child or grandchild, legal or common law spouse of the deceased, or a person in a demonstrated settled intention to be treated as a child or parent of the deceased.

1. Priority of a spouse

A married spouse of an intestate has the right to elect in favour of an equalization payment under the *Family Law Act*[18] rather than as an heir to the estate. That is another topic that I'm not addressing in this paper, and there are considerable resources available to counsel on the relevant considerations to such an election.

Ontario succession law provides a significant benefit to a surviving spouse, and this is often an unwelcome surprise to children of a first marriage. Where the deceased had a spouse but no issue surviving, the spouse will inherit the entire estate.[19] This is different from other jurisdictions, especially those founded on civil law, where the rules governing succession favour blood relatives of the deceased.

Where there is a spouse and a surviving issue, the spouse will take the entire estate absolutely if the estate's net value[20] is below the preferential share, up to $200,000 for persons who died after April 1995.[21] The preferential share is adjusted in the event of a partial intestacy.[22]

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[18] *Family Law Act*, RSO 1990 c F 3, s 5.
[19] *Supra* note 8 at s 44.
[20] "Net value" means the value of the property after payment of the charges thereon and the debts, funeral expenses and expenses of administration
[21] *Ibid*, s 45.
[22] *Ibid*, s 45(3)(a).

A spouse may receive more than the preferential share, if the estate exceeds their preferential share and there is surviving issue of the deceased.[23] Where the intestate had a spouse and one child, the spouse is entitled to one-half of the residue after payment of the preferential share. If there are two or more children surviving the deceased intestate, the spouse is entitled to one-third of the residue after the payment of the preferential share and the children split the remainder.

2. Who is a spouse pursuant to the SLRA?

Since the coming into force of the *AFAE Act,* the definition of 'spouse' in the *SLRA* refers simply to the meaning provided in section 1 of the *Family Law Act,* that is to "two persons who are (a) married to each other, or (b) have together entered into a marriage that is voidable or void, in good faith on the part of the person relying on this clause to assert any right."[24] This is similar but not identical to the old definition in the *SLRA.* Subs. 1(2) of the *FLA* includes same-sex married spouses and also incorporates the reference to polygamous marriage as it stood in the *SLRA*.

It does not include common law spouses who are excluded from consideration for purposes of inheritance but may claim dependent support.[25]

In Ontario, spouses who are separated from each other, regardless of the length of the separation, are still deemed to be spouses of each other for purposes of the rights to administer

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[23] *Ibid*, s 46.
[24] *Ibid*, s 1; *Supra* ,note 18.
[25] Common law spouses are included in the definition of "a spouse" under s 57 of the *SLRA* for the purposes of dependent support. Note that s. 57 now references the definition of s.29 of the *FLA.*

a spouse's estate or to the right to inherit from their estate. If the spouses have divorced, parties will no longer qualify as spouses of one another for purposes of intestate distribution.

The Application for a Certificate of Appointment of Estate Trustee without a Will requires yes or no answers to a number of detailed questions about the deceased's marital status, as part of the Applicant's sworn statement. From the perspective of the Court staff, these questions go primarily to ensure who is the deceased's spouse, and who is entitled to apply to be appointed as estate trustee without a Will. A fact situation with uncertainties will be referred to a judge for a determination. Of course the answers to these four questions also have an impact on the determination of who may be the deceased's legal heir(s). Counsel for the applicant is therefore well advised to obtain all the necessary details and documentation and provide it at the time of the Application.

In most cases, information should be available on a divorce obtained by the deceased, based on the family's knowledge of the deceased's history. If more information is required, The Central Divorce Registry in Ottawa will provide a reference number and court address where the details of a Canadian divorce can be obtained.[26] The organization will act on a search request from someone who was a party to the divorce, or with their consent or that of their substitute decision maker. Only information about divorces made after 1968 can be obtained.[27] Research about

[26] *The Central Registry of Divorce Proceedings,* Department of Justice, online: <http://www.justice.gc.ca/eng/fl-df/divorce/crdp-bead.html>.

[27] For a divorce proceeding filed in the Province of Ontario prior to 1968, contact the Archives of Ontario at 134 Ian Macdonald Boulevard, Toronto, ON M7A 2C5. For a divorce proceeding filed outside of the Province of Ontario before 1968, you may have a search conducted at the Senate of Canada, Room 1310, 40 Elgin St. Ottawa, ON K1A 0A4.

someone else's divorce requires some legal authority. In the case of a deceased person, the instructions for a search request require proof of authority – either a power of attorney or another form of legal authorization.

3. When does a spouse lose any rights to an estate?

a) Release in a Matrimonial Agreement

If the deceased was separated, a mutual waiver of each other's estate in a matrimonial agreement must be specific and clear, using "direct and cogent" language, in order to block inheritance rights. A general release of claims against assets will not suffice.[28] Absent such clear language, a separation agreement alone is also not sufficient to extinguish a spouses claim to an estate. Rather the Will should be updated and a clear waiver of any rights to the estate should be drafted.[29]

b) Murder

It is clearly established in common law, as a matter of public policy, that someone who has been convicted of causing the death of another is barred from benefiting from the death, either under a Will or on an intestacy.[30] A spouse who murdered their spouse is also denied the right to an equalization of net family property.[31]

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[28] *Re Saylor*, (1983), 36 RFL 92d 288, 15 ETR 253 (HC); *Brant* v. *Brant*, (1997) 16 ETR (2d) 134 (Ont Ct Gen Div).
[29] *Makarchuk v Makarchuk,* 2011 ONSC 4633.
[30] *Re Charlton* [1969] 1 OR 706, 3 DLR (3rd) 623 (CA); *Re* Dreger (1976), 12 OR (2d) 371; *Re Benson Estate* (1998), 29 ETR (2nd) 104.
[31] *Maljkovich* v. *Maljkovich Estate*, [1995] OJ No 4338 (QL) (Gen Div).

c) Other grounds

Other than the act of killing a spouse and a clear release of an interest, there are no other grounds that would cause a spouse to have lost their right to inherit from another**.**

Ontario' *Succession Law Reform Act* takes a clear "no fault" approach to inheritance rights, unlike the law in many other provinces and US jurisdictions. It was also a new direction from the statutes which it repealed, the *Devolution of Estates Act* and the *Dower Act*[32]*,* under which marital misconduct of a wife adversely affected her inheritance rights. Living common law with another person is no longer a bar to inheritance.[33]

It would appear that even an act of bigamy is not in itself sufficient to be considered a "gross repudiation of the marriage", and does not disentitle the surviving spouse's succession rights under the *SLRA.* In the case of *Fillion Estate* v. *Mouflier,*[34] the Manitoba Court of Appeal held that the public policy prohibition against profiting from one's crime would not prevent a bigamist from inheriting from her first (legal) husband as the benefit did not arise from her bigamous conduct.[35]

In Alberta, separation of more than two years will prevent any entitlement to a share of the deceased spouse's intestate estate. In addition, a surviving spouse will be treated as if he or she predeceased the intestate spouse if at the time of the intestate's death, certain types of

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[32]*Devolution of Estates Act,* RSO 1970, c 129 (as repealed by *The Succession Law Reform Act*, 1977, c 40)
[33] *Ingram* v. *Fenton*, (1987), 60 OR (2d) 73, 39 DLR (4th) 7.
[34] *Fillion Estate* v. *Mouflier,* (1995), 103 Man R (2d) 230; [1995] 7 WWR 371.
[35] The Court did opine that the argument could be raised in relation to an intestacy in the estate of her second "husband."

proceedings had been initiated or a final settlement of their affairs had been entered into. This is also the case in Manitoba and the North West Territories.

In Yukon, North West Territories, Nova Scotia, Prince Edward Island, and Saskatchewan, a conjugal or spousal relationship with another person will disqualify a spouse. While Quebec does not specifically identify separation or adultery as a reason to exclude a spouse from a succession, article 621 of the *Civil Code of Quebec*[36] states that a person may be declared unworthy of inheriting if that person behaved toward the deceased in a seriously reprehensible manner.[37]

d) Descendants, Ascendants and Collateral Heirs

As a general rule, "kinship" is established by blood or adoption. Other than the deceased's spouse, there are no other entitlements based on marriage. Thus step-children (children of the deceased's spouse) will not be in line unless they were formally adopted by the deceased. A niece or nephew must be a blood or adopted relative of the deceased, therefore an "in-law" does not meet the legal definition. It is often quite surprising that respected counsel have been known to get caught up in such an error. Lawyers must probe their client to specify parents' names, clarify the family relationships, disclose any adoptions, deceased family members and their issue. Drawing a family tree, is a prudent file-papering move. Kinship should never be assumed.

[36] *Civil Code of Québec*, art 621 CCQ.
[37] *Canadian estate administration guide*, CCH, 1994, at para 13,190.

No distinction is made in the shares of half-blood relatives. Subsection 47(8) of the *SLRA*[38] provides that "kindred of the half-blood shall inherit equally with those of the whole-blood in the same degree."

I should also point out that section 31 of the *SLRA*, often called the 'anti-lapse' provision, does not apply to intestacies.

4. Children and Issue

After the intestate's spouse, the law favours descendants of the intestate. Subject to the rights of a surviving spouse as set out in sections 45 and 46 of the *SLRA,*[39] and the *Family Law Act* election (sections 5-6) the balance in an intestacy will pass in its entirety to the deceased's issue. By operation of subsection 46(2), if all of the children of the intestate survived him/her, then they will take their share equally (per capita). Similarly, per subs 47(1) if all the children had predeceased and all the grandchildren had survived the intestate – they would all share equally. But by virtue of section 46(3) and sections 47(2), if a child of the deceased has predeceased leaving issue, the issue (grandchildren or great-grandchildren of the intestate) take the share of their predeceased parent. This principle of representation applies to further generations, such that if the intestate has outlived their spouse, children and grandchildren, any surviving great-grandchildren would take ahead of a collateral relative even if the latter is of a closer degree of kinship to the deceased.

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[38] *Supra,* note 8 at s 47(8).
[39] *Ibid*, at s 46-47.

5. Who is a child or issue of the deceased?

For purposes of intestate succession, the definitions of "child" and "issue" found in section 1 of the *SLRA* will apply. A "child" includes a child conceived before and born alive after the parent's death, but now pursuant to the *AFAE Act*, can also include a child conceived posthumously. The definition of "issue" has been similarly modified.

It is now well established that the effect of section 158 of the *Child and Family Services Act (CFSA)*[40] is to treat adopted children for all purposes as if they were born to the adoptive parent.[41] In Ontario, the adopted child's birth certificate will be changed to reflect the new parental link. Therefore adopted children will inherit from their adoptive parents on an intestacy. The parent-child relationship to the birth parent is severed by the adoption, and therefore an adopted child is no longer issue of their birth parent.[42] However care should be taken to ascertain whether the inheritance rights arose prior to or after the adoption. An adoption will not wipe out rights to an inheritance which had previously vested in the child. So, if a parent dies leaving an estate which is not administered until after the child is adopted by a new family, that child is still entitled to that inheritance because the child's rights had vested prior to the adoption.[43] Someone can also be adopted as an adult, with the commensurate effects on an estate.[44]

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[40] *Child and Family Services Act*, RSO, 1990, c C 11, s 158.

[41] Section 158(5) of the Child *and Family Services Act* provides that "any interest in property or right of the adopted child that has indefeasibly vested by an adoption order or before the 1st day of November 1985, is not adversely affected by the CFSA.

[42] *Trombley Estate* v. *Rachow*, [1988] OJ No 3014 (Ont SC).

[43] Supra note 42 at s 158(5).

[44] For more information about adult adoptions and its impact on inheritance, visit the blog article, *Adult Adoptions: a Method of Manipulating Inheritance Rights* by Natalie Rouse of ScotiaTrust, at www.allaboutestates.ca.

The *Children's Law Reform Act* has always provided for conditions by which someone can be presumed to have been the father of a child, "unless the contrary is proven on a balance of probabilities." This is now found in section 7(2) of the *CLRA.* The use of DNA or other evidence to rebut the presumption of parentage was restricted where one of the parties to such an application was deceased.[45] That restriction appears to now have been removed from the *CLRA,* according to my reading of the new section 13. But other conditions have been added that now take into account assisted reproduction and protect the child. It will be interesting to see the case law under these new provisions, for estate purposes.

The practical aspects of DNA testing, and how it can be obtained, are discussed below.

6. Parents and Siblings

If the deceased left no spouse or issue surviving, the estate will pass to the parents – equally if both survived or if only one survived, then to the surviving parent, absolutely.[46]

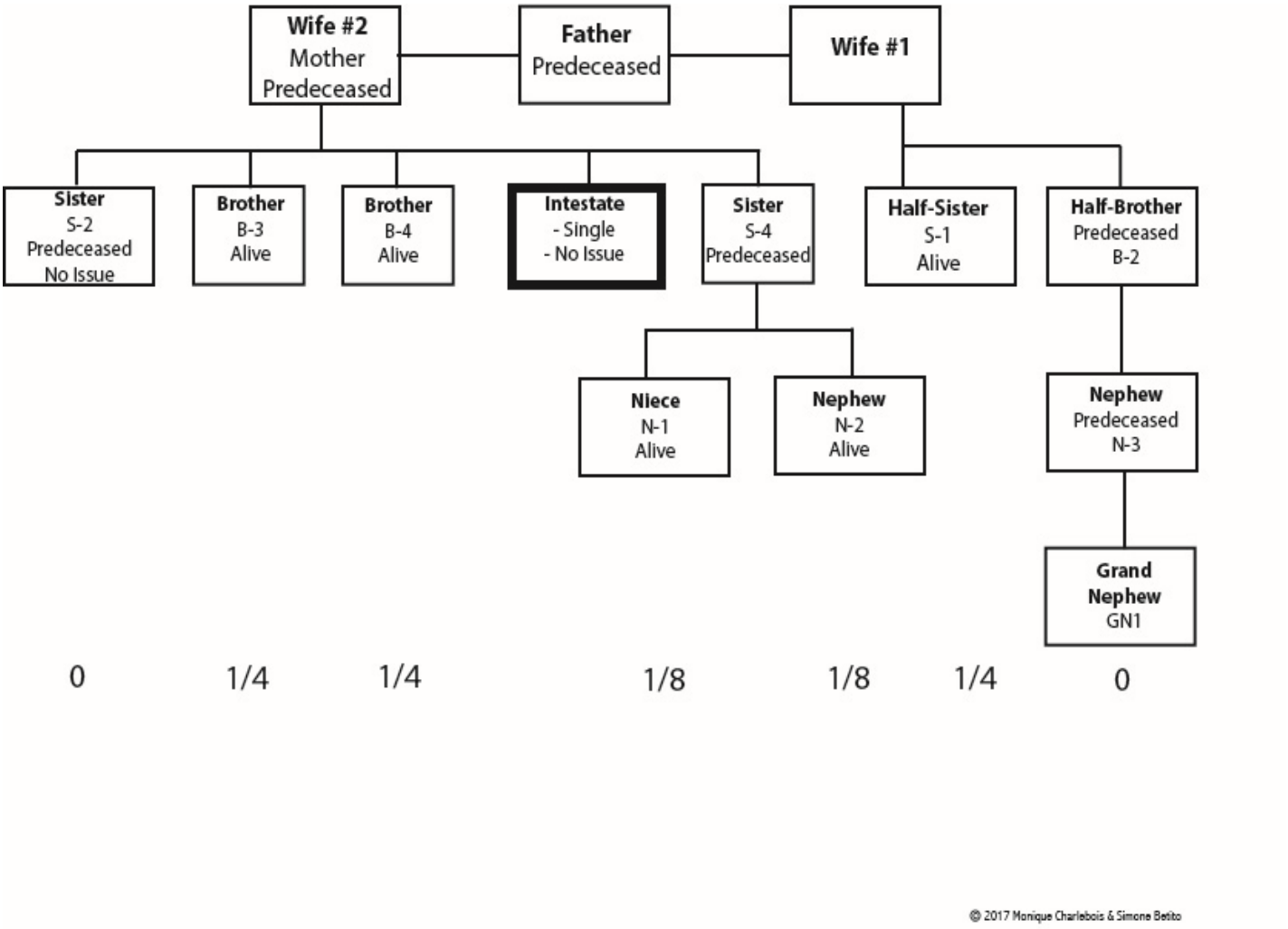
If there were no spouse, issue, or parents surviving the deceased, the estate passes to the surviving siblings of the deceased and to the children of a predeceased sibling who will take the share of their predeceased parent.

It is quite common, in my experience that surviving siblings tend to not volunteer the existence of a predeceased sibling's children, assuming that the estate will pass only to the surviving siblings. A person claiming that a solicitor "never asked" about surviving children of a

[45] See former sections 4, 5 and 6 of the *CLRA* prior to January 1, 2017.
[46] *Supra* note 8 at s 47(3).

predeceased sibling is likely to have a successful LAWPRO claim against the estate's solicitor. Care must be taken in collecting information from a client Estate Trustee, to probe for the existence of a predeceased sibling having surviving children. However, section 47(4) specifically uses the word "children", not "issue", of a predeceased sibling. By this we infer that if the children of the predeceased sibling predeceased the intestate, leaving children of their own, there would be no representation to the next degree. These grand-nieces and nephews of the intestate would not be entitled to a share of the intestate estate. Here is an example, with an illustration:

> Intestate had no spouse, issue or parents alive at date of his death. He was survived by a living half-sister S-1, and two full-blood brothers, B-3 and B-4. He was predeceased by sister S-2 who left no children; another sister (s-4) who had two children surviving the intestate (niece and nephew N-1 and N-2) , and a half-brother B-2. The latter had a son (N-3) who also predeceased, leaving a child (GN-1) of their own. Distribution:
>
> > S-1, B-3 and B-4–1/4 share each. (Half siblings take equally with siblings of the whole blood – per 47(8)
> >
> > N-1 and N-2– 1/8th share each.
> >
> > S-2, GN-1– no share.



7. Nieces and Nephews

Where there are no surviving siblings and nieces and nephews are the sole legal heirs, no entitlement passes to any issue of a predeceased niece or nephew. In the *SLRA*, it states:[47]

[47] *Ibid*, at s 47(5).

> Where a person dies intestate in respect of property and there is no surviving spouse, issue, parent, brother or sister, the property shall be distributed among the nephews and nieces of the intestate equally without representation.

The presence of the words "without representation" means that the children of a predeceased niece or nephew do not take their parent's share of the intestate estate. The buck literally stops with all of the nieces and nephews who survived the deceased intestate. They will take the estate in equal shares – *per capita*, not *per stirpes*.

8. Other next-of-kin and the Table of Consanguinity

In the absence of any of the above (spouse, issue, parent, sibling, niece or nephew), the estate will be distributed "among the next of kin of equal degree of consanguinity to the intestate equally without representation." This means that:

1. Degrees of kinship are explained by counting from the deceased up to the closest common ancestor and then down to a living relative. This is a universally accepted method of counting kinship in genealogy and has been recognized by early case law. It is illustrated by the *Table of Consanguinity*, an example of which is included at the end of these materials.
2. It is essential to remember that the *SLRA* prevails over the Table of Consanguinity. For example, section 47(2) explicitly favours descendants (issue), even though a great-grandchild is of a more distant degree of kinship than a sibling (three vs. two degrees) or is equal to a nephew.[48] In another example, while a niece and an aunt of the deceased are both at 3 degrees of kinship to the deceased, section 47(5) favours the niece ahead of the aunt.[49]
3. It is often tempting to assume that the older relatives have predeceased – do not make that mistake. For instance, an aunt or uncle will take the entire estate ahead of first

[48] *Ibid*, at s 47(2).
[49] *Ibid* at s 47(5).

cousins, because of the closer degree of consanguinity. At the OPGT we once were surprised to learn of a surviving parent, age 108, "who still had all her teeth."

4. It is also important to consider that first cousins are of the same degree of kinship as a great-niece/nephew or great-aunt/uncle of the deceased. Research at that level of kinship needs to account for all the potential relatives.
5. As discussed above in connection with s.47(5) (nieces and nephews), representation applies only to issue of the deceased and the children of a predeceased sibling of the intestate. Otherwise, it is a "winner take all" for the next of kin of the closest degree of kinship among those relatives who have not been included under the previous sections 46 and 47 (1) to (5).[50] So a single surviving aunt or uncle on one side of the family could take ahead of first cousins on both sides.

After you have gathered satisfactory evidence that the deceased had no surviving issue, spouse, parent, sibling, niece or nephew, only then do you need to proceed to documenting the grandparents, aunts and uncles for *both the maternal and paternal families of the deceased*. If there are no survivors in that category, you will next need to move on to the fourth degree of kinship, which includes first cousins, great-nieces or great-nephews, great-aunts and great-uncles, again for both the maternal and paternal sides of the family. So if you find one great-aunt, one first cousin and two grand-nephews who survived the deceased, all four take the estate in equal shares.

From time to time in an PGT estate, it would be necessary to search even further – to the fifth degree of kinship, which includes the children of first cousins, and children of great-aunts and uncles. While I caution you to not make assumptions about the elderly predeceasing the young, or about an older man's ability to procreate, some biological assumptions can be made that help to narrow the research. For instance, if someone was born 110 years prior to the date of death

[50] *Ibid*, at s 46 and 47 (1) to (5).

of the intestate, he or she can be reasonably presumed to have predeceased. Women who lived some years prior to recent medical advances can reasonably be presumed to be unable to procreate beyond age 55. So depending on the respective dates of birth of the various generations, it may be unreasonable to document certain relatives if the cost of continuing searches could be an excessive drain on an estate, depending on its value and the availability of other corroborating evidence. Although these are complex scenarios, fortunately they are rare.

C. SEARCHES FOR MISSING HEIRS

The need to search for missing beneficiaries can arise not only in a full intestacy but also in a partial intestacy or with respect to an individual bequest or class gift in a Will.

Since I wrote my 2004 article on the duty to search for missing heirs, *The Estate Trustee's Duty to Search for Heirs,*[51] the general rule has not changed at all. But there have been considerable changes with respect to the ease of searches.

1. Legal Duty Generally

An estate trustee is responsible for the final distribution of the estate, whether in accordance with a Will or the applicable rules of intestacy. An estate trustee may be liable for negligence in not making all reasonable and proper searches to locate all the legal heirs. [52] In most cases

[51] Monique Charlebois, *The Estate Trustee's Duty to Search for Heirs* (2004) 23 ETPJ 209.
[52] See, for example: Anne E Armstrong, *Estate Administration: A Solicitor's Reference Manual,* Vol 1 (Thomson Carswell) at Special Instruction 19 "Personal Representative's Duties and Powers" SI-20.4; Canadian Estate Administration Guide at para 13,951; Ian Hull, "Locating Missing Beneficiaries" *Practice Gems: Probate Essentials 2016*, LSUC (Sept 20, 2016)

however, the estate trustee will have no expertise in this area and will rely heavily on their legal counsel for advice and assistance.

According to the express terms of subsection 53(3) of the *Trustee Act*,[53] a published advertisement will not protect the estate trustee from claims by heirs, next of kin, devisees or legatees. Inquiries need to be more than casual and should be targeted based on the known information about the missing person. In order to satisfy an attack on his or her administration by a disappointed beneficiary, the estate trustee would therefore need to demonstrate that reasonable inquiries had been made: In *Re Short Estate*.[54] Where the estate is relatively large or it is not clear that the claimant is the only heir, Courts have refused to accept the evidence of advertising as sufficient to order distribution. In such circumstance, the Court may request further inquiries.

In its comprehensive 1991 *Report on Administration of Estates of Deceased Persons*, the Ontario Law Reform Commission stated as follows[55]:

> With respect to beneficiaries other than children born outside marriage, there are no clear rules concerning the extent of the inquiries that must be undertaken by a personal representative to find persons who may be entitled to share in the estate of a deceased. Personal representatives have been held liable for *devastavit* for not making sufficient inquiries, but the precise nature of the inquiries that should be made has not been clarified. Even if the personal representative has been as careful as possible in making inquiries and advertising, it is not clear that she would be protected from liability in *devastavit* to an overlooked beneficiary. Certainly, apart from section 23(2) [now section 24(2)] of the *Estates Administration Act*, there is no

[53] *Trustee Act,* RSO, 1990, c T 23, s 53(3).
[54] Re Short Estate, [1941] 1 WWR 593.
[55] Ontario Law Reform Commission*, Report on the Administration of Estates of Deceased Persons* (Toronto: Law Reform Commission, 1991) at 143-144.

> statutory provision specifically relieving a personal representative from liability for failing to distribute an estate to someone whose existence was not disclosed by reasonable efforts.

There have been few reported decisions on the issue of searches for missing beneficiaries to an estate. Decisions dealing with absentees can be helpful and some are discussed in my 2004 paper. The size of the share or estate is a consideration in what would be considered "reasonable searches." [56]

I refer you to the authorities that I have cited above for more details as to the legal obligation to locate missing beneficiaries, and the extent of the estate trustee's legal duty. My focus in this paper is on the more practical issues of who and how.

2. Searches for Births Outside of Marriage

With respect to birth outside a marriage, section 24 of the *Estates Administration Act* provides that an estate trustee is required to make "reasonable enquiries", including a parentage search of the Registrar General records. [57] Do not neglect this very basic of statutory requirements.

Searches are done through a series of steps. First, inquiries should be made of the deceased's friends and other relatives for any evidence or rumours. The estate trustee will not be expected to search indefinitely for someone who may in fact not exist. However, if there was clear indications such as photographs or letters suggesting that the deceased had a child, beyond mere exaggeration and bragging, then those enquiries should be pursued further.[58]

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[56] *Parker (Re)* (1982), 139 DLR (3d) 292, 12 ETR 83.
[57] *Estates Administration Act,* RSO, 1990, c E 22, s 24
[58] *Bedford Estate v Bedford*, 24 ACWS (3d) 576.

The Registrar General's office is not user-friendly on the parentage search duty in section 24(1) of the *Estate Administration Act*. There is no available form but a letter will suffice, with the appropriate instructions and fee enclosed. It costs $22 for every five years searched, and records start in 1978. For someone who died between 2013 to 2017, the fee would be $176 to cover a search from 1978 to the date of death. The relevant records are "Statements of Finding of Parentage" and "Statutory Declarations Affirming Parentage." After a few weeks, you will receive a form letter advising (in most cases) that no records were found. Please keep in mind that this is a very limited search of records of court orders or voluntary statements of recognition of parentage. It is impossible to request a search of all birth records at the Registrar General to inquire if the deceased appears on any of them as a parent of any child.

3. Other Search Tips and Techniques

When I wrote my 2004 paper, the internet age of genealogy had just begun. Since that time there has been an explosion of archival records now available online, including the 1921 Census of Canada, now indexed for searching. Many of the specific references that I provided then are now out of date, but the fundamental advice has not. I have repeated it here with some additions.

- The deceased's address books, personal letters and other papers (education, baptism, parents' papers) are crucial sources of information, providing clues for searches in old municipal directories, cemeteries and obituaries.
- Valuable corroboration of the deceased's marital status over the years can be gleaned by requesting copies of the applications filed by the deceased to obtain their Social Insurance

Number, Canada Pension Plan benefits and Old Age Security benefits. Military enlistment, immigration and real estate records are also valuable.

- In complicated searches, you need an expert who is up-to-date in what is available and where, for your specific case. It is not an efficient use of estate funds to pay a lawyer's hourly rate for work that the lawyer knows little about. The research instructions must be clear and specific, in writing, and request a detailed report of all avenues searched, as this will be necessary to support a court application.
- In my article, I discuss the reliability and efficacy of hiring heir tracers who charge a finder's fee or commission. My opinions have not changed: the estate trustee is not relieved from their obligations to stand by the work done and ensure that thorough research has been conducted to find all the legal heirs. A commission based heir tracer has no financial incentive to find more than one claimant. Their fee may substantially exceed the work required to locate the missing person(s), which could be turned against the estate trustee. It can also be difficult to obtain an adequate written report if the search is unsuccessful.
- Concerns about heir tracer commissions led to amendments to the *Crown Administration of Estates Act* in 2009. Where an estate is administered by the PGT, section 5.1 of this *Act* limits the heir tracer's compensation to 10% of the value of the estate. [59] There are a number of requirements and controls set out in the amendments to monitor and enforce this fee cap.[60]
- As we all know, the influence of the print media is rapidly declining. In my personal experience, newspaper notices are completely useless in finding anyone, except in smaller close knit communities where the local newspaper is still carefully perused, especially by the elders who can have valuable information about local families.
- Social media is a great new tool. It is surprisingly easy to find someone with a Facebook or LinkedIn account, and to send them a message. The advanced search function in Google is also useful.
- If you have a date of birth (e.g. from a *Personal Property Security Act* search) or a previous address, a licensed private investigator can access the Ministry of Transportation's drivers' license records for a current address.
- Online family trees such as are found on *Ancestry.com* or *Ancestry.ca,* are a starting point only and not reliable. Generally, amateur genealogists tend to repeat the errors of others. Few take the time to quote an authoritative source, let alone verify it. They may however

[59] *Supra* note 12, at s 5.1.

[60] Additional details can be found at "Compensation Agreements - Ministry of the Attorney General"<http://www.attorneygeneral.jus.gov.on.ca>

provide useful clues or a point of contact to connect with individuals or agencies who may have the best evidence.

- I've been successful with general letters of inquiry to persons with the same name or within a specific area in the telephone directory, but I suspect that this tool is now declining in usefulness along with telephone land lines. The letters need to be carefully drafted to reassure the reader that this is not a scam, but leaving room for the person being sought to volunteer information that would confirm their connection to the case.
- If you are you looking for someone who had mental health issues and may have been institutionalized, try a letter to their provincial Public Trustee's office. Finding an elderly individual living in a care home can be very difficult in general.

While more information has been made available for searching, especially online, it tends to be archival and relate to persons long deceased. It may not be of assistance in finding persons still alive or recently deceased, because of the increased awareness to protect individual privacy. Information sources that were formerly cooperative to an estate trustee searching for heirs have now restricted access to legal representatives of the person to whom the information pertains. However, you may be able to obtain the information you need simply by making a search request and obtaining a positive confirmation that a record exists, even if your client does not fall into the categories of persons entitled to receive an actual certificate.

While a good professional can find some "work-around" techniques, if you are truly stuck, you may be able to obtain access to the information or a certificate by way of a court order, as is provided by section 45 of the *Vital Statistics Act.*[61] I would recommend that you first speak to legal counsel at the institution holding the records of interest to you, for suggestions on how to

[61] *Vital Statistics Act*, RSO 1990, c V 4.

proceed and how best to frame the order. For the Ontario Registrar General, counsel is based in Toronto at the Legal Services Branch of the Ministry of Government and Consumer Services.

4. How to Document Proof of Heirship

If the estate trustee was intimately familiar with the deceased's personal family history, then formal documentation of the heirs is probably an unreasonable and excessive demand on the estate. He or she probably just needs their counsel to provide a clear explanation of their legal responsibilities and what would happen if another claimant came forward. Counsel should of course have asked all of the detailed questions that I have referenced earlier.

Documentation requirements should be commensurate to the estate trustee's knowledge of the family and the risks involved if an error is made. The estate trustee should not make excessive demands on the claimants in order to be protected from liability.[62]

The Office of the Public Guardian and Trustee has no personal knowledge of its estates and wishes to minimize its exposure to wrongful distributions. Accordingly, the PGT requires original or notarized copies of birth, marriage (and/or divorce, if relevant) and death certificates for each claimant and family member of higher or equal degree, along with two or three affidavits. In total there needs to be sworn evidence, ideally from a non-interested party, clearly stating the affiant's personal knowledge of the deceased's marital status and any issue at date of death. Claimants are required to swear to their knowledge of the number of children in each relevant

[62] *Re Tehan*, (1928) 35 OWN 252 (HCJ)

family and whether any were adopted in or out of the family. The Office also asks for a corroborating affidavit from someone who knows the claimant and family.

The PGT only presumes that someone has died if they were born at least 105 to 110 years prior to the relevant date of death. Official death certificates from vital records offices, including sufficient information to identify the deceased, are the best evidence of death. A funeral proof of death can substitute. A combination of an obituary and cemetery record may be adequate depending on a value/risk assessment.

To prove parentage, a "long form" registration of birth is necessary as it shows the parents' names. If an adoption occurred in Ontario, the birth registration will be changed to reflect the names of the adoptive parents. Surprisingly, more people than you would expect, have erroneous ideas as to whether they were adopted or not.

5. Using DNA Evidence

DNA analysis can be extremely helpful, either to clarify the legal heirs to an estate, whether dependent's support may be owed, or to protect the estate from potentially fraudulent claims.

Ideally, tissue samples should be obtained prior to burial or cremation. DNA can also be extracted from stored tissue samples such as biopsy or autopsy samples which tend to be stored for long periods of time. DNA has also been successfully extracted from personal items such as a toothbrush, dental guard, inhaler, hairbrush or hat, watches, rings, razors, old bandages and bathroom drains. Another alternative, while not as reliable, is a kinship analysis comparing the claimant's DNA profile to that of other close relatives of the deceased.

Some examples of the circumstances in which I have been involved in using DNA evidence include:

- Proof that a claimant to an estate was a child of the deceased, even though the claimant's mother was married to another man at the time of the claimant's conception.
- Proof that the intestate was the father of a child born after his death.
- Proof that a claimant was *not* a child of the deceased who had been married to the claimant's mother around the time of conception.
- Where the deceased had a large estate and came to Canada from Eastern Europe after World War Two, obtaining her DNA profile could be used to confirm or disprove multiple claimants recruited by heir tracers.
- Proof that the husband of the deceased's mother, who were married when the deceased was two years old, was not her biological father. This case required the exhumation of the remains of the deceased, her mother and the mother's husband.

In all of the above examples, the estate trustee not only consented, but in fact, took the initiative in obtaining DNA extraction and testing, considering it a matter of public policy and in the interests of justice to establish the true heirs to the estate. It seems quite clear that an estate trustee has the authority to obtain DNA extraction, even to the point of exhumation.[63] However I am not aware of a decision in Ontario that clarifies whether a Court has the authority to compel an estate trustee to consent or to provide material from which DNA could be extracted. It would be very helpful to have such clarification at some point, and I would certainly be supportive.

[63] See the analysis of Quinn J. in *Sopinka (Litigation Guardian of)* v. *Sopinka,* (2001), 55 OR (3d) 529.

In my experience, I have been satisfied with the safeguards put in place by DNA testing laboratories in collecting DNA samples from claimants abroad, with adequate evidence of their identity.[64]

6. When To Go To Court

The searches may be completely unsuccessful or there may be significant gaps in the evidence. If the estate is relatively small and there is a practical solution in terms of who should otherwise inherit the estate, it may be sufficient in the event of a claim for the estate trustee to rely on a defence that thorough reasonable searches were conducted. For larger estate, it would be more prudent to proceed with an application for the advice and directions of the Court pursuant to Rule 14.05(3).

There are a number of different solutions which could be appropriate. Possibilities include a simple payment into the Court pursuant to section 36 of the *Trustee Act*; an application to manage the property of an absentee under the *Absentees Act* (RSO 1990 c.A.3); a formal application pursuant to the *Declaration of Death Act, 2002* S.O. 2002, c.14; or a 'Benjamin Order'.

The latter term refers to a 1902 decision of the English Chancery Division to authorize the distribution of an estate in spite of a missing beneficiary, where extensive inquiries have been made and no determination is possible.[65] In that decision, the missing beneficiary was presumed dead for the purposes of the distribution of the estate. It is a narrower, limited focus on the

[64] For a detailed discussion of the law and available resources about DNA testing in the estate context, I recommend two articles by Kimberly A Whaley: *The Use of DNA Testing in Contested Estate Matters* (2004), 23 ETPJ 140 and *Life After Death: Modern Genetics and the Estate Claim* (2009) 28 ETPJ 134

[65] [1902] 1 Ch. 723

distribution of a specific estate and is not an *in rem* declaration such as a formal declaration of death for all purposes. Therefore the right of the missing beneficiary (or their heirs) is preserved if they come forward at a later date. It will be necessary for the resurfaced beneficiary to pursue the individuals who received the benefit of the estate in order to trace their share, but the estate trustee is protected from liability upon receiving the order.

D. CONCLUSION

My focus has been on resolving intestacies, including partial intestacies arising from a failed bequest. However, a considerable amount of problems also arise from missing beneficiaries named in a will, and the same legal duties apply to the estate trustee in such a case. While section 31 of the *SLRA* might be of assistance in resolving bequests to close family members who predeceased, it can be very difficult to find an old friend of the testator named in a 20-year-old will, without any further information.

I also like to take every opportunity to beg drafting solicitors to include more information about beneficiaries in the wills that they draft, such as the relationship to the testator, their current or former occupation and their place of residence at the time of drafting the will. We all know that notes and files are eventually destroyed and all that is left are the words in the will. Adding some basic information in the will provides an excellent starting point for a successful search for the missing beneficiary. A time limit on making searches can also be helpful in a will.

There are plenty of challenges in the administration of intestacies, failed bequests or potential partial intestacies. The identification of all the persons with rights and interests is a tricky area.

Counsel need to manage their clients' expectations while being fully aware of the reliance that clients place in their counsel for guidance. You should seek the assistance of qualified experts at the earliest opportunity.

APPENDIX A

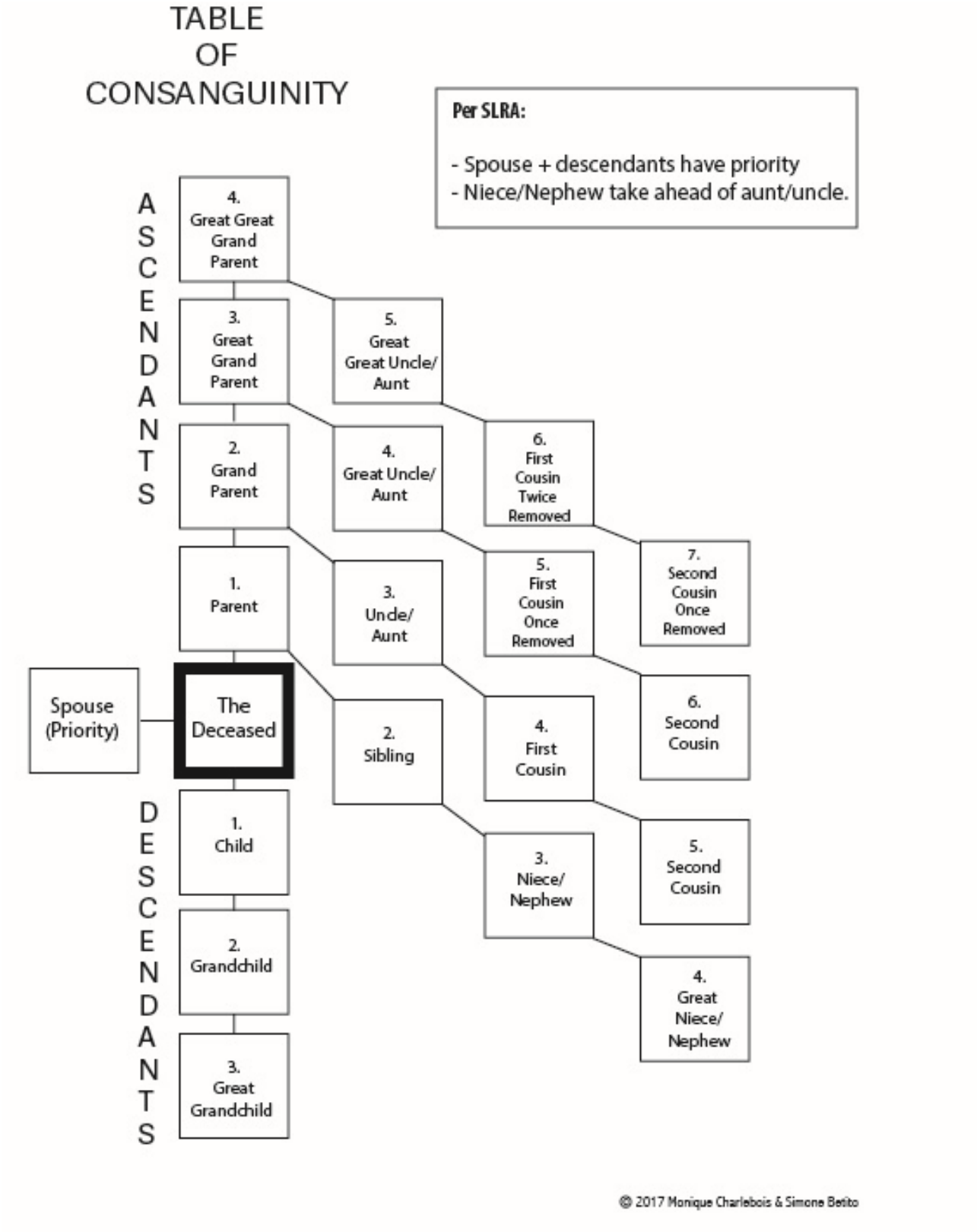
TABLE OF CONSANGUINITY
Per SLRA:
- Spouse + descendants have priority
- Niece/Nephew take ahead of aunt/uncle.
ASCENDANTS
4. Great Great Grand Parent
3. Great Grand Parent
2. Grand Parent
1. Parent
5. Great Great Uncle/ Aunt
4. Great Uncle/ Aunt
3. Uncle/ Aunt
2. Sibling
6. First Cousin Twice Removed
5. First Cousin Once Removed
4. First Cousin
3. Niece/ Nephew
7. Second Cousin Once Removed
6. Second Cousin
5. Second Cousin
4. Great Niece/ Nephew
Spouse (Priority)
The Deceased
DESCENDANTS
1. Child
2. Granddchild
3. Great Granddchild
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