THE ESTATE TRUSTEE'S DUTY TO SEARCH FOR HEIRS

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1. Overview

This article[1] examines the estate trustee's legal duty to search for heirs. Although the commentary on statutory provisions refers mainly to the law of Ontario, the discussion on relevant case law refers to

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1. The views and opinions expressed in this article are those of the author and should not be construed as the policy of the Office of the Public Guardian and

decisions from across Canada, the United States and other common law jurisdictions. This article is not intended to provide a comprehensive inventory of similar provisions in other provinces. The practical implications of the lack of definitive guidelines are discussed, followed by some suggestions for the estate trustee and his or her counsel on how to initiate searches. The resources and Internet information described here are relevant to searches anywhere in Canada or abroad.

2. General Duties of an Estate Trustee in Ontario with Respect to Finding Heirs

It is self-evident that an estate trustee is responsible for the final distribution of the estate, whether in accordance with a will or with the applicable rules of intestacy. The following discussion typifies what one finds in most estate administration textbooks and manuals:

> After the personal representative has paid the deceased's debts and settled all claims, he then must distribute the estate in accordance with the terms of the will, under the laws of intestacy . . . or if the spouse elects, under the section 5 entitlement provisions of the Family Law Act.
>
> . . . . .
>
> There are three potential areas of concern on an intestacy: 1) ascertaining the next-of-kin. This may involve hiring an expert whose expertise is to trace next-of-kin wherever they may live. It can be expensive and very time-consuming tracking down third and fourth cousins; 2) ascertaining children born outside of marriage. The Estate Trustee must make reasonable inquiries to ascertain that class gifts are distributed to all entitled . . .[2]

Trustee of Ontario or the Ministry of the Attorney General. This article was originally presented at a Continuing Legal Education session of the Ontario Bar Association, " No Will Know-How", on April 29, 2002, and updated for a subsequent CLE session on September 15, 2003, entitled "Estate Litigation: Pleading, Preparing and Proving Your Client's Case". The author acknowledges the valuable research assistance of Kit Howlett, Kathleen Laverick, Amanda Dale and Aissa Nauthoo, who articled at the Office of the Public Guardian and Trustee in 1996, 2000-2001, 2001-2002 and 2002-2003 respectively. The author also wishes to express her gratitude to the Deputy Registrar General for Ontario for that office's review and corrections to those portions of the article which refer to that office. Thanks also to Ms Ronnie MacCarl of Northern Horizon Research Associates for her assistance and expertise on the section dealing with genealogical searches, and to Jennifer Clay of Orchid Helix for reviewing the section on DNA evidence.

2. A.E. Armstrong, *Estate Administration: A Solicitor's Reference Manual* (Toronto: Carswell, 1984), Vol. 1, items 3.14.1 and 3.14.3 and Special Instruction 19.

An estate trustee may be liable in negligence for not making sufficient inquiries to locate the proper heirs. Casual inquiries will not be sufficient to discharge this liability.[3] In order to resist an attack on his or her administration by a disappointed beneficiary, the estate trustee would therefore need to demonstrate that reasonable — if not thorough — inquiries had been made. However, there is no clear delineation of how much is enough.

3. Statutory Requirements in Ontario

Section 53 of the *Trustee Act*[4] provides as follows:

> 53(1) A trustee or assignee acting under the trusts of a deed or assignment for the benefit of creditors generally, or of a particular class or classes of creditors, where the creditors are not designated by name therein, or a personal representative who has given such or the like notices as, in the opinion of the court in which such trustee, assignee or personal representative is sought to be charged, would have been directed to be given by the Superior Court of Justice in an action for the execution of the trusts of such deed or assignment, or in an administration suit, for creditors and others to send in to such trustee, assignee or personal representative, their claims against the person for the benefit of whose creditors such deed or assignment is made, or against the estate of the testator or intestate, as the case may be, at the expiration of the time named in the notices, or the last of the notices, for sending in such claims, may distribute the proceeds of the trust estate, or the assets of the testator or intestate, as the case may be, or any part thereof among the persons entitled thereto, having regard to the claims of which the trustee, assignee or representative has then notice, and is not liable for the proceeds of the trust estate, or assets, or any part thereof so distributed to any person of whose claim there was no notice at the time of the distribution.
>
> (2) Nothing in this section prejudices the right of any creditor or claimant to follow the proceeds of the trust estate, or assets, or any part thereof into the hands of persons who have received the same.
>
> (3) Subsection (1) does not apply to heirs, next of kin, devisees or legatees claiming as such.

Subsection (3) was enacted in 1926[5] specifically to negate a line of cases in Ontario and England[6] that had held that the personal

3. *In re Short Estate*, [1941] 1 W.W.R. 593 (B.C.S.C.).
4. R.S.O. 1990, c. T.23.
5. *Trustee Act, 1926*, S.O. 1926, c. 40.
6. *Re Ashman* (1907), 15 O.L.R. 42 (H.C.J.); *Newton v. Sherry* (1876), 1 C.P.D. 246.

representative was protected from liability towards any next-of-kin who came forward after the expiration of the notice period. Accordingly, the *Trustee Act* will not allow the estate trustee to hide behind a mere advertisement as sufficient notice to heirs.

With respect to a birth outside marriage, s. 24 of the *Estates Administration Act*[7] provides that an estate trustee is required to make "reasonable inquiries", including a parentage search of the Registrar General records. Consideration of this provision is therefore relevant to the broader issue of searches for heirs generally.

Section 24 of the *Estates Administration Act* therefore protects the estate trustee who has made "reasonable inquiries" as required by s. 24(1) and (2)(a), and has completed searches of the Registrar General's records as required by s. 24(2)(b).

4. Direction from Commentaries

What constitutes "reasonable inquiries"? In its comprehensive 1991 *Report on the Administration of Estates of Deceased Persons*,[8] the Ontario Law Reform Commission stated as follows:

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7. R.S.O. 1990, c. E.22. Section 24 provides as follows:

> 24(1) A personal representative shall make reasonable inquiries for persons who may be entitled by virtue of a relationship traced through a birth outside marriage.
>
> (2) A personal representative is not liable for failing to distribute property to a person who is entitled by virtue of a relationship traced through a birth outside marriage where,
>
> (a) the personal representative makes the inquiries referred to in subsection (1) and the entitlement of the person entitled was not known to the personal representative at the time of the distribution; and
>
> (b) the personal representative makes such search of the records of the Registrar General relating to parentage as is available for the existence of persons who are entitled by virtue of a relationship traced through a birth outside marriage and the search fails to disclose the existence of such a person.
>
> (3) Nothing in the section prejudices the right of any person to follow the property, or any property representing it, into the hands of any person other than a purchaser in good faith and for value, except that where there is no presumption or court finding of the parentage of a person born outside marriage until after the death of the deceased, a person entitled by virtue of a relationship traced through the birth is entitled to follow only property that is distributed after the personal representative has actual notice of an application to establish the parentage or of the facts giving rise to a presumption of parentage.

8. Ontario Law Reform Commission, *Report on the Administration of Estates of Deceased Persons* (Toronto: Law Reform Commission, 1991), at pp. 143-4.

> 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 s. 24(2)] of the *Estates Administration Act*, there is no 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.

This concept was referred to by Rodney Hull, Q.C., in a 1999 newsletter to the legal profession:

> The solicitor should ensure that the advice given to the personal representatives respecting the requisite efforts which should be made to ascertain heirs will give protection to that solicitor from a claim of negligence at the suit of disappointed heirs who have not been located.[9]

In a 1980 article,[10] Malcolm Archibald opined that an estate trustee should search for children born outside of marriage in the same manner as he or she would search for any possible heirs to the estate. In his view, when searching for any heirs, the estate trustee must first make inquiries of family members, who may have some knowledge of such matters. The estate trustee should specifically ask if there is any knowledge of children born outside marriage. Archibald submits that if no family member knows of such children or has reason to believe there are any, the requirement for making reasonable inquiries would be satisfied.

He continues by noting that, when there is knowledge of a missing heir, the estate trustee might advertise in the place where the missing heir was last heard of or believed to reside and might also hire a private investigator to make inquiries. Similarly, for a missing child born outside marriage, the estate trustee should consider advertising where the missing child was last heard of or believed to reside, and possibly hiring a private investigator or doing some further personal investigation.

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9. R. Hull, "Procedures and Responsibilities of the Personal Representative: The Ascertainment of Heirs in Intestacy or Partial Intestacy" (1999), 58 *Will Power*.
10. M. Archibald, "Estate Administration After the Repeal of the Succession Duty Act", in *Special Lectures of the Law Society of Upper Canada 1980: Recent Developments in Estate Planning and Administration* (Toronto: R. De Boo Limited), at pp. 74-6.

Archibald notes that if searches have proved fruitless, or if they have indicated there is a possibility that there is a missing heir, the general practice would be to apply to court for directions. Similarly, for a known or possible child born outside marriage who cannot be located, the estate trustee should consider applying to the court for directions.

5. Direction from the Case Law on Searches

(1) Canadian and English Case Law

It is clear that searches for the heirs must be more than merely casual. In the words of the British Columbia Supreme Court:

> The defendant was negligent in not ascertaining the whereabouts of the infant plaintiff. I am entirely satisfied that if inquiry was made in this connection it was of the most casual kind . . . It was the duty of the defendant to endeavour to locate all of those who were to benefit under the will . . . I find further upon the material that the defendant did not subsequently make any proper inquiry in this connection . . . After all, a trustee does owe duties to a *cestui que trust* and one of the first of them is to let the *cestui que trust* know of his interest and something about the trust.[11]

The courts have consistently held that an estate representative should advertise for a person entitled to share in an estate in the locality where the claimant was known to reside or where he or she is reasonably likely to reside.[12]

In the 1876 English case of *Newton v. Sherry*,[13] the claimant was a daughter of the deceased who, at an early age, changed her name and left England for America without notice to any of her relatives. The administratrix had advertised in three London newspapers for "creditors and other persons having claims or demands against or upon the estate of the intestate". The court determined such notices were sufficient in the circumstances, since the administratrix had no reason to know if the daughter was alive or, if alive, where she was residing. However, if there had been reasonable grounds for believing the daughter was alive in America, the administratrix ought to have advertised there as well. (This case was decided in the absence of a statutory

11. *In re Short Estate*, *supra*, footnote 3, at pp. 595-6
12. *Re Ashman*, *supra*, footnote 6; *Stewart v. Snyder* (1898), 30 O.R. 110 (H.C.J.), affd 27 O.A.R. 423 (C.A.). For similar decisions in Saskatchewan and Alberta, see *Re Barton Estates*, [1950] 1 W.W.R. 46 (Sask. K.B.), and *Re George Estate* (1960), 30 W.W.R. 462 (Alta. Dist. Ct.), respectively.
13. *Supra*, footnote 6.

provision such as s. 53(3) of the *Trustee Act*, and should therefore be applied with caution in the modern context.)[14]

Contrast *Newton v. Sherry* with *Atlantic Trust Co. v. McGrath.*[15] In *McGrath*, the administrator was put on notice by photographs and by some of the next-of-kin that the deceased may have had a son. The administrator had reasonable grounds for supposing there may have been a son in existence who was last known to be in the northeastern United States. The administrator had, however, put out only the "usual notices" in the *Royal Gazette*, namely, a six-month advertisement. The administrator had "a very definite warning that further inquiries and investigations should have been made".[16] The court held that, since the administrator had reasonable grounds for believing in the existence of a son of the deceased, the administrator ought to have made further inquiries and investigations where he could reasonably expect the son or his descendants to be found. By not doing so, the administrator was in breach of an obligation as a trustee that would be enforced in a court of equity.

However, the estate trustee will not be expected to search indefinitely for someone who may not exist. In the 1990 decision of *Bedford Estate v. Bedford*[17] the Ontario Court (General Division) considered whether reasonable inquiries had been made to locate a possible daughter of the deceased under the *Estates Administration Act*. Evidence demonstrated that the deceased had on occasion mentioned the existence of this daughter to his common law wife, who had been asked by unknown third parties about this daughter. The personal representative had pursued every possible lead in search of this daughter: the records of the Registrar General were searched as required by the Act and advertisements were placed for anyone having knowledge of this daughter. The court interpreted this provision to mean that a personal representative shall not proceed to distribution, knowing of the existence of a person entitled, without making further effort to obtain an actual identity. But, the court also held that there must be actual and real knowledge of the existence of a person entitled,

14. A notice to "creditors and others" is no longer sufficient to protect an estate trustee from liability to heirs, next-of-kin, devisees or legatees who come forward after distribution with a claim against the estate (see *Trustee Act*, s. 53(3), and discussion under the heading, "Statutory Requirements in Ontario", *supra*. However, *Newton v. Sherry* is still useful in support of the proposition that the executrix should have advertised in any area where she had reason to believe the daughter may have resided.

15. (1968), 1 D.L.R. (3d) 207, [1965-69] 2 N.S.R. 551 (S.C.), affd 8 D.L.R. (3d) 225, 1 N.S.R. (2d) 103 (C.A.).

16. *Supra*, at p. 238 (C.A.).

17. (1990), 24 A.C.W.S. (3d) 576 (Ont. Ct. (Gen. Div.)).

and not just potential existence. Evidence indicated that the deceased was not beyond lying to suit his own needs, and often exaggerated. Given the inquiries made and the lack of evidence upon which one could conclude, on a balance of probabilities, that the deceased had a daughter, the court found reasonable inquiries had been made and ordered the personal representative to distribute the estate to the known beneficiaries in accordance with the will.

In the 1982 case of *Parker (Re)*,[18] the British Columbia Supreme Court considered an application for directions by the Public Trustee to search for two missing heirs of the deceased. It was known that the missing heirs had resided in Seattle approximately 40 years earlier. The Public Trustee advertised in two issues of a Seattle newspaper without success. She offered the court no suggestions as to possible further steps which might be taken to locate the missing heirs. Taylor J. held that it would be inappropriate to give directions on how to search for the heirs, given the court's limited knowledge of the matter. Rather, Taylor J. advised the Public Trustee to pursue the matter herself, diligently and according to the best of her information, having regard to the size of the estate and being guided by careful professional advice.

Case law on the form of a notice or advertisement has established the importance of providing sufficient detail to enable a potential heir to recognize the deceased and the importance of responding to the notice in order to participate in a distribution of the estate.[19] On the other hand, the estate trustee should not make excessive demands on the claimants in order to be protected from liability.[20]

Useful guidance may also be gleaned from cases involving an application for a presumption of death of a missing person. These decisions are quite consistent with the cases dealing with missing heirs: the applicant should make "diligent inquiries" and advertise in the location or locations where the missing person or his or her children were known to have resided or might reasonably be expected to reside. When the amount at issue is relatively small, the court will consider these inquiries to have been sufficient.[21]

By contrast, where the estate is relatively large or it is not clear that the claimant is the only heir, the courts have refused to accept

18. (1982), 139 D.L.R. (3d) 292, 12 E.T.R. 83, [1982] 5 W.W.R. 543 *sub nom. Jones v. Public Trustee* (B.C.S.C.).
19. *Re Barton Estate*, [1950] 1 W.W.R. 46 (Sask. K.B.).
20. *Re Tehan* (1928), 35 O.W.N. 252 (H.C.J.).
21. *Re Ashman*, *supra*, footnote 6; *Re Peacock* (1915), 9 O.W.N. 175 (H.C.J.); *Re Ramsay*, [1943] 2 D.L.R. 784 (Ont. H.C.J.).

advertising as being a sufficient step to warrant an order for distribution of the estate on the basis that the missing beneficiary had predeceased without issue — even where a person had not been heard from for more than 25 years.[22] In such circumstances, the court may require further inquiries, or order that the missing heir's share be paid into court.

Giberson (Litigation Guardian of) v. Giberson[23] involved an application under the New Brunswick *Presumption of Death Act* for a declaration of the death of Mr. Giberson so that his estate could be distributed. The applicant had checked service history record entries of the New Brunswick Department of Health and Wellness for medicare usage, banking records and medical records, and had made inquiries of relatives and friends. The court was satisfied that the applicant had made reasonable attempts to locate Mr. Giberson through banking and government records, by contacting his family doctor, and that the police had made reasonable inquiries to locate him.

In *Hepditch Estate v. Halifax (Regional Municipality)*,[24] the issue before the court was whether a claim against an estate to recover the costs of the deceased's care was barred by certain provisions of the *Social Assistance Act*. In order for the court to determine how to administer Mrs. Hepditch's estate and settle the claim against her estate, it was necessary to contact her heirs. The applicant made several efforts to locate the deceased's heirs: he wrote letters to various people who were believed to have a list of the heirs; he personally travelled to different locations to find people who may have had relevant information; and he placed advertisements in several newspapers which turned up a relative who had information about the deceased's heirs. As well, he searched the Canada 411 Internet telephone directory to locate any heirs of the deceased.

Kindrachuk (Re)[25] involved an application for a declaration of a person's death under Saskatchewan's *Absentee Act*. The issue before the court was the degree of proof required for a declaration that a missing person is an "absentee" within the meaning of the statute. The *Absentee Act* requires a party to satisfy the judge that a person has disappeared, that his or her whereabouts are unknown, and that all reasonable efforts have been made to locate him or her.

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22. *Re Driscoll*, [1948] O.W.N. 124 (H.C.J.); *Re Davis*, [1934] O.W.N. 62 (H.C.J.); *Re Calder* (1923), 24 O.W.N. 146 (H.C.J.); *Re Bull*, [1934] O.W.N. 284 (H.C.J.). See also *Bennett Estate (Re)* (2002), 44 E.T.R. (2d) 132, 18 Sask. R. 244 (Q.B.).
23. (2001), 39 E.T.R. (2d) 184, 239 N.B.R. (2d) 284 (Q.B.).
24. (2000), 33 E.T.R. (2d) 248, 184 N.S.R. (2d) 245 (S.C.).
25. (2000), 35 E.T.R. (2d) 22, 196 Sask. R. 294 *sub nom. Krowchuk (Re)* (Q.B.).

The court held that a determination as to whether reasonable attempts have been made to locate the missing person include the following:

(a) whether the disappearance was reported to police;
(b) whether a private investigator was hired;
(c) whether newspaper advertisements were used;
(d) whether the media was used to gain assistance from the public;
(e) whether reasonable inquiries were made in and around places where the missing person was last seen or heard of or is likely to have gone;
(f) whether inquiries were made in a country where the person may have fled; and
(g) whether rumours and reports were investigated to determine their validity.

It was also held that reasonable attempts to trace the person through records include the following:

(a) checking bank records to see if there was any activity in the person's bank account, credit cards or safety deposit box;
(b) searching government records for activities such as a renewal of a passport or a driver's licence, applications for welfare, pension, a Social Insurance Number, recent income tax returns, registrations of marriages or births and deaths; and
(c) contacting local health authorities to see if medical records of the missing person had been forwarded at that person's request.

(2) United States Case Law

Given the dearth of cases in Canada and the Commonwealth on this issue, it is useful to examine discussions by the United States courts. In *Shepherd v. Townsend*,[26] the Mississippi Supreme Court found an executor liable for not having made sufficient searches to determine who were the deceased's next-of-kin. A half-uncle of the testator had sued the executrix of the estate for negligence and lack of diligence in failing to ascertain he was the deceased's next-of-kin. Instead, the estate was wrongly paid out to three first cousins.[27] The court stated

26. (1964), 249 Miss.LEXIS 400 (Miss. S.C.).
27. *Supra*, at p. 2.

that where an executor or administrator negligently distributes an estate to the wrong person or persons, he or she may be compelled to pay a bequest again to the person rightfully entitled, notwithstanding the distribution was made in good faith and in ignorance of the existence of the unknown heir.[28] The court stressed that reasonable inquiry was essential in determining the existence of heirs. In this case, the court made a finding of fact that the executrix could have determined the existence of the half-uncle by making a reasonable inquiry of the three first cousins.[29] The executrix was found to have been negligent, and ordered to pay the half-uncle his share of the estate.[30]

In *Re: Alexander Estate,*[31] a decision of the Pennsylvania Superior Court, the deceased left her estate to her nearest next-of-kin in the Republic of Georgia in the former U.S.S.R. If her executor failed to find them within one year of her death, three hospitals would share in the estate.[32] The executor did not find the next-of-kin, obtained a court order approving the adequacy of his searches, and paid the funds to the hospitals. Six years later, the relatives in Georgia came forward and attacked the 1988 distribution order on the grounds that the executor had previously misrepresented his efforts, and had not in fact made every effort to contact the deceased's relatives in Russia, as required by the will. The court found that the executor had failed to use relevant information from his own files to identify surnames of the heirs, had hired a translator instead of an experienced genealogist to perform the search, and had not begun the investigation until six months after his appointment. Furthermore, he had failed to notify the foreign consulate, as required by state rules. The court concluded that this was not a reasonable search and

28. *Supra*, at p. 3.

29. Sufficient inquiry was made as to one side of the family, the "Barnes" family. With respect to the "Shepherd" side of the family, the court stated that in order for the executrix or her attorney to ascertain whether the uncle was an heir it would be necessary to ascend the family tree to the common ancestor of decedent and cousins, then descend the family tree to determine what descendants of the common ancestor survived the decedent. However, no efforts were made to establish a pedigree of the Shepherd side of the decedent's family. The court found that the cousins who received the proceeds of the estate could have helped provide information that would have led to the discovery of the half-uncle. Therefore, reasonable care and ordinary diligence on the part of the executrix, or on her behalf, would have established the existence of the half-uncle.

30. *Supra*, at p. 3.

31. 2000 PA Super 206.

32. The will in this case read:

> I will and direct that my Executor, hereinafter named, shall make every effort to contact my relatives in Russia, who would inherit my estate if I were to die intestate in the Commonwealth of Pennsylvania. Said heirs in Russia shall receive such share from my estate as defined by the intestate laws of Pennsylvania.

that, since the heirs did not receive the legally required notice, the 1988 order approving the distribution to the hospitals was void.

The 2001 case of *Eugene S. Frechette v. Probate Appeals*[33] involved a challenge by the heirs of an estate to the probate court's order distributing the assets of the estate. The heirs argued that they had not received proper notice of the administration of the estate and that the court had erred in authorizing an expenditure for an heir search which constituted over one-third of the value of the estate. The trial court found that two of the three heirs did not receive actual notice. However, they did receive legal notice through publication of the administration of the estate in a local newspaper. In the case of the third heir, the trial court found that a reasonable search would have turned up his valid address and, as such, the distribution was amended to include his share. The Probate Appeal Court affirmed the orders of the Probate Trial Court. The letter of notice to Roger Frechette, the third heir, was returned as undeliverable at the address used. The court ruled that this should have alerted those obligated to provide the address for the giving of notice that further research (*e.g.*, examining the local telephone directory) should have been carried out to locate his address. An examination of local sources for ascertainment of addresses is not beyond what would be reasonable. The court referred to the case of *Hatch v. Connecticut Bank & Trust Company*,[34] in which the court itself located the address of an heir in a local directory.

6. Suggestions for the Estate Trustee

There appears to be little available in either statutes or case law to guide estate trustees when trying to ascertain next-of-kin and/or searching for missing heirs. According to the few (and relatively old) cases on the subject, an estate trustee should be advised to make inquiries of family, friends and other persons likely to have heard about or from a missing heir. If other methods of inquiry are unsuccessful, the courts are likely still to expect some form of advertising where persons entitled are known or reasonably likely to reside. The notice should provide as much detail as possible about the deceased's life to assist in his or her identification and possible persons entitled.

If no heir can be determined within one year from the date of my death, I will and direct that this devise to them shall lapse and I direct that all the rest and remainder of my estate shall be divided into three equal shares [to three hospital beneficiaries].

33. 2001 Conn. Super. LEXIS 1472.

34. 26, Conn. Supp. 435, 438, 226 A.2d 665 (1966).

With respect to the possibility of children born outside marriage, an estate trustee — at least in Ontario — must complete the necessary searches of vital statistics records as required by the *Estates Administration Act*. A prudent estate trustee should also make inquiries of family members as to the existence of any children born outside marriage. Where there is knowledge of a specific child born out of wedlock, the estate trustee should advertise, make further inquiries, and possibly hire an investigator to locate the child. Where such inquiries have proved fruitless, the estate trustee may consider applying to court for its opinion, advice and direction, or for an order directing a reference for a determination of the issue.

The ruling in *Parker (Re)*,[35] suggests that the size of the estate or of the share(s) of the missing heir(s) is an important consideration in determining the extent of inquiries. A small estate or bequest may not justify as extensive a search as would a large estate or bequest.

In the author's view, a prudent estate trustee should seek the advice of experts with respect to the effectiveness of search techniques other than newspaper advertisements. One can easily conceive of circumstances where some basic search techniques — such as a search of drivers' licence records where the person's name and date of birth are known — may be more economical and likely to succeed than would an advertisement in a national newspaper. On the other hand, in a small or close-knit community, a notice published in a local paper with a high rate of circulation is likely to be successful in finding a current or former resident — or at least some clues to that person's whereabouts. Nevertheless if a number of economical and reliable search techniques have been attempted unsuccessfully — and particularly if the matter is likely to be brought before a court for a determination — an estate trustee would be wise to consider advertising in an area where the missing beneficiary is known to have resided.

Some consulates or embassies can be very helpful in assisting the estate trustee in searching for heirs who reside in their respective countries, while others provide no assistance. The estate trustee should ask if any fees will be charged to the heirs and consider whether such fees compare favourably with fees charged by private search firms, taking into account the reliability of the documentation submitted on behalf of the individuals claimed to have been located.

Not infrequently, an advertisement for an heir will provide notice to an independent heir-tracer firm that may act on its own initiative to locate person(s) being sought and may approach the estate trustee with a proposal whereby the heir, when found, will pay a commission on his

35. *Supra*, footnote 18.

or her share. If the fee to the heir(s) or estate is negotiable and reasonable, this may be very helpful to the estate trustee. Such arrangements can also be useful in a case where some of the beneficiaries object to any further expenditures being made out of the estate to locate missing heirs, but the estate trustee has a sense that additional beneficiaries may exist.

However, it is the author's view that such arrangements do not relieve the estate trustee of the duty to carefully scrutinize the documentation, to ascertain the links between the deceased and the claimants, and to confirm that no further heirs of the same degree are likely to exist. The financial incentive to find someone — anyone — in order to collect the commission, may override the researcher's interest in full documentation and the identification of the correct heir. At a minimum, the estate trustee should request a search plan and a detailed report on the sources searched, even if additional cost is involved in producing such a report.

What if the estate trustee, before being bound to a high commission, could easily have found the heirs directly through reasonable searches at a much lower cost? Searches for a Canadian family, if paid on an hourly basis, are unlikely to cost more than a few thousand dollars, unless the matter requires searches for large families down to second cousins, or the name is very common, or the family is geographically dispersed. The cost does increase in certain countries where documents are decentralized and difficult to access. Even so, in the author's own experience, in the vast majority of cases a missing individual or a complete family tree with accompanying report and documentation can be obtained for less than $5,000. Given the explosion of genealogical search tools and the recent jurisprudential trends in favour of disappointed beneficiaries, it is submitted that the standard of due diligence imposed on estate trustees has been raised.

Finally, the evidence required to prove heirship is that which would be reasonably sufficient to satisfy a careful and prudent administrator as to persons entitled to share in the distribution of the estate.[36] Strict proof may be justified where the estate is large and there is some doubt about who is entitled to share in the distribution.

7. Dealing with a Researcher

It is becoming easier — and always fascinating — for a lawyer with a modicum of detective skills to conduct some searches directly. Certainly, some simple steps can often lead to the desired information.

36. *Re Tehan, supra*, footnote 20.

On matters of any complexity, however, it is questionable whether a lawyer who is not an expert researcher should be charging legal fees for search work, if the searches could be done more cheaply and more quickly by a genealogist or private investigator. A capable researcher should be familiar not only with dusty genealogical records but also with current public records, such as estate and divorce records, both in the courts and in the government archives.

Provincial and federal archives often provide a list of independent genealogical researchers as a reference tool for the general public. The list may even be available on the archives' website. A list of accredited researchers for international, U.S. and Canadian searches in the United States is also found at the respective websites of the Utah Genealogical Association and the International Commission for the Accreditation of Professional Genealogists.[37] Rates vary from $25 per hour to $50 per hour or more. The higher rates are usually charged by licensed private investigators and certified genealogists. However, there are many very competent researchers who do not have formal certification.

Common sense should prevail in retaining a professional genealogist or private investigator. One should ask for references, of course, and discuss the general scope of the search request. The researcher should be able to provide a general plan of sources to be examined, an estimate of cost, and a budget or ceiling. If a proper family tree is likely to be needed, the researcher should have the software to provide it. An estate trustee should be clear about what type of evidence is required to back up a finding of an event or address. The search for heirs involves advising one's client about the likelihood that the persons located are the closest next-of-kin and the only ones of that degree. It is therefore suggested that legal counsel advising an estate trustee require — and scrutinize — a copy of each document from which information is derived, be it a census, a city directory record or an obituary.

Clear instructions as to who is being sought must be given. One should ensure that the researcher is not documenting the family's distant branches to an unnecessary degree, but is focusing on finding the right people who would take under the law. This requires a complete understanding of relevant statutory provisions. In Ontario, these would include s. 31 (the "anti-lapse" provisions for a bequest in a will) and s. 47 of the *Succession Law Reform Act*.[38] Dates of death must be ascertained, since an interest in an estate vests at the date of

37. See www.icapgen.org.
38. R.S.O. 1990, c. S.26.

death of the intestate. Heirs will include all closest next-of-kin of the same degree, of whole or half blood, who survived the intestate, even by one day. If there is no surviving spouse, issue or parent, searches can end if all potential claimants are located from the category of siblings or children of predeceased siblings. Beyond that, according to the table of consanguinity, a single surviving aunt or uncle can take the entire estate ahead of any first cousins. Finally, do not assume that the elderly will have predeceased. The number of centenarians is on the rise.

The researcher should have had some experience with the specific databases that need to be examined. It is sometimes necessary to retain several researchers in different parts of the world for the same estate. Over the past few years, the Public Guardian and Trustee of Ontario has conducted hundreds of searches around the world. Experience has demonstrated that it is more efficient to retain a local professional or one in Salt Lake City, Utah (repository of microfilm records for most states and parishes and many countries) who will be very familiar with the database and can obtain an answer in a day or two.[39] However, there are a number of established genealogical search firms based in Salt Lake City or in the United Kingdom, for example, which have agency agreements with researchers in other parts of the world and the expertise to co-ordinate out-of-country searches.

8. Search Tips for Lawyers

The following are some common questions in conducting searches, and some suggested sources of information:

39. See, for example, the Utah Genealogical Association: www.infouga.org.

Search Need	**Potential Source of Required Information**
Where is X now living?	• Former employers and neighbours • Lawyers who acted in a divorce or house sale • Mass mailing to persons of the same last name as found on Internet telephone directories, especially where uncommon • Requesting transfer payment, social insurance and tax authorities to forward a letter to this person (see discussion under heading, "Income Tax Records", *infra*) • Search of credit agency records and driver licence records (*e.g.*, through a licensed private investigator)
Is X dead?	• If in the United States or United Kingdom searches in Internet database death records (see discussion under heading, "Vital Statistics Documents", *infra*) • Telephone and city directory searches, to identify the year that X is no longer listed in the directory • Internet cemetery database, if location known or very uncommon name • Vital statistics searches
Did X marry and have children?	• Census records, voter lists, city directories and municipal tax rolls where X is known to have lived, to see if spouse or children are listed • If date of death known: check X's obituary, or obituaries and wills of X's parents or of other family members • Hospital admission records, subject to access regulations (older documents may be in government archives) • Divorce records (at Central Divorce Registry in Ottawa or in provincial archives) • Vital statistics searches (see discussion under heading, "Vital Statistics Documents", *infra*) • Posting a message on an Internet surname genealogy message board

Where was X born?	• Original Social Insurance application • Immigration and Citizenship or old age pension records (see discussion under heading, "Vital Statistics Documents", *infra*) • Birth, marriage and death registrations for X
What was X's mother's maiden name?	• Original Social Insurance application (see discussion under heading, "Social Insurance Archives", *infra*) • X's marriage registration • X's parents' marriage registration • X's mother's obituary and cemetery records

(1) Useful Internet Resources

Probably the most useful starting point for research on the Internet is known as "*Cyndi's List*" (www.cyndislist.com), a categorized and cross-referenced index to over 100,000 genealogical resources on the Internet. *RootsWeb* (www.rootsweb.com) contains hundreds of free databases; *Ancestry.com* (www.ancestry.com) also provides access to additional databases for a reasonable subscription fee. Finally, *JewishGen* (www.jewishgen.org) is truly "the home of Jewish genealogy".

(2) Vital Statistics Documents

The right to access archival or personal information about an individual varies by jurisdiction. An increasing amount of information is available online, either through the official website or through non-official genealogy websites. A few examples:

1. The Archives of British Columbia has posted all deaths more than 20 years old, beginning in 1872; for New Brunswick, the posting covers 1888 to 1920.
2. Basic U.S. death information is provided in the United States Social Security Death Index, available online through both *RootsWeb* and *Ancestry.com*. It contains the records of over 60 million deceased persons who possessed social security numbers and whose death had been reported to the Social Security Administration. It is possible to search name spelling variations by the "Soundex" method. Searches can be narrowed by state, by date of death or by date of birth. For instance, even without knowing a woman's married name, a search can be done for all women named Edith who were born on a certain day.

3. *Ancestry.com* provides indexes for California and Florida deaths and for many other states.
4. Over 1.5 million birth, marriage and death records for Polish Jews have been indexed by name and town on Jewish Records Indexing — Poland (www.jewishgen.org/JRI-PL), a member of *JewishGen.*
5. The FreeBMD project (http://freebmd.rootsweb.com/cgi/search.pl) contains index information for over 28 million entries from 1837 to 1901 or later, for all of England and Wales.

However, once an occurrence is located, it may still be necessary to obtain a death certificate from the place where the event occurred, in order to confirm the identity of the individual.

Documents which are accessible by virtually anyone in some countries and U.S. states are very tightly protected in other jurisdictions. However, most jurisdictions now have websites which explain the documents that they hold, what information is required before a search can be initiated, and who can access them. Sometimes the actual request form itself is available online, along with the schedule of fees. The requirements and access rights vary considerably from one jurisdiction to another.

For example, the Indexes (where they exist) and Registration Books from the Office of the Registrar General of Ontario for births from 1869 to 1906, marriages from 1801 to 1921 and deaths from 1869 to 1931 are held at the Archives of Ontario.[40] All of these records are publicly available on microfilm, and can be accessed by a visit to the archives or by a researcher hired for this purpose. Another year of records is sent annually to the archives. The Office of the Registrar General holds all the more recent registrations; access is governed by the *Vital Statistics Act*[41] and regulations.

Applications for documents from the Ontario Registrar General are available from all Land Registry Offices and Government Information Centres and from the Ministry's website at www.cbs.gov.on.ca. Applications can be mailed or faxed to the main office in Thunder Bay or dropped off at certain Land Registry Offices (see the website for locations).

To obtain copies of vital statistics events, the estate trustee must provide proof of authority in the form of the certificate of appointment

40. Available online at: www.archives.gov.on.ca. See also British Columbia Archives, available online at: www.bcarchives.gov.bc.ca; and New Brunswick Archives, available online at: http://gov.nb.ca/archives.
41. R.S.O. 1990, c. V.4.

or a copy of the will. The estate trustee has the same entitlement as the deceased person would have had if alive (for example, to their children's birth records or to their parents' marriage records). Particulars as to entitlement to certificates or registrations of events are found in ss. 44 to 48 of the *Vital Statistics Act*. Note that the Registrar General no longer accepts a third party authorization signed by a lawyer on behalf of his or her client. The client must sign the application form, but can authorize the lawyer to pick up the document or receive it by mail.

The following documents are available only to the estate trustee of the person concerned, or in some cases to the person's closest surviving next-of-kin:

- certified copy of the registration of death in Ontario, containing the information as to place and date of birth, parents and marital status and name of the informant, as reported by the informant;
- certified copy of the birth registration in Ontario, if the person is deceased (with proof of death being required). This is a reproduction of the actual form completed by the person who reported the birth, usually one of the parents. This will contain the names of the parents, the place and date of birth. Depending on the form used in the year of birth, it may also contain such useful information as the mother's maiden name, address of residence of the parents, their marital status, and the total number of children born to the mother as of that date;
- certified copy of the marriage registration in Ontario, if either party to the marriage is deceased. This is an actual reproduction of the original registration signed by the parties to the marriage, witnesses and person who officiated. Generally, it provides the occupation and address of the parties to the marriage, their marital status, and the name and place of birth of each party's parents. A witness may be a previously unknown relative.

In Ontario, "search letters", for which anyone may apply, are available for all registered vital events and indicate whether or not an event is registered with the Registrar General. A fee of $15 is charged for every five-year period searched. If there is an event registered, the search letter contains the name of the person, as provided by the applicant, and the registration number. No other information is disclosed. If there is no event registered, the letter contains only the name of the person, as provided by the applicant, the period of time that was searched and a statement that no registration was found exactly matching

the information provided. These are referred to as "no record" letters. It is of course important to give as much information known about the deceased to ensure proper identification. Useful information includes different spellings of the name, maiden name, previous married name, name at time of death and spouse's name.

However, without having the copy of the long-form registration with information corroborating a party's identity, it can be difficult to be absolutely certain that the event confirmed is the one requested for the specific individual(s) sought — particularly if a name is common. Not infrequently, the Public Guardian and Trustee receives death certificates for the wrong person, which do not match the names of the parents provided. It may be possible to corroborate the identity of the person named on the event record through some other means, such as obtaining an obituary from the local newspaper.

In other cases, a slight discrepancy between the information entered on the application form and the information in the Registrar General's records may result in an inability to obtain a document. In such a case, it may be possible to obtain the record by providing an explanation for the discrepancy or corroborating information about the event, such as an obituary. Pursuant to s. 45.2(3) of the *Vital Statistics Act*, if a request for a birth certificate or for a certified copy of a registration of birth is refused by the Ontario Registrar General, a written application for reconsideration may be made to the Deputy Registrar General in Thunder Bay.

Section 45 of the *Vital Statistics Act* acknowledges that the Ontario Registrar General can release a certified copy of a registration of a birth, change of name, death, still-birth or marriage upon receipt of a court order. These court orders are generally sought by persons who are not entitled to receive these "long form" documents under the *Vital Statistics Act*. The Deputy Registrar General for Ontario should be made a party to such a court application and service may be made upon her in Thunder Bay. Advance notice of such applications is desirable to ensure that any order obtained can in fact be obeyed. If a request for any other document under the Act is refused by the Ontario Registrar General, the only recourse is by way of a judicial review.

Adoption records held by the Ontario Registrar General are sealed, pursuant to s. 28 of the *Vital Statistics Act* and are not released to any member of the public. However, it may be possible to obtain confirmation of whether a record of adoption exists for a particular individual, or whether none exists in that jurisdiction. The Adoption

Disclosure Unit of the Ministry of Community and Social Services can be contacted for additional service or individual case information.[42]

The Parentage Registry is a small database comprised of voluntary declarations of parentage and statements respecting court orders made under the *Children's Law Reform Act*.[43] It is not a database of all the parents in Ontario. The fee for a parentage search is $22. One of the following three documents will be issued by the Ontario Registrar General: a certified copy of a statutory declaration filed under s. 12 of the *Children's Law Reform Act*; a certified copy of a statement respecting an order or judgment confirming or making a finding of parentage filed under s. 14 of the *Children's Law Reform Act*; or a "no record" letter. Written requests for these documents may be made to the head office of the Ontario Registrar General in Thunder Bay and must include the name of the child, date of birth of the child, and the name(s) of the parent(s).

Pursuant to s. 32 of the *Vital Statistics Act*, the Registrar General may not issue a certificate of a divorce even if he or she has a record of it. A search letter is available for any divorce records held by the Ontario Registrar General which date between 1949 and 1989. As these records are incomplete, a search request should first be addressed to the federal Central Divorce Registry.[44] Divorces in Ontario have ceased to be registered with the Ontario Registrar General. Divorce documents filed between 1949 and 1968 will be found at the Archives of Ontario.

(3) Citizenship and Immigration

Documents filed in support of a citizenship application can be accessed by a person's estate trustee.[45] These documents usually provide place of birth, names of parents, name of any spouse, place and date of marriage, and addresses lived in Canada.

Until July 1, 1947, no citizenship records were kept for any emigrants to Canada from the United Kingdom. Recently, the list of names of thousands of non-British immigrants to Canada who were naturalized in the early 20th century became available through the Canadian Genealogy Centre website,[46] which greatly speeds up the process of obtaining the correct detailed records from the federal government.

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42. Telephone: (416) 327-4730.
43. R.S.O. 1990, c. C.12.
44. Telephone: (613) 957-4519.
45. Citizenship and Immigration Canada, Public Rights Administration, Case Processing Centre, P.O. Box 7000, Sydney, Nova Scotia, B1P 6V6.
46. See www.genealogy.gc.ca/index_e.html, including the searchable database of Canadian Naturalization Records from 1915 to 1932.

Passenger lists and border-crossing records were kept for all persons coming to Canada. The passenger entry will set out the place of origin, embarkation point, destination address, intended occupation, marital status and name of closest relative in the home country. If a family travelled together, all the names of the children will be listed. Listings for 1925 to 1935 are available online, along with border entries for individuals whose surname starts with the letter C. Once an entry is located, it provides a microfilm number for the copy of the passenger ship list, which list can be accessed in an archive office or reference library. This website is also very helpful in explaining how to access older, newer and various other types of immigration documents.

Ship lists and border-crossing records for 1919 to 1924 are not indexed. A manual search of each microfilmed entry is required. These are available at large reference libraries across Canada, such as the North York location of the Toronto Reference Library. Records from 1936 to the present are still in the custody of Citizenship and Immigration authorities. Access can be obtained by the estate trustee or by anyone when the person has been dead for more than 20 years. Some evidence of the death is required. Details on the procedure can be found on the National Archives of Canada website.[47]

(4) Home Children

Between 1869 and 1937, over 100,000 children were sent to Canada from Great Britain during the child emigration movement. These are sometimes called the "home children" or "Dr. Barnardo" children, although that was only one of the many organizations which sent children to North America. Often, the information about the circumstances of arrival to Canada was kept secret by the individuals. For this reason, if the deceased's origins in the United Kingdom are cloudy, it may well prove useful to check if the deceased was a "home child". Members of the British Isles Family History Society of Greater Ottawa are locating and indexing the names of these home children found on passenger lists in the custody of the National Archives of Canada.[48] Once a file is located, a copy can be requested from the sponsoring agency.

(5) Census of Canada

Census records are extremely useful in confirming the members of a family. Indexed listings for many districts in Ontario and Canada for

47. See www.archives.ca/02/0201_e.html.
48. See www.archives.ca, and www.ingeneas.com/free/index.html, and www.barnardos.org.uk (go to section on "What we do", then "Aftercare").

1901 and for all of Ontario for 1871 are now available online at *RootsWeb*. However a copy of the actual record must be obtained from a central depository, *e.g.*, provincial or federal archives, some reference libraries or the Church of Latter Day Saints Family History Centres. For example, the North York location of the Toronto Reference Library has complete census records, many of them having been transcribed by volunteers.

(6) Income Tax Records

The privacy of income tax records is carefully protected. However, if all efforts to locate an individual in Canada have been exhausted, the Canada Revenue Agency ("CRA") provides a "last resort" letter forwarding service in urgent or compassionate circumstances, on a cost-recovery basis. CRA asks for the individual's name, date of birth and Social Insurance Number, although the author suspects that the absence of a Social Insurance Number may not be fatal to the search request, as long as there is a date of birth. It is the author's understanding that, in the recent past, the fee for forwarding a letter to one individual is about $150. Information about the requirements and procedure can be obtained from the Director, Special Programs and Partnerships Division.[49] Note that, in order to protect individual privacy, the CRA will not provide confirmation as to whether a particular individual you were seeking was identified and was sent your letter.

(7) Social Insurance Archives

An individual who applies for a Social Insurance Number must state his or her marital status, current address, place and date of birth, and parents' full names. An estate trustee can obtain this information by writing to Social Insurance Registration.[50] Human Resources Development Canada will also consider acting as an intermediary, on a request from a person or organization seeking the address of an individual registered in the Social Insurance Register, and will contact the individual to inform him or her of the request. However, its policy is to inform the individual that there is no obligation to contact or to reply to the requester. Details on the process are available on the Social Insurance website.[51] Identifying information is required. The letter is forwarded to the most recent address on Human Resources

49. Benefit Programs Directorate, Canada Revenue Agency, 4th Floor, Tower C, 25 McArthur Road, Vanier, Ontario, K1A 0L5.
50. P.O. Box 7000, Bathurst, New Brunswick, E2A 4T1.
51. See www.sdc.gc.ca/en/gateways/topics/sxn-gxr.shtml.

Development Canada's records. The requester will be informed if the office is unable to locate an address or if the letter is returned undeliverable.

(8) Victims of the Holocaust

Some may be surprised to learn that a considerable amount of documentation is available with respect to survivors and victims of the Holocaust. "Pages of Testimony" at Yad Vashem, the Holocaust Martyrs' and Heroes' Remembrance Authority in Israel, are constantly being submitted by survivors for persons whom they know to have perished.[52] Yad Vashem also holds basic information about survivors who were assisted by the Red Cross refugee camps after the war. These can be searched by Yad Vashem staff or by independent researchers in Israel. Similar work can be done in the Survivor Registry, published survivor records or in the actual death lists held by the United States Holocaust Memorial Museum in Washington, D.C. *JewishGen* is also collecting a large number of memorial books for various Jewish communities liquidated by the Holocaust and is posting the pages online.

(9) Cemetery Databases

The Ontario Cemetery Finding Aid and the Worldwide Cemetery Index provide the surnames, cemetery name and location of over two million interments from several thousand cemeteries and monuments.[53] Unfortunately, both are incomplete. For instance, the Ontario database does not contain the listings from several large cemeteries, notably Toronto area cemeteries, Notre Dame cemetery in Ottawa, and cemeteries in Northumberland County.

9. Use of DNA/Genetic Testing as Evidence in Estate Claims[54]

Although the use of DNA testing is most widely recognized in the forensic context, it can be extremely useful in resolving issues in estate matters. Testing may be performed in post-mortem paternity suits,

52. Available online at: www.yadvashem.org; for an excellent explanation of this resource, see the *JewishGen* infofile, available online at: www.jewishgen.org InfoFiles/YadVashem.htm.

53. Ontario Cemetery Finding Aid, available online at: www.islandnet.com/ocfa/homepage.html; Worldwide Cemetery Index, available online at: www.interment.net/.

54. For a detailed discussion of the law and available resources, see K.A. Whaley, "The Use of DNA Testing in Contested Estate Matters" (2004), 23 E.T.P.J. 140.

when a will is being contested by potential heirs or where documentary evidence is unavailable.

The test is based on DNA (*deoxyribonucleic acid*), the genetic material carried in most cells in any human body. DNA is also shared amongst other family members. Siblings share approximately 50% of their DNA with each other; a parent shares an average of 50% of his or her DNA with a child, while a more distant relative, such as an aunt or nephew, shares approximately 25% of his or her DNA. A number of organizations offer DNA testing services and can help determine kinship by using a 12-marker test.

Genetic genealogy can be the only means of establishing a family connection where there are no records or paper trail. In fact, this may be the only corroborative evidence available if the deceased and claimants originated in some countries where record keeping was unreliable or non-existent, or was destroyed as a result of armed conflict or natural disaster. If the estate trustee can reasonably foresee the likelihood of a challenge by possible children of the deceased, or next-of-kin from a country which lacks adequate documentary evidence of parentage, then the banking and testing of the deceased's DNA information should be seriously considered. Samples can easily be obtained from the deceased's remains before cremation or burial, by the funeral director or by a laboratory technician, at a total cost, including analysis, of less than $500. Special sealed packages are provided to ensure the chain of evidence and the sample can be stored at room temperature for many, many years.

If tissue has not been banked, other sources of DNA from the deceased can be considered, such as:

- autopsy samples;
- medical samples taken during the deceased's lifetime, including stored blood, dental work, pathology slides/biopsies and Pap smears;
- personal items such as an asthma inhaler, hairbrush, lipstick, shower or tub drainage traps, jewellery (particularly rings and watches), socks, bedsheets, envelopes and stamps, toothbrushes, bicycle helmets, razors, tobacco, pipes, used tissues, cigarette butts, used drinking containers, and musical instrument mouthpieces (however, for samples taken from such items, the risk of contamination by someone else's DNA must be considered, so that more than one source may be necessary);
- buried, uncremated remains may be useful. However, a funeral provider must conduct any exhumation in accordance with public

health regulations and the cost generally runs to several thousand dollars. DNA cannot be recovered from cremated ashes, although some bone fragments may still contain recoverable cells.

Finally, if no direct sample from the deceased is available, a sample from known living relatives (parents, siblings) may be used to put together the DNA pattern of the deceased. It is possible to make inferences about the deceased's kinship even without any direct samples, if samples can be obtained from a sufficient number of relatives of the deceased. For instance, if a person in another country claims to be a sibling of the deceased and the deceased has surviving siblings or nieces and nephews in North America, the DNA of the known survivors can be analyzed and compared to the DNA of the claimant. By studying the family tree, the DNA specialists can advise on the likelihood of sufficient evidence to rule out or find a connection. Once a detailed list of available parties is gathered, the DNA testing company can help determine which DNA technology should be used for the analysis. In cases involving distant relatives, the preferred technology is Y-STR or Mitochondrial DNA analysis, due to the high degree of conclusiveness of these tests. However, if the male line or female line is broken, the laboratory may have to use Autosomal STR technology. With this type of test, conclusive results cannot always be guaranteed.[55]

Samples from relatives abroad can be obtained by the testing company with the aid of sworn statements, fingerprints, photographs and tamper-proof packages, which are returned by courier to the lab in Canada. However, because such testing can involve costs of $500 to $1,000 or more per person being tested, such an exercise would only be useful in larger estates and to avoid or settle any litigation.

Due to variations in procedural methods and security measures in different testing facilities, test results may generate a high level of variability. Despite its accuracy, the probative value of DNA test results entered into evidence is always contestable. The possibility of human or technical error still exists. However, it remains a useful evidentiary tool in proving the existence of familial relationships and in establishing legal rights of claimants, particularly in dependant support and intestacy situations, especially where no conventional records are available.

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55. Information received from Jennifer Clay, Marketing Director, Orchid Helix, 635 Columbia Street, New Westminster, British Columbia, V3M 1A7. Toll free: 1-800-563-4363; telephone: (604) 523-2945; fax: (604) 523-2974; www.orchidhelix.com.

10. Conclusion

Given the former dearth of research tools available, the jurisprudence in favour of newspaper advertisements is hardly surprising. However, the past few years have seen an explosion in the number of genealogical and personal databases available in archival depositories and on the Internet. It is submitted that, for that reason, an estate trustee's fiduciary duty to distribute to the proper legal heirs would no longer be satisfied by a simple advertisement for a missing or potential beneficiary.

In searching for a missing beneficiary, it appears that the estate trustee should be guided by the size of the estate and the size of the share of the missing heir, in determining the extent of further investigation, further advertisements and how much expense to incur. An added consideration should be the availability of relevant information. If an application for directions becomes necessary, the estate trustee should obtain expert assistance and provide sufficient information from which the court can suggest or approve additional avenues of inquiry.