COMMENTS ON THE PROCEDURES OF PROVING A WILL IN SOLEMN FORM

C. H. Molyneaux*

At some time or other members of the Bar practising in the Province of Alberta will find it necessary to consider the procedure to follow in proving a will in solemn form. When this time arrives the practitioner will be faced with the problems presented by the pertinent rules of Court.

The first relevant rule is 983 (g) which defines contentious business as:

> "—A proceeding or matter shall be adjudged contentious when there are conflicting claims as to the rights to obtain or retain a grant and where proceedings in respect of such claims are taken by one person against another;"

Accordingly, if a person who believes that the testator was incompetent when the will was made, takes action to require the executor to prove the will in solemn form, the situation created is considered "contentious business". Let us review the steps of such a proceeding as set forth in the Rules of Court.

A is a person who opposes the issue of a grant of probate to the executor B on the ground that the will naming B as executor is invalid because of the incompetency of the testator at the time the will was executed. A files a caveat in the office of the Clerk of the District Court pursuant to Rule 1001;

> "Any person intending to oppose the issue of any grant may personally or by his solicitor, file a caveat in the office of the Clerk of a District Court in which the application is pending, or in the office of the Deputy Attorney General."

The next four rules prescribe the contents of the caveat, and provide that it operates as a stay and that it expires after 90 days unless extended by order of a judge.

The next important rule is 1006, which states;

> "Any person whose application for a grant is affected by a caveat may serve notice of motion returnable not less than five days after service, calling upon the caveator to show cause why it should not be discharged, and the procedure on such application shall be that prescribed in Rules 1038 and 1039."

This permits the executor, to issue a notice of motion calling upon A to show cause why the caveat should not be discharged. On the return of the notice the procedure is governed by Rule 1038. The rules do not specifically cover the case where the executor has not served notice under Rule 1006 and the caveator wishes to proceed anyway. Presumably he can do so under Rule 1038.

> "All contentitous business shall be begun by way of notice of motion before the judge in chambers. On the return of the notice the judge may hear the matter in a summary way on he affidavits filed or on viva voce testimony, or he may direct an issue to be tried for the purpose of ascertaining any facts in dispute, and may give directions respecting the parties to such issue, examinations for discovery, production of documents or other steps in the case leading to the trial thereof in the Supreme or District Court as in an ordinary action having regard to the amount or nature of the issues involved."

Whether the executor has served notice or whether the caveator takes the initiative, the rules would indicate that a hearing is held on the return of the notice of motion before a District Court judge under Rule 1038. At that time the Court will hear evidence adduced by A, upon which is based his plea for

*B.A. LL.B. (Alta.) of the firm of Chambers, Might, Saucier, Peacock, Jones, Black, and Gain, Calgary, Alberta.

an order requiring the executor to prove the will is solemn form. A produces some evidence of the incapacity of the testator and the District Court judge directs that the executor must prove the will in solemn form. The proof in solemn form cannot be made at this stage however, because not all interested persons are before the Court.

In taking the next step the executor is governed by the following rules. Rule 1040:

> "When a will is voluntarily propounded for proof in solemn form, the judge shall, after examining the petition and proofs, fix a time and place for taking evidence in support of the will, and grant a summons to see proceedings at such time and place. The summons is to be served upon all persons having or claiming to have an interest in the question of the validity of the will."

Rule 1043:

> "The same method of notifying parties and proving wills shall, as nearly as may be, be followed in a case where an executor is put upon proof of a will in solemn form by compulsion."

It appears, therefore, from the reference to "the petition" in Rule 1040 that proving a will in solemn form is a matter which is brought before the Court by way of a petition. Accordingly, the executor B issues his petition and prays for an order admitting the will to probate. On the return of the petition, the District Court judge under Rule 1040 must grant an order which directs the issue of a summons to all interested parties, requiring their attendance before the Court at a certain time and place. Then Rule 1041 provides:

> "At the time and place fixed the person propounding the will shall produce for examination one or more of the witnesses to the will, if he or they are alive, and shall give such further evidence generally of the validity as the judge may desire."

Accordingly, the Court hears the evidence that the executor produces in support of his contention that the will is valid and should be admitted to probate. The witnesses summoned by the executor may be cross-examined at this time by A or any other interested party, but this is the limit to which A or such other party may go in opposing the admission of the will to probate. If A now wishes to produce evidence in support of his contention that the will is invalid, then the hearing grinds to a halt. Why? Because of Rule 1042.
Rule 1042:

> "When any of the persons summoned attends and takes part, the proceedings, if they go beyond the cross-examination of the witnesses to the will, shall be continued and disposed of as provided for in Rules 1038 and 1039."

This rule directs that the matter now becomes subject to Rules 1038 and 1039, and it to be disposed of as described in these rules. The circle is complete and, after there have been three appearances in Court, the parties are back at the point of commencement.

In following the rules to the letter, A will issue notice of motion pursuant to Rule 1038, on the return of which he will ask for an order that the will is invalid and should not be admitted to probate. He will again produce the evidence he produced on the return of the first notice of motion. If the judge is in a hurry, he may merely direct the executor to prove the will in solemn form, in which case the parties may find themselves back at Rule 1040. However it is to be hoped the judge would take the bull by the horns, direct that an issue be tried and name the parties to the action. Finally after the issue of the usual pleadings and, following the usual pre-trial proceedings, the Court will decide whether the will is valid or invalid. By the time the matter has

reached the trial stage the parties will be disenchanted with the whole affair and there will be substantial costs built up by all sides. Witnesses will be completely unhappy with their respective counsel and will be balking at the continual popping in and out of the Court that seems to be their lot.

A recent case, *Montreal Trust Company* v. *McKay* (1957) 21 W.W.R. 611 (Alberta), which was decided by Mr. Justice J. M. Cairns, was one dealing with the situation where members of the testator's family compelled the executor to prove the will in solemn form. The judgment makes no mention of the procedure, and the procedure followed was never in issue before the Court. However, it was a case where the counsel involved co-operated in working out the manner in which the problems created by the rules should be handled, as well as one in which counsel received advice and guidance from His Honour Judge R. M. Edmunson in bringing the matter to trial as speedily as the rules would permit.

The matter commenced when the persons opposed to admitting the will to probate filed a caveat in the office of the Clerk of the Court as previously described. The caveat states that nothing is to be done in regard to the estate of the deceased without notice to the caveator. Details of the contents of the caveat and the accompanying affidavit are set out in Rule 1002(1) while the form of the caveat is specifically set forth as Form 14 in the schedule to the rules. In the case being discussed the caveator, with the blessing of the District Court judge, then proceeded to issue a petition under Rule 1040.

The executor would of course have launched the petition but in this case it was the caveator who did so.

The virtue of issuing the petition immediately is that it avoids the preliminary step of a notice of motion under 1038 which could have resulted in a direction by the Court to one or other of the parties to issue the petition mentioned in Rule 1040.

The petition issued by the caveator in the McKay case was one in which the prayer was for an order directing:

(a) the issue of a summons to all persons having or claiming to have an interest in the question of the validity of the will to see proceedings in the matter of proving the last will of the testator in solemn form; and

(b) the executor to bring into Court and to propound the will for proof in solemn form.

In the case where the executor is the petitioner, the prayer would be for an order admitting the will to probate, in addition to the direction to issue the summons to see proceedings.

On the return of the petition in the McKay case, the Court heard only the affidavit of the caveator, which contained sufficient information to satisfy the judge that it was necessary for the will to be proved in solemn form. It is suggested that, except where extradordinary circumstances exist, this is the usual situation, and only the two counsel involved need appear. The same holds true where the executor named in the will is the petitioner.

At this time the Court need decide only whether or not the affidavit in support of the contention that the will should be proved in solemn form contains sufficient grounds to cast doubt on the validity of the will.

Once the parties involved find themselves under Rule 1040 then the next step is obligatory. The judge in the McKay case had no alternative but to grant an order which directed that at a certain time and place the executor was to produce evidence in support of the will, and further directed the executor to issue a summons to all persons having, or claiming to have, an interest in the question of the validity of the will, to attend to see proceedings at the appointed time and place. The judge knew, at the time of the granting of this order, that such proceedings would not result in any substantial progress, since he was aware from the affidavit filed that the petitioner must adduce evidence to support his position. On the return of the summons to see proceedings some time was saved in the McKay estate case by not adhering stricty to the rules. The relevant rules provide:

> "At the time and place fixed the person propounding the will shall produce for examination one or more of the witnesses to the will, if he or they are alive, and shall give such further evidence generally of the validity as the judge may desire."

Rule 1042: (set out earlier but repeated here for clarity)

> "When any of the persons summoned attends and takes part, the proceedings, if they go beyond the cross-examination of the witnesses to the will, shall be continued and disposed of as provided in Rules 1038 and 1039."

All new parties to the action were allowed to raise any matters they left were relevant, but the Court did not require the executor to submit his evidence in support of the will. The persons opposing the validity of the will indicated that their case would require the calling of witnesses of their own, and so the judge dispensed with the calling of the witnesses who were to support the executor's contention. At this point the judge interpreted the rules to bring the matter within Rule 1038. He declined to hear the matter in a summary way, as he is entitled to do under this rule, and granted an order to the following effect:

(a) the executors were to proceed within a certain time to propound the will in solemn form in the Supreme Court of Alberta;

(b) the proceedings were to be commenced by the issuance of a statement of claim, with the executors as the plaintiffs' and the persons originally filing the caveat as defendants;

(c) the parties were to have the usual rights of pre-trial proceedings;

(d) the parties were at liberty to cite all persons whose interests were adverse, and to add them as parties to the action;

(e) the parties were to serve a copy of the order granted, and all other subsequent documents, on those persons who were cited.

The statement of claim issued by the executors was in the usual form but contained an allegation that the will was properly executed by the testator in accordance with the provisions of the Alberta Wills Act. The executors recited in the statement of claim that it was issued pursuant to the order granted by the District Court judge, and claimed that the Supreme Court should pronounce for the will in solemn form of law. The statement of defence contained the allegation that at the time of the execution of the will the testator was not of sound mind, memory and understanding, but was afflicted by insane delusions, which affected the defendants, such that the testator was incapable of understanding and appreciating the nature of a testamentary document, or appreciating the claims of the defendants upon his testamentary dispositions. The

defendants asked for the dismissal of the plaintiff's action and for a declaration that the document was not the will of the deceased.

The only unusual part of the pleadings was the "citation". Since the widow and children of the deceased were the defendants, it was not necessary for the plaintiff to issue such a document. If the will was set aside the widow and children would be the sole beneficiaries. The defendants, however, were required to issue a citation and serve this on all persons named in the will since their interests were being affected . If the will was set aside as being invalid then of course the beneficiaries named in the will would lose the share of the deceased's estate to which they were entitled under the will. The document was called a "citation to see proceedings" and, as in a notice, was directed to the persons interested. It contained in the recitals a reference to the order granted by the District Court and a statement that the persons being cited were beneficiaries under the will. Notice was given in the citation that the action had been commenced to have the Court pronounce for the will in solemn form of law, and a copy of the statement of claim was attached. It then gave notice that a defence had been entered, and that the defendants asked that the Court declare the will was invalid. A copy of the statement of defence was also attached. Finally the citation advised that if the person cited failed to appear the matter would be dealt with in his absence and such order given as the Court considered advisable without further notice to him.

If either party to the action, or the person cited wished, the person cited could then be added as a plaintiff or defendant in the usual way. The balance of the pleadings followed the usual forms and the trial was finally held.

It is suggested that although the procedure followed in the McKay case appears to be that contemplated by the rules, an alternative procedure does appear available within the confines of the rules. The problem is created by the section in the rules commencing with Rule 1040 under the heading "Proof of Will in Solemn Form". Rule 1040 requires a petition when a will is being voluntarily propounded for proof in solemn form, and Rule 1043 requires the same procedure where a executor is put to the proof in solemn form. However, Rule 1038 states that all contentious business shall be begun by way of notice of motion, and where the executor is forced to prove the will in solemn form, this is contentious business as defined in rule 983 (g), quoted earlier.

It is therefore contended that a person opposing the validity of a will may commence his proceedings under Rule 1038, since he is in fact contending that the executor named in the will has no right to obtain the grant and has taken proceedings to establish that position. Such a person issues the notice of motion for an order directing the executor to propound the will for proof in solemn form. The applicant should serve all parties interested, or the Court should adjourn until such notice is given. If the applicant indicates he will adduce evidence to support his contention that the will is invalid, the Court should then direct that the issue be tried, direct the issuance of the statement of claim and the statement of defence and name the parties to the action. If the applicant in his caveat indicates that he merely wishes to cross examine the witnesses produced in support of the will (Rule 1044), the judge could hear the matter on the return of the notice of motion in a summary way as permitted by Rule 1038. If any of the other persons who were served with notice wished

to go beyond the cross examination stage, the Court could then direct the trial of the issue. Since in this situation all persons who are interested are before the Court there is no need for the citation. The same disposition could be made of the matter if the executor issued the notice of motion requiring a caveator to show cause why the caveat should not be discharged. If the caveator shows sufficient reasons to support his contention that the will is invalid the judge could direct the issue be tried, or direct the executor to produce his evidence in support of the will and hear the matter in a summary way.

It is suggested that this procedure conforms with the rules and that this was the method contemplated by the authors of the rules and has the advantage of dispensing with a petition. The objection to this contention is of course the existence of the rules dealing with proof of a will in solemn form, commencing with Rule 1040.

The submission in this regard is that these rules were contemplated for use in only one certain set of circumstances, and are intended to give to an executor a method of proceeding where otherwise he would be unable to move. The circumstances contemplated are ones in which the executor has no personal convictions as to the validity or invalidity of the will. However, if he personally has some doubts on this point, or persons interested have indicated doubts on their part, or have even advised the executor that they oppose the granting of probate of the will, the executor must have some procedure to follow. Perhaps the executor may be faced with a situation in which a person interested has advised that he considers the will invalid, but such person will take no further steps to substantiate this contention. Rule 1040 permits the executor to clarify the matter. The executor may issue the petition, and, on an ex parte basis, appear before the judge to explain his dilemma. At this point he does not know precisely what his problem involves, whether a trial will be needed or whether in fact there will be any opposition at all. In any event he is able to obtain an order directing the issue of the summons to all persons who may be interested to see proceedings. On the return of the summons the executor will produce the witnesses to the will and offer such evidence as he has to support the will. If no opposition is forthcoming the Court will admit the will to probate. If the opposition does appear, but proceeds only to the extent of cross examination, the judge may hear the matter at that time and render a decision. If opposition does appear, and wishes to adduce evidence, the Court could hear it at that time in a summary way, or direct that the issue be tried and give the supplementary directions leading to the trial.

It is submitted that the rules, as presently constituted, support these suggested procedures although the wording of the various rules may raise some doubt. Notwithstanding this doubt, the procedures outlined are realistic and prove a quick method to obtain the Court's decision without dispensing with any safeguards. However, it would seem desirable to make some amendments to Sections (6) and (7) of Order LIX (Rules 1038-1044) in this regard to clarify the rules and indicate clearly the procedure to be followed in each set of circumstances where the propounding of a will for proof is solemn form is indicated.