





Testator is Still Alive

Supporting the Health of Survivors of Family Violence in Family Law Proceedings

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May 2023 Issue

Thank you to all the contributors and advertisers for supporting this month's edition of the Snail.

Want to contribute to the next issue?

The deadline is noon on May 25, 2023

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Middlesex Law Association Newsletter

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President's Message



Contributed by:

Jake Aitcheson / Lerners LLP and MLA Board President

o say the least, we're living in unprecedented times. A.I. is taking significant steps forward and resembling Skynet more and more each day; the Toronto Maple Leafs are in the second round of the playoffs (should I repeat that one for those still in shock); and a three week civil jury trial was heard in London! Like I said, unprecedented times. Your MLA Board of Trustees are embracing change as well, and are working hard to deliver original programming and social events to our membership. Stay tuned to hear more in the near future about upcoming MLA offerings.

Bencher Election

The results are in! Fortyfive lawyer and paralegal benchers were elected by Law Society licensees to serve in Convocation for the next four years. While the MLA extends its congratulations to all the successful candidates, we are proud to boast that 3 of the newly elected benchers are members of the Middlesex Law Association! Congratulations to Karen Hulan, Kevin Ross, and Matthew Wilson on a successful campaign. We take comfort in knowing that our association will be well represented over the next 4 years and wish you all the success during your term as the real work now begins.

Straight From the Bench Conference

I also want to congratulate the Co-Chairs of this year's Straight from the Bench Conference that was held May 1, 2023. This was the first in-person SFTB since 2019 and by all accounts, it was a tremendous success. It's no small feat organizing a program of this nature, but the Co-Chairs made it look effortless. Thank you for your dedication and hard work, Evelyn ten Cate, Rasha El-Tawil, Dara Lambe, and John Nicholson. I also want to personally thank our Executive Director, Tracy Fawdry, for all the work behind the scenes to organize this conference. This program could not have been run without your organization, support, and energy. Please read more about the SFTB conference within this edition of the Snail.

Paralegals

Further to the Annual General Meeting, and the overwhelming support to extend membership to paralegals practicing in Middlesex County, the MLA Board of Trustees have discussed how to best engage the paralegals in our community and bring them into the fold. It has been decided that any paralegal who is interested in joining the Middlesex Law Association will be able to register effective July 1, 2023 with full access to the Practice Resource Centre. Effective that date, paralegal MLA members will be charged a prorated fee

of \$100.00 for access to the PRC and membership to the MLA for the remainder of 2023 Those who are formal members of the MLA as of September will be able to participate in an election for the purpose of electing a paralegal to sit on the Board of Trustees. Over the next few months, the MLA intends to engage with the many paralegals in our community to canvas ideas for programs and seminars of interest.

Snail

Finally, the Snail is a tremendous publication and the envy of many law associations. Maciek Piekosz of Siskinds was the visionary behind the Snail. Back in 2016, he turned our simply black and white print newsletter into the product we are accustomed to today. We have a membership of over 900 and almost half of the membership open the Snail each month. With that in mind, I want to encourage our members to reformat their obscure or interesting research memorandums and submit the pieces to the MLA for publication. We are always seeking content and would be happy to publish interesting content. Just think, you may be one good article away from being known as an expert in your area of law.

Jake Aitcheson

President

Practice Resource Centre News





Contributed by:

Cynthia Simpson and Shabira Tamachi
library@middlaw.on.ca

New Summer Students

It's that time of year again when the summer students start at the various law firms in town. These students, like articling students, enjoy full library privileges and most association privileges during their work term. As such, it is important for you to send them to the MLA PRC to get registered, receive a tour of our space, and find out what services and resources are available to them here. There is no charge to register with the MLA and it guarantees they will receive all our communications while they are working for our members. You can also email us with your students' names and email addresses so we can set them up in our records. Please encourage them to drop in and we generally do not need advance notice of their arrival.

Spring Cleaning at the MLA PRC

Everyone likes a Spring refresh, and the MLA is no exception! The closets. in our practice resource centre have become the final resting place for a variety of coats, jackets, shoes and other wearables, and most have been there since the Pre-Pandemic Era. The cupboards and drawers in our lounge are also full of items (including food!) that have been cluttering up that space for years. We will be removing all unclaimed items on Wednesday, May 17th so, if you have used our closets and space in the past and are wondering where your trench coat has gone, make sure you drop in prior to that date or it will be donated or discarded.

Have a Research Question? Ask Us!

Are you having trouble finding something and don't know where to

look? Well, ask us! We are here to assist you with your reference questions. We won't write your research memo, but we will provide you with the resources to complete it. We have access to the full LiRN Electronic Suite of Legal Resources if you don't have time to come to the library and search those resources yourself. You can reach us by email at library@middlaw.on.ca.

We have always asked that our members email us their requests as it is easier to formulate a search strategy if the individual has laid out the request in writing (and, to be honest, it helps you put together a succinct request better than an off-the-top-of-your-head phone call).

Case Law and Legislation – we have access to Westlaw Canada, Lexis Advance Quicklaw, vLex with Vincent AI, plus Hein Online, CanLII, and other freely available website sources. Looking for an old piece of legislation from the 1950's or need to know how a current day section read in 1992? Maybe you need a British case or even an Australian one. We love those questions.

Texts and Loose-leaf Titles – We have online access to our active Thomson Reuters loose-leaf titles through the ProView platform, plus the resources available through both our Lexis Advance Quicklaw and Westlaw Canada subscriptions, including the leading texts in various areas of law. We also have a document delivery service amongst the 48 county & district law association libraries, plus the Great Library at Osgoode Hall, and can access resources not part of our local collection.

Precedents - A new resource to the system is Lexis Practical Guidance which has a wealth of precedents. We still subscribe to several modules of the O'Brien's Encyclopedia of Forms collection and have access to Canadian Forms & Precedents and Williston & Rolls Ontario Court Forms through Lexis Advance Quicklaw. There are also precedents available in the various modules to which we subscribe in Westlaw Canada. Another pro tip is to check the LSO's AccessCLE portal for precedents available in their CPD seminars going back to the mid-2000's.

Quantum Searches – Need to know the notice period for a 45-year-old middle management employee who has been employed for 16 years? There's a Wrongful Dismissal Notice Searcher in Lexis Advance Quicklaw not to mention breach of contract, child and spousal support, medical negligence, and personal injury quantum services in both Lexis Advance Quicklaw and Westlaw Canada.

So <u>send us an email</u> today and let us help you!

New Books

Davis, Margot et al. Financial crimes in Canada: an overview of money laundering and fraud, LexisNexis, 2023

Jokinen, Karen & Peter Keen.
Impaired driving and other
criminal code driving offences: a
practitioner's handbook, 2nd ed.,
Emond Publishing, 2023

MacDonald, James C. **2022 annotated Divorce Act**, Thomson Reuters, 2023

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Petrou, Sean & Akiva Stern. Virtual advocacy: litigating from a distance, Lexis Nexis, 2023

Pratt, Michael G. **Termination** and rescission of agreements for the purchase and sale of land, LexisNexis, 2023

Williston, WB & R.J. Rolls, (+ USB), LexisNexis, 2020

Missing Books

Auerback, Stephen. **Annotated Municipal Act, Volume 3**, Thomson Reuters

Bourgeois, Donald J. Charities and not-for-profit administration and governance handbook, 2nd ed., LexisNexis, 2009.

Bullen, Edward et al. **Bullen & Leake & Jacob's precedents of pleadings, 14th ed., Volume 1**, Sweet & Maxwell, 2001.

Bullen, Edward et al. **Bullen & Leake & Jacob's Canadian precedents of pleadings, 3rd ed., Volume 3**, Thomson Reuters, 2017.

Fridman, G.H.L. **Law of contract** in Canada, 5th ed., Thomson Reuters, 2006.

Harris, David, **Law on disability issues in the workplace**, Emond Publications, 2017.

Hull, Ian M. **Macdonell, Sheard and Hull on probate practice, 5th ed.**Thomson Reuters, 2016

Knight, Patricia. Small Claims Court: procedure and practice, 5th ed., Emond Law, 2021 -new

LSO. Accommodating age in the workplace, 2015

LSO. Duty to accommodate in the workplace, 2016

LSO. Six-minute administrative lawyer 2018.

MacFarlane, Bruce A. **Cannabis law**, Thomson Reuters, 2018

Marseille, Claude, ed. **The law of objections in Canada: a handbook**, LexisNexis, 2019

OBA. Constructive trusts and resulting trusts 2007: bringing order to chaos.

Oosterhoff, Albert H. **Oosterhoff on** wills, 8th ed., Thomson Reuters, 2016

Osborne, Philip H. Law of torts, 5th ed., Irwin Law, 2015.

Steinberg, et al. **Ontario family law practice, 2022 edition,** 2 vol., Lexis Nexis, 2022.

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Challenging the Validity of Wills While a Testator is Still Alive: Palichuk v. Palichuk, 2023 ONCA 116



Contributed by: Kimberly A. Cura / Lerners LLP

an you challenge the validity of a will while the testator is still alive? In Palichuk v. Palichuk 2023 ONCA 116. the Ontario Court of Appeal said no.

The background: Nina Palichuk has two daughters, Linda Palichuk and Susan Palichuk. On September 11, 2020, Nina executed four instruments:

- 1. A will that disinherited Linda and named Susan as the main beneficiary of her estate;
- 2. A continuing power of attorney for property that named Susan as the sole attorney;
- 3. A power of attorney for personal care that named Susan as the sole attornev:
- 4. A transfer and declaration of trust transferring Nina's home in Acton to Susan as a bare trustee.

Linda brought an application seeking a declaration that Nina was incapable of managing property and personal care and her appointment as Nina's guardian. She also sought the "opinion, advice, and direction of the Court" with respect to the above four instruments, claiming Nina was incapable of executing them or that they were executed as a result of Susan's undue influence over Nina.

Nina brought her own application, seeking to have Linda removed from an account held by Nina at BMO Nesbitt Burns. During the course of the litigation, Nina consented to be assessed by a geriatric psychiatrist, who found her to be capable of, among other things, making a will and granting and revoking powers of attorney for property and personal care.

The applications judge dismissed Linda's application, and Linda appealed. Her appeal raised several issues, but for the sake of brevity, this article will focus on only one of Linda's grounds of appeal: that the application judge erred in failing to address the issue of undue influence with respect to Nina's execution of her testamentary documents.

During the hearing of the application, Linda attempted to have the applications consolidated and converted into an action, citing triable issues with respect to Nina's capacity to execute her testamentary documents and Susan's alleged undue influence over her. The application judge declined to do so, essentially holding that the validity of the testamentary documents was contingent on Nina's death. Nina, still alive and having been found capable, could change her testamentary documents at any time, resulting in a

"Palichuk also contains very helpful commentary from the Court of Appeal on capacity issues in guardianship applications, granting powers of attorney, and in making transfers of property. I commend this case to my fellow estate litigators."

waste of judicial time and resources. The Court of Appeal agreed with the application judge's decision.

Typically, a will may be challenged on the basis that the testator was incapable, the will is a product of undue influence, and/or the will was made under suspicious circumstances. The Court of Appeal held that determining the validity of a will "depends upon a future contingency the testator's death" (para 67). Trotter J.A. referred specifically to section 22 of the Succession Law Reform Act, which provides that a will speaks from death.

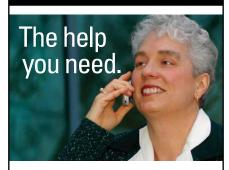
The court also identified public policy reasons to prohibit will challenges before the death of the testator. Testators may change the will as often as they like prior to death. There is no way to determine what property will be left, if any, to distribute until after a testator dies. Beneficiaries may predecease the testator. If will challenges were permitted during a testator's lifetime, as Trotter J.A. said at para 71, "the courts would be inundated with litigation that is hypothetical during the lifetime of the testator, with the potential for relitigation after their death".

One aspect of the capacity issue that the Court of Appeal did not touch upon was the inherently fluid nature of capacity. A testator's capacity to make a will is determined right at the time they make the will. This can be problematic for testators whose medical records show a history of cognitive deficits. For example, a person with dementia could be lucid enough to meet all the requirements

of the Banks v. Goodfellow test at the time of execution, and yet exhibit strong symptoms before and after. Accordingly, detailed notes by the drafting solicitor are critical in will challenge cases, and their evidence will be essential in determining whether or not the will is valid.

Palichuk also contains very helpful commentary from the Court of Appeal on capacity issues in guardianship applications, granting powers of attorney, and in making transfers of property. I commend this case to my fellow estate litigators.

This article was originally published on the Lerners LLP website on March 1, 2023 at https://www.lerners.ca/lernx/ challenging-the-validity-of-wills-whilea-testator-is-still-alive/



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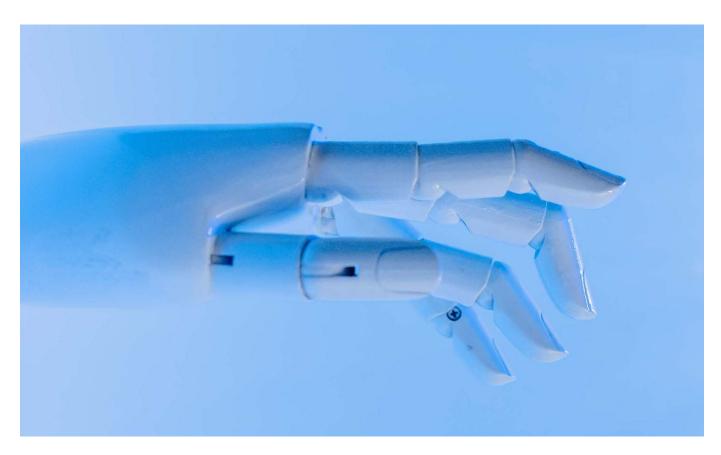


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Do you need an AI policy?





Contributed by:

David Canton / Lawyer and Trademark Agent, Harrison Pensa LLP

e are inundated with Artificial Intelligence (AI) tools. Examples include image generators such as Dall-E, Stable Diffusion, and Midjourney, and text generators such as ChatGPT, and Jasper. Google and Bing search tools also use AI to generate search results.

Al has been used for several years for things like recommendation engines, but only recently have Al tools been generally available for use by everyone.

It is inevitable that we will use AI tools in some fashion. But we need to keep in mind that AI carries <u>several legal</u> and ethical issues.

Depending on the entity, the nature of the Al tool, and how the output will be used, relying on them might cause issues.

Businesses and organizations should consider whether they should implement rules around the use of Al tools in an Al policy, or an addition to their existing technology use policy. Those rules might prevent certain activities, or might put a vetting process in place before use.

The goal could be to set a framework for ethical AI use. Also to control inappropriate rogue use of AI tools by employees who may not understand the risks and issues. Some of these issues depend on how AI is being used. Using ChatGPT directly, for example, has more issues than if it is being used as a conversational interface layer to some other service you are using. It is important to understand that distinction and what the AI is actually doing in each situation.

Al policy issues to address

- Images and text created by AI tools are probably not protectable by copyright. So you can't stop others from copying and using what you ask AI to create. If you don't want others to use what you create, that could be an issue.
- Al tools generate output based on a database of existing images or text.
 Some of them retain the queries you make and any document you enter.

- Inputting anything that is confidential, sensitive, or personal should be avoided.
- The output from Al tools is notorious for being incorrect. It also parrots the biases contained in the material in its database. If Al tools are to be used to make decisions, the tool should be vetted for accuracy and bias. Al output should be carefully reviewed before it is relied upon or published.
- If the business wants to formally use Al tools, it should vet the tools to make sure they can be used in a legal way and comply with published ethical standards.
- Algorithmic transparency is desirable, and will no doubt be required at some point legally. Consider how transparent you should be with the public and

- your customers about how your Al makes decisions.
- Using AI to get ideas or inspiration for images, articles, or other creative works may not be something that needs to be disclosed. But from an ethical perspective, disclosure may be desirable if it is being used to make decisions or to create published material. To some extent, it is no different than passing off someone else's work as your own.
 See, for example, how Wired recently described how it will and won't use generative AT technology.
- Someone in the business should be accountable for the use of Al – similar to a privacy officer or CIO. That person would be the gatekeeper for Al issues and policies, vetting Al tools, and educating staff.

The last thing a business or organization needs is for an employee to use an AI tool in a way that embarrasses the business. Best to set the tone up front to prevent that from happening.

<u>David Canton</u> is a technology and Al lawyer at Harrison Pensa with a practice focusing on technology, privacy law, technology companies and intellectual property. Connect with David on <u>LinkedIn</u>, <u>Twitter</u> and <u>Mastodon</u>.

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Statement

FOLA reacts to Law Society bencher election results

For immediate release: Monday, May 1, 2023

The following statement can be attributed to Douglas W. Judson, Chair of the Federation of Ontario Law Associations (FOLA):

"FOLA extends its congratulations to the successful candidates in this year's bencher election. We also wish to thank everyone in the legal community who participated in FOLA's candidate survey and law association candidate forums over the past two months.

"With the election now behind us, the real work begins. In the days and weeks ahead, FOLA is looking forward to connecting with the new and returning benchers to share FOLA's priorities on behalf of Ontario's law associations.

"Among those priorities are electoral reforms at Convocation as well as securing a sustainable future for Ontario's county and district law library system. These are two of the areas that many of the successful candidates committed to address, including through their responses to our candidate survey.

"Legal Aid funding and the greying of the bar also remain significant concerns across the province that are setting back our professional commitment to facilitate access to justice. At the same time, this new Convocation must play catch-up on emerging technology in the justice sector, such as AI platforms. The stakes are high, and FOLA is here to support the new benchers as they confront these challenges.

"FOLA is the only law association that represents lawyers on the front lines of legal service in all corners of the province. The concerns of our members are innately tied to the justice needs of their communities and the public interest duties of the Law Society. We look forward to continuing our strong, respectful, and consultative relationship with the Law Society over the next term."

About FOLA

<u>FOLA</u> is a non-profit organization that represents Ontario's 46 county and district law associations. Together with our associate member, the Toronto Lawyers' Association, FOLA represents approximately 12,000 lawyers. Most of FOLA's members are sole practitioners or work in small firms across the province.

###

Contact:

Douglas W. Judson Chair

Email: info@douglasjudson.ca

Included with the permission of the Federation of Ontario Law Associations (FOLA).

Supporting the Health of Survivors of Family Violence in Family Law Proceedings

Contributed by:

Jennifer Foster / Foster Family Law and Lisa Heslop/ Associate, Centre for Research & Education on Violence Against Women & Children (CREVAWC)

The Supporting the Health of Survivors of Family Violence in Family Law Proceedings project is crucial to addressing the unique needs of survivors of family violence within the family justice system. I am a proud member of the Southwestern Ontario Community of Practice since

its inception in 2020. Comprised of local experts and leaders in their respective fields, our Community of Practice has played a key role in supporting sustained knowledge mobilization in this field. I encourage you to read the briefs and legal bulletins and to watch the webinars

that have been developed through this collaboration so you can increase your capacity to support survivors of family violence.

The Supporting the Health of Survivors of Family Violence in Family Law Proceedings project is a three-year initiative (2020 - 2023) of the Alliance of Canadian Research Centres on Gender-Based Violence, with a financial contribution from the Public Health Agency of Canada.



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The overarching goal of the project is to enhance support to survivors of violence through the family law system by increasing opportunities for family law practitioners to have training, guidance and resources to support trauma-informed practice, and to improve coordination of services that will enhance the safety and wellbeing of all parties. To date, the Alliance has established five regional Communities of Practice (CoPs) comprised of family violence experts, survivors, family lawyers, researchers, mental health, and social service professionals. The five CoPs are situated in:

- British Columbia (FREDA Centre for Research on Violence against Women and Children),
- Winnipeg and surrounding area (Research and Education for

- Solutions to Violence and Abuse RESOLVE),
- Southwestern Ontario (Centre for Research & Education on Violence Against Women & Children -CREVAWC),
- Quebec (Recherches Appliquées et Interdisciplinaires sur les Violences intimes, familiales et structurelles - RAIV),
- New Brunswick (Muriel McQueen Fergusson Centre for Family Violence Research - MMFC).

Each CoP meets regionally four times a year and nationally twice a year and work together to:

 Enhance training opportunities for Gender-Based Violence and Family Law specialists to support traumainformed practice Identify strategies for improved communication and awareness across sectors to support family violence survivors as they engage with the family law sector.

In addition to hosting regional and national CoP meetings, the five Alliance centres work collaboratively with their CoPs to identify topics of interest for further learning, discussion, and knowledge mobilization. To date, the project has published 17 Family Violence and Family Law Briefs and has hosted 16 Family Violence and Family Law Webinars. For more information and project resources, please visit to our website: www.fvfl-vfdf.ca, subscribe to our mailing-list, and follow us on Twitter: myfdf.cd,















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STRAIGHT FROM THE BENCH Thank You!



Sincere thanks to our conference co-chairs, our incredible speakers, and our skilled moderators who made this year's *Straight From the Bench Conference* – the first in-person since 2019 - a great success! Thanks also to Justice Lynne C. Leitch and MLA President, Jake Aitcheson, for graciously welcoming and hosting our guests for the day.

Conference Co-chairs

Evelyn ten Cate

Rasha El-Tawil

Dara Lambe

John Nicholson

Speakers and Panelists

The Honourable George R.

Strathy

Justice Bruce G. Thomas

Justice Spencer Nicholson

Justice A. Duncan Grace

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Rasha El-Tawil 519-660-7712

John Nicholson 519-914-3358

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Member Updates

Our 2022-2023 members' directory, generously sponsored by Davis Martindale LLP, has been published and copies are available for pickup from the MLA Practice Resource Centre during normal office hours. You can always access the up-to-date membership details through our <u>online members'</u> <u>directory</u>. Please <u>let us know</u> if you move.

Aguilera, Luciano – new member at Miller Thomson LLP, direct ph: 226-559-7657, laguilera@millerthomson.com

Buac, Jelena – is now at Family Law Collective LLP, 301-200 Queens Ave., London N6A 1J3, ph: 226-785-3130, jelena@ familylawcollective.ca

Doran, William – has rejoined the MLA and is practicing at Drake Law, 104-256 Pall Mall St., London N6A 5P6, ph: 548-866-9997 ext 3, william@drakelaw.ca

Farnell, Bruce – has opened a sole practice at 28 Sinclair Cres, Aylmer N5H 3B7, ph: 226-577-8684, farnellbruce@gmail.com

Granger, KC, Honourable B.T. – has opened Granger Legal, 52 Birchmount Walk, London N6K 4K5, ph: 519-641-1650, btgranger@grangerlegal.ca

Horn, John – the firm John Horn Professional Corporation has moved to 10471 Sunset Rd, Talbotville, N5P 3T2, all else the same.

Khami, Mana – is now with Borden Ladner Gervais, Bay Adelaide Centre, East Tower, 22 Adelaide St. W., Toronto M5H 4E3, direct ph: 416-350-2563, mkhami@blg.com

Kuehn, Natalie – new member at Siskinds LLP, direct ph: 519-660-2062, <u>natalie</u>. <u>kuehn@siskinds.com</u>

McNamara, Dan

- has retired, phone: 519-870-3987, email: djmcnamara49@gmail.com

Mimnagh, Louise – is now at Family Law Collective LLP, 301-200 Queens Ave., London N6A 1J3, ph: 226-785-3130, louise@familylawcollective.ca

Paonessa, Isaac – new Call practicing at Drake Law, 104-256 Pall Mall St., London N6A 5P6, ph: 548-866-9997 ext 4, isaac@drakelaw.ca

Rho, Alice – is now at Family Law Collective LLP, 301-200 Queens Ave., London N6A 1J3, ph: 226-785-3130, alice@ familylawcollective.ca

Van Klink, Tony – email should be listed as <u>tvanklink@</u> millerthomson.com

Wilson, Zachary – office has moved to 430-495 Richmond St., London N6A 5A9, all else the same

Will Notices

Kenneth Raymond Cameron

Anyone knowing of a Last Will and Testament for Kenneth Raymond Cameron, born 01/11/1938 and died 03/26/2023, in London, Ontario, which Will was prepared by Stephanie Gower of Smith, Gower, please contact Kevin Fryday at phone 519-679-8800, email: kfryday@lawhouse.ca

Shirley Lynn Cuthbert

Anyone knowing of a Last Will and Testament for Shirley Lynn Cuthbert, born November 23 1948 and died May 28 2002 of London Ontario, please contact Jane Campbell-Morris at 519-657-6725, email: JaneCampbellMorris@gmail.com

Shirley Lynn Cuthbert

Anyone knowing of a Last Will and Testament for Shirley Lynn Cuthbert, born November 23, 1948 and died May 28, 2002 of London, Ontario please contact David Amin at 226-224-8823, email: info@davidaminlaw.com

Wayne Andrew Delanghe

Anyone knowing of a Last Will and Testament for Wayne Andrew Delanghe, born January 31, 1964 and died March 11, 2023 of Chatham, Ontario, please contact Allison Ranger at 1-519-352-1800 ext. 5, allison@hinneganlaw.com

Wasyl "Bill" Pyluta

Anyone having knowledge of a Last Will and Testament for Wasyl "Bill" Pyluta, born June 29, 1963, died March 27, 2023, last known address 604-650 Cheapside Street, London Ontario N5Y 5J8, please contact Jody Stone at Siskinds LLP, direct at 226-213-7364 or email: jody.stone@siskinds.com

Estate of George Steven Selby

Anyone having knowledge of a Will of the late George Steven Selby, of the City of London, County of Middlesex, in the Province of Ontario, born on October 22, 1944, who died on May 15, 2022, is requested to contact Matthew Bota, Harrison Pensa LLP, 130 Dufferin Avenue, P.O. Box 3237, London ON, N6A 4K3 Tel: 519-661-6752, Fax: 519-667-3362, mbota@harrisonpensa.com

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