The Probater

HULL & HULL LLP
Barristers and Solicitors
Trust Experience™

VOLUME 26, NUMBER 3, SEPTEMBER 2020

A Lasting Impact?: A Look Back and a Look Ahead

By David Morgan Smith

As we know all too well, the last five and a half months have been largely defined by COVID-19 and how it has impacted every aspect of our lives. As estates practitioners, we have had to adapt to the practical problem posed by social distancing: how do we have testamentary documents executed when their validity depends entirely on the formal requirement of having two witnesses sign in the presence of the testator? In hindsight, the legislation providing for virtual execution of Wills and Powers of Attorney was passed with extraordinary speed. At the time of writing, O. Reg 129/20, which allows for the temporary virtual and counterpart execution of Wills and Powers of Attorney, has been extended until September 22, 2020

Business as Usual

In the midst of all this chaos, the Judiciary has released several decisions which have been the subject of scrutiny by the Estates bar:

- *Calmusky v. Calmusky, 2020 ONSC 1506* in which gratuitous transfers of not just joint accounts but also a RIF designation between a parent and an adult child, were held to be subject to a presumption of resulting trust. Since the recipient could not show donative intent, the bank accounts and the RIF funds were deemed to be held in trust for the estate of the deceased parent. As the Court stated: *"I see no principled basis for applying the presumption of resulting trust to the gratuitous transfer of bank accounts into joint names but not applying the same presumption to the RIF beneficiary designation."*

  However, the case is clearly an outlier: not only is the reasoning unprecedented and not contemplated by the Supreme Court of Canada decision in *Pecore*; there is legislation that uniquely applies to beneficiary designations (e.g. *Income Tax Act, Succession Law Reform Act*, *Insurance Act*) that appears to conflict with the decision.

- *The Public Guardian and Trustee v Willis at al, 2020 ONSC 3660* in which the Court considered whether the respondent son should be required to pass his accounts for the period before he became the attorney for property for his mother.

  The Court held that, even if an individual is not specifically appointed in a fiduciary role (such as an attorney) one must look at the types of duties that the individual was carrying out to determine if they were acting in a fiduciary capacity. On this basis, the Court found that the individual had been acting as a fiduciary for his mother for some time, and determined that he should provide detailed explanations of financial transactions.

- *Kent v. Kent, 2019 ONSC 6873* in which the Court considered a claim by the son-in-law of the deceased to the home of the deceased. The deceased left equal shares of her home to her grandchildren and the son-in-law. The son-in-law sought a declaration that, since his mother-in-law had registered his late wife as a joint tenant (the transfer was gratuitous), and he and his late wife had moved in a decade after, the house became their matrimonial home and afforded the surviving son-in-law entitlements under the *Family Law Act*.

  The Court ruled in favour of the grandchildren, finding that because the transfer was made from a parent to a child,

with no consideration, the presumption of resulting trust applied. The Court also ascribed significance to the Will itself: *"The provisions of the Will and transfer made by [the Deceased] in July 2015 suggest that she believed that she was the sole owner of the property, and in a position to dispose of it as she did."*

What does the future hold?

While these cases demonstrate that the courts have carried on amidst this crisis, the failure to more seamlessly adapt to the closure of the physical courts has highlighted this as a time for reflection and re-invention. If nothing else, there is consensus that there needs to be a shift towards a paperless justice system and, perhaps, an opportunity to reassess whether the estates law regime in Ontario needs to be revisited.

(i) A Paperless Framework

When Covid-19 caused the courts to hit the brakes on physical court attendances, urgent attention was turned towards how to create a paperless system. While band-aid solutions were devised to get matters heard in the short term, the need for a permanent and effective paperless system has become a high priority.

Enter CaseLines. CaseLines is a "user-friendly cloud-based document sharing and storage e-hearing platform for remote and in-person court proceedings."

A pilot project began August 10, 2020 for selected civil motions and pre-trial conferences in Toronto, with an aim to expand to other practice areas and court locations. According to the SCJ's website, the goal is to have CaseLines implemented province-wide in all SCJ Court locations by December 31, 2020.

There is reason to be optimistic that an effective paperless system will be a reality by the end of the year.

(ii) A Re-think of Longstanding Estates Legislation

On August 6, 2020 the Estates bar engaged in a virtual town hall discussion with the Province of Ontario Attorney General, Doug Downey. In addition to the immediate question of whether to continue to allow for virtual execution of Wills and Powers of Attorney, the Attorney General is receptive to considering more substantive change to longstanding provisions in estates legislation.

Section 16 of the *Succession Law Reform Act*, which provides for revocation of Wills on marriage, is one potential target for change. The increasing concern surrounding predatory marriages in an aging population suggests that this provision can be eliminated or at least softened.

Another issue discussed was whether the courts in Ontario should be given greater latitude in validating or rectifying an improperly prepared Will.

Currently, in Ontario, a person making a Will is required to meet all of the legislated formalities relating to the making of a Will, known as "strict compliance". If there is an error in complying with the requirements of the legislation, then the Will is not valid. At present, the law in Ontario does not give a judge options to correct the error, even if the Will was entirely correct otherwise, a doctrine known as "substantial compliance".

It will be interesting to see how these discussions play out in the days ahead. Despite the challenges of the past half year, there is reason to be optimistic that these are exciting times to be an estates practitioner!

Editor: Suzana Popovic-Montag
spopovic@hullandhull.com

141 Adelaide St. W., Suite 1700
Toronto, Ontario M5H 3L5
Tel: 416.369.1140 Fax: 416.369.1517

Please note that all back issues of The Probater are available in full text on our website www.hullandhull.com