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AVOIDING LIABILITY FOR FAILED GIFTS: IDENTIFYING PROPERTY THAT THE CLIENT CANNOT GIVE

By Suzana Popovic-Montag - December 2023

Building on last month's discussion of the standard of care, this month's Solicitor's Tip addresses two circumstances where clients may be unable to gift property in their wills: when the client does not have both legal and beneficial ownership of the property, and where the disposition of the property is governed by another legal instrument. If a gift fails on either of these bases, the drafting lawyer could be held liable to a disappointed beneficiary, depending on the circumstances.[1] As noted by the British Columbia Court of Appeal, lawyers can be considered to owe a duty of care to the beneficiaries named in a will, which mirrors the duty owed to the client to competently fulfill the client's instructions.[2]

To avoid potential liability, it is advisable for wills and estates practitioners to make it part of their standard practice to take steps to confirm that the client has both legal and beneficial ownership of property that the client wishes to gift, particularly in respect of large bequests, such as land, and to ask the client whether property to be gifted in the will is subject to any other legal instruments.

Confirming Legal Ownership and Beneficial Ownership

A client may not be able to effectively gift property unless the client holds both legal title and beneficial ownership. While confirming legal ownership of property like land can be as simple as pulling and reviewing a parcel register confirming the manner in which title is held, confirming beneficial ownership of property is often more difficult. In some cases, there may be documentation of a transfer of beneficial ownership, such as a land transfer,[3] making it easier to decipher whether beneficial ownership has been transferred. However, in other cases, there may be no such documentation, making it prudent for counsel to discuss each specific bequest with the client and, if necessary, request additional information. For example, lawyers could ask their client whether they have promised to give land disposed of under the will to a third party. If so, it may be wise to ask the client questions to determine whether the bequest could fail due to a claim of proprietary estoppel[4] or other equitable claim, and to warn the client of this risk.

Property Governed by Other Legal Instruments

A client's ability to gift property under a will may be impeded by other legal instruments that deal with that property; therefore, it is important to ask whether there are any other instruments that

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[1] See, for example, *Hickson v. Wilhelm*, 1997 CanLII 11088 (SK KB), var'd 2000 SKCA 1, leave to appeal denied [2000] S.C.C.A. No. 124 [*Hickson*].

[2] See *Johnston Estate v. Johnson*, 2017 BCCA 59 at para. 38.

[3] *Hickson*, *supra* note 1.

[4] See *Adomauskas v. Chrolavicius*, 2022 ABQB 567.

govern the property the client wishes to gift under the will. If so, those instruments should be carefully reviewed. As noted above, a client may be unable to gift property if a land transfer has already changed beneficial ownership of the property.[5] Alternatively, if another instrument details how the property is to be distributed upon the client's death, it may render a bequest under the client's will ineffective without court intervention.[6]

If the client conducts other business through the estate planning lawyer's law firm, it may be prudent to confirm instructions to review those files to see if there are any other legal instruments that could impact the client's ability to gift an asset under the will. For example, if the client wishes to gift land, it may be a good idea to check for files dealing with the property. Alternatively, if the client wishes to gift corporate shares, it would be prudent to see if there are any files containing corporate instruments.

If it becomes apparent that another instrument could impact the distribution of the client's property under the will, the client must be advised of this risk.

Requesting Further Information From the Client

Lastly, the type of information that lawyers seeks from their clients about property to be disposed of pursuant to a will ought to be determined on a case-by-case basis. In the words of Justice Zarzeczny of the Saskatchewan Court of King's Bench:

> … the nature and extent of the inquiries which a solicitor undertakes in receiving instructions for the preparation of a will depend on the particular circumstances of each case. The duty requires a solicitor to make the inquiries necessary to satisfy himself that the wishes of the testator will be honoured and given proper legal expression through the provisions of the will. Unusual circumstances, if presented, must be inquired into, their results analysed, consults taken where appropriate, all to ensure that the will that is ultimately prepared meets the wishes of the client while at the same time minimizing adverse consequences which can legally be avoided by due diligence.[7]

Taking steps during a client's lifetime to ensure that their wishes set out under a will can be implemented without issue (or cautioning them about such possible issues) can go a long way in preventing the frustration of those wishes after death and the negligence claims that sometimes follow.

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[5] *Hickson*, *supra* note 1.

[6] For example, see *Simpson v. Zaste*, 2022 BCCA 208. A shareholder agreement required the testator's company shares to be transferred to his business partner at fair market value upon the testator's death, contrary to his will, which gifted the shares to his sons. The gift in the will could not be honoured as originally drafted, but the court rectified the will to effect the testator's intentions.

[7] *Hickson*, *supra* note 1. See also *Meier v. Rose*, 2012 ABQB 82 at para. 21.