HULL & HULL

ESTATE, TRUST AND CAPACITY LAW BREAKFAST SERIES

"Review of Estate Related Tax Matters - Part I"
Ian M. Hull

"Contracts and Wills"
David M. Smith

"Executor's Options for Minor's Funds"
Jordan M. Atin

January 19, 2005

REVIEW OF ESTATE RELATED TAX MATTERS

PART I

BREAKFAST SEMINAR JANUARY 2005

HULL & HULL
BARRISTERS AND SOLICITORS

IAN M. HULL

HULL & HULL
Barristers and Solicitors
141 Adelaide Street West, Suite 1700
Toronto, Ontario, M5H 3L5

Direct Dial: (416) 369-7826
Fax: (416) 369-1517

Email: ihull@hullandhull.com
Web site: www.hullandhull.com

REVIEW OF ESTATE RELATED TAX MATTERS – PART I
Ian Hull

HULL & HULL
Barristers and Solicitors
141 Adelaide Street West, Suite 1700
Toronto, Ontario, M5H 3L5

Direct Dial: (416) 369-7826
Fax: (416) 369-1517

Email: ihull@hullandhull.com
Web site: www.hullandhull.com

Introduction

This paper is not intended to be an exhaustive review of Estate and Tax issues. However, in our daily practice, we are regularly faced with tax issues that are of importance in the context of the administration of the Estate assets.

The following is a review of some of those important tax related issues, and although there are no direct death taxes in Canada, the income tax payable on death is largely exigible on the net accrued gain on assets held by the taxpayer at death.

Returns for Deceased Taxpayers

There are various returns that may need to be filed on the death of the taxpayer.

(a) Terminal Year

The final tax year of the deceased is known as the "terminal year" and begins on January 1 of the calendar year of the death and ends on the date of death.

The deceased is subject to tax on all income earned or realized in the terminal year, in a manner similar to the previous taxation years.

Prior year returns, which were required, but were not filed and are in effect overdue need to be filed as promptly as possible.

However, returns for a taxation year where death occurred in the period commencing November 1st and ending either April 30th or, if the deceased would have qualified for the extension for the self-employed and their spouses, June 15th, are due in the later of six months after the date of death and the April 30th or June 15th date as otherwise applicable.

It is important to note that the payment date, as opposed to the return filing date, is calculated on a different set of rules and can be earlier.

Furthermore, if the deceased person had filed a return for the year in circumstances where death has occurred for example, following April, the legal representative still has up to six months from the date of death to re-file.

(b) Final Return

A return for the period from January 1st of the year of death to the date of death must be filed by the later of six months after the date of death and the normal filing date for the deceased for the year of death. Normally, the deadline is April 30th of the year following death, but June 15th if the deceased or a "co-habiting spouse" of the deceased had business income for the year of death.

It should be noted that notwithstanding the filing deadline, the payment date normally remains April 30th, of the year following the year of death.

Except, where the death occurs in November or December the payment date for the final return is six months after the date of death.

Where a spouse trust which is "tainted" by a requirement for payment of debts of the deceased out of trust property, there is provision for an extension to 18 months after the date of death.

Rights Or Things

Subsection 70(2) provides that, where a taxpayer died and had "rights or things", which, if realized or disposed of prior to death would have been included in a taxpayer's income, the value of the rights or things are included in the deceased's income in the taxation year in which the taxpayer died. Dividends may for example be rights or things, depending on the circumstances.

The personal representative of the deceased taxpayer may elect to file a separate return for the value of the rights or things, owned by the deceased at the time of death. That return must be filed by the later of:

- one year from the date of death; or
- Ninety (90) days from the assessment date of the ordinary return for the year of death.

Testamentary Trusts

Where a taxpayer died after the fiscal year end of a testamentary trust from which he has income, the income received by the taxpayer for the period between the fiscal year and of the testamentary trust and the date of death may be included in a separate return.

Residence of an Estate

An estate will be taxable in Canada if it is resident in Canada, carries on business in Canada, or disposes of taxable Canadian property.

The residence of an estate is determined in the same manner as that of a trust. It is sometimes difficult to determine the residency of an estate where there are several executors.

If a majority are resident in Canada and if control over the trust property is exercised in this country, the estate is generally considered to be a resident of Canada.

If the majority of executors are not resident in Canada and those who are resident in Canada do not exercise any control or management over the estate property, the estate might not be considered resident in Canada.

It is important to note where there is a non-resident trustee consideration needs to be given to whether or not there will be a negative tax consequence if the non-resident trustee assumes *de facto* control of a trust.

Principal Residence

Pursuant to paragraph 40(2)(b) of the ITA, the deceased's principal residence is exempt from any capital gain tax owing on death.

The principal residence exemption applies to the whole amount of the gain where the home was the deceased's principal residence for the entire period jointly or otherwise, and the deceased was a Canadian resident.

Where the home is jointly owned by the deceased and his or her spouse it also qualifies as a principal residence to the deceased's joint interest upon death.

Where the principal residence passes by right of survivorship on death, it does so on a rollover basis.

Prior to 1982, one family could have more than one principal residence. The principal residence exemption essentially eliminates, for income tax purposes, the capital gain on the disposition of a taxpayer's principal residence.

Interpretation Bulletin IT 120R6 (made on July 17, 2003 outlined in detail CRA's position in respect of this issue)

The IT bulletin deals with issues relating to:

- Types of property that can qualify as a principal residence;
- Ownership requirements;
- The "ordinarily inhabited" rule.

The IT Bulletin does not refer to such topics as:

- The disposition of part of a principal residence;
- Disposition of property where only part of it qualifies as a principal residence;
- Principal residence on land used in a farm business;
- The ability to designate a principal residence in a personal trust.

Specifically, this IT Bulletin deals with the transfer of a principal residence inter vivos.

For example, paragraph 38 of the IT Bulletin deals with subsection 40(4) of the *Income Tax Act* (ITA) and its applicability if property of a taxpayer has been transferred inter vivos to the transferors' spouse, common-law partner, former spouse, former common-law spouse or a form common-law partner.

Furthermore, it addresses the issue of circumstances where a spousal or common-law partner trust is created or a joint spousal or common-law partner trust, or an alter ego trust is created.

For example, CRA has been asked to comment on circumstances where a property is transferred into an alter ego trust and it is noted that the principal residence status, a tax exempt status, is preserved where a property is transferred from one to another in the appropriate circumstances.

Alter Ego, Joint Spousal or Common-law Partner, Trusts-Income Attribution Rules

Pursuant to sub-paragraph 73(1.01)(c)(ii) the settlor of an alter ego trust is entitled to receive all of the income that arises before the individual's death. While property is transferred into a joint spousal or common-law partner trust, the settlor, his or her spouse, or both must be entitled to the income from the trust.

On the death of the settlor, the later of the settlor's spouse's or common-law partner's death, there is a deemed disposition and any gain realized on a disposition of property of an alter ego trust would not be included in the income of the settlor.[1]

Joint Spousal Trust-Inquires for Qualifying

Pursuant to subsection 73(1.01) the individual or individual's spouse, in combination with the other, must be entitled to receive the income of the trust that arises before the later of the death of the individual and the death of the spouse. No other person may, before the later of those deaths, receive or otherwise obtain the use of any of the income or capital of the trust. If these

[1] Document no. 2001-0114045, July 11, 2002.

conditions are met, then CRA's view is that a transfer of property to such trust, by either spouse, would be eligible for the rollover in subsection 73(1).[2]

Executor's Year-IT Bulletin (IT-286R2)

CRA indicates that during the first twelve months following the date of death, the executor's year, a beneficiary's right to the income of the Estate is enforceable under Common Law.

In William Grayson v. N.N.R.[3], the Court held that income earned by an Estate was taxable on the hands of the beneficiary. The Court held that the purpose of the executor's year was to provide time for the executor to deal with the Estate according to the Will. However, in Grayson, the taxpayer attempted to use his power as sole executor and sole beneficiary to create an essentially artificial testamentary trust and the Court held that he as a beneficiary and sole executor, could enforce payment of the income of the Estate before the end of the first year. As such, the Court held that the income reported by the Estate during the first year was in fact taxable in the taxpayer's hands and not in the Estate.

Transformation of an Estate into an Ongoing Testamentary Trust

Careful note should be made where a testamentary trust became an inter vivos trust where the assets of the Estate were not distributed in accordance with the terms of the Will. CRA held[4] that if it is an immediately distributable Estate, the executor does not have the right to simply create a testamentary trust as a result of delay in the distribution of the assets. CRA held that at the end of the executor's year, it is a question of fact as to whether or not the Estate is in a

[2] Document no. 2001-0099055, January 23, 2002.
[3] 90 DTC 1108 (T.C.C.).
[4] Document no. 2002-0172475, May 30, 2003.

position to distribute the property. In fact, inadvertently, a trust might be created whether there is certainty of the deceased's intention to create a trust or not. Therefore, if you do not wish to have the income of the Estate taxed at the trust level then one must be careful.

Specific Income Tax and Estate Planning Issues

(i) Estate Freezes

- Estate freeze is a fundamental tool in respect of the many Estate planning options for the wealthy client.
- The ultimate goal of a properly executed Estate freeze is the smooth intergenerational transfer of wealth.
- Can be a "bumpy road".
- Classic example of an Estate freeze gone wrong and ultimately aggressively litigated is the intergenerational transfer of wealth of the *Estate of Harold Ballard*.[5]
- Corporation grows more profitable, the tax implications become more and more of an issue.
- Potential capital gains which will be triggered on the death of the person who created the company.
- Typical Estate planning technique is to consider whatever steps are necessary to limit the tax liability on death so that the tax burden at that time is not so significant that it dramatically impacts the ongoing financial success of the company.
- Estate freeze can be effected to allow for the future growth of the company to go to the benefit of his or her children.

[5] 820099 v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2nd) 13 (Ont. Ct. (Gen. Div.)).

- Allows for the creator of the company's stake in the corporation to be converted into voting preference shares with the common shares owned by the children.
- The preference shares will retain voting control.
- For an good summary of the issues see: John J. Chapman article "Estate Freezes Thirty Years Later"[6].
- Estate Freeze concept begins with the belief that our young children will love us as much in the future as we so desperately love them now, the founder of the company will shrug off warnings by some overly cautious lawyer of possible theoretical complications 20 or 30 years hence.
- The reality that with this planning tool comes a certain degree of loss of control of the company from the perspective of the individual who created it.
- Loss of control factor combined with the family dynamics that exist can be enough to create many litigation scenarios.
- Definition of estate freeze: October 21, 1988 information circular 88-2 in respect of Section 245 of the Income Tax Act describes an Estate freeze as follows:
- Under a typical Estate freeze arrangement a parent transfers to a newly formed corporation all of the shares of an operating company and elects under subsection 85(1) a rollover to defer recognition of the gain on the transfer. The consideration for the transfer is preferred shares retractable at the option of the parent for an amount equal to the fair market value of the shares of the operating company transferred. The preference shares carry voting control. A

[6] John J. Chapman "Sharper Than A Serpent's Tooth: Estate Freezes Thirty Years", [1996] 16 E.T.J. 47 at page 51.

trust for minor children of the parent subscribes for common shares of the new company for a nominal amount.[7]

- The remedies available in the Estate freeze context are found through the commercial litigation protections such as the oppression remedy.[8]
- Family dynamics that run through the whole Estate freeze process are of course the difficulties that can arise as between child and parent.
- The Estate freeze itself usually creates a common shareholder for the child and this irrevocable gift to the child brings with it minority shareholder status.
- Furthermore, prior to the Estate freeze the creator of the company and typically the sole shareholder, will likely have operated without any scrutiny from others including the shareholders.
- The ability of the creator to set the company's compensation, borrow money from the corporation, enter into related-party transactions and manage the business enterprise will now be subject to a battery of legal tests.[9]

Corporate Litigation Issues

- Tax savings created by an Estate freeze demand that the child directly receives common shares and is the true "owner" of those shares.

---

[7] October 21, 1988, ITA Information Circular 88-2 - General Avoidance Rule - Section 245 of the Income Tax Act.
[8] For the purpose of this article I will refer throughout to the Canada Business Corporations Act, R.S.C. 1985 , c.C-44.
[9] John J. Chapman "Sharper Than A Serpent's Tooth: Estate Freezes Thirty Years", [1996] 16 E.T.J. 47 at page 49.

- As such the ownership interest of these common shares, creates numerous rights for the child which can be important if the friendly family relationship changes in any significant way.
- Business corporations statutes both federally and throughout the provinces are for the most part a series of checks and balances that provide a mandatory framework of corporate governance.[10]
- The following is a list of some of the limits on the individual who created the company and his or her ability to govern generally and therefore may be used as a sword by the common shareholder children:
  - (i) Obligation to have audited financial statements;[11]
  - (ii) To provide audited financial statements to the shareholders;[12]
  - (iii) To hold annual shareholders meetings;[13]
  - (iv) The veto of common shareholders (by way of a requirement of class veto) on fundamental changes to the corporation's affairs or structure, including a sale of substantially all assets or amalgamations;[14]
  - (v) The directors of the corporation are under an obligation to act in the best interests of the corporation;[15]
  - (vi) The compensation agreements of the corporation and all its officers, directors and shareholders is subject to scrutiny;[16]
  - (vii) If there is a disgruntle child a buyout by the individual who created the company will involve an insider trade requiring

[10] Supra Note 2 at page 53.
[11] C.B.C.A., S. 163. (The consent of all shareholders is required in order to dispense with the audit requirement.)
[12] Ibid. Section 155.
[13] Ibid. Section 133.
[14] Ibid. Section 176.
[15] Ibid. Section 122(1). The best interest of the corporation have been judicial held to be the best interest of all of the shareholders "taking no one sectional interest to prevail over the others" See John J. Chapman Supra Note 2 at page 54.
[16] 29 Ibid. s. 120 (7).

specific confidential facts having material bearing of the value to be disclosed to the child.[17]

(viii) Scrutiny of the Court by way of winding-up applications and the oppression remedy sections of the relevant business statutes.[18]

(ii) Gifts, Charities:

- Common means of reducing taxation.
- Generally bequests to charity made in a Will are deemed to be made in the year of death and must be included in the terminal return (sec. 118.1 (5) of the *Income Tax Act*).
- The amount of donation must be specified in the Will.
- A percentage or specified share of the residue is sufficient.
- Previously if the charity itself was not specified then you could not reduce taxation. However, recent changes at CRA seem to have settled this question.
- If Will stipulates that a specific amount is to be gifted to a charity and includes a list of charities to which the gift or gifts may be made, but discretion is left to the trustees to determine the amount to be received by each charity, the donation will qualify as a gift by will if the donation is made to a charity that is a "qualified donee".

(iii) RRSPs:

- Registered Retirement Savings Plans ("RRSPs") – attractive tax planning tool.
- Unused RRSP contribution room can be taken advantage of by the executor within 60 days of the calendar year of death.

[17] See John J. Chapman Supra Note 3 at page 54.
[18] See MacIntosh, "The oppression remedy: Personal or derivative?" (1991), 70 Can. Bar. Rev. 29.

- As the deceased is deemed to have disposed of all of his or her capital assets immediately before death, this can be a significant tax advantage.
- Section 196 of the *Insurance Act* allows for the proceeds to devolve directly to the designated beneficiary and not the estate.
- Therefore a certain degree of creditor protection exists.
- No probate fees payable.
- Spousal RRSP is another useful roll-over tool.
- Executor may need to create a spousal RRSP if not in place at the date of death.
- Ability exists to roll-over RRSPs to finance a dependant child or grandchild under the age of 18 years old (sec. 60(1)(ii)(B)).

(iv) Carry Back of Loss from Estate's first taxation year

The Executor of an estate may elect to treat all or any part of the total capital losses in excess of the capital gains realized in the first taxation year of the estate as though the elected amount of these net losses have been losses of the deceased in the year of death. (see paragraph 164) 6 (c)).

Any of the capital loss which the Executor chooses to apply to the income of the deceased is deemed not to be a loss of the estate for the purposes of calculating income or its net capital loss for the first taxation year. The election must be filed within a year of death.

CONTRACTS AND WILLS

By David M. Smith[1]

1. Introduction

This brief paper deals with the manner in which the law of contract interacts with the law of Wills. The intent is to consider and explore issues of concern to solicitors when drafting Wills and otherwise advising their clients.[2] The following topics will be considered:

(a) Restrictions on Testamentary Freedom generally;

(b) Contracts to make a Will;

(c) Contracts not to revoke a Will or Contracts not to change a Will;

(d) The Doctrine of Mutual Wills; and

(e) Contracts not to take a benefit under a Will;

2. Restrictions on Testamentary Freedom

(i) Statutory Restrictions

In considering the preparation of his or her Will, a testator may typically give consideration to his or her spouse, children, or extended family as the likely beneficiaries of his or her estate.

While the client's decision to name family members in his or her Will is commonly motivated by love and affection, we know that Part V of the *Succession Law Reform*

---

[1] Of Hull & Hull, Barristers & Solicitors

[2] This paper is not to be considered as legal advice but, rather, provides a general overview of certain issues. Specific guidance and advice should be sought with respect to any particular situation.

Act , in fact, imposes an obligation upon a testator to benefit those who are dependent upon him. Thus, if a testator fails to appropriately provide for his spouse, children, parents, siblings or grandchildren whom he was supporting or had a legal obligation to support immediately prior to his death, the disappointed family member may commence an application against the estate for support pursuant to the provisions of Part V of the *Succession Law Reform Act*.

Accordingly, clients should be advised about the provisions of Part V of the *Succession Law Reform Act* and the impact of the statute upon their testamentary freedom.

In addition, the right of a spouse to elect under the provisions of the *Family Law Act* provides a further restriction on the testamentary freedom of the testator. A client intending to make a Will cutting out his spouse is well advised to be wary of the provisions of the *Family Law Act* in addition to the spouse's remedy under of Part V of the *Succession Law Reform Act*.

(ii) Contracts

Moreover, clients need to be advised that, in making their Wills, the primary intention to provide a gift has to take into consideration all restrictions on testamentary freedom imposed by law. While this will generally consist of the statutory obligation to dependants and spouses (as noted), the law of contract may also operate to restrict the ability of a testator to revoke a Will or make a new Will.

The most readily ascertained contracts are domestic agreements such as marriage contracts and separation agreements. Typically, such contracts are drafted by lawyers, duly executed and backed up by a Certificate of Independent Legal Advice. As such, there may be little question as to the validity of such contracts (even if their enforceability to preclude a support claim is questionable).

However, the interaction between domestic agreements and Wills gives rise to its own set of issues, the full extent of which are beyond the scope of this paper.

Other than domestic agreements, less formal (though potentially just as valid) contractual arrangements may exist and it is these that are the focus of this paper.

The difficulty for the solicitor drafting a Will may be that he or she will not be apprised by the client of all of the circumstances which may give rise to a contract thereby restricting the testamentary freedom of the client.

3. Contracts to make a Will

For example, a testator may have a contractual obligation to benefit a particular person ("the promisee") which obligation is unknown to the solicitor who drafts the Will. Such an obligation will typically arise in situations wherein the testator has promised (often verbally) to leave his estate or a certain asset (his or her house, for example) to the promisee.

If such a contract has been created, the act of making the Will benefiting the promisee constitutes performance of the contract by the testator. However, if the contract is simply to make a Will, the promisee has no guarantee of receiving his entitlement under the Will on the death of the testator.[3] So, for instance, if the testator depletes his assets through *inter vivos* transactions, leaving little if any assets in his estate, the promisee may have little recourse.[4]

Who is the disappointed promisee? A typical scenario will involve someone at arm's length who either: (i) offers assistance to an elderly widow or widower or (ii) accepts the request made of them to provide assistance in consideration of a promise made by the testator to grant the promisee a benefit under his or her Last Will.

If the promisee performs the requested or offered services in accordance with the contract, his actions may evidence a reliance upon the promise made by the testator. If the testator fails to make a Will in accordance with the contract, or revokes his Will in breach of the contract, the promisee will have a claim for damages for breach of contract.

The breach of contract will be discovered by the promisee upon the death of the testator, at which time he or she will have a cause of action.

---

[3] see *The Law of Succession*, A.R. Mellows, 3rd edition, p.16.

[4] However, if the promisee can demonstrate that he acted to his detriment in reliance upon the contract, the equitable remedies of *quantum meruit*, *constructive trust*, and/or *proprietary estoppel* may be

Note, however, that if the contract calls for the promisee to receive a specific piece of property (most commonly a piece of real property) the breach will occur when the testator disposes of the property.

If the testator provides for the promisee to receive a property in a Will and promises not to revoke the Will (but does) the breach occurs when the Will is revoked.

4. Contracts not to revoke a Will or Contracts not to change a Will

The typical scenario is again one in which a stranger is engaged by the testator to provide services in the expectation of receiving compensation out of the deceased's estate.

A contract not to revoke a Will must be differentiated from a contract to make a Will. The former is able to withstand the Statute of Frauds because the Will itself is a written document which can be construed as an agreement if parole evidence is admitted. The beneficiary under such a Will therefore becomes, in effect, a party to a contract with the testator. If the beneficiary under such a Will is provided with a copy and told "Here is my Will, I shall not revoke it on the understanding that, in reliance on my promise, you shall care for me (or provide services, etc.)", a contract is created.

---

invoked to provide alternative support for claims against the estate of the testator by the

The effect is that the Will, which does not take effect until the death of the testator, in fact is evidence of a contract from the date that the Will is executed or, at least, disclosed to the promisee.[5]

For evidentiary purposes, this form of contract is superior to a contract to make a Will for the simple reason that the Will itself provides written evidence of the contract and will be compelling corroboration of the contract in the event that litigation is commenced against the estate.[6]

Payments made by the deceased to the promisee during the deceased's lifetime may actually militate against (rather than in favour of) the existence of a contract not to revoke a Will. If the promisee purports to rely on the promise of the deceased not to revoke a Will in performing services, evidence of payments within the deceased's lifetime may tend to raise a question as to whether the deceased considered such payments to be conclusive of her obligations to the promissee.

---

disappointed promisee.

[5] This is not the only situation in which a Will may take effect prior to the death of a testator. Consider the existence of a beneficiary designation contained in a Will which will take effect from the date the Will is executed.

[6] Such corroboration is required by s. 13 of the *Evidence Act*.

5. The Doctrine of Mutual Wills

The doctrine of mutual wills constitutes a specific kind of contract not to change a Will. The common scenario is one in which a husband and wife attend together at a lawyer's office with a common (agreed) intention as to how the surviving spouse is to allocate his or her estate. Mutual Wills would appear to be increasingly common as an estate planning technique in second marriages whereby spouses can agree between themselves as to an appropriate distribution to the children of either spouse's first marriage, regardless of the order of death.

The solicitor who draws the Mutual Wills is a witness to the contract. Moreover, the solicitor who draws the Mutual Wills is aware of the terms of the contract and has a duty to each of the parties who have jointly retained him for the purpose of making mutual wills.

There has been much debate within the profession as to the obligations of the solicitor who acts for clients on a joint retainer for the purpose of making mutual wills.

Most recently, at its November, 2004 convocation, the Law Society of Upper Canada, by a vote of 15-14, rejected a proposed commentary to be added to Rule 2.04(6) of the Rules of Professional Conduct dealing with the issue. The proposed commentary had been provided to Convocation by the Professional Regulation Committee.

Rule 2.04(6) states as follows:

> Before a lawyer accepts employment from more than one client in a matter or transaction, the lawyer shall advise the clients that
>
> (a) the lawyer has been asked to act for both or all of them,
>
> (b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
>
> (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both of them or all of them and may have to withdraw completely.

The present **Commentary** to the rule is as follows:

> Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

The additional **proposed Commentary** put before Convocation reads as follows:

> A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act*, 1992 S.O.1992 c.30 to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). At the outset of this retainer, the lawyer should advise the spouses or partners that if one of them were later to contact the lawyer with different instructions, for example with instructions to change or revoke a will

without informing the other spouse or partner, the lawyer has a duty to decline to act unless both spouses or partners agree.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8)

At the November convocation, the Professional Regulation Committee's motion for acceptance of the proposed Commentary was, as noted, narrowly defeated and the proposed Commentary was sent back to the Committee for further study. The motion was defeated because there remains an issue as to whether a solicitor has a duty to advise a spouse when his or her spouse contacts the solicitor to revoke or change his or her will. The proposed commentary was silent on the issue.

The issue is significant for estates practitioners, particularly in the context of the contractual relationship that is created by the making of mutual wills. If the lawyer is aware of the existence of a contract between his two clients, and if one of the client's contacts him to revoke his Will or make a new Will, such an act will constitute a breach of contract. Clearly, the lawyer cannot act to assist in the breach of contract thereby causing damages to one of his clients.

From a practical point of view, the client who wishes to breach the contract will most likely attend at the office of a lawyer other than the lawyer who drew the mutual wills. However, this begs the question whether a lawyer who meets with the client for the first time should explore the issue of previous Wills in detail including the possible existence of a contract between the client and his spouse.

If the new lawyer thereby becomes aware of the existence of mutual wills, it is a nice question as to whether the lawyer should be prepared to draft a will for only one of the spouses. While the existence of Mirror Wills between spouses is not necessarily evidence of a contract between the spouses not to change their Wills, the lawyer drafting a Will for only one spouse, who is aware of the existence of the Mirror Wills may be well advised to explore the issue with his new client. If advised by the new client that there was no contract or legal obligation between the spouses not to change their wills, it may be advisable for the lawyer to reference this representation in his reporting letter to the client.

6. Contracts not to take a beneficial entitlement under a Will

The most common example is a separation agreement. A separation agreement is a contract and the ordinary rules of interpretation of contract must be applied to such a document. A contract has existence by act of the parties and, as such, reflects the intentions of the parties to the contract. The general rule is that separation agreements, being contracts, are enforceable by and against the executor of a deceased contracting party.[7]

If the parties to a separation agreement have (prior to the agreement) previously made Wills giving the other their estate, the separation agreement would appear

[7] see *Re Potruff*, [[1972] 3 O.R. 81-89 (H.C.).

to evidence a clear intention on the part of each party not to benefit the other.[8] However, if the Will is not changed, the court will review the Separation Agreement with a high degree of scrutiny. Only if each party has clearly contracted away his or her right to take as a beneficiary of an estate will the Court find that the Separation Agreement acts to disinherit such party.

A beneficial entitlement is a right (ie. a right to property). The threshold for a finding that a party has given up a right (as opposed to a claim) is, apparently, very high. Why is there a higher threshold for the former? It would seem that as long as each party has been afforded independent legal advice, the contract can stand. If the parties who have contracted away their rights have received ILA, and the contract is not vulnerable under arguments relating to coercion, etc., a beneficial entitlement under a Will may be surrendered by contract. The gift having therefore failed, it lapses and passes either to the next of kin of to those who take under any built-in anti-lapse provision contained in the Will.

A contracting party, in renouncing her entitlement to apply for her appointment as Estate Trustees With a Will in respect of the estate of the deceased, has acted in part performance of her obligations under the contract and is thereby estopped from taking the position that the Separation Agreement is invalid.

The wording of a separation agreement will preclude a testator from continuing to benefit his or her spouse under the terms of his or her will where the agreement

---

[8] Similarly, if the parties have not made Wills, the separation agreement would appear to evidence

clearly states an intention that the parties waive their rights to claim under the other's will.[9]

Where a sole residuary legatee of the deceased's estate, has contracted out of her entitlement as a beneficiary under the deceased's estate, the disposition to her under the Will has failed and there is a lapse of her interest under the terms of the Will.[10]

7. Summary

The legal obligations imposed upon a testator may arise under contract and not merely under statute. These obligations restrict testamentary freedom and the solicitor drafting a Will for a client should explore obligations that the testator has which, but for such enquiry, may not be readily ascertainable.

---

an intention to of the parties not to benefit each other on an Intestacy.

[9] see *Re Kindl*, 13 E.T.R..

[10] see *Canadian Forms of Wills* (4th edition) at p. 172, and *Theobald on Wills* (15th edition) at Chapter 58, p.781.

Executor's Options for Minor's Funds

Jordan M. Atin
Associate Counsel
Hull & Hull
(416) 369-0335
jatin@hullandhull.com

Where minor beneficiaries are involved in an Estate, an Estate Trustee has a number of options for dealing with the portion of the Estate to which the minor is entitled.

This paper explores the three major options that Estate Trustees have with respect to minors' funds.

Typically, the Will will include a clause that permits the Estate Trustee to hold the minors' funds in trust until they reach the age of majority. A sample clause is as follows:

> **SUBJECT AS MAY BE SPECIFICALLY provided herein, if any person should become entitled to any share in my estate before attaining the age of majority or while under any other disability, the share of such person shall be held and kept invested by my Trustees and the income and capital or so much thereof as my Trustees in their absolute discretion consider necessary or advisable shall be used for the benefit of such person until he or she attains the age of majority or is no longer under such disability when such share or the amount thereof remaining shall be paid or transferred to him or her, or should such person die before attaining the age of majority or while subject to such disability, to his or her legal personal representatives.**

Coupled with that provision, one normally finds a provision permitting an executor to make payments to a minor's parent or guardian.

> **I AUTHORIZE my Trustees to make any payments for any person under the age of majority or who is otherwise under a legal disability to a parent, guardian or attorney under continuing power of attorney of such person or to any other person my Trustees may consider to be a proper recipient therefore whose receipt shall be a sufficient discharge to my Trustees.**

However, the decision in *Headley v. Grant*[1] held that such a clause does not permit an Estate Trustee to merely transfer the whole of a minor's entitlement to the parent or guardian of the minor so as to rid himself from the duty of holding the minor's funds.

Since the decision in *Headley v. Grant*, many practitioners have altered the provisions in their Will to permit the Estate Trustee to transfer the minor's entire

---

[1] 1998 (unreported) (O.C.G.D.)

interest to the parent or guardian who becomes the successor trustee of those funds. A sample clause follows:

> **to make any payment of income or capital or to pay any legacy or residuary interest in part or in whole on behalf of any person under the age of majority or under any disability to a parent or guardian of such person or to any person to whom my Trustee, in his absolute discretion, shall consider it advisable to make such payment or payments, whose receipt shall be a complete and sufficient discharge to my Trustee and who shall be deemed to be a successor Trustee with all of the powers of my Trustee with respect to such funds.**

If such a clause exists in the Will, one option that the Estate Trustee has is to transfer the minor's entire interest to the parent or guardian. In such circumstances, it is advised that the Estate Trustee receive an Acknowledgement by the parent of his or her assumption as the Successor Trustee of those funds. It is also recommended that you consult with the Office of the Children's Lawyer to see if they have any objection to such course of action

Assuming the Will includes only the old version of the power to pay funds to a parent or guardian, the option to pay the entire amount to a parent or guardian is not available.

However, there are three additional options available:

1. **Maintaining the minor's share in the Estate Trustee's hands.**

Provided that the Will permits it, the Estate Trustee may hold the funds in trust until the minor reaches age eighteen.

The Estate Trustee, therefore, has responsibility to ensure that the share is invested properly and that any encroachment decisions are made in accordance with the Will.

Obviously, depending on the age of the children, this may prove to be an onerous task for the Estate Trustee. Consequently, an Estate Trustee may wish to discharge his or her obligations as Trustee of those funds in some other manner.

2. **Payment of the minor's funds into Court.**

Sections 36 of the *Trustee Act* describe an Estate Trustee's ability to pay monies due to a minor into Court. The proceeds are paid to the Accountant of the Superior Court who holds the money in interest bearing investments until the minor reaches age eighteen. To effect the payment into Court, the executors must swear an Affidavit confirming certain information regarding the share of the Estate and details regarding the minor. A precedent Affidavit is attached.

A certified cheque or bank draft payable to the Accountant of the Superior Court must be submitted with the Application. Payment into Court in such manner discharges the Estate Trustee's responsibility with respect to those funds.

Subsequent distributions to the minor of his or her interest may be made in a similar fashion.

Typically, on a final Passing of Accounts, the minor's share will be directed to be paid to the Accountant of the Superior Court.

The parent or guardian of the minor has the opportunity to request release of a portion of those funds, depending upon certain circumstances. A request is made to The Office of the Children's Lawyer who assesses the proposal and, if it is satisfactory, attends before a Judge for a fiat permitting payment out of Court to the parent or guardian on behalf of the minor at no charge to the parent or the minor.

3. **Appointment of parent as Guardian of Property.**

In circumstances where the parent is adamant that the money not be paid into Court, the Estate Trustee has another alternative.

The *Children's Law Reform Act* permits the payment of up to $10,000.00 to a parent or guardian, without that parent or guardian being appointed as the Guardian of Property for the minor.

Thus, a Release from the parent with respect to that $10,000.00 is a sufficient discharge for the Estate Trustee.

This is a one-time aggregate amount of distributions to a minor. Therefore, you cannot simply make several $10,000.00 payments to a parent or guardian.

For amounts greater than $10,000.00, a parent must apply to Court to be a Guardian of Property for the minor.

Once appointed, the Estate Trustee may pay the minor's interest to the Guardian of Property for that minor and receive a discharge from him or her. Guardianship applications can be limited to a share in an Estate, rather than governing all of the minor's properties.

The application requires that a Management Plan be produced as well as evidence of the respective guardian's own net worth.

A sample Guardianship Application is attached.

Obviously, one of the disadvantages of such an application is its cost. Typically, The Children's Lawyer takes the position that it is a cost that ought to be borne by the prospective guardian and not paid from the minor's share. The Children's Lawyer takes the position, in the alternative, that payment into Court could occur without any significant legal fees.

Court File No.

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF THE ESTATE OF JOHN DOE
AND IN THE MATTER OF THE *TRUSTEE ACT*, R.S.O. 1990,
Chapter T. 23, Section 36(6) as amended

AFFIDAVIT OF JIM JONES AND SUSIE SMITH
SWORN DECEMBER_____, 2004

We, JIM JONES and SUSIE SMITH of the City of Toronto, respectively, in the Province of Ontario, jointly and severally MAKE OATH AND SAY:

1. John Doe died on the 22nd day of August, 2001, leaving a Will dated December 21, 2000.

2. We were appointed Estate Trustees with a Will of the estate of the said John Doe by the Superior Court of Justice at Toronto on the 10th day of December, 2002. On November 1, 2003, we provided to you a copy of the Certificate of Appointment of Estate Trustee with a Will.

3. We are holding funds as trustees on behalf of the following minor beneficiaries:

   _____, a minor, born on June 3, 1994 residing at _____ with her mother _____;

   _____ (described in the Will as _____), a minor, born on May 5, 1997 residing at _____with her mother _____.

4. The balance on hand for distribution to each of the said minor beneficiaries is $_____ and we are desirous of paying this amount into Court to the credit of the minor beneficiaries named above.

5. There may be further distributions that will be paid into Court for the minors.

6. The minor beneficiaries are entitled to receive his or her funds upon attaining the age of majority in accordance with the Will.

7. We make this affidavit for no improper purpose.

SEVERALLY SWORN BEFORE)
ME at the City of Toronto,)
in the Province of Ontario)
this day of)
December, 2004)
)

SUSIE SMITH

A Commissioner, Etc.

SEVERALLY SWORN BEFORE)
ME at the City of Toronto,)
in the Province of Ontario)
this day of)
December, 2004)
)

JIM JONES

A Commissioner, Etc.

Court File No.

SUPERIOR COURT OF JUSTICE

B E T W E E N:

_____ Applicant

-and-

_____,

a minor by his Litigation Guardian, THE CHILDREN'S LAWYER

Respondents

APPLICATION UNDER *Sections* 47, 48, 54 *and* 55 *of the Children's Law Reform Act*, R.S.O. 1990 c.C.12 *as amended*.

NOTICE OF APPLICATION

TO THE RESPONDENT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicant(s). The claim made by the applicant(s) appears on the following pages.

THIS APPLICATION will come on for a hearing before a judge on , 2005 at 10:00 o'clock in the forenoon at the Court House, 393 University Avenue, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 33C prescribed by the Rules of Civil Procedure, serve it on the applicant(s) lawyer(s) or, where the applicant(s) do(es) not have a lawyer, serve it on the applicant(s), and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant(s) lawyer(s) or, where the applicant(s) do(es) not have a lawyer, serve it on the applicant(s), and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date:

Issued by _____
Local Registrar

Address of Court Office:

393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

APPLICATION

1. **THE APPLICANT MAKES APPLICATION FOR:**

(a) An order appointing _____ as Guardian of Property of _____, a minor with respect to all interest in the estate of _____;

(b) an order propounding a management plan for the management of the said funds, including

(c) an Order that the initial passing of accounts of _____, as guardian of the property for _____shall occur on or before February 1, 2007 and thereafter as required by this Honourable Court;

(d) an Order dispensing with the posting of a bond by the Applicant with respect to the care and management of the settlement proceeds; and

(e) such further and other relief as this Honourable Court may seem just.

2. **THE GROUNDS FOR THE APPLICATION ARE:**

(a) the applicant _____ is the mother of the minor Respondent _____;

(b) _____ is entitled to an interest in the estate of his father _____, which are valued at approximately $300,000.

(c) Sections 47, 48, 54, and 55 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, as amended;

(d) Rules 7.03 (2) and 58.08 of the *Rules of Civil Procedure*.

3. **THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of this Application:

(a) The Affidavit of _____;
(b) The Consent of _____;
(c) The Proposed Management Plan of the applicant; and
(d) The Proposed Fee Arrangement for the applicant.

Date: May , 2005

Solicitor for the Applicant