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"Trust Experience"

The Fundamentals of Estate Administrations

Avoiding Common Estate Litigation Scenarios

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Introduction

This paper is designed to provide a brief outline and overview of estate administration problems that are often seen in an Estate litigation practice.

Probate Fees/ Probate Tax

Since approximately 1992, paying probate fees has become an important planning issue to review and consider with your client.

While probate fees have increased dramatically in recent years, too much attention can sometimes be paid to this issue to the detriment of your client.[1]

It has been suggested that since the increase in probate fees in 1992, there has been a substantial effort by the profession to take planning steps that will avoid probate fees.[2]

Solicitors must be careful when advising their clients as planning advice for one generation may bring with it bigger problems for the next generation.

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[1] See Barry Corbin "How Not to Avoid Probate Fees" 16 E.T.J. 169.
[2] IBID. at p. 171.

Whether or not probate itself will be obtained, is something that should be reviewed with your client. This of course depends on the assets of the estate and whether or not third parties, such as financial institutions will be insisting that the asset will not be released until probate is obtained.

Inter Vivos Gifts

There are of course many techniques available to the practitioner to deal with the issue of probate fees, and one of the most popular planning techniques is to have your client dispose of her property *inter vivos*. Fees are of course payable on the assets as at the time of death and *inter vivos* transfers by way of gift or for consideration can be a useful planning tool.

Careful consideration must be given to the potential income tax consequences, if any, of such dispositions well in advance of completion[3].

Another fact to consider when proceeding with *inter vivos* gifts, is whether or not it can be proved on the date of death of your client that such gifts were, in fact, intended to be made. Often, later in life, your client will want to proceed to gift certain assets *inter vivos* and one must remember that if after the death of your client the gift is challenged, the recipient of the gift must meet the onus of providing convincing and unimpeachable evidence that the donor intended to

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[3] Supra, Note 2, at p. 171-173.

make the gift.[4] Another common planning technique is to encourage your client to put their cash assets into joint accounts with various family members.

There is obvious loss of control that comes with these planning techniques and this must be carefully reviewed with your client[5].

LEGAL ISSUES

While it is not my intention to deal in any exhaustive way with the legal concepts referred to below, I have attempted to review some of the general legal concepts that should be considered.

Assets in Jurisdictions Other than Ontario

In the circumstances, other than the use of an international will under the *Succession Law Reform Act*, the problems faced in this situation can be dealt with in several ways.

You may simply have a will that was prepared in the usual way and rely on the reciprocal legislation of the foreign country to give the Ontario applicant the equivalent of confirmation by resealing of Appointment of Estate Trustee With or

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[4] See Re: Taerk, [1957] O.R. 482 (C.A.) and Dell' Aquila Estate v. Mellof, [1996] 6 W.W.R. 445 (Sask. Q.B.).

[5] See Anthony P. McGlynn and K. Thomas Grozinger, "Joint Ownership of Property in the Context of Inter-Generational Transfers of Estates: Convenience and Conflict", 16 E.T.J. 105.

Without a Will (Rule 74.08) or a Certificate of Ancillary Appointment of Estate Trustee With a Will (Rule 74.09).

Section 52 of the *Estates Act*, R.S.O. 1990, c.E.21, allows the resealing of a grant of probate or letters of administration granted by a court in another province or territory of Canada, the United Kingdom or "any British possession". The "foreign" grant is given the seal of the Ontario Court and then has the same force and effect as if it had been originally granted by the Ontario Court.

Difficulties and additional expense can be encountered when probate is sought in jurisdictions whose laws are not similar to ours when an ancillary grant is required.

Another option is to prepare the will so as to provide for two sets of executors, each of whom is to distribute the assets of the estate in each jurisdiction where they are situate in accordance with the terms of the will. (For a form of this type of will see Canadian Forms of Wills, Sheard, Hull and Fitzpatrick 4th Edition, pp. 77).

You can also prepare an Ontario will for disposal of Ontario assets and have the testator prepare a complementary will dealing with the foreign assets or prepare a will in accordance with the laws in the foreign country where probate is sought.

The International Will

The *Succession Law Reform Act* includes the provisions of the International Convention providing a uniform law on the form of an international will that is applicable to the Province of Ontario.

Therefore, any country which has ratified the convention will recognize a will made pursuant the provisions of the *Succession Law Reform Act.* In such circumstances, the will will be valid as to its formalities "irrespective particularly to the place where it is made, of the location of the assets, and of the nationality, domicile or residence of the testator".

If you wish to prepare an international will, you should ensure that the countries in which the assets with which you wish to deal are countries to which the convention applies and you should make those inquires to the Department of External Affairs in Ottawa.

Revocation by Marriage

Section 16 of the *Succession Law Reform Act* provides that a will is revoked by the marriage of the testator except where there is a declaration in the will that it is made in contemplation of the marriage, unless the spouse of the testator elects to take under the will by an instrument in writing signed by the spouse or where the

will is made in exercise of a power of appointment of property which would not in default of the appointment pass to the heir, executor or administrator of the testator or the persons entitled to the estate of the testator if he or she died intestate.

Thus, if a testator wishes to give instructions for a will and is about to be married or is a widower, it should be pointed out to him or her that if he or she is about to be married, the will must be stated to be made in contemplation of marriage to a specifically named person or if not contemplating marriage, it is carefully explained that the will will be revoked upon any subsequent marriage.

Careful attention must also be paid to s. 17 of the *Succession Law Reform Act* which provides that a will is not revoked by presumption of an intention to revoke it on the ground of a change in circumstances except on termination of marriage.

Constructive Trusts

It is clear that the registration of an asset in the testator's name alone is not sufficient to prevent the spouse or the common law spouse or any other person who claims to have contributed to the ownership of an asset from making a claim to an asset such as the matrimonial home, the business operations of the testator or other similar assets.

If the spouse or common law spouse or any other person can prove participation in the payment of the house or other asset or show domestic

services or participation in the business, the personal representatives of the testator may be held to be the constructive trustees of the property to the extent of the claimant's interest as determined by the court.

Accordingly, this issue must be reviewed with your client when you are taking instructions to ensure that she understands the consequences of such a claim which may be made against the estate and the significance of the form of registration of ownership of an asset.

a) Lapse

Black's Law Dictionary[6] defines "lapse" as "a failure to vest a bequest or devise by reason of death of a devisee or legatee prior to the death of testator. The death of a legatee before the testator causes the legacy to lapse and to fall into the residue unless there is a statute which provides for its disposition as, for example, if the legatee is a child or relation of the testator, the legacy passes to the issue of the legatee".

Such a provision is contained in s. 31 of the *Succession Law Reform Act*, with which I deal later on in this paper.

It is sometimes necessary to explain this legal concept to your client when children or grandchildren are beneficiaries.

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[6] Black's Law Dictionary, 5th Edition, West Publishing Co.

Lapse occurs when there is a failure of a gift by reason of the death of the beneficiary before the gift is vested.

The general principal with respect to lapse has been stated by Lord Parker of Waddington[7] as follows:

> The general law does not allow a legatee who predeceases the testator to take any benefit under his will. In that event, the gift is said to lapse, with the consequence that it falls into residue, or if it is itself a share of residue, goes to the testator's next-of-kin. It is not competent to a testator to exclude the application of this rule of law, but the consequences of a lapse can be avoided by the substitution of some other legatee to take the legacy if the event which occasions the lapse occurs. Such a substitutionary gift is often introduced by a direction that the legacy is not to lapse but is to go to the substituted legatee. In such a case the introductory words are of course quite inoperative unless followed by the substitution of another legatee, but if so followed, they are not construed as an attempt to exclude the rule of law as to lapse, but as indicating an intention to avoid the consequences which a lapse would otherwise entail by substituting another legatee.

Section 31 of the *Succession Law Reform Act* referred to above provides an anti-lapse provision where, unless a contrary intention appears by the will, gifts to children, grandchildren, brothers or sisters do not lapse in such circumstances.

Section 31 provides as follows:

> Except when a contrary intention appears by the will, where a devise or bequest is made to a child, grandchild, brother or sister of the testator who dies

[7] Re Greenwood, [1912] 1 Ch. 392 at 396, per Parker J. (as he then was); Browne v. Hope (1872), L.R. 14 Eq. 343.

> before the testator, either before or after the testator made his or her will, and leaves a spouse or issue surviving the testator, the devise or bequest does not lapse but takes effect as if it had been made directly to the persons among whom and in the shares in which the estate of that person would have been divisible,
>
> (a) If that person had died immediately after the death of the testator;
>
> (b) If that person had died intestate;
>
> (c) If that person had died without debts; and
>
> (d) If s. 45 had not been passed.

The provisions of s. 31 clearly operate to prevent lapse of bequests to certain classes of beneficiaries, and they operate in favour of those dead at the date of the will as well as those alive at the date of will but who die in the testator's lifetime.

b) Abatement

Black's Law Dictionary[8] defines "abatement" as "a reduction, decrease, or diminution. The suspension or cessation, in whole or in part, of a continuing charge, such as rent. Furthermore, it is a proportional diminution or reduction of the pecuniary legacy, when the funds or assets out of which such legacies are payable are not sufficient to pay them in full".

The rule with respect to abatement is that the general legacies abate rateably.

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[8] Black's Law Dictionary, 5th Edition, West Publishing Co.

If the assets of an estate are insufficient to pay all of the legacies in full, the general legacies must, in the absence of a contrary direction by the testatrix, abate in equal proportions and the onus of proving that a legacy was intended by the testatrix to be paid in priority lies on the party seeking priority, and the proof must be clear and conclusive in the language of the will.[9]

c) Ademption

Black's Law Dictionary[10] defines "ademption" as the "extinction or withdrawal of a legacy by a testator's act, equivalent to revocation or indicating intention to revoke. Testator's giving to a legatee that which he has provided in his will, or his disposing of that part of his estate so bequeathed in such manner as to make it impossible to carry out the will".

d) Specific Devises and Bequests

When obtaining the information necessary for the preparation of a will, it is important to have your client provide an accurate description of any property that is to be specifically given to a beneficiary.

While a complete legal description is not necessary, to simply say "my Florida property" can be problematic. You will find that most of your clients will know the basic legal description or municipal address of specific real property and if they do not have it readily available, they can obtain a tax bill or deed to ensure that it is described as accurately as possible.

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[9] Williams on Wills, 7th Edition (Butterworths: 1995) at p. 282.
[10] Black's Law Dictionary, 5th Edition, West Publishing Co.

You will find some clients will attach a disproportionate importance to bequests of specific personal items such as jewelry. I find that a memorandum prepared by the testator and maintained in the testator's safety deposit box is an easy way to allow the testator to specifically set out where such items are to go and at the same time, have some flexibility if the items are no longer in the will maker's possession or the will maker changes his or her mind. It can become costly and time consuming to have the testator change his or her will every time a personal household item is either lost, sold or destroyed.

If certain shares owned by the testator in a particular company are to be the subject of a specific direction in a will, they should be described in detail and some consideration should be given to the marketability of the shares and the impact on the company when such shares are transferred. For example, if there are shares held in a small company in the Caribbean and they have not been transferred for many years, it can be difficult to deal with that asset in accordance with the testator's intentions.

e) Life Insurance

In view of the rising costs of probate fees, many solicitors are advising their clients to ensure that the proceeds of policies of life insurance are payable to a named beneficiary so that they do not flow through the estate.

f) Description of Beneficiaries

While counsel are usually conscious of the difficulties that arise when the will maker's property has not been properly described, many solicitors who draw

wills forget to fully identify those who are to benefit under the will. Errors can be made in describing charitable institutions and their proper names should be obtained.

While describing charitable institutions can be resolved by directly contacting the charity itself, the solicitor has usually no means of checking the correct names of individual beneficiaries except through the will maker.

While the solicitor should obtain the full name of the beneficiary, an additional method of identifying such beneficiary is to describe them with reference to their relationship to the will maker or some other person.

g) Selection and Powers of Trustees Including The Power To Encroach

When a trust is created, the will maker must carefully consider the selection of a trustee and the powers needed to carry out the trust.

In practice, it is often the case that a will will provide for an infant to receive a substantial interest in the estate and a trust may well be the appropriate vehicle for this purpose. The duration of the trust is often a prolonged one and in such circumstances, it is sometimes advisable to appoint a trust company when the duration of the trust is lengthy.

With respect to discretionary powers of encroachment, the leading decision in this area is *Gisborne v. Gisborne*[11] which outlines the general principles with respect to the exercise of discretion.

When determining to what extent a Court will supervise the discretion of a trustee, consideration must be given as to whether or not the clause conferring such powers was intended to give the trustee uncontrolled or controlled discretion.

The approach in the past has been that the courts will not intervene unless the exercise of discretion was made with mala fides, improper purpose, a failure to consider all relevant matters, having exercised discretion based on irrelevant considerations or lack of prudence.[12]

SPECIAL CLAUSES

1. *Forfeiting The Right to Contest the Will*

Some clients may insist that a clause be set out in the will providing that a beneficiary forfeits his or her rights if they take proceedings to contest the validly of the will.

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[11] (1877), 2 A.C. 300.

[12] For a full discussion of these issues see Maurice Cullity, "Judicial Control of Trustees' Discretions" (1975), 25 University of Toronto Law Journal 99 and for the recent case law in this area see Fox v. Fox Estate (1994) 5 E.T.R. (2d) 174 (Ont. Gen. Div.), (1996) 10 E.T.R. (2d) 229 (Ont. C.A.), Application for Leave to Appeal to the Supreme Court of Canada submitted September 13, 1996 and leave to appeal refused January, 1997. For a discussion of the personal liability of trustees and rights of indemnification see Maurice C. Cullity "Personal Liability of Trustees and Rights of Indemnification" 16 E.T.L. 115.

These clauses are frequently referred to as "in TERROREM" clauses. The enforceability of the clause itself is always a problem; however, it is not in most circumstances illegal or invalid,[13] which confirms that such clauses are only illegal when they attempt to oust the jurisdiction of the court to determine questions of construction and other such issues.

The following clause probably goes far enough to meet the wishes of most will makers who insist on a clause of this kind:

> "I declare that if any beneficiary of this my Will shall, within _____ years after my death without the consent in writing of my Trustees, which Trustees in their discretion may give or withhold, institute any action or proceeding in which the validity of this my Will or any Codicil thereto is sought to be impeached, then, in every such case, such beneficiaries shall absolutely forfeit and loose all interest in any right to any gift to him hereunder or any Codicil hereto and every gift so forfeited shall fall into my residuary estate unless it is a gift of a share of my residuary estate, in which case it shall devolve as though such beneficiary had died at the time such action or proceeding was instituted."[14]

CLAIMS AGAINST THE ASSETS OF THE ESTATE

1. *Family Law Act* ("FLA")

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[13] see Re Raven, [1915] Ch. 673 and Re Wynn, [1952] Ch. 271.
[14] Sheard, Hull, Fitzpatrick, Canadian Forms of Wills 4th Edition, Carswell 1982 at p. 119.

Ontario has established and developed a deferred community of property regime in this Act which has a tremendous impact upon surviving spouses and the estates of the deceased spouse. Generally speaking, community of property legislation provides that a spouse should share certain assets equally on divorce or voluntary separation and upon the death of a spouse.

Pursuant to Part I of the Family Law Act[15] ("FLA"), the surviving spouse may make a claim against the assets of the deceased spouse's estate.

A spouse, former spouse or a deceased spouse's personal representative may apply for equalization of the net family property.[16] The application may be made when a spouse dies[17] and may not be brought more than six months after the date of death of a party to the marriage.[18]

Generally speaking, the equalization entitlement for the surviving spouse is based on the spouse whose net family property is the lesser of the two and thereby entitled to an Order to equalize the net family properties by providing for payment of one-half the difference between them.

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[15] R.S.O. 1990, c.F.3.
[16] Ibid, c.F.3, s. 7(1).
[17] Ibid, s. 5(1).
[18] Ibid, s. 7(3)(c). Note that the limitation period may be extended in certain circumstances, see s. 2(8).

Typically, when your clients are a married couple, the property of one spouse generally passes on death to the other spouse. However, if your client wishes to do something different to that provision, you must outline to your client the impact of the community of property regime in Ontario as set out in the FLA.

2. *Dependants Relief*

A solicitor who draws a will for a client should review with him or her the limits on testamentary power and in particular the types of claims that may be made pursuant to the various statutory provisions relating to support of dependants.

In this regard, a careful review of the will maker's current family circumstances must be undertaken to ensure that any such potential claims have been considered at the time of making the will. Such claimants include:

- the deceased's wife or husband, same-sex partner or common law spouse or husband;
- a brother or sister of the deceased;
- a former wife or husband of the deceased;
- a child or grandchild of the deceased;
- a person treated by the deceased as a child of the family in relation to any marriage of the deceased.

to whom the deceased was or was obliged to provide support for that person.

Part V of the SLRA contains the specific limits on testamentary power that should be reviewed with your client. Essentially, where a deceased has not made adequate provision for the support of his or her dependants, the court may order that such provision be made out of the estate of the deceased.[19]

The expansive and broad language in s. 58 of the SLRA is important to consider and your client must know that the courts have a wide discretion to order payment out of the estate to dependants.

Consideration must be undertaken with your client to review who could be a dependant of the will maker as set out above.

A review of s. 62(1) of the SLRA is useful to determine quantum. This section sets out the considerations that the court will review when determining the amount and duration, if any, of support.

It should be noted that while the FLA does not allow for claims to be made by common law spouses, Part V of the SLRA includes the common law spouse in the definition of dependant.

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[19] R.S.O. 1990, c.S.26, s. 58(1).

Conclusion

In conclusion, when administering an estate, the solicitor must not take on the task as a routine matter and must consider some of the complex issues that may arise. A solicitor should, after she has received her instructions, determined the facts and analyzed the problems related to the estate administration; consult various precedents and forms; familiarize herself with the applicable law and roughly determine the basis that the plan or administration shall proceed on. Where appropriate, the solicitor should review these matters with other professionals such as tax and investment consultants.