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Update from the Estates List

Mr. Justice Brown

I wish to thank the Section's Executive for permitting me to write a piece for inclusion in this edition of *Deadbeat*. Let me bring you up to date on several initiatives concerning the Estates List.

Resources available to Estates List judges

Judges sitting on the Estates List now have access to enhanced reference resources to assist them in dealing with cases on the List. An updated Judges' Reference Book has been distributed, cross-referenced largely to the excellent Estates Electronic Bench Book created by Justice Haley in 2005. In addition, the Judicial Library Intranet, which is accessible by all judges of the Superior Court of Justice, now contains an Estates webpage on which are posted current articles of interest, including some from OBA CLE events.

I should mention that the precedent clauses for orders for directions prepared by this Section have been included in the Judges' Reference Book and posted on the Judicial Library Intranet. I wish to thank members of the Section for their contribution in preparing the precedents.

Published endorsements giving filing directions to Estates Office

I recognize that questions sometimes arise about the filing requirements for certain applications in the Estates Office. In order to ensure a consistent and transparent approach to these issues, I have decided to release, where appropriate, brief endorsements designed to give directions to the Bar and the Estates Office on particular issues. The endorsements will be posted on CanLII. To date I have released the following endorsements:

McMichael Estate, 2008 CanLII 28443 (ON S.C.) – applications for probate must be filed in the office for the county of the district in which the testator had a fixed place of abode at the time of death;

Kerzner Estate, 2008 CanLII 42020 (ON S.C.) – multiple wills; probate only sought for one will – applicant should file a brief affidavit attesting that the non-probated will does not revoke the will for which probate is sought;

Goushleff Estate, 2008 CanLII 53131 (ON S.C.) – multiple wills, different executors – where probate is sought for both wills by way of separate applications, separate limited assets certificates may issue limited to the assets in the applicable will;

Robertson v. Robertson, 2008 CanLII 53132 (ON S.C.) – an application under the *Substitute Decisions Act* may be issued from the Toronto Estates Office even where the person in respect of whom a declaration of incapacity is sought resides outside of Toronto.

I especially would encourage Section members to read the two endorsements dealing with multiple wills. Issues concerning them arise frequently. Their efficient processing requires the co-operation of the Bar.

Updating Estates List Practice Direction

Earlier this year, I received approval from Chief Justice Smith and Regional Senior Justice Then to initiate a process to update the Estates List Practice Direction. The current one is almost a decade old.

In early October, I distributed to the Bar for comment a draft revised Practice Direction. The draft seeks to update the old one to recognize current practices and to encourage the use of certain “best practices” which I think will provide a better level of service to the public. The only institutional change proposed by the draft is the implementation of an Estates List Scheduling Court - suggested to be held twice a month - to put in place Case Timetables for applications which will involve a hearing of one hour or more.

I have circulated the draft for comment to members of the Estates List Bench and Bar Committee, which includes your Section Chair, and a number of other members of the Bar. I understand that the draft has been disseminated to Section members. It is my intention to implement the revised Practice Direction early in the New Year.

Time to secure hearing dates

Finally, at present, little delay exists in obtaining hearing dates on the Estates List.

I look forward to working with members of the Section to enhance the service provided by the Estates List to the public.

Fraudulent Use of Power of Attorney and Bank's Duty of Care to Review: *Reviczky v. Meleknia*

*Suzanne Michaud**

An interesting case was reported earlier this year involving the use of a forged power of attorney to fraudulently sell an elderly man's investment property. The decision in *Reviczky v. Meleknia* (2007) 88 O.R. (3d) 699 (Ont. S.C.J.) contains findings regarding a bank's duty of care to review the power of attorney, which should be instructive to all financial institutions accepting instructions from an attorney under a power of attorney.

The facts are similar to other title fraud cases. Mr. Reviczky, an 88 year old, owned a house in North York, Ontario, which, after the death of his wife, was held by him in sole ownership; its title free and clear of any encumbrances. He rented the property to a couple who paid three months rent, March to May 2006, in advance, in cash. They did not occupy the house, telling him a family was to arrive in Canada and it was to be for their use. After the three months had gone by, the owner went to check the property, which had never been occupied, and found a hydro bill in the name of Mr. Meleknia. A real estate agent had been approached by a fraudster, presumably in cahoots with the couple who rented the house, who held himself out as a relative of the owner and his attorney under power of attorney. The sale by the attorney closed within the three month rental period.

One lawyer represented the attorney "vendor", who provided a power of attorney ostensibly made April 2006. The document was unusual from most power of attorneys executed in Ontario as it:

1. gave the donee the power to "manage and conduct all my affairs and to exercise all of my legal rights and powers" rather than the commonly seen wording "to do on my behalf anything in respect of property that I can lawfully do by an attorney, except make a will".
2. contained unusual wording for Ontario to purport to make the power of attorney "durable", stating that it "shall not be affected by my disability or lack of mental competence, except as may be provided otherwise by *applicable state statute*" [italics added].
3. had only the signature of one witness with a statement that the donor was personally known to the witness and had produced "driver's license No...." as identification.
4. contained dates of birth for donor and donee.

The solicitor acting for the fraudster signed a copy of the power of attorney document and affixed his notarial seal. He registered the power of attorney in the General Register electronically on 3:47 p.m. on the date of closing. A copy was then faxed to the solicitor acting for the innocent purchaser and the bank providing the mortgage financing to the purchaser.

The analysis the judge undertook of the applicable Ontario legislation, the *Land Titles Act* and the *Substitute Decisions Act, 1992* and the case law was to determine whether the charge registered by the bank was valid against the innocent property owner. The purchaser acknowledged that his title was defeasible, acquired as a result of the direct dealings with the fraudster and his transfer was struck from the title register.

In considering the bank's claim that its charge was valid, the judge focused on two lines of analysis. Firstly, was the bank's charge part of the transaction, whereby the purchaser took title as an intermediate owner, transferred from the fraudster? The issue is important because under the *Land Titles Act*, a subsequent owner or encumbrancer, called a "deferred owner", can acquire good title under the *Land Titles Act*. Without detailing the theory of deferred indefeasibility, the judge held, as the bank retained the purchaser's lawyer to act for it in the mortgage loan, the lawyer had direct dealings with the lawyer for the fraudster so that the charge was ranked with the purchase as an "intermediate owner" transaction and could not be held as valid against the vendor.

The second, more interesting, issue was about the power of attorney and the bank's failure to review it. The issue was whether the bank had an opportunity to avoid the fraud. The judge held that the bank knew that it was dealing with an attorney rather than the owner himself as the agreement of purchase and sale provided as part of the mortgage application was signed by an attorney, the fraudster. The lawyer acting for the purchaser and the bank did not, in his requisition letter to the vendor's lawyer, requisition either:

1. that a true copy of the power of attorney be produced (form);
2. evidence as to the applicability of the power of attorney to the property in question (content);
or
3. evidence as to the validity of the power of attorney.

In the standard form Mortgage Loan Agreement sent by the bank to its lawyer, its conditions included the right to receive documents and assurances satisfactory to it about the "ownership" of the mortgaged property and the right to refuse to loan the money if the information provided was incorrect in any material way. The judge stated:

"With that awareness of the risk of the purported vendor not being the true owner of the property, and with the knowledge that the person purporting to sell the property to Mr. Meleknia was acting pursuant to a Power of Attorney, I find the bank knew from early May [commitment dated May 4 and closing May 15], that the form, content and validity of the Power of Attorney required scrutiny. However, I find that the bank, whether through its employees or agents including the solicitor, failed to scrutinize these factors".

A review of the Power of Attorney prior to closing would have led to several questions about its validity; most serious being a power of attorney that purports to be a continuing power of attorney needs to be witnessed by two witnesses in Ontario. The judge proposed two ways by which the bank could have avoided the fraud. If the fraudster had been questioned about the validity of the Power of Attorney through his solicitor, he would likely have abandoned the scheme. Or if Mr. Reviczky, the vendor had been questioned to determine whether he was alive, mentally competent or had revoked the Power of Attorney, the invalidity would have been found.

In short, neither the bank nor its solicitor reviewed the power of attorney and failed to meet a level of care and analysis, referred to in the Mortgage Loan Agreement, in a transaction that was not "business as usual", but required something more. This higher standard of care was imposed on the bank and its solicitor because in the judge's words:

"Powers of Attorney are important legal mechanisms. Powers of Attorney are not standard and invariable in their form. They are infinitely variable in the powers granted and in their duration. They may be revocable or irrevocable, voidable, void, real or forged, or terminated by the death of the grantor. Like any legal mechanisms, a Power of Attorney may be misused. A forged Power of

Attorney is an easy means of stealing a person's identity. Forged Powers of Attorney therefore are an easy means of perpetrating mortgage fraud.”

Royal Bank of Canada has recently revised its instructions to lawyers acting on its behalf in Ontario as lender in a mortgage transaction involving residential real estate to reflect this decision. Previously, the standard instructions addressed powers of attorney only insofar as the mortgage was being executed under one. The lawyer representing the Bank and the mortgagor must now also enquire into the transaction by which title was transferred to the mortgagor. These instructions now specifically direct the lawyer to review the power of attorney to determine its validity for the required purpose; to obtain the vendor's lawyer's confirmation that the power of attorney has not been revoked, the donor of the power of attorney is not deceased, and that the vendor's solicitor has confirmed the identity of the attorney and the donor; and finally to obtain appropriate title insurance.

With aging populations, transactions conducted on behalf of elderly clients through their attorneys will be more common. Financial institutions will need to increase staff and training to carefully review these documents, given by their clients to appointed attorneys, as to form, content and validity and take any other steps to ensure the transactions made by clients through attorneys are valid and not liable to later attack.

** Suzanne Michaud, Senior Counsel, RBC Law Group. This article is for general guidance/informational purposes only. It is not intended to provide nor should it be relied upon for specific tax, legal or other advice. It represents the author's personal opinion only and not necessarily the position of Royal Bank of Canada or its subsidiaries or affiliates. © Royal Bank of Canada 2008*

Ontario Court of Appeal Confirms an Estate Cannot Continue a Claim based upon the *Charter*

Giamomelli v. Canada (Attorney General) [2008] O.J. No. 1687, 292 D.L.R. (4th) 379, 236 O.A.C. 212 (Ont.C.A.)

*Melanie A. Yach**

Background Facts

Oswaldo Giacomelli (“Giacomelli”) was born in Canada and a Canadian citizen of Italian origin. As alleged in the Statement of Claim he filed against Canada in 2005, Giacomelli was arrested in June 1940 and transported to and imprisoned in a concentration camp in Petawawa, Ontario pursuant to the *War Measures Act*. While in the concentration camp, he was forced to do hard labour for which he was paid \$6 a month. Canada withheld \$5 each month from Giacomelli's pay to compensate itself in respect of the administration of property. However, Giacomelli did not have any property to administer.

In November 1990, Canada's then Prime Minister admitted that the arrest and imprisonment of Giacomelli and other Canadians of Italian origin during World War II was wrongful, arbitrary and discriminatory. Yet, while Canada compensated other ethnic communities and individuals who suffered harm in similar circumstances, no compensation was paid to Giacomelli or to other members of the Italian-Canadian

community. Giacomelli alleged that Canada's refusal to offer compensation was discriminatory and contrary to the freedoms and liberties of the *Charter*, particularly ss. 7 and 15.

Giacomelli sought a variety of declarations and compensation including compensation for his wrongful arrest and detention and for wages lost while he was detained. Shortly after the claim was commenced, Canada moved to strike Giacomelli's claim for want of a reasonable cause of action. Canada's motion was dismissed and it subsequently appealed the dismissal. The appeal has yet to be heard.

Giacomelli died in March 2006. In accordance with Rule 11.01 of the *Rule of Civil Procedure*, his claim against Canada was automatically stayed. The executors and trustees of his estate (the "Estate Trustees") proceeded to obtain an Order to Continue.

In April 2007, Canada brought a motion to vary the Order to Continue so that the Estate Trustees could only pursue those claims which fell under section 38(1) of the *Trustee Act*. By Order dated August 15, 2007, Harris J. granted the motion and varied the Order to Continue to prohibit the Estate Trustees from pursuing any claim for relief under section 24 (1) of the *Charter* based on violations of s. 7 or 15 of the *Charter*.

In reaching his decision, Harris J. cited the Supreme Court of Canada's decision in *Canada (Attorney General) v. Hislop* [2007] 1 S.C.R. 429 where the Court ruled that an estate cannot continue a claim based on s. 15(1) of the *Charter*.

The Estate Trustees appealed Harris J's decision.

The Issue on Appeal

As framed by Gillese J.A. of the Ontario Court of Appeal, the appeal raised a single issue: namely, can an estate continue a claim based on the *Charter*?

The Court's Analysis

The Court of Appeal found no basis for interfering with the Order and dismissed the Estate Trustees' appeal.

Gillese J.A., writing for the Court, stated that like the motion judge she was of the view that the *Hislop* case was determinative of the issue before the Court. In *Hislop*, the Supreme Court explained that rights guaranteed by s. 15(1) of the *Charter* cannot be asserted because those rights are personal and being personal ends with the death of the affected person. The Court went on to state in paragraph 73 that an estate is just a "collection of assets and liabilities of a person who has died. It is not an individual and it has no dignity that may be infringed."

Gillese J.A. noted that the two exceptions to the foregoing principle identified by the Supreme Court (where the claimant dies after judgment while an appeal is pending or where the claimant dies after the conclusion of argument, but before a judgment is rendered) were not applicable in Giacomelli's case.

Interestingly, counsel for the Estate Trustees asked the Court of Appeal to recognize that they could use the *Charter* in a defensive manner – as a "shield rather than a sword". On that issue, Gillese J.A. indicated it was important to note that the question of the defensive use of the *Charter* was a matter of substance, not form. If, at its essence, the Estate Trustees' "defensive use" of the *Charter* was simply a recharacterization of a s. 7 or 15 *Charter* claim, it could not be continued.

* *Melanie A. Yach, Partner – Estates & Trusts Group, Aird & Berlis LLP, Barristers & Solicitors.*

Case Comment: *Warren v. Gilbert Estate*, [2008] O.J. No. 3963 (C.A.)

*Pinta Maguire**

How long is “too long” for an estate trustee to take steps to secure the assets of the estate?

The deceased died intestate in July 2005. She was survived by her two brothers and a nephew. The main asset of the estate was property held in joint tenancy with the deceased’s nephew. The property was purchased in 1995 for \$125,000. By October 2005, the nephew was engaged in a family law trial wherein the wife asserted a 50% interest in the matrimonial home, its title held as joint tenants between the deceased and her nephew. By the time of the family law trial, the property was worth over \$2,000,000 and the deceased’s interest had passed by right of survivorship to her nephew.

When she was alive, the deceased had been made a party to the family law proceeding because she was joint tenant on title to the property. The deceased filed an answer and an affidavit which stated her position that she held the property as joint tenant with her nephew, she was the beneficial owner of her half of the property and not a bare trustee and she contributed financially to the upkeep of the property. The deceased denied that her nephew’s wife was entitled to any interest in the property. At no time prior to her death did the deceased attempt to sever the joint tenancy, as she could have.

At the family law trial, counsel for the nephew’s wife told the trial judge that the deceased had passed and that the nephew was the sole owner of the property by right of survivorship. Counsel for the nephew’s wife also told the trial judge that the deceased had abandoned her claim in the litigation, which was not pursued by the estate. The nephew’s lawyer did not take issue with these statements. At trial, the nephew’s wife was ultimately awarded a half interest in the property by way of a resulting trust. The nephew appealed the trial decision and lost.

The deceased’s two brothers were the estate trustees, and made no attempt to intervene in the appeal or seek any right or status for the estate in the appeal. It was only after the Court dismissed the nephew’s appeal that the estate trustees brought a motion asserting an interest in the property for the first time. The estate sought to reopen the family law proceeding on the basis of the rights of the party who died before trial had been determined without notice to the estate, and without affording it an opportunity to participate in the proceeding, with the result of judgment that could not bind the estate.

The motion judge dismissed the motion on three bases:

1. The estate was not prejudiced because it could still claim against the nephew for its share of his half of the property. The motion judge relied on the finding at the family law trial that the wife was entitled to half of the property, no matter who owned it on title;
2. The estate trustees were well aware of all facts and circumstances throughout the entire period of the litigation and could well have raised them at trial; and
3. The deceased took no steps to sever the joint tenancy during her life and it was her wish that the property pass to her nephew, as it did.

Justice Feldman at the Court of Appeal reviewed the law regarding a trustee's duty to move in a timely manner and held the following.

1. The motion judge was correct.
2. The trustees did not move in a timely manner to assert any rights on behalf of the estate.
3. Once appointed, the estate trustees did not seek to assert any position on behalf of the estate in the appeal of the trial judgment, despite the fact that they were fully aware of the appeal, that the subject matter of the appeal was primarily the property that formed the most valuable potential asset in the estate and despite being appointed estate trustees four months prior to the appeal being heard.
4. Trustees, once appointed, have an obligation to secure the assets of the estate in a timely manner.
5. In protecting the assets of the estate, the estate trustees must act honestly and reasonably. Since the property was still the subject of litigation when the estate trustees were appointed, it was incumbent on them to seek timely advice to determine whether and how they could assert any interest of the estate in the property at issue, and to take those steps in a timely fashion.

Justice Feldman dismissed the appellants' appeal, finding that they did not meet the criteria for reopening a completed proceeding. Moreover, the estate's claim was without merit. The estate had no basis to assert that, without the deceased's knowledge and contrary to her intentions, the joint tenancy was severed while she was alive, thereby retroactively reversing the transmission of her interest to her nephew by right of survivorship, that occurred upon her death.

Justice Rouleau wrote a strong dissent, finding that the law recognizes the difficulty in getting the affairs of an estate in order by generally providing the executor with a year in which to do so. Although an executor must not delay in converting or realizing the assets of the estate, in this case, the four months that passed between their appointment and the hearing of the appeal, and the six months before the motion was launched, both fell well within the general one year period.

Moreover, Justice Rouleau found that the estate's claim had merit. He felt that the estate could emerge from a new trial with an interest in the property, either by way of a beneficiary of a trust imposed on the property, or that the deceased had wished to sever her joint tenancy from her nephew while she was still alive.

In my view, this case offers a good reminder that an estate trustee must proceed in a timely fashion in asserting any claims on behalf of the estate and in converting or realizing assets of the estate. It also underlies the importance of protecting an estate's interest in the course of family law proceedings.

** Pinta Maguire, Lenczner Slaght, Barrister & Solicitors.*

Case Comment: *Frye v. Frye Estate*

*Jane E. Martin**

In *Frye v. Frye Estate*, 2008 CarswellOnt 5207 (CA), the Court of Appeal reversed the decision of Patterson J., reported at 2006 CarswellOnt 3186, 24 E.T.R. (3d) 118 (Ont. S.C.J.), holding that a bequest of shares in a family business was prohibited by a shareholders' agreement and therefore the bequest was void. The Court of Appeal held that a restriction on the transfer of shares arising from a shareholder's agreement does not affect the right of a testator to bequeath those shares. Property of a deceased, even if subject to restrictions on transfer, can be bequeathed.

Background

The Frye siblings squabbled over their interests in a family business, which had been left to them in equal shares by their father. The feud was resolved through a shareholder's agreement, initiated prior to the father's death and subsequently amended (the "Agreement"). The Agreement provided that no sibling could transfer his or her shares without the approval of three of the other siblings. Before this case arose, one sibling had transferred his interest to the other four, Cam, Jack, Don and Cheryl, and those four each held a 25% interest in the business.

Cam died with a Will in 2002. Jack challenged the provision in Cam's Will bequeathing his shares to Cheryl. Jack also challenged Cam's Will on the grounds that Cam lacked domicile in Ontario at the time he made the Will, that he lacked testamentary capacity at the time he made the Will, and that Cheryl asserted or should have been presumed to have asserted undue influence over Cam when he made his Will.

Jack withdrew his claim concerning domicile in Ontario at trial, and the trial judge dismissed Jack's claims of undue influence and lack of testamentary capacity. The trial judge was also asked to approve a proposed settlement between Cheryl and the incapable sibling. He declined to do so, however, that issue was not questioned on appeal.

Patterson J. held that the Agreement imposed restrictions preventing Cam from gifting his shares to his sister, emphasizing the desire of the siblings' father to preserve his business as a family business and to have all of his children share equally in that business.

Patterson J. found that Cam, being bound by the provision of the Agreement, had no right to transfer his shares by Will. He concluded that therefore the portion of the Will purporting to transfer the shares was severable, null and void. Patterson J. in turn ordered the shares be sold in accordance with the provisions of the Agreement. The proceeds of the sale would fall into the residue of the estate, which was distributed equally among the surviving Frye siblings.

The Appeal

At issue on appeal was whether the trial judge erred in voiding Cam's specific bequest of his shares in the family company to Cheryl.

The Court of Appeal agreed with the trial judge that the Agreement was broad enough to apply to a transfer by testamentary disposition. However, the Court disagreed that Cam's bequest of his shares to Cheryl was void. Although a testator may be bound by contractual obligations, the testator's ability to bequeath property

by means of a will is not constrained by those obligations. The breach of an obligation to make or refrain from revoking a will gives rise to an action for breach of contract. The right to make or refrain from revoking a will is unaffected.

Section 67(2) of the *Business Corporations Act*, R.S.O. 1990, c. B 16, which was not drawn to the attention of the trial judge, expressly contemplates corporate articles and shareholders' agreements that restrict the transfer of shares. Under s. 67(2), Cam's estate trustees stand in the same position as Cam did with respect to the corporate shares; they must comply with the provisions of the shareholder's agreement regarding the transfer of the shares. The estate trustees hold the shares as bare trustees for Cheryl and must exercise the rights associated with those shares as she directs. The restriction on transfer applies to the transfer from the estate trustee to Cheryl and not to a transfer from Cam to his estate. The fact that a further act is required to perfect Cheryl's title to the shares – the consent of Cheryl's siblings to a transfer – does not invalidate the bequest.

It is unclear why, at paragraph 23, Juriansz J.A. made reference to the anti-ademption provision of the *Succession Law Reform Act*, R.S.O. c. S-26, stating that whether the anti-ademption provision of the *SLRA* applies or not, "the shares vested in the estate trustees in trust for Cheryl when Cam died." There may have been submissions by parties on the applicability of ademption that are not reflected in the reasons for judgment. Ademption occurs where a testator makes a gift of specific property that does not form part of the testator's property at the date of death. That gift in turn fails or adeems. Anti-ademption legislation has been developed in many common-law jurisdictions, and in Ontario s. 20(2) of the *SLRA* permits a will to operate on substituted property. In this case, there is no suggestion in either the trial judge's or Juriansz' reasons that Cam's ownership of the shares was disputed.

The decision of the Court of Appeal leaves the estate trustees in a difficult position: under the Agreement, approval of at least three of Bing, Cam, Cheryl and Jack is required to transfer title of Cam's shares. Jack's challenge to Cam's Will suggests that his consent will not be forthcoming and the estate trustees will remain obliged to exercise the rights associated with Cam's shares as directed by Cheryl until the siblings are able to reach some sort of resolution.

** Jane E. Martin, Counsel, Office of the Children's Lawyer. This case comment represents the opinion of the author and does not represent or embody the official position of the Children's Lawyer or the Ministry of the Attorney General.*

Supreme Court of Canada Denies Leave to Appeal in Joint Tenancy Case: *Clarke v. McIlmoyl* [2008] S.C.C.A. No. 205

*Dina Stigas**

The Supreme Court of Canada recently dismissed an application for leave arising from a decision of the British Columbia Court of Appeal (*Armstrong v. Clarke*, [2008] B.C.J. No. 577) involving the joint tenancy of a home owned by separated common-law spouses.

The summary of the Court of Appeal case is as follows:

The appellant, Thomas Armstrong, owned a home that was held in joint tenancy with his former common-law wife, Barbara Clarke. They purchased the home on April 30, 2001. Clarke contributed the down payment while Armstrong paid the mortgage.

Clarke's daughter, Melissa Clarke, lived in the lower unit of the home and paid her mother \$750 a month.

Armstrong and Clarke separated on June 14, 2003. After separation, Armstrong moved out of the home and Clarke changed the locks.

Three weeks later, Clarke died intestate in a motorcycle accident. She was survived by the respondents: her three daughters (Melissa Lynn Clarke, Amanda Marie McIlmoyl, and Brittany Lynn) and her mother, Verna Vass (co-administrator of Clarke's estate).

After Clarke's death, Armstrong registered the home in his own name and then sued for a declaration of ownership. He also moved back into the house and delivered an eviction notice to Melissa Clarke, who refused to move. As a result, he also sought an order for occupational rent under the *Residential Tenancy Act* (S.B.C. 2002, c. 78) for the 10 months she occupied the home after her mother's death.

The respondents counterclaimed for a declaration of resulting or constructive trust and argued that Armstrong had been unjustly enriched.

At trial, the judge relied on Armstrong's evidence at his examination for discovery. Armstrong stated that when he purchased the home with Clarke, he told her that should she predecease him, he would allow her younger daughters to live in the house until graduation and would give them the home upon his death.

This evidence led the trial judge to find an express trust (i.e., Armstrong held the property in trust for Clarke's three daughters subject to a life interest in his favour) even though an express trust was not pleaded before her. She also awarded the disbursements to the respondents.

With respect to the order for occupational rent, the application was heard before an arbitrator who dismissed the matter having found no tenancy relationship, but rather a license to occupy. The trial judge refused to deal with the matter and stated that the appropriate remedy was for either an appeal from or a judicial review of the arbitrator's decision.

An appeal was brought by Armstrong to the British Columbia Court of Appeal to set aside the trial judge's finding of an express trust and the arbitrator's dismissal of his application for occupational rent. Armstrong argued that he was entitled to the property by right of survivorship. In the alternative, he argued that the trial judge could not find an express trust because it was not pleaded or argued before her.

The respondents sought to uphold the declaration of an express trust. In addition, they sought the costs of the trial. If the appeal was granted, they sought an order that the joint tenancy was severed at the date of separation and that Clarke's interest in the home would be vested in her estate.

The Court of Appeal set aside the trust declaration and the order for payment of the disbursements and dismissed the claim for occupational rent. Costs of the appeal were awarded to Armstrong. Justice C.M. Huddart delivered the reasons.

With respect to severance of the joint tenancy, the Court of Appeal stated that Armstrong and Clarke knew that since their relationship had come to an end, the property would eventually have to be sold or alienated by one of the parties. This led the trial judge to correctly find that as joint owners, they were unable to establish an *inter vivos trust*. It also led her to find that the joint tenancy was not severed by unilateral or mutual conduct or agreement.

However, the Court of Appeal held that there was not enough evidence to support any of the certainties required to find an express trust, a constructive trust, or a resulting trust. Since Clarke contributed the down payment and Armstrong paid the mortgage, there was a joint effort to provide security for the family that neither could have accomplished on their own.

Furthermore, the Court found that Armstrong's promise to Clarke to give the house to her daughters upon his death was akin to making a testamentary gift rather than an acceptance of an immediate joint trust obligation. Even if there had been evidence of an express trust, the trial judge could not arrive at that conclusion without giving the parties the opportunity to make submissions on that claim.

With respect to the application for occupational rent, the Court of Appeal agreed with the trial judge that she was unable to hear the matter.

The deceased's younger daughters and mother (the Applicants) then applied to the Supreme Court of Canada for leave to appeal. The application was dismissed on October 30, 2008, without reasons and with costs to the respondent, Armstrong.

This case serves as a reminder to review with clients the pros and cons of owning a home with a common law partner in joint tenancy and the benefits of addressing property ownership issues in a cohabitation agreement.

** Dina Stigas is an estates lawyer in Toronto and can be reached at (416) 488-1282.*

Re Kaptyn Estate, [2008] O.J. No. 4032 (O.S.C.J.)

*Katherine Duvall Antonacopoulos**

Facts

On May 8, 2007, the testator died, leaving a substantial estate. He left two wills executed on April 5, 2007, and a codicil for each will. Although both codicils were executed on the same date, April 25, 2007, the codicil to the primary will was not in issue as it was agreed that the legacy granted by that codicil would be respected. The testator left two wills so that the assets that must be subject to estate administration tax are dealt with separately from the other assets.

In the summer of 2006, the testator decided to restructure his estate so that assets of equal value would be left to the children of each of his two sons. As the testator wished for his grandchildren to receive the assets free of any tax or inter-company debt, he planned that funds would be set aside to pay those sums, as well as legacies. The residue would then be divided between the testator's sons.

With this plan in mind, the testator executed wills on October 6, 2006. It was understood that the documents required further work. The testator wished to have a complete understanding of the distribution of the properties, to be sure that the division between the two families would be equal in value and that there would be sufficient funds in the estate to pay the liabilities and legacies. To this end, the testator had his chartered accountant prepare schedules that demonstrated and compared the value of the assets to be distributed to the two sets of grandchildren. The schedules showed that the preference shares owned by Marktur Limited and Captain Investments Inc. (two corporations wholly owned by the testator) were to be redeemed, rather than given as a gift to one set of grandchildren. The testator executed new wills in March of 2007, but requested further amendments to the documents, as well as a re-organization of the structure of the corporations involved in his estate to address the tax issues.

In early 2007, the testator was advised that he had terminal cancer. Following his release from hospital on April 5, 2007, the testator's counsel and his accountants attended at his home to review the revised wills with him. Upon being advised that there would likely not be sufficient time to resolve the tax issues, the testator indicated that he wanted the estate to pay the taxes so that his grandchildren would receive the real estate free of tax.

After the testator had executed the wills on April 5, 2007, his chartered accountant noted some problems with the contents of the secondary will. In particular, the will continued to provide that the preference shares owned by Marktur in Captain Investments were to go to one set of grandchildren, contrary to the plan established by the testator in the summer of 2006 and contained in the schedules: i.e., that those shares were to be redeemed.

Witnesses described the testator as experiencing a period of delirium between April 10 and April 15, 2007. He rebounded on April 16, 2007, and subsequently he was able to have meaningful, although slower, conversations. Following the testator's improvement, he instructed that his wills be changed. The testator's solicitor and chartered accountant attended at his home on April 25, 2007 to have the codicils signed. The testator read the codicils, reviewed the changes and asked his chartered accountant to confirm that the

secondary codicil was as they had discussed. His solicitor did not ask any questions to assess whether the testator could identify himself, knew where he was or was familiar with the issues raised in the codicils, as he had not been concerned about the testator's mental capacity. The solicitor further testified that the testator knew that he had come to discuss the codicils.

The Decision

Justice Lederer held that the testator had testamentary capacity when he executed the codicil to the secondary will. The wills were not complex for the testator who had a longstanding sophisticated understanding of his business holdings and their tax implications for his estate. The testator understood the content of the codicil, which affected changes to his secondary will so that it complied with the intention he had been expressing since the summer of 2006, namely that the preference shares in Captain Investments be redeemed and that his two sets of grandchildren receive real estate of equal value. The testator's mental capacity at the time of execution was sufficient, based upon the observations of family members and various professionals.

With respect to the onus of proof, Justice Lederer cited the Supreme Court of Canada's decisions in *Robins v. National Trust Co.*, [1927] 2 D.L.R. 97, and *Vout v. Hay*, [1995] 2 S.C.R. 876, for the principle that when a party with an interest in the will challenges the testator's capacity, the onus lies with the proponent on a balance of probabilities. However, Justice Lederer also noted that in *Robins* the court held that this onus will only be the determining factor of the whole matter if the court finds that evidence pro and con is so evenly balanced that it cannot come to a conclusion. As Justice Lederer was able to reach a determinative conclusion in this matter, he did not consider the onus.

Justice Lederer considered the decision of Justice Macaulay of the British Columbia Supreme Court in *Pollard Estate v. Falconer* (2008), 20 BCSC 516, as the objector stated that this decision represents the current state of the law. Justice Lederer cited an excerpt from *Pollard Estate* that suggests that, when a testamentary document is being executed, the solicitor has a duty to make inquiries to establish that the testator understands the document and possesses testamentary capacity. According to Justice Lederer's analysis, however, the quoted paragraphs cannot be taken to mean that there is a requirement that the solicitor preparing the will must make inquiries as to whether the testator fully appreciates the effect of what he is doing when he makes his will, before a determination of testamentary capacity can be made. Although there may be circumstances in which proof of testamentary capacity will be assisted by evidence of the solicitor's inquiries into whether the testator knows and approves the contents of the will, there is no legal requirement that such inquiries be made. Making such inquiries is within the given solicitor's choice and discretion, although in some cases it may bear an attendant risk where the testator's capacity may be challenged.

Justice Lederer also distinguished *Pollard Estate* on its facts, as the circumstances in which the will in that matter was executed were suspicious, and the new will was significantly different from the testator's previous will and ignored her fundamental intention that her brother be looked after. In *Kaptyn*, the evidence demonstrated that the testator had a consistent and continuing intention that the preference shares be redeemed and used as part of the fund to pay taxes, inter-company loans and legacies.

Furthermore, Justice Lederer noted that, to demonstrate capacity, there is no requirement that the testator acknowledge the effect of any change at the time the will is executed. In *Kaptyn*, given the testator's experience, knowledge and past involvement in the preparation of his estate, he had requisite mental capacity and knowledge and approval at the time he executed his codicil. Where the testator has provided a clear statement of his testamentary intentions, he could later simply assent to the codicil and still be considered to have testamentary capacity.

This decision suggests that it remains difficult to challenge a will in circumstances where the testator maintained a consistent and continuing testamentary intention and there are no allegations of suspicious circumstances, even in complex estates with lengthy and complicated estate planning documents. It appears that this will be the case even where the solicitor who prepared the will did not make inquiries into the testator's capacity. As Justice Lederer put it, "Surely, when death is on the horizon, we owe the dying more dignity than that."

** Katherine Duvall Antonacopoulos, Counsel, Office of the Children's Lawyer. This case comment represents the opinion of the author and does not represent or embody the official position of the Children's Lawyer or the Ministry of the Attorney General.*

Legislative Update

Ed Esposto

Demand Promissory Notes and the *Limitations Act*

Good news has arrived from the Ontario Legislative Assembly.

Many practitioners have been vexed by the decision in *Hare v. Hare* (218 O.A.C. 164). That decision of the Ontario Court of Appeal held that the limitation period on demand promissory notes began to run from the date the note was issued (or the date on which the last act in furtherance of the note was taken). This caught many lawyers off guard as they had assumed that the limitation period on a demand promissory note would begin to run from the date a demand for repayment was made. Hence, pursuant to *Hare v. Hare* and the new *Limitations Act*, the limitation period on demand promissory notes could expire as soon as two years from the date of the note.

In October, the Ontario government introduced Bill 114, Budget Measures and Interim Appropriation Act, 2008 (No. 2). This piece of legislation deals with a great number of matters. Tucked into that legislation is an amendment to the *Limitations Act* which deals with demand promissory notes.

The Schedule I of Bill 114 amends the *Limitations Act, 2002* by,

- (a) specifying the starting point for counting in relation to demand obligations for the purposes of discoverability and the ultimate limitation period;
- (b) adding a provision respecting the application of the *Limitations Act* to claims about payments made to the Crown or to another public authority for which it is alleged that there was no valid legal authority; and
- (c) replacing references in the Act to effective or commencement dates with the actual dates.

This Bill has passed second reading and is now in the Standing Committee on Finance and Economic Affairs. Passage of this legislation will be welcome news for many practitioners.

Spelling and Grammar Query: “In/with regard to” vs. “In/with regards to”

Susan J. Stamm*

A reader commented that his grammatical pet peeve is “in regards to” and “with regards to”. He believes that one should never use the “s” on the end of “regard” unless the word is being used in a greeting, such as: “Give my regards to your mother”. He asked us to look into the matter.

He appears to be correct. It is best to avoid this very common error.

Dr. Grammar (www.drgrammar.org) notes as follows:

“The use of the plural *regards* in the phrases *in regards to* and *with regards to* is incorrect. Since each phrase shows its speaker regarding just one issue, the *regard* is singular: *in regard to* and *with regard to*:

I am calling *in regard to* your memo.

With regard to our meeting, I cannot attend.”

I paraphrase Kenneth G. Wilson, in *The Columbia Guide to Standard American English*, 1993 and offer some guidelines:

1. *In regard to* and *with regard to*, *regarding*, and *as regards* are all standard, synonymous prepositions (they relate a noun to another word in the sentence), slightly longer and more varied than, but meaning much the same as *about* and *concerning*, e.g., *I spoke to him regarding [as regards, in regard to, with regard to] his future*.
2. *With regards to* is non-standard, although it can be Standard and idiomatic in complimentary closes to letters: *With [my] regards to your family...*
3. *In regards to* is substandard and vulgar (his word, not mine), although it appears unfortunately often in the spoken language of some people who otherwise use standard. It never appears in edited English.

It appears that the only time one can use an “s” on the end of regard is when you are sending greetings or when you are commenting “as regards” to an item. Wilson does not offer any explanation as to why “as regards” is correct and the other usages are incorrect.

My favourite grammatical website, Brian’s List (based upon Paul Brian’s book) agrees that “as regards” is acceptable, again without explanation. He offers this simple suggestion:

“Business English is deadly enough without scrambling it. “As regards your downsizing plan . . .” is acceptable, if stiff. “In regard to” “and “with regard to” are also correct. But “in regards to” is nonstandard. You can also convey the same idea with “in respect to” or “with respect to,” or—simplest of all—just plain “regarding.”

<http://www.wsu.edu/~brians/errors/regard.html>

If you would like us to address common errors, please send an email to *me* at susan.stamm@ontario.ca.

* Susan J. Stamm, Counsel, Office of the Children’s Lawyer.

Brown Bag Lunch Summary

*Bianca La Neve and Suzana Popovic-Montag**

We continued with our Brown Bag Lunch series after the summer break on **September 16, 2008**.

We began with a discussion regarding probate fees and how to obtain a refund when real property is overvalued on probate applications. A particular fact situation was raised, whereby some real property sold for less than its value as listed on the probate application. The parties applied for a refund from Hamilton's estates office. The original probate application did not state that the value of the real property was an estimate, and a refund was refused on this basis. As a practice tip, it was suggested that one should always include Affidavits of estimated value in order to preserve the opportunity to obtain a refund, if property sells for less than it was originally valued for probate purposes.

We then briefly discussed designations of successor annuitants of RIFs. A participant inquired as to whether one can grant a life interest in a RIF to a spouse, with the remainder to pass to their children. It was suggested that the *Income Tax Act* precludes trusts in the context of RIF and RSP designations. It appears that the Canadian Bar Association is working on amending the rules in this regard.

A participant raised an interesting fact scenario involving a personal injury case and the attendant settlement. The injured person's lawyer believed that, although his client could not manage the settlement funds himself, he had capacity to appoint a Power of Attorney for property to manage them on his behalf. The Judge referred the matter to the Office of the Public Guardian and Trustee ("OPGT"). It appears that the Judge may have been concerned that, if the injured person had capacity to appoint an Attorney for property, he would also be capable of revoking the POA at a later date. We discussed situations in which the OPGT becomes involved. It was noted that Rule 7 of the *Rules of Civil Procedure* provides for a Judge to direct the OPGT to provide comments on a pending settlement requiring Court approval. It was suggested that, if capacity is an issue in attorneyship matters, it may be prudent to file a Management Plan.

A recurring theme at our lunches is the issue of whether testators should state their reasons for leaving their estate to some beneficiaries, and not others, in their Will or in separate memoranda. We discussed the advantages and disadvantages of each, including whether one or the other will encourage Will challenges. It was suggested that because Wills are public documents, testators should make a simple statement in their Wills confirming that they have excluded a specific beneficiary. Testators may then set out their reasons for such exclusion in a separate private memorandum.

We then discussed the *Cummings* decision and how it may affect testators' moral obligations to family members. One participant noted that he has been tracking Ontario reported cases for references to *Cummings*. Apparently, *Cummings* is still being strictly applied in Ontario.

Another recurring theme at our lunches is a solicitor's retainer and conflicts of interest in the context of Wills made at the same time by spouses. It was noted that, at the time the Wills are made, it is likely a joint retainer situation. A conflict of interest may arise at a later date, when one spouse dies and the surviving spouse wishes to change their Will. It was generally agreed that barring a mutual Wills scenario, the surviving spouse can likely change their Will. However, it may be prudent to direct the surviving spouse to another solicitor to avoid any appearance of a conflict of interest. Some practitioners regularly raise with their married clients the possibility of the surviving spouse changing their Will and possibly disinheriting children of the marriage in favour of a second spouse. If spouses want to make mutual Wills, a contract with independent legal advice

should be recommended. A participant then raised an interesting issue regarding whether assets inherited by a surviving spouse after the death of the first spouse are covered by a mutual Will. We discussed ways of wording mutual Wills to deal with such situations.

We ended our September lunch with an interesting discussion concerning the advantages and disadvantages of including a delay provision in beneficiary designations in Wills, such that the designated beneficiary must survive the testator by a certain number of days. It was noted that the *Succession Law Reform Act* is silent on the matter.

Our next Brown Bag Lunch was held on **October 21, 2008**.

A participant raised an interesting issue regarding incapable persons retaining counsel. One lawyer, who acts for a Guardian of property of an incapable person, was contacted by another lawyer, claiming to represent the incapable person and requesting a retainer. We discussed whether Guardians of property should consent to funding the retainer, and inquire as to the nature of the retainer. We also discussed retaining counsel for an incapable person pursuant to section 3 of the *Substitute Decisions Act, 1992*. It was noted that this situation raised difficult issues, as a Guardian of property has a duty to account for the management of an incapable person's assets.

We then discussed the new draft Practice Direction being circulated by the Honourable Mr. Justice Brown to regulate estate matters in Toronto. All participants were asked to review the practice direction and provide their comments. Participants were also encouraged to read His Honour's recent reported endorsements.

We next discussed how long estate practitioners should keep records. A recent case involved a beneficiary suing the estate and the institutional estate trustee, claiming that she had not been notified of her interest in the estate. Apparently, given the passage of time, the institutional estate trustee no longer had any estate records and it could not be conclusively proven that all of the beneficiaries had been notified of their respective interests in the estate. We discussed the ultimate limitation period of 15 years in the context of record keeping.

A participant raised a drafting issue in respect of trusts established for the purpose of holding shares of health professional corporations (such as in the medical and dental professions), particularly on account of a professional's children. We debated whether such trusts are bare trusts or discretionary trusts. We also discussed the limits imposed on such trusts by the regulatory bodies governing health professionals.

We ended with the announcement of the new Listserv being set up by the Trusts and Estates Section of the Ontario Bar Association. The new Listserv will field questions from estate practitioners and provide networking opportunities. It is hoped that the new Listserv will be useful to estate practitioners.

* *Bianca La Neve, Hull & Hull LLP*, (416) 369-4782.

Suzana Popovic-Montag, Hull & Hull LLP, (416) 369-1416.

Listserv for Trusts and Estates Section!

In January, 2009, the OBA will start a 'listserv' for Trusts and Estates Section members.

A 'listserv' is an email-based mailing list. Listserv members, who have a question or comment that they would like to share, simply send an email to a specified email address. The email is automatically sent to all other Trusts and Estates Listserv members. Members who receive the message may 'reply' only to the sender or to all other listserv members.

Membership in the listserv is on an 'opt in' basis: Trusts and Estates Section members, who do not sign up, will not be part of the list serve.

If you are concerned about email volume, use the 'Rules' feature in Outlook to manage listserv emails so that they are kept out of your 'inbox' and are delivered, instead, to another folder. The subject line of each listserv message will have a bracketed item – i.e., [oba_est] – identifying the listserv. You can create a 'rule' that checks the subject line of every incoming message, and automatically moves any message with this text from your 'Inbox' into the appropriate folder. For instructions on how to set up rules for Outlook 2003 go to:

<http://office.microsoft.com/en-us/outlook/HP052428971033.aspx>

For Outlook 2007 go to:

<http://office.microsoft.com/en-us/outlook/HA100968031033.aspx#3>

Look for an email from the OBA in January with details on how to subscribe.

Any questions? Contact Sean Lawler at (416) 214-5283, or at sean.lawler@shibleyrighton.com

Upcoming Programs

Trusts and Estates - Will-ful and Wantin': Estates Practice in the First Half of the 21st Century

2009 Institute - February 3, 2009 – 9:00 a.m. (full day)

Trusts and Estates: Dead and Busted: The challenges posed by insolvent estates

Section Program - February 24, 2009 – 12:00 p.m.

Trusts and Estates: Income Tax Update 2009

Section Program - March 24, 2009 – 12:00 p.m.

Trust and Estates: Dinner with the Estates List Judges

Section Program - April 28, 2009 – 5:30 p.m.

Nominations are now being accepted
for 2009

OBA Award for Excellence in Trusts and Estates

http://www.oba.org/En/tru/tru_main/award.aspx

and the

Hoffstein Book Prize

http://www.oba.org/En/tru/tru_main/book.aspx

Nominations will be accepted until January 16, 2009 at 4:00 p.m.

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