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Trusts and Estates Section
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In this Issue:

Award of Excellence

Breakfast Meeting with the Ombudsman for Banking Services and Investment and the CBA Elder Law Section Executive

The Lawyer as Estate Trustee, Attorney for Property/Personal Care: Things You Need to Know

Dinner with your Honourable Estates List Justices

Toronto Estates List – Booking of Summary Judgment Motions

Case Comment: *Schwark Estate v. Cutting*

Vokes Estate v. Palmer 2009 CanLII 70132 (ON S.C.)

Ontario Disability Support Program and the Use of Disability and Discretionary Trusts

Estate Planning for Blended Families

Case Comment: *Nieweglowski Estate (Re)*

Brown Bag Lunch Summary

Henry and The Burden of Proof

Spelling and Grammar Query

Deadbeat
Editor: Ed Esposto
OBA Editor: Cheryl Crocker

Award of Excellence

The OBA's Trusts and Estates Section is pleased to announce that **Hilary Laidlaw** will be the recipient of this year's Award of Excellence in Trusts and Estates. Over the years, Ms. Laidlaw has demonstrated exemplary leadership through her knowledge, skill, passion and strength of character. Ms. Laidlaw's exceptional contributions and achievements will be celebrated at the End of Term Annual Awards Dinner (the date of which has yet to be finalized at the time of publication).

Breakfast Meeting with the Ombudsman for Banking Services and Investments and the CBA Elder Law Section Executive

The Canadian Bar Association's National Elder Law Section is having its annual in-person meeting on Friday, April 16, 2010 in Toronto at the Sheraton Centre Downtown. The day will kick-off with a free breakfast meeting with the executive, featuring a presentation and question and answer session with Douglas Melville, Ombudsman and CEO, Ombudsman for Banking Services and Investments (OBSI).

OBSI is the provider of dispute resolution services for most of the banking and investment sectors in Canada. Douglas Melville's presentation will focus on problems that arise between elderly consumers and their providers of financial services. Here is your opportunity to learn more about cost-effective solutions to client issues with financial institutions through use of the services of OBSI and to meet fellow elder law lawyers from across the country.

Breakfast is free, but space is limited! To book a spot, contact Rachel Watson at the Canadian Bar Association at rachellew@cba.org.

The Lawyer as Estate Trustee, Attorney for Property/Personal Care: Things You Need to Know

Date: Thursday, May 20, 2010 1:00 pm to 4:30 pm

Location: Ontario Bar Association, 20 Toronto Street, Toronto, Ontario M5C 2B8

Be prepared to take part in this expanding practice area and be home in time for dinner. This program targets lawyers who take on the role of trustee, estate trustee or attorney. It will provide practical advice from senior practitioners, insights from the Bench and an overview of the jurisprudence. It will cover such important issues as getting paid and dealing with disputes with family members or co-trustees.

Focus: Legal and practical considerations when lawyers take on the role of estate trustee, estate trustee during litigation, trustee, and attorney for property and personal care.

Highlights:
- Distinguish between legal and trustee services
- Accounting obligations
- Liability issues and insurance
- Resolving conflicts

Dinner with your Honourable Estates List Justices

Date: Tuesday, April 27, 2010 5:30 PM

Attending members of the Bench:
The Honourable Mr. Justice David M. Brown, Superior Court of Justice; The Honourable Madam Justice Barbara A. Conway, Superior Court of Justice and The Honourable Mr. Justice George R. Strathy, Superior Court of Justice

Case of the Month presented by Ameena Sultan, Whaley Estate Litigation

Program Chair: Sender Tator, Schnurr Kirsh Schnurr Oelbaum Tator LLP

More details coming soon…

Toronto Estates List - Booking of Summary Judgment Motions

Effective January 1, 2010, significant changes to Rule 20 of the Rules of Civil Procedure dealing with motions for summary judgment came into effect. Since some summary judgment motions may involve "mini-trials" using both written and viva voce evidence, all motions for summary judgment on the Estates List will now be subject to pre-hearing management.

Justice David Brown has set up a new procedure for the booking of summary judgment motions. In order to schedule such a motion, counsel must book a Summary Judgment 9am appointment. Details on booking such appointments are available in OSCAR or from the Estates Court Office.

Case Comment: *Schwark Estate v. Cutting*, Ontario Court of Appeal, Docket: CA C49746, Judgment: January 27, 2010, E.E. Gillese J.A., J. MacFarland J.A., and R.A. Blair J.A.

*Amy Cull**

The case of *Schwark Estate v. Cutting*, 2010 ONCA 61, required the Ontario Court of Appeal to decide whether the trial judge had erred in granting the respondents relief on the ground of proprietary estoppel. The case is important in that, on the one hand, it serves as a reminder that proprietary estoppel, when deployed correctly, provides another means for the estate litigator to level equity's scales in favour of those clients who have suffered injustice from hollow promises. On the other hand, the Court of Appeal makes clear that the test is not an easy one and the facts must truly "raise an equity" or, to quote the Court, "give rise to an estoppel."

The Facts

In the 1920's, the appellants registered a plan of subdivision on the shores of Lake Erie. The respondents were the owners of lake*view* cottage lots located atop a bank overlooking the lake, but without direct access to it. Interposed between the respondents' lots and the lake were water lots owned by the appellant with the boundaries thereof demarcated by "no trespassing" signs. Eventually, the bank began to erode causing the respondents to construct a berm at its base. In response, the appellants threatened to sue. Later, however, the appellants gave permission to the respondents to use the water lots for passage to the beach in exchange for use of the respondents' stairs. However, in the fall of 1998, the

appellants deliberately obstructed the path aligning their lots with barrels and brush, thus drawing a final line in the sand.

The Ontario Court of Appeal

The Court of Appeal set aside the judgment of Hambly J. According to the Court, the trial judge had failed to apply the law to the facts as he found them and failed to consider whether the requirements for proprietary estoppel were met on the evidence.

The Requirements of Proprietary Estoppel

According to the Court, the elements necessary to establish proprietary estoppel are: (i) there must be encouragement of the plaintiffs by the defendant owner; (ii) there must be detrimental reliance by the plaintiffs to the knowledge of the defendant owner; and (iii) the defendant owner must later seek to take unconscionable advantage of the plaintiff by reneging on an earlier promise.

In order to establish unconscionability, the Court of Appeal opined that a plaintiff must meet the five-part test set out by Fry J. in the case of *Wilmott v. Barber* (1880), 15 Ch. D. 96 and adopted by the English Court of Appeal in the seminal case on proprietary estoppel: *Crabb v. Arun District Council*, [1976] 1 Ch. 183. Fry J.'s five-part test is summarized as follows: (i) the plaintiff must have made a mistake as to his legal rights; (ii) the plaintiff must have expended some money or must have done some act on the faith of his mistaken belief; (iii) the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff, since the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights; (iv) the defendant must know of the plaintiff's mistaken belief of his rights; and (v) the defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right.

Analysis

The Court of Appeal was firm in applying the requirements for proprietary estoppel. The Court found that there was no evidence that the appellants had made any false inducements and, in fact, the respondents knew they had no legal right to use the water lots. Nor was there any evidence that the respondents had acted to their detriment, since no money had been expended on the rubble used to construct the berm. The Court was clear that simple reliance on another's indulgence is insufficient to lead to an estoppel, stating, at paragraph 33: "mere acquiescence or being a good neighbor is not enough to establish a claim in proprietary estoppel."

Application to the Estates Context

Although this case is not an estates case, it is helpful for estate practitioners, since proprietary estoppel, like constructive trust or *quantum meriu*t, provides another valid claim against the assets of an estate.

Applied to the estates context, a successfully-established claim of proprietary estoppel will enable the court to "ignore the provisions of the Will and attribute to the claimant what would reasonably have been expected in respect of the assets of the estate"[1] and, therefore, award damages in favour of the claimant. It is applied in circumstances where the court finds that "there is a reasonable expectation of fair and judicious conduct on behalf of the deceased and attempts are made to preserve and protect the property accordingly."[2] In these circumstances, "a court will not insist on strict adherence to legal rights of a party where it would be inequitable for that party to do so having regard to the dealings which have taken place between the parties."[3]

Importantly, however, the estate practitioner must be sure that the three criteria—(i) encouragement by the defendant, (ii) detrimental reliance by the plaintiff to the knowledge of the defendant, and, (iii) an attempt by the defendant to take unconscionable advantage of the plaintiff by reneging on an earlier promise—are met in asserting a claim in proprietary estoppel on behalf of his or her client.

Examples of expenditure or "detriment" are situations where "the claimant has spent money on improving the property, done repairs, contributed to mortgage payments," and may also consist of cases where the claimant foregoes his or her job to take care of the deceased.[4] Although the doctrine of proprietary estoppel has traditionally concerned rights over land,[5] it has been relied upon to assert claims to other forms of property,[6] such as a farm business[7] or the family home.[8]

Obiter

Although *obiter dicta*, *Schwark Estate v. Cutting* also stands for the principle that where a person makes a binding contract that they will not insist on the strict legal position or their strict legal rights, a court of equity will hold them to their promise. However, as noted by one legal scholar, this raises the question of what is to happen in a scenario where when one spouse argues that she did not bargain harder in her marriage contract because the deceased had promised to take care of her in his will. Does this not "raise an equity"?

**Amy Cull, B. A. (Hons.), J.D., Associate, Whaley Estate Litigation*

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[1] Ian Hull, "Proprietary Estoppel – An Innovative Claim Against the Assets of the Estate," at 8-10.
[2] *Ibid*.
[3] *Ibid*.
[4] *Ibid*. at 8-12. See also *Jennings v. Rice* (2002), [2002] EWCA Civ 159.
[5] See *Dillwyn v. Llewellyn* (1862) 4 De G.F. & J. 517; 45 E.R. 1285 and the leading Ontario Court of Appeal case of *Depew v. Wilkes* (2002), 60 O.R. (3d) 499 (Ont. C.A.).
[6] *Ibid*. at 8-12.
[7] *Gillett v. Holt*, [2000] 3 W.L.R. 815 (C.A.).
[8] *Campbell v. Griffin*, [2001] WTLR 981 (C.A.).
[9] All credit for this excellent philosophical question goes to Clare Burns, Weir Foulds LLP (Estate Planning Council Meeting, February 2, 2010).

Vokes Estate v. Palmer 2009 CanLII 70132 (ON S.C.)

*Ameena Sultan**

This recent decision by Price J. dealt with the issue of capacity to understand an oath or solemn affirmation and the capacity to communicate evidence. In this motion, the Court emphasized that it is not a simple matter for a party to be found incapable of testifying under oath and that evidence of cognitive impairment alone does not provide a sufficient basis to exempt that party from giving evidence.

Randal Palmer suffered a brain injury in 2003. Three years later, he was the driver in a car accident that caused the death of Michelle Vokes and her unborn child in another vehicle. Ms. Vokes's family commenced an action naming Mr. Palmer as the defendant, and he in turn brought a Third Party Claim against Parkwood Hospital on the basis that the Hospital had previously found him fit to drive when it should have been clear that he could not drive safely. In the course of the litigation, Mr. Palmer's sister was appointed litigation guardian.

When Mr. Palmer was to be examined for discovery, his lawyer refused to have him take an oath or solemn affirmation arguing that Mr. Palmer's brain injury rendered him incapable of doing so. Mr. Palmer's examination for discovery proceeded without him taking an oath or solemn affirmation and a transcript was produced.

Six months later, Mr. Palmer's lawyer submitted a report from a social worker and *SDA*-certified capacity assessor that stated that Mr. Palmer was indeed incapable of understanding the nature of an oath or affirmation. The Hospital then brought this motion for an order directing Mr. Palmer to be examined, this time under oath or solemn affirmation. Mr. Palmer opposed the motion, maintaining that he was incapable of understanding the nature of an oath or affirmation, and incapable of communicating his evidence.

In reviewing the issues before it, the Court emphasized that parties can only be exempted from examinations for discovery in highly exceptional circumstances and that the burden of establishing that an exemption is appropriate by reason of incapacity falls squarely on the party seeking to be exempted.

The Court referred to subsection 18(1) of the *Ontario Evidence Act* that provides that "a person of any age is presumed to be competent to give evidence" as well as subsection 16(1) of the *Canada Evidence Act* that directs courts faced with the question of capacity to testify, to examine "(a) Whether the witness understands the nature of an oath or solemn affirmation; and (b) Whether the witness is able to communicate his evidence."

The Court looked closely at the capacity assessment provided by Mr. Palmer's lawyer, as well as the transcript of Mr. Palmer's unsworn examination for discovery.

In respect of the capacity assessment, the Court was not satisfied that the capacity assessor was qualified to specifically address capacity to take an oath or to communicate evidence. The Court also

found that the assessment itself dealt with general matters of the defendant's cognitive impairment and the fact that a litigation guardian had been appointed, and not the specific question of his ability to understand the nature of an oath or solemn affirmation or to communicate his evidence.

In scrutinizing the discovery transcript, Price J. found that Mr. Palmer had testified that he understood the importance of telling the truth and that he knew it was wrong to tell a lie. The transcript also showed that the defendant had been able to answer questions posed to him and that when he did not know an answer or when he disagreed with a point, he clearly indicated his lack of knowledge or disagreement. The Court pointed out that the threshold for giving evidence is not high. A capable witness is required to be able to observe, recollect and communicate but is not required to communicate to a level of perfection.

The Court emphasized that medical evidence is required for a finding that a person is incapable of testifying and that even with the appropriate evidence, the standard of proof is high.

Justice Price was not satisfied that the high standard had been met in this case and ordered the defendant to re-attend for examination for discovery and to take an oath or solemn affirmation at the examination. The fact that the defendant had suffered a serious brain injury and required a litigation guardian did not lead to the conclusion that he was incapable of understanding an oath or solemn affirmation or of communicating evidence. In spite of his demonstrated cognitive impairment, Mr. Palmer was still presumed capable of testifying under oath and was required to do so by the Court.

**Ameena Sultan, LL.B., Associate, Whaley Estate Litigation*

Ontario Disability Support Program and the Use of Disability and Discretionary Trusts

*Vincent J. De Angelis**

An increasing number of beneficiaries will be disabled and eligible for government assistance. This issue cannot be ignored by clients with beneficiaries that are receiving income support from various government programs. In Ontario, the most common government program of support for persons with disabilities is the Ontario Disability Support Program (ODSP). Without proper steps being taken in advance, an inheritance could disqualify a recipient from receiving these benefits.

This article focuses on trusts set up for the benefit of ODSP recipients, and in particular, the disability trust and the Henson Trust, as a means of complying with the asset and income restrictions under the ODSP.

Overview of the *ODSP Act* - Asset and Income Limits

In essence, under the *Ontario Disability Support Program Act*, 1997 (the "Act")[1] the prescribed asset limits for a benefit unit are $5,000 for a single recipient, $7,500 if there is a spouse included in the benefit unit, and $500 for each dependant other than a spouse.[2] However, excluded from this are several types of assets, the most significant of which are:

- principal place of residence;
- motor vehicle;
- payments toward disability related items, provided they have been approved by the Director;
- a disability trust fund having assets worth up to $100,000.00, provided the fund is derived from an inheritance or proceeds of a life insurance policy;
- an absolute discretionary trust, referred to as the "Henson Trust" worth any value;
- a Registered Disability Savings Plan.[3]

The ODSP excludes several types of income, examples of which include:

i) income that is applied toward disability related items or services or education or training incurred because of a disability:
ii) payments from a trust or life insurance policy or gifts or other voluntary payments that do not exceed $6,000.00 in any 12-month period; and,
iii) payments of any amount from a Registered Disability Savings Plan.[4]

Disability Trust

Excluded from the asset limits are a person's beneficial interest in assets held in one or more trusts and available to be used for maintenance of that person if the capital of the trust is derived from an inheritance or from the proceeds of a life insurance policy. Persons receiving benefits may transfer up to $100,000.00 received from an inheritance or life insurance proceeds, to such a trust.[5]

To the extent payments from the trust, including both capital and income, are used only for disability related items or services or education or training incurred because of a disability, they will not be included in the recipient's income for ODSP purposes.[6] In addition, the recipient can receive up to $6,000.00 in any twelve-month period without having his or her benefits affected.[7]

Any income that is not paid to the beneficiary may accumulate in the trust.[8] To the extent that the accumulated income and capital exceed $100,000, such excess will be included in the income in the month received and an asset thereafter unless otherwise exempt.[9] However, the trust may only accumulate income during the maximum period allowed for under accumulations legislation.[10]

Thereafter, the income must be paid out. If the payment is not related to a disability expense and exceeds $6,000.00 in any twelve-month period, benefits will be affected.

Unlike the Henson Trust discussed below, the disability trust may also be settled by the beneficiary from the proceeds of the inheritance or life insurance policy.[11]

The "Henson Trust"

A discretionary trust, commonly referred to as the "Henson Trust", is not provided for in the regulations. It arises out of a 1987 decision of the Supreme Court of Ontario.[12]

The applicant, Audrey Henson, received benefits under the predecessor program to the ODSP, and lived in a group home. Her father died in 1981. By the terms of his will, he created a discretionary trust.

Mr. Henson's trustees were given unfettered discretion to pay income or capital for her benefit. The will specifically stated that Ms. Henson was not to have a legal interest except for payments actually made to her or for her benefit and provided that the trustees might take into account other sources of benefits for her in order to maximize the benefits which she would receive. Justice Callaghan held that the provisions of the will gave the trustees absolute and unfettered discretion and did not constitute an asset of Ms. Henson.

Therefore, in the case of a discretionary or "Henson Trust", the trustee has absolute and sole discretion to put funds out of the recipient's control. In other words, the Henson Trust must include a non-vesting clause making it clear that the trust beneficiary (the ODSP benefit recipient) does not own the assets, and that the funds are held in trust, to be distributed at the sole discretion of named trustees.

Properly drafted, Henson Trusts are not assets and therefore are not subject to the limit of $100,000.00 as is applicable to the disability trust. However, payouts of capital and interest from a Henson Trust are subject to the asset and income rules and their exemptions noted above. For example, a payment from a Henson Trust which is used for non-approved purposes would be deducted as income in the month received and an asset thereafter, unless otherwise excepted. The same exceptions and limits to income payments out of a disability trust also apply to the Henson Trust.

The Henson Trust may be inter vivos or testamentary. Unlike the disability trust, the Henson Trust must be planned for in advance. Contrary to the belief of many practitioners, the Henson Trust cannot be settled by the ODSP recipient.

Any income that accumulates in the Henson Trust that is governed by Ontario law must be paid out after the maximum period allowed for under the *Accumulations Act*.[13]

General Considerations

In planning for the disposition of his or her estate, the client must consider whether her or his beneficiary will be in need of ODSP benefits. If the beneficiary is in need of such benefits, but the inheritance is large enough to prevent her or him from receiving ODSP benefits, the client must consider the above limits and exemptions. Whether the funds are held in a disability or Henson Trust, a separate entity will be created and annual tax returns must be filed.[14]

The advantages of a Henson Trust over a disability trust include the following:

- a Henson Trust is not subject to the same onerous reporting requirements of the ODSP;[15]
- there are no limits on the amount of assets held by a Henson Trust
- beneficiaries other than the ODSP recipient may be chosen to receive income that must be paid out after the maximum period allowed for under accumulations legislation; and,
- the Henson Trust is a more secure arrangement. The disability trust is an exception to the general limits of assets and income prescribed by regulation. It may be repealed by an administrative decision of the Minister of Community and Social Services. The Henson Trust has been tested and approved by the courts. The government would be required to pass legislation to impose limits on or eliminate the Henson Trust.

On the other hand, a disability trust will ensure that the beneficiary does receive benefits and will not be subject to the whims of the trustee.

Total reliance on government support would not be prudent. Such support may be curtailed or withdrawn altogether. Therefore, where the beneficiary is in receipt of, or is expected to receive, ODSP benefits, a disability trust or Henson Trust should be settled just in case government support stops. Furthermore, funds from the trust may be used to pay for various luxuries such as vacations, entertainment and for maintenance of the place of residence.[16]

For those with limited funds, life insurance offers a secure source of funds for establishing the trust. The proceeds are tax free. The beneficiary of the trust should be an insurance disability trust or Henson Trust, separate from the will so as to avoid probate fees.

Conclusion

It is imperative that the solicitor ascertain whether or not a proposed beneficiary of the client has a disability and is in receipt of (or eligible for) benefits under a provincial or federal program for disabled persons. In Ontario, the program that is likely to be of relevance is the ODSP. A disability trust or Henson Trust will be of great assistance in preserving eligibility under this program. In addition, the client should be asked whether or not he or she has taken full advantage of the various tax credits (refundable and

non-refundable) available to taxpayers who are supporting persons with disabilities. Where it is determined that a Henson Trust is appropriate for the beneficiary, it is essential that the trust terms are drafted properly to ensure no part of the income or capital vests with the ODSP recipient. Equally important will be the choice of a trustee that will understand the needs of the beneficiary. It may be beneficial to have the trustee prepare a non-binding letter of wishes to assist the trustee in administering the trust.

**Vincent J. De Angelis LL.B., T.E.P., De Angelis Law Professional Corporation, Toronto.*

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[1] S.O. 1997, c. 25, Schedule B.
[2] Sections 1(1); 27(1), O. Reg. 222/98.
[3] *Ibid*. Sections 27 (2); 28(1),(2), (2.1), (3); 43(1) 2.1, 6 and 9.
[4] *Ibid*. Sections 38; 39(1),(2); 41; 42;43(1),(2),(4),(5),(6) and 43.1. For an excellent article on the Registered Disability Savings Plan with reference to the ODSP, see the article by Elena Hoffstein and Rachel Blumenfeld entitled "*Special Arrangements*" STEP Journal, July/August 2009, page 59.
[5] *Ibid*. Sections 28(1) 19 and 20; 28(3);
[6] *Ibid*. Section 43(1) 9;
[7] *Ibid*. Section 43(1) 13;
[8] *Ibid*. Section 43(1)10 i);
[9] *Ibid*. Sections 37, 43 (1) 9, 10;
[10] *Accumulations Act*, R.S.O. 1990, c. A.5, Section 1
[11] The proceeds will be treated as income in the month received and exempt as assets thereafter, but the trust must be established within 6 months of receipt in order to qualify – See *ODSP – Income Support Directive 4.7- Funds Held In Trust*.
[12] *The Director Of Income Maintenance Branch Of The Ministry Of Community And Social Services v. Audrey Henson*, 28 ETR 121, Callaghan A.C.J.H.C., aff'd (1989) 36 ETR 192 (Ont.CA).
[13] Note 10, s.1. A way to avoid this limitation is to have the trust resident in a jurisdiction without accumulations legislation.
[14] Income tax issues, including the 21 year deemed disposition, attribution rules, rate of taxation, etc. need to be considered. These issues are beyond the scope of this article.
[15] The beneficiary must provide an annual report accounting for any payments made out of the Henson Trust or verifying that no payments were made - *ODSP – Income Support Directive 4.7- Funds Held In Trust.*
[16] There is always the risk that an application for support under Part V of the *Succession Law Reform Act* R.S.O. 1990, c. S.26 may be brought on behalf of the ODSP recipient if he or she is a "dependant" of the deceased – and see Section 11 of O.Reg 222/98 which provides for the denial or reduction of benefits where the Director of ODSP is not satisfied that a member of a benefit unit is making reasonable efforts to obtain compensation or realize a financial resource or income that the person may be entitled to or eligible for.

Estate Planning for Blended Families

*Gosha S. Sekhon**

With the rise in divorce and remarriage, many family units involve a mix of children from prior relationships and multiple sets of parents. When advising legally married couples in blended family situations, there are many unique planning considerations that will be involved.

The following fact situation helps to identify just some of those considerations which you should canvass with your clients before putting their estate plan together. The scenario proceeds on the assumption that the clients have agreed to you acting for both parties, after you have discussed the necessary requirements set forth by the Law Society with regard to joint retainers.

The Situation

Jim, a divorcee, and Carol, a widow, married two years ago.

Jim has two children from his first marriage. Both are financially independent adults. Jim is paying spousal support to his ex-wife pursuant to their Separation Agreement.

Carol has three adult children from her first marriage. Two are married and financially independent. The third child, Martha, has special needs and lives with Jim and Carol.

Carol's children are civil to Jim but their relations are strained because they suspect that Jim is a "gold-digger": Carol had significantly more assets than Jim when they married.

Jim and Carol each have wills they made prior to their marriage. They have now come to you to put a new estate plan in place.

Factors to Consider

Prior Wills

Did the clients make their prior wills in contemplation of marriage? If not, their prior wills would have been automatically revoked when they married. Section 16 of the *Succession Law Reform Act*, R.S.O. 1990, c. S. 26 ("SLRA"), sets out the exceptions to the rule that a will is revoked by marriage.

The clients need to be aware that unless their prior wills demonstrate a contrary intention, and barring the applicability of the other exceptions set out in section 16 of the *SLRA*, if one of them were to die before their new wills are completed, that spouse would be considered to have died intestate. The deceased spouse's estate would then be distributed in accordance with the rules for intestate succession, as set out in Part II of the *SLRA*. This could lead to unexpected and possibly undesirable consequences.

Non-Binding Nature of "Mirror" Wills

Your clients may be proceeding on the expectation or assumption that once they have agreed on a mutually satisfactory estate plan, their partner will not make any subsequent changes to that plan, either later in their life together or upon the death of the first of them. It is important to clarify that a will is not a contract, even if prepared for both on what are currently mutual goals.

Either Jim or Carol can change their respective wills at any time. This means that unless Jim and Carol enter into a further formal arrangement, each of them will be free to amend their wills, either while both are alive or on the death of the first of them. Some of the options that would provide greater assurance that each will stick to the agreed upon plan, even after the death of the first of them, include:

a) the use of spousal trusts;
b) a mutual wills contract; or
c) a marriage contract.

Each option in turn involves many considerations. Further, some couples do not want to enter into restrictive arrangements or “complex” plans despite the security that would be provided.

Each option requires a detailed discussion of its own but for the purposes of this article it will suffice to say that you should familiarize yourself with the options and thoroughly canvas them with your clients.

Restrictions on Testamentary Freedom

While individuals generally have testamentary freedom, there are certain limits to such freedom due to various legal obligations that may arise. The *SLRA* and the *Family Law Act*, R.S.O. 1990, c. F.3 (“FLA”), allow an individual’s spouse or a legal dependent (which can include a legally married or common-law spouse, a child, a parent, or a sibling of the testator/testatrix) to bring certain proceedings against the individual’s estate if they have not been adequately provided for in the estate plan.

Family Law Act

Under the *FLA*, a legally married spouse is entitled to an “Equalization of Net Family Property” on dissolution of marriage or the death of their partner. If Jim or Carol does not make adequate provision for the other, the surviving spouse can make a claim against the deceased spouse’s estate for the value that he or she would have received if there had been an equalization of the net family property.

If Jim and Carol reach an understanding that they will each leave the bulk of their estate to the children of their prior relationship, they should again give serious consideration to entering into a formal agreement, such as a marriage contract, which would modify some of the provisions of the *FLA*.

Succession Law Reform Act

Jim and Carol must give consideration in their estate plan to their obligations towards Carol’s daughter Martha, who has special needs and resides with them. Part V of the *SLRA* allows a dependent of the deceased to make a claim against the estate if adequate provision for his or her needs has not been made. Martha may well be considered a dependent because of her special needs, despite the fact that she is an adult.

If Carol leaves her entire estate to Jim, Martha may make a claim against Carol’s estate. Equally important, Martha may also be considered Jim’s dependent because she resides with both Jim and Carol. Accordingly, Jim may have a legal obligation to provide for Martha as well, depending upon the nature of their relationship and the support he may be providing to her. It is important to review the details of any obligations this has created for Jim.

Existing Contractual Obligations

Jim has the added consideration of ensuring that he fulfills his obligations to his former spouse in accordance with their Separation Agreement. It is important to obtain and review a copy of Jim’s Separation Agreement with his ex-wife to determine how the provisions effect or restrict Jim’s planning options.

Does the Separation Agreement set out whether support will simply cease on Jim's death? If not, does the Separation Agreement deal with the funding of ongoing support on Jim's death?

A common way in which funding for ongoing support is addressed is through the provision of life insurance. Does the Separation Agreement set out a requirement for Jim to maintain a certain amount of life insurance for a certain length of time and naming his former spouse as beneficiary? If insurance has not been arranged or addressed as an option, this may be a good time for Jim to consider putting something in place.

Jim should be cautioned that it is not uncommon for a former spouse to make a claim against the deceased former spouse's estate. It is important to plan so as to minimize the chances of such a claim occurring as it would cause expense and delay in the administration of his estate.

Income Tax Implications

While their wills address the distribution of assets that fall into their estates, Jim and Carol likely have assets that will be distributed outside of their estates, either through joint-ownership or by beneficiary designation.

With regard to assets that pass by beneficiary designation, Jim and Carol should take into account the tax benefits available to them in naming each other as the beneficiaries of particular assets. This should be considered even if their intention is to leave a majority of their estates to their children from the prior relationships.

For example, if Jim names Carol as the beneficiary of his RRSP, the full value of the plan could be rolled over to Carol's RRSP on his death. This is significant because whereas Jim's estate would otherwise be responsible for taxes on a deemed disposition of the RRSP on his death, those taxes can now be deferred because the beneficiary of the RRSP is his spouse. Taxes would thereafter be payable when Carol begins to draw from the RRSP or upon Carol's death when her RRSP is deemed to have been disposed.

In contrast, if Jim were to name his children as the beneficiaries of his RRSP, there are at least two significant consequences to that choice:

a) there is no deferral of taxes owed by the estate on the deemed disposition of the RRSP on Jim's death; and
b) the entire tax liability for the deemed disposition of the RRSP would fall on Jim's estate, but the children would receive the full amount of the RRSP.

The additional risk is that there may not be enough assets in the estate to address the income tax obligations that may arise.

Ownership of Assets – Circumventing the Estate Plan

As mentioned above, Jim's and Carol's assets may be distributed outside of their estates if they are jointly owned or have a designated beneficiary. Does the way in which Jim and Carol own assets circumvent their estate plan?

Assets which are held jointly with right-of-survivorship by legally married spouses, or assets on which a beneficiary is designated, will flow outside of the estate to the surviving owner or named beneficiary, as the case may be. There are exceptions to this general rule, which should be explored in detail as well.

If Jim and Carol own many assets in joint names or have named each other as beneficiaries on a significant number of assets, then the use of planning tools such as spousal trusts become far less effective. If a vast majority of assets flow outside of the estate, it also creates a concern as to whether enough assets fall into the deceased's estate to address expenses, taxes and debts.

Depending upon their overall planning objectives, it is important to explore the entire asset structure for the couple and put together a comprehensive estate plan that deals with all assets, not just those which will be addressed by the will.

Choice of Executors

Blended family situations entail varying dynamics and tensions, sometimes creating circumstances that are ripe for conflict. When choosing an executor, Jim and Carol should give careful consideration to whether their appointment will create a situation of discord.

If they choose to appoint their spouse as executor, or their spouse and children, or a combination of their children from both prior relationships, will this create tension? Will the individuals be able or willing to work together on the administration of the estate? If there is dissatisfaction on either side as to the distribution of the estate, how will the conflict be resolved?

It is advisable to bring to the clients' attention the option of using a neutral third-party to act as executor and trustee for any ongoing trusts. This is especially important where there is a greater potential for conflict. While a neutral third-party such as a trust company may entail increased costs for the estate, the estate may incur significant costs if litigation ensues.

Conclusion

There is a great deal of complexity in estate planning for legally married couples in blended family situations. This article has touched only briefly on some of the key areas which should be discussed in detail with clients who approach you to put an estate plan in place.

This article is intended as a general overview and is not intended as specific legal advice.

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***This article has been adapted from an article written by Michael J. Prsa and Gosha S. Sekhon entitled "*Estate Planning – Blended Families: Who Gets What?*", which will be appearing in March, 2010 in the* Lawrences Letter*. The* Lawrences Letter *is a quarterly publication by Lawrence, Lawrence, Stevenson LLP.*

Case Comment: *Nieweglowski Estate (Re)*

*Angélique Moss**

Is a lawyer entitled to refuse to give evidence pursuant to Rule 39.03 in the absence of a court order requiring him to attend at an examination? According to a recent decision, yes. In *Nieweglowski Estate (Re)* 2009 Canlii 13033 (Ont.S.C.) ("*Nieweglowski*"), Justice Strathy held that it is not unreasonable for a lawyer to refuse to give evidence in an examination where the subject matter concerns privileged communications with the lawyer's former client. In this case, the litigation in question involved the late Mr. Nieweglowski's will and a property transfer he made prior to his death. An Order Giving Directions was made by Mr. Justice Perell, on consent, which set out the issues to be tried and the procedures to be followed. The Order Giving Directions also provided for the production of solicitors' records. However, no order was made for the examination of the solicitors. The Order Giving Directions did, however, provide that the parties could apply for further directions.

The lawyer who prepared Mr. Nieweglowski's will and the disputed property transfer produced his files in accordance with the consent Order. The applicant's lawyer then served Mr. Nieweglowski's lawyer with a summons to witness and attendance money, directing him to attend to be examined pursuant to Rule 39.03. The lawyer attended at the examination, but refused to answer any questions on the grounds that the order did not specifically provide for his examination.

The issue of the lawyer's examination was subsequently resolved on consent between the parties. However, the applicant nevertheless brought a motion before Justice Strathy asking for costs of $975.00 for the frustrated examination of the lawyer along with $671.00 for disbursements, and sought those costs from the lawyer, personally, or by the respondents. Prior to the hearing of the motion, the respondents' lawyer undertook to cover the cost of the disbursements.

Justice Strathy was asked by applicant's counsel to make a finding that the lawyer's objection to the examination was without merit and that the absence of a specific provision in the Order Giving Directions was not an obstacle to his examination. Justice Strathy refused to make such an order. First, he held that the issue of the lawyer's examination was ultimately resolved on consent by the parties. Moreover, he found that it was not unreasonable for the lawyer to require the direction of the court with respect to his examination:

> The Order of Perell J. granted the parties leave to obtain further directions. In giving directions with respect to the examination of a solicitor, the court frequently orders that the solicitor may give evidence concerning what would otherwise be privileged communications made by the former client and orders that any claim for solicitor client privilege or confidentiality is waived. It was reasonable for Mr. Mamak to insist upon a court order directing him to attend the examination before disclosing privileged information. For greater certainty, I order that he is entitled to give evidence concerning the matters in issue in this proceeding and concerning what would otherwise be privileged or confidential communications. (at para. 8)

Justice Strathy ordered the respondents to pay, in accordance with their undertaking, the disbursements relating to the aborted examination, less the attendance money which had already been paid to the lawyer and which the applicant would have been required to pay in any event. Justice Strathy also

ordered that the applicant was not required to serve another summons to witness or to provide further attendance money to the lawyer.

The litigation costs in *Nieweglowski* were, no doubt, higher than the parties initially expected: not only was one attendance required to obtain an initial court order for production of the lawyer's files required, the frustrated examination costs were incurred (one wonders whether this attendance could have been avoided had the parties communicated in advance), along with a second court attendance to determine the costs of the frustrated examination.

Can some of these costs be avoided by including in an Order Giving Directions a provision requiring the drafting lawyer to attend at discovery in addition to the usual order requiring production of solicitors' records? Covering off the possibility of an examination of the drafting solicitor in an initial Order Giving Directions prior to obtaining the solicitor's file will obviously avoid the cost of obtaining a second Order Giving Directions. However, in most cases such an Order Giving Directions is unlikely to be granted by the court in light of the changes to the *Rules* in force on January 1, 2010. Courts will consider the proportionality principle in scrutinizing Orders Giving Directions. In so doing, a court will consider the amount at stake and the complexity of the issues. The proportionality principle as it relates to discovery is specifically referenced in Rule 29.2, which holds that in making a determination as to whether a party or other person must answer a question or produce a document the court shall consider the time required and the expense associated with answering the question and whether requiring the person to answer the question would unduly interfere with the orderly progress of the action. As well, in crafting discovery plans under Rule 29.1, the parties are to consider "information that is intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action." Since discovery plans will be required by the courts where discovery is anticipated in Orders Giving Directions (as suggested by Justice Brown during a program recently held by the OBA, "Stay on Top of the New Rules of Court"), counsel should bear this principle in mind in crafting their Orders Giving Directions.

As such, it might be anticipated that where the drafting lawyer's file has not yet been produced, the court may question whether an order requiring the lawyer to attend at an examination is putting the proverbial cart before the horse. It may also be the case that a court will refuse to order an examination of the lawyer where the amounts at issue do not warrant incurring the expense of an examination. Counsel may want to consider whether there are more cost effective and time efficient ways of eliciting the desired information from the solicitor in the appropriate case, such as obtaining "will say" statements from the drafting solicitor. A court may look more favourably on an Order Giving Direction that requires the drafting solicitor to produce his or her file and produce a "will say" statement.

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Brown Bag Lunch Summary

Bianca La Neve and Suzana Popovic-Montag***

Our last Brown Bag lunch of 2009 was held on **December 15, 2009**.

We began with an interesting discussion regarding Registered Education Savings Plans and the treatment of such plans in tax efficient ways. In a particular case raised by a participant, a client's RESP had grown to over $1 million in value, largely through investment gains. Although the client's children were currently attending university, they would never use up all of the money accumulated in the RESP. The client would be able to withdraw the initial $30,000.00 contribution to the RESP without penalty, but likely not all of the gains without some tax consequence. We discussed various ways to address the issue, such as rolling part/all of the RESP into an RSP, and perhaps adding grandchildren to the RESP if the plan provider so allowed.

We then discussed Hensen Trusts and, in particular, whether a trustee of a Hensen Trust can be a contributor/subscriber. The government's website on Hensen Trusts was recommended as a good starting point for information and guidance.

We next considered the use of multiple (domestic) Wills versus the use of an international Will in accordance with the provisions of the *Succession Law Reform Act* (the "*SLRA*"). With respect to the latter, many foreign jurisdictions, including apparently the United States, have signed on as contracting states under the relevant treaty. In the particular case raised by a participant, a U.S. resident owned property in Canada and was exploring whether to prepare an *SLRA* international Will, a Canadian Will or an American Will purporting to deal with worldwide assets. We discussed the advantages and disadvantages of each approach. It was noted that using a Canadian Will, in which a resident was named as estate trustee, would avoid the requirement of posting a bond.

We then discussed various cases, including *Lipson v. Lipson*, 2009 CanLII 66904 (ON S.C.), dealing with rectification applications. We also discussed various recent cases from the Tax Court of Canada, dealing with the interplay between tax law and longstanding trust principles.

We ended the December meeting with a discussion regarding when beneficiaries can and/or should loan money to an estate in order to fund bequests. In a particular situation raised by a participant, a testator's adult child inherited their father's substantial investment portfolio by right of survivorship. Accordingly, there was no money in the estate to fund a $50,000.00 charitable bequest. The adult child was prepared to loan money to the estate to fund the bequest, but wanted to obtain the tax benefit of any charitable deduction. We discussed the mechanics of the proposed loan, and the implications of same, including whether such a proposal would be acceptable to Canada Revenue Agency.

Our first Brown Bag Lunch of the New Year took place on **January 19, 2010**.

We began with a discussion regarding a specific scenario raised by a participant, in which a spouse had left her estate, comprising of a house, to her husband, who had since become incapable. The deceased spouse's estate had never been probated and the house was still in the deceased's name. We discussed whether the house could now be transferred to the husband, and/or an adult child (who was the husband's sole heir), without the need for probate. In this context, we discussed the implications of

section 9 of the *Estates Administration Act*, and the decision in *Proudfoot Estate (Re)*, 1997 CanLII 663 (ON C.A.).

We then discussed a particular situation regarding the amount of compensation, if any, due to one estate trustee when their co-estate trustee actually did all of the work to administer the estate. The active co-estate trustee claimed that the other co-estate not only did no work, but also took various steps that delayed the administration and caused unnecessary costs to the estate. It was suggested that the *Proudfoot Estate (Re)* decision may provide some guidance on the issue. As to the mechanics of holding the passive estate trustee accountable, we discussed the feasibility of commencing a court application to deal with the compensation issue and any allegations of breach of trust.
We also considered a situation in which an elderly client wanted to transfer her cottage to her adult child in order to avoid probate and/or income taxes on death. We discussed various ways in which to effect the transfer as tax-efficiently as possible, including the use of an alter ego trust.

Another participant raised a very interesting scenario regarding the effect of a properly executed power of attorney after death. In the particular scenario raised, the POA document stated that the grantor wanted the person appointed as their attorney for property to continue as their business manager after death. After the grantor's death, the attorney wanted to rely on the POA document to continue managing the deceased's lucrative business affairs and administer his estate. We discussed whether the POA document could be construed as a testamentary document or trust document, and/or whether the named attorney had any authority to act after death. It was suggested that the named attorney apply for probate, on notice to all beneficiaries.

We then discussed another interesting scenario in which a testator bequeathed his entire estate to his spouse, in trust for her lifetime and with a power to encroach completely on capital. The contingent beneficiaries were the testator's minor grandchildren, who lived in the U.S. The spouse and her two adult children were the named estate trustees and were considering encroaching fully on the capital for the spouse's benefit. The spouse's children and grandchildren would then benefit under the spouse's Will. We discussed the implications of same for the various parties. It was noted that the Office of the Children's Lawyer could claim jurisdiction in respect of the contingent interests of the minor grandchildren.

We ended our interesting lunch with a discussion regarding the concurrent use of several limited powers of attorneys to govern different asset classes. For example, one participant was asked to prepare a limited power of attorney to deal with a client's shares in a private corporation, while the client's other assets would continue to be governed by a different power of attorney. We discussed the mechanics of preparing such limited powers of attorney to operate concurrently.

We hope you can join us at our next Brown Bag Lunch.

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Henry and The Burden of Proof

*John O'Sullivan**

Be grateful for small mercies. That's what my grandmother used to say. And the decision of Newbould J. in *Henry v. Henry* [1] a year ago gives trust and estates practitioners a small mercy for which to be grateful.

All Deadbeat readers know by heart the eight principles of the burdens of proof in issues of testamentary capacity, undue influence and suspicious circumstances hewn by Cullity J. in *Scott v. Cousins*[2] from the Supreme Court of Canada's decision in *Vout v. Hay*.[3]

One of them may now have become simpler.
The seventh principle says this:

> 7. The existence of suspicious circumstances does not impose a higher standard of proof on the propounder of the will than the civil standard of proof on a balance of probabilities. *However the extent of the proof required is proportionate to the gravity of the suspicion.*[4] (emphasis added.)

The last sentence is based on Sopinka J.'s statement in Vout v. Hay that in applying the civil burden of proof on a balance of probabilities, the evidence must be "scrutinized in accordance with the gravity of the suspicion".[5]

Thirteen years after *Vout v. Hay* the Supreme Court of Canada rendered its decision in *F.H. v. McDougall*.[6] The case involved allegations of sexual abuse of a school boy by a school supervisor more than 30 years before the action was commenced. The trial judge concluded the plaintiff was a credible witness notwithstanding significant discrepancies in his evidence. The majority of the B.C. Court of Appeal allowed an appeal from findings of sexual assault because the trial judge did not scrutinize and accept the plaintiff's evidence in the manner required, and thereby erred in law.

In the Supreme Court of Canada, following a lengthy analysis of UK and Canadian jurisprudence on the standard of proof where the allegations made against a defendant are particularly grave, Rothstein J. wrote that to suggest that depending upon the seriousness the evidence in civil cases must be scrutinized with greater care, implies that in less serious cases the evidence need not be scrutinized with such care. He concluded:

> "In the result, I would affirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred." [7]

In *Henry v. Henry* Newbould J. had to decide whether a will was null and void by reason of the testator lacking testamentary capacity or by reason of undue influence. He cited the principle that the extent of the proof required is proportionate to the gravity of the suspicion as stated by Sopinka J. and summarized by Cullity J. in the seventh principle, and then concluded, "However this statement may no longer be good law as a result of the decision in *H (F) v. McDougall*."

Newbould J. specifically stated it was not necessary for him to decide this point, because his view of the evidence was the same regardless of the level of scrutiny.[8]

Newbould J's statement is in obiter but it does look like we may now be able to dispense with the last sentence of principle 7 in *Scott v. Cousins*.

Be grateful for small mercies.

**John O'Sullivan, Partner, WeirFoulds LLP*

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[1] (2009), 96 O.R. (3d) 437
[2] (2001), 37 E.T.R. (2d) 113 (S.C.J.)
[3] [1995] 2 S.C.R. 876
[4] (2001), 37 E.T.R. (2d) 113 (S.C.J.), at para. 39
[5] [1995] 2 S.C.R. 876 at para. 24
[6] (2008), 297 D.L.R. (4th) 193
[7] (2008), 297 D.L.R. (4th) 193 at para. 49
[8] (2009), 96 O.R. (3d) 437 at para. 39

Spelling and Grammar Query

*Susan. J. Stamm**

I have received a lot of emails from people suggesting topics for this article. I thought some of these could be grouped together.

Here they are:

1. **Begging the Question**

Wikipedia, among others, notes that the phrase “begging the question” is a logical fallacy. If you don’t know what that means, don’t use it! It does not mean the same thing as “raises the question”.

> Example of how “begging the question” is commonly misused:
>
> “His stated expectation of success on all matters in dispute was unrealistic. This begs the question of which matters he realistically had a chance on which to succeed.”

I find this helpful explanation on http://www.nizkor.org/features/fallacies/begging-the-question.html.

> Also Known as: Circular Reasoning, Reasoning in a Circle, *Petitio Principii*.

Begging the Question is a fallacy in which the premises include the claim that the conclusion is true or (directly or indirectly) assume that the conclusion is true. This sort of "reasoning" typically has the following form.

1. Premises in which the truth of the conclusion is claimed or the truth of the conclusion is assumed (either directly or indirectly).

2. Claim C (the conclusion) is true.

This sort of "reasoning" is fallacious because simply assuming that the conclusion is true (directly or indirectly) in the premises does not constitute evidence for that conclusion. Obviously, simply assuming a claim is true does not serve as evidence for that claim. This is especially clear in particularly blatant cases: "X is true. The evidence for this claim is that X is true."

Some cases of question begging are fairly blatant, while others can be extremely subtle.

Examples of Begging the Question

Bill: "God must exist."
Jill: "How do you know."
Bill: "Because the Bible says so."
Jill: "Why should I believe the Bible?"
Bill: "Because the Bible was written by God."

"If such actions were not illegal, then they would not be prohibited by the law."

"The belief in God is universal. After all, everyone believes in God."

Interviewer: "Your resume looks impressive but I need another reference."
Bill: "Jill can give me a good reference."
Interviewer: "Good. But how do I know that Jill is trustworthy?"
Bill: "Certainly. I can vouch for her."

2. "I could care less"

When people use this phrase, what they mean to say is that they "couldn't care less": i.e., that they care as little as humanly possible about the issue already. If they could care less, then they care quite a bit already on the scale of caring from not caring, to caring a lot. So if you have already hit rock bottom on the caring scale, make sure that you "couldn't care less" not "could care less".

3. The suffix "-wise"

Dictionary.com notes that:

> The suffix -wise is old in the language in adverbs referring to manner, direction, etc.: crosswise; lengthwise. Coinages like marketwise, saleswise, and weatherwise are often criticized, perhaps because of their association with the media.
>
> This suffix should not be confused with the adjective wise, which appears in such compound words as streetwise and worldly-wise.

Brian’s List notes that:

> In political and business jargon it is common to append “-wise” to nouns to create novel adverbs: “Revenue-wise, last quarter was a disaster.” Critics of language are united in objecting to this pattern, and it is often used in fiction to satirize less than eloquent speakers.”

Some examples I have recently heard are “saleswise”, “moneywise” and “schedulingwise!”. For some reason, lawyers and business people love making up new words.

It is best to avoid adding the suffix “-wise” to your nouns to create new ones, unless you want to sound less than eloquent.

4. “Very unique”

One reader noted this as her pet peeve. Once something is unique, it cannot be modified to be particularly unique. Either it is unique, or it is not unique.

From Brian’s List:

“Unique” singles out one of a kind. That “un” at the beginning is a form of “one.” A thing is unique (the only one of its kind) or it is not. Something may be almost unique (there are very few like it), but nothing is “very unique.”

**Susan. J. Stamm, Counsel, Office of the Children’s Lawyer. If you would like us to address common errors, please send an email to me at susan.stamm@ontario.ca.*