



Deadbeat

TRUSTS AND ESTATES SECTION / SECTION DES FIDUCIES ET SUCCESSIONS

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Trusts and Estates Section News

Annual Award Dinner

The Trusts and Estates Section cordially invites you to its annual Award Dinner. This year we are delighted to be honouring Barry S. Corbin.

We will also be enjoying this award dinner at a new and unique venue: The Gardiner Museum.

Event details are as follows:

Date: Tuesday, May 27, 2008

Time: 5:30 p.m. Reception - 6:30 p.m. Dinner

Place: Gardiner Museum, Jamie Kennedy at the Gardiner Restaurant, 111 Queen's Park, Toronto.

Note that seating to this event is limited due to the venue, so tickets will be issued on a “first come first served” basis.

Registration: To purchase tickets or for more information, [click here](#) or call 1-800-668-8900 ext. 307.

Hoffstein Book Prize

The Hoffstein Book Prize was created to recognize contributions and/or achievements by younger members of the Ontario Bar Association to the area of wills, trusts and estates. This year's winner of the Hoffstein Book Prize is Corina Weigl of Fasken Martineau DuMoulin LLP. Congratulations Corina!



ONTARIO
BAR ASSOCIATION
A Branch of the CANADIAN BAR ASSOCIATION

Letter to the Editors

I saw your comment on *Re Carlisle* in on-line Deadbeat today. I certainly agree with you on the issue of the third policy that was acquired after the date of the Will. The court clearly rejected the import of the provision in Saskatchewan's Insurance Act which is the counterpart of subsection 192(2) of Ontario's Insurance Act.

Despite the *Succession Law Reform Act*, a designation in a will is of no effect against a designation made later than the making of the will.

(If memory serves, he said that the question of whether there was an effective insurance declaration was not the issue before him. An interesting splitting of hairs.)

However, on the first two policies, I think the will drafter was careless in the drafting of the declaration. (If you were at the January Estate Planning Council dinner, you might have heard me raise this issue with Robin Goodman who presented that evening.) Nowhere in the declaration is there any mention of a beneficiary on whose behalf the insurance proceeds are to be held. There is merely an implication that it is for the residuary beneficiaries that the insurance proceeds are being held. Given the language of the particular exclusion on which the applicant was relying (that is, "insurance payable to a named beneficiary"), I would say that the court had strong justification for reaching the conclusion that it did. Of course, there is no way of telling whether a better drafting job would have made a difference to this particular judge.

As for Ontario and the absence of any need to provide back-up information on the application, I merely point out paragraph 6(1)(c) of the *Estate Administration Tax Act, 1998*, whereby the Lieutenant Governor in Council is authorized to make regulations "prescribing procedures to be followed and information or evidence to be given to any person by a person applying for an estate certificate, for the purpose of establishing the value of the estate". Happily, we have not seen anything yet. However, I think it is reasonable to expect, in the face of continuing anemic year-over-year EAT revenue increases, that we could eventually see a government reaction along these lines.

Barry Corbin
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The National Elder Law Section Commentary

*Jan Goddard**

One of the many benefits of membership in the Canadian Bar Association is that for the low, low price of **free**, all members can join the National Elder Law Section.

Arguably, we are all practising elder law, or will be as the population of Canada ages. Elder law is a wide-angled frame for a range of legal issues that affect aging persons. It sits at crossroads with estates, trusts, guardianship, family, pension, health, criminal, employment, labour, privacy, banking, insurance and immigration law. Its quality of being defined by the common fact that its clients are aging persons presents both a challenge and an opportunity for members of the Section.

The National Elder Law Section Executive met in Ottawa on April 6, 2008 for a full day of strategic planning and setting of priorities. Ontario is the only jurisdiction without its own Section, and therefore has no branch chair sitting on the national Executive. However, the province is ably represented by Mary-Alice Thompson (Member-At-Large) and Judith Wahl (Chair).

It was decided that some of the Executive's priorities for the coming year are providing continuing legal education, developing Section infrastructure and establishing relationships with other Sections of the CBA.

A major continuing legal education conference, to be held jointly with Queen's University in beautiful Kingston, is scheduled for May 2009. Following the success of the Sections first "webinar" in October 2007, the Section is looking for further opportunities to provide continuing legal education nationwide in this cost-efficient, accessible format.

The Section is going to continue to build its capacity to communicate with members and the public through development of its website and semi-annual electronic newsletter. The website will soon contain lists of potential topics and speakers that can be used by local law associations who want to focus activities on the growing field of elder law.

The Section will also be looking for opportunities to collaborate with other Sections at the national and provincial levels, to increase awareness of the interaction between law and aging.

Keep in the elder law loop - sign up for your free Elder Law Section membership when your CBA membership comes up for renewal!

** Jan Goddard, (A proud National Elder Law Section member), Jan Goddard & Associates, Lawyers, (416) 928-6685.*

Jarvis v. Jarvis, [2007] O.J. No. 3430, 35 E.T.R. (3d) 213, 2007 Carswell Ont 5727 (S.C.J.)

*Jane E. Martin**

Justice Karatcatsanis released this decision on September 5, 2007.

The proceedings concerned an application commenced by three children of a deceased, challenging the validity of his Will and transactions involving his assets. The grounds for the application included lack of capacity and the use of undue influence by the deceased's second wife. The applicants brought a motion for the production of bank records belonging to the deceased jointly with his wife and for the production of bank records belonging to the wife solely.

The applicants alleged that their father was incapacitated as of January 1993 until his death in May 2002. His will was executed in September 1997 and his second wife was granted powers of attorney for property in September 1997.

An Order Giving Directions was made by Walters J. in 2002, directing a trial on issues including whether there were any transactions that ought to be rescinded, gifts set aside or monies returned to the Estate. The 2002 Order also required production of all records relating to assets held solely by the deceased for the period January 1, 1993, to May 26, 2002, a list of the assets, including joint accounts, their right of survivorship, the original date of opening of any joint accounts, and permitted any party to seek further and other directions as needed.

In 2007, the applicants sought an Order for the production of documents relating to joint accounts held by the deceased and his wife between 1993 and 2002 and of documentation of the wife's sole accounts and investments during the same period of time.

Res Judicata:

Justice Karatcatsanis considered whether the issue of production of joint bank and investment records was res judicata by virtue of the 2002 Order for Directions. Despite the Respondent's argument that the issue of production had been argued in front of Walters J. in 2002, that there had been no material change of circumstances, and that the applicants knew about all the impugned transactions at the time of the original Order for Directions, Karatcatsanis decided that res judicata did not apply in the circumstances, holding that res judicata will rarely apply to orders for production and citing the decision of Lane J. in *Klein v. Zagdanski*, [1998] O.J. No. 4767, in which Lane J. observed that production is dependent upon circumstances in the litigation as they develop and this is never totally settled.

Production of Joint Account Records:

Justice Karatcatsanis ordered production of documents relating to the joint accounts of the deceased and his wife, noting that the 2002 Order for Directions had only required the Respondents to produce information regarding the existence of the accounts, not the documents pertaining to them. Justice Karatcatsanis reasoned that ordering production in stages, as had happened in this case, was an appropriate way to balance the privacy interests of a surviving joint tenant, especially in circumstances where the presumption of advancement applies, while leaving the court the ability to expand on production orders in a progressive manner.

The documents regarding the joint accounts were considered relevant to the issues to be tried in the applicants' case, which Karatkatsanis identified as: determining what the deceased's assets were at the date he became incapable and at the date of his death; determining whether the deceased created the joint accounts and investments at the time he was incapable or through an exercise of a power of attorney held by his wife; determining what funds were deposited or received into the joint accounts after the deceased's incapacity; and testing the accuracy of the evidence given by the respondents regarding impugned gifts, loans and mortgages.

Karatkatsanis refused to order production of the records relating to the wife's solely held accounts, rejecting the argument of the applicants that evidence of deposits of money from the deceased's sole accounts to his wife's accounts, and transactions which showed an intermingling of funds met the semblance of relevance test applicable to determine the scope of production. Instead Karatkatsanis held that the disclosure of the joint accounts, alone or together with the other productions, may raise sufficient concerns to justify the general disclosure of the wife's sole accounts, and she left the door open to the applicants to return to seek further disclosure.

It is not clear from the reasons delivered by Karatkatsanis, who identified as an issue for trial testing respondents' evidence regarding gifts, loans and mortgages, why the wife's sole accounts do not meet the semblance of relevance test. It is clear, however, that style of discovery embodied by Karatkatsanis' reasoning could easily lead to the necessity for Applicants to return to court on multiple occasions to gain full and frank disclosure from uncooperative Respondents, creating the risk of extremely protracted and expensive proceedings.

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.

**Jane E. Martin, Counsel, Office of the Children's Lawyer.*

Sheldrake v. Sheldrake, [2008] O.J. No. 150, 163 AC.W.S. (3d) 324 (S.C.J.).

*Jane E. Martin**

This decision of Justice A. Panet was released on January 3, 2008.

Aside from providing an overview of the type of facts which will support an equitable claim to an interest in land in circumstances where an agreement fails to meet the requirements under the *Statute of Frauds*, R.S.O. 1990, c. S-19, the decision provides an interesting comment on the risks posed by failing to call a defence in a civil case.

The Plaintiff, a son of the defendant Margaret Sheldrake, made a claim against his mother regarding two family cottages. He sought a declaration that he had a beneficial interest in the cottages and that his mother held the cottages in trust for his benefit.

The Plaintiff alleged that in the fall of 2000, an agreement was made with his mother that he would move into and renovate two badly run-down cottages which his mother wanted to keep in the family, but which no other relatives wished to retain. In exchange for his labour, the mother agreed to leave both cottages to him on her death. The cottages were estimated to be worth approximately \$300,000, and the mother planned to compensate her other children appropriately in her Will.

In spring 2001, the Plaintiff moved into one of the cottages and commenced extensive repairs and renovations to bring them to a condition where they could be rented. His work continued for several years, and included performing repairs and renovations, supervising those repairs which were subcontracted, purchasing of some of the materials and payment for some of the contracted services (others were paid for by the Defendant). At trial, the Plaintiff produced a document written by himself and signed by the Defendant which made reference to their agreement about the eventual transfer of the cottages in exchange for the labour of the Plaintiff.

In the fall of 2003, the relationship between mother and son deteriorated, in part due to the involvement of a brother who had been named as a co-Defendant in this claim (the claim against the brother was discontinued by the time of trial). By 2006, communication between mother and son had all but ceased, and a Writ of Possession was obtained by the mother which required the Plaintiff to vacate the cottage property.

The Defendant, who unlike the Plaintiff was represented by counsel, did not call any evidence at trial, nor did she testify on her own behalf. No evidence was called to explain the Defendant's failure to testify or to call evidence.

Justice Panet accepted the Plaintiff's evidence that the oral agreement had been formed on the terms claimed by the Plaintiff. In face of the lack of participation by the Defendant, no evidence of her incapacity or explanation of her failure to participate, and noting that the Defendant had been represented by counsel, the court accepted the Plaintiff's evidence and drew an adverse inference amounting to an implied admission that the evidence of the Defendant would not support her position in the case, nor would it contradict, in any material aspect, the evidence of the Plaintiff in the case. Due to the failure of the Defendant to call the brother of the Plaintiff to testify, Panet J. also drew an adverse inference that the evidence that the brother would have given would have supported the Plaintiff's evidence.

Although Justice Panet accepted that there was an agreement as alleged by the Plaintiff, that in exchange for his labour, the mother would transfer the cottage to him, he found that the agreement failed to comply with the requirement of the Statute of Frauds that a transfer of land shall be made in writing.

Panet J. turned to the doctrine of part performance to take the case outside of the requirements of the Statute of Frauds and found that the acts of part performance relied upon by the Plaintiff were unequivocally referable to the contract asserted. Panet J. again noted that it was within the power of the Defendant to give evidence that would have provided some other explanation for the actions of the Plaintiff, and allowed the application for declaratory relief.

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.

** Jane E. Martin, Counsel, Office of the Children's Lawyer.*

De Zorzi Estate v. Read, 2008 WL 673479 (Ont. S.C.J.), 2008 CarswelOnt 1330

Kimberly A. Whaley*

Question: Does an Attorney have to account and disclose to beneficiaries, financial information predating the death of a capable grantor of a Power of Attorney?

Answer: Yes

Three significant issues are resolved by Herman J. in her reasons for Judgment on March 12, 2008:

1. In what Her Honour Madam Justice Herman describes as “a novel point of law,” the court ordered disclosure of account statements and records under attorneyship predating the death of the deceased to beneficiary respondents;
2. Herman J., relying on *Stickells Estate v. Fuller*, [1998] O.J. No. 2940 (O.C.J.),¹ and on Section 42(4) of the *Substitute Decisions Act, 1992*, S.O. 1992, c.30.² (the “SDA”), decided that a beneficiary could on application ask for a passing of accounts of an Attorney, since a beneficiary within the meaning of Section 43(4) of the SDA, would come within the realm of those contemplated who may be entitled to apply at Section 42(4) (6) as being “any other person with leave of the Court” and therefore a beneficiary would be entitled to a passing of accounts with leave; and
3. In resolving the issue of who an Attorney can be required to account to, Herman J. said: “where an Attorney and the Estate Trustee are one and the same person, there cannot be a true accounting as between the Attorney and the Estate Trustee.” Her Honour’s opinion in the circumstances of *De Zorzi Estate* was that the Attorney should be required to account to someone other than the Estate Trustee. Moreover, Her Honour stated that: “disclosure is an essential part of this obligation.”

The Facts:

The facts of the *De Zorzi* case were the respondents, as residuary beneficiaries, sought an Order of Ms. Guerin, in her capacity as Estate Trustee, for disclosure of financial records. In the alternative, the respondent beneficiaries sought an Order for the Estate Trustee to pass accounts from the date she started acting as an Attorney for the now deceased grantor.

Ms. Guerin, Attorney prior to death, in her capacity as Estate Trustee opposed providing disclosure of records prior to the date of death of the deceased.

Ms. Guerin took the position that she had no obligation as an Attorney to account to anyone, but the grantor, while the grantor was alive.

It was undisputed that Ms. De Zorzi remained competent at all times prior to her death.

The additional facts suggest the relationship was one of agency in that Ms. De Zorzi directed the management of her own finances, and that Ms. Guerin simply carried out her instructions.

The issue giving rise to the beneficiaries’ request for an accounting prior to death, entailed their belief that bank accounts had been closed prior to death, and Ms. Guerin may have closed those accounts and distributed funds, which may have been estate assets.

There were also concerns raised regarding Ms. Guerin's administration of the Estate after death.

The analysis of Justice Herman:

Fair v. Campbell Estate (2002) 3 E.T.R. (3d) 67 at paragraph 29 (O.S.C.J.)³ is precedent for the contention that where the grantor of a Power of Attorney is competent, the Attorney has no obligation to account, except to the grantor during the grantor's lifetime.

In *Stickells Estate*,⁴ the court ordered the Attorney to pass her accounts as of the date when the SDA came into effect. The Court relied on Section 42(1) of the SDA and the court's understanding that this section does not stipulate dependence upon the grantor becoming incapable. Rather, it is dependant on whether the Power of Attorney document provides for powers to be exercised during a period of the grantor's subsequent incapacity.

In order to follow the remainder of the court's analysis, it is essential to review Section 42 in its entirety:

Passing of accounts

42. (1) *The court may, on application, order that all or a specified part of the accounts of an attorney or guardian of property be passed. 1992, c. 30, s. 42 (1).*

Attorney's accounts

(2) *An attorney, the grantor or any of the persons listed in subsection (4) may apply to pass the attorney's accounts. 1992, c. 30, s. 42 (2).*

Guardian's accounts

(3) *A guardian of property, the incapable person or any of the persons listed in subsection (4) may apply to pass the accounts of the guardian of property. 1992, c. 30, s. 42 (3).*

Others entitled to apply

(4) *The following persons may also apply:*

- 1. The grantor's or incapable person's guardian of the person or attorney for personal care.*
- 2. A dependant of the grantor or incapable person.*
- 3. The Public Guardian and Trustee.*
- 4. The Children's Lawyer.*
- 5. A judgment creditor of the grantor or incapable person.*
- 6. Any other person, with leave of the court. 1992, c. 30, s. 42 (4); 1994, c. 27, s. 43 (2).*

P.G.T. a party

(5) *If the Public Guardian and Trustee is the applicant or the respondent, the court shall grant the application, unless it is satisfied that the application is frivolous or vexatious. 1992, c. 30, s. 42 (5).*

Filing of accounts

(6) The accounts shall be filed in the court office and the procedure in the passing of the accounts is the same and has the same effect as in the passing of executors' and administrators' accounts. 1992, c. 30, s. 42 (6).

Powers of court

(7) In an application for the passing of an attorney's accounts the court may, on motion or on its own initiative,

- (a) direct the Public Guardian and Trustee to bring an application for guardianship of property;*
- (b) suspend the power of attorney pending the determination of the application;*
- (c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application;*
- (d) order an assessment of the grantor of the power of attorney under section 79 to determine his or her capacity;*
or
- (e) order that the power of attorney be terminated. 1992, c. 30, s. 42 (7).*

Same

(8) In an application for the passing of the accounts of a guardian of property the court may, on motion or on its own initiative,

- (a) adjust the guardian's compensation in accordance with the value of the services performed;*
- (b) suspend the guardianship pending the determination of the application;*
- (c) appoint the Public Guardian and Trustee or another person to act as guardian of property pending the determination of the application; or*
- (d) order that the guardianship be terminated. 1992, c. 30, s. 42 (8).*

In *Stickells*, the court did order a passing of accounts for a period within which the grantor was competent. Ms. De Zorzi, according to Herman J. appointed Ms. Guerin to act even during subsequent incapacity. Herman J. relied on *Stickells* for the proposition that Ms. Guerin could be required to account to the Estate Trustee even though Ms. De Zorzi was competent.

On the question of whether the obligation to account to the Estate Trustee extends to an accounting to the beneficiaries, Herman J. considered *Roger v. Leung Estate*,⁵ where the court determined a duty existed to account to an estate trustee after the death of the grantor, even where the grantor was competent. However, on the question of the accountability to the beneficiaries, the court decided that the beneficiaries had no status on the facts of *Roger v. Leung*, and the obligation therefore lies with the Estate Trustee alone.

Herman J. opined that it was appropriate in the circumstances of De Zorzi, that the attorney be required to account for the period of time in question to someone other than the Estate Trustee, in this case, the beneficiary respondents.

Noting that the motion involved a novel point of law, the costs of the motion on point were fixed payable to the respondents out of the Estate.

A further look at *Roger v. Leung*:

In *Harris v. Rudolph* (Attorney for) [2004] O.J. No. 2754,⁶ decision of Valin J., it was decided following the grant of a Power of Attorney, the Attorney has a duty to account for all transactions which he undertakes for the Grantor. The Attorney is the one who has the information. An Estate Trustee stands in the shoes of the grantor for the enforcement of the duty owed by the Attorney as agent to the deceased as principle. There is a duty on the Attorney to keep accounts and to be ready upon request to produce those accounts. It is an ongoing obligation

and should not be considered an imposition on the Attorney if he has failed in that duty over a long period of time. Hence, in *Roger Estate v. Leung*, Haley J., makes it clear that an Estate Trustee stands in the shoes of a grantor of a Power of Attorney for the enforcement of a duty to account. In this case, Haley J. found that a beneficiary had no status to compel an accounting based on a narrow agency argument on facts particular to the case.

In *Strickland v. Thames Valley District School Board*, 2007 O.J. No. 3758 (S.C.J.),⁷ Herman J. considered the status of the beneficiaries where the Attorney and the Estate Trustee was the same person. Though the Estate Trustee in the proceedings was ordered to pass accounts, the trial judge questioned whether the beneficiary had status to cause a passing where the accounts in question covered a period prior to the SDA legislation. Herman J. refers to the conflict in this decision and that of the *Stickells*⁸ decision, where the judge found authority to make the Order under Section 42(4) of the SDA, which extended to a beneficiary compelling the accounting, with leave of the court.

Prior to the SDA, the *Powers of Attorney Act*, R.S.O. 1990, governed and contained no provisions for compelling an Attorney to pass accounts, except where the power granted within the document survived subsequent incapacity and where any person with an interest in the estate could then require an Attorney to pass accounts for powers exercised during incapacity.

Under Section 42(1) of the SDA, the court may order that all or specific part of the accounts of an Attorney be passed. Who may apply for the order is set out in Section 42(2)–(6).

The power under Section 42(1) to order the Attorney to pass accounts is not restricted to transactions involving an exercise of the power during the incapacity of the grantor. Section 42 contains no restriction. The Act contemplates a situation where a grantor with capacity may request a passing of accounts.

In *Stickells*,⁹ the court concluded that since the SDA came into effect, as long as a Power of Attorney document provides that it can be exercised during a period of subsequent incapacity, then the Power of Attorney is governed by the SDA and whether or not the grantor becomes incapable or not, the Attorney may be compelled to pass accounts.

The *Advocacy, Consent and Substitute Decisions Statute Law Amendment Act 1996*, S.O. 1996, c.2 effective March 29, 1996, which amended the *Substitute Decisions Act, 1992*, at Section 32(6), provides that the Attorney has a duty to keep accounts of all transactions involving property.

The importance of an accounting is most ably set out in the *Stickells*¹⁰ decision where Lack J. states on the interpretation of Section 42 of the SDA, “the interpretation accords with the purpose of the SDA which is to increase protection for the vulnerable. Incapacity usually has a slow, insidious onslaught. The donor of any Power of Attorney which contemplates incapacity needs assurance that the donee can be called upon to account for the entire period in which the Power of Attorney is effective”.

In summary:

1. An Attorney, if requested, on application may have the onus of accounting to beneficiaries for the exercise of power as an Attorney prior to death of a capable grantor;
2. Section 42 of the SDA contemplates a beneficiary receiving an accounting by the Attorney with leave of the Court;

3. An Attorney can be required to account to an Estate Trustee, yet where the Attorney and Estate Trustee are one and the same person, and there cannot be a true accounting, there is further cogent reason for such an accounting to be given to a beneficiary since disclosure is an essential part of the Attorney obligation; and

4. On the analysis of the case law and the SDA in *De Zorzi*, it is clear that since the coming into effect of the SDA, as long as a Power of Attorney provides that it can be exercised during a period of subsequent incapacity, whether or not the grantor becomes incapable or not, an Attorney may be compelled to account, or pass accounts.

5. This Judgment is very helpful in that it clarifies the law on when an Attorney can be compelled after the death of the grantor to pass accounts, and to whom the obligation to pass accounts is owed.

* *Kimberly A. Whaley, Whaley Estate Litigation*, (416) 927-0891 x150.

¹ *Stickells Estate v. Fuller*, [1998] O.J. No. 2940 (O.C.J.)

² Section 42(4) of the *Substitute Decisions Act, 1992*, S.O. 1992, c.30

³ *Fair v. Campbell Estate* (2002) 3 E.T.R. (3d) 67 at paragraph 29 (O.S.C.J.)

⁴ *Stickells Estate v. Fuller*, [1998] O.J. No. 2940 (O.C.J.)

⁵ *Roger v. Leung*, [2001] O.J. No. 2171

⁶ *Harris v. Rudolph*, (Attorney for), [2004] O.J. No. 2754

⁷ *Strickland v. Thames Valley District School Board*, 2007 O.J. No. 3758 (S.C.J.)

⁸ *Stickells Estate v. Fuller*, [1998] O.J. No. 2940 (O.C.J.)

⁹ *Stickells Estate v. Fuller*, [1998] O.J. No. 2940 (O.C.J.)

¹⁰ *Stickells Estate v. Fuller*, [1998] O.J. No. 2940 (O.C.J.)

February Budget Summary

Matters of Interest for Estate Planners

Corina Weigl and Laura West***

For estate planners, the new federal budget laid before Parliament on February 26, 2008 (the “Budget”) introduced a significant new program of interest, as well as a hodgepodge of notable amendments and revisions to existing programs and policies. The Notice of Ways and Means Motion to implement the budget 2008 tax measures was introduced in the House of Commons on March 11, 2008 (the “Motion”). For the purposes of this article, we will only briefly describe the new tax free savings account program introduced by the government, leaving it to other authors to discuss some of the beneficiary designation and other issues that this new program raises. Instead, the focus of this brief summary will be those program specific amendments that were introduced in the Budget that may be of significance to estates and trusts practitioners.

1. Tax Free Savings Account

The press release issued by the federal government concurrent with the introduction of the Motion described the new tax free savings account program in terms of superlatives: “the single most important personal savings vehicle since the introduction of Registered Retirement Saving Plans in the 1950s”, a “historic measure” and “the first account of its kind in Canadian history.” Putting aside this rhetoric, in essence, the new tax free savings account program allows Canadian resident individuals 18 years or older to contribute up to \$5000 per year to a tax free savings account (“TFSA”), with income and gains within the TFSA not being subject to income tax.

Contributions to a TFSA (as well as interest on money borrowed to invest in a TFSA) will not be deductible; however, withdrawals from the TFSA will not be subject to tax. In addition, spousal contributions to TFSAs will be permitted without the application of the existing attribution rules. The program will also allow individuals to make withdrawals from TFSAs and then have the amount withdrawn added to their TFSA contribution limit (with unused contribution room carried forward without limitation), thereby making it an effective complement to the RRSP program for most individuals interested in maximizing the efficiency of their personal investment and savings strategy.

2. Section 116 Certificates

Amendments were proposed to the section 116 certificate process. At this stage, it is uncertain whether the proposed amendments will alleviate the burden of executors and trustees having to obtain a section 116 certificate when making a cash distribution to a non-resident beneficiary. Stay tuned to a subsequent issue of *Deadbeat* for consideration of this issue.

3. Registered Plans

(a) *Registered Education Savings Plans ("RESPs")*

The Notice implementing the Budget had two interesting provisions of note regarding RESPs. First, the passage of the Notice effectively blocked the efficacy of Bill C-253, a private member's bill introduced by the Hon. Dan McTeague and passed by the House of Commons, which proposed to allow a tax deduction for contributions to RESPs. Second, new provisions with respect to the existing RESP program were introduced to make the program more flexible and adaptable to the needs of students.

The Motion provides for a 10 year increase in the maximum periods during which an RESP may remain open and have contributions made to it. RESP contributions will now generally be permitted for 31 years, as opposed to 21 years, and termination of the RESP will be required within 35 years, as opposed to 25 years. This 10 year increase will mean that the rationale of setting up individual plans for each child within a family, as opposed to setting up a family plan, is no longer as prevalent. The increase will also apply to time limits applicable to RESPs with beneficiaries eligible for the disability tax credit, which have different and slightly longer time periods.

In addition, new provisions will allow payments to be made from an RESP to a beneficiary during the six month period following the date at which the beneficiary ceases to be enrolled at a qualifying educational program. This allows for some flexibility for students who may be delayed in seeking such payments.

The flexibility that these new provisions add to the RESP program will no doubt increase the popularity of RESPs (although obviously not as much as if the contribution deductibility provisions of Bill C-253 had become law), as well as increase the time periods during which RESPs will remain viable assets of individuals during their lifetimes.

(b) *Registered Disability Savings Plans ("RDSPs")*

The Budget materials indicated that the regulations to the legislation implementing the RDSP program, which received royal assent in December 2007, are in the process of being finalized and that the federal government is in the process of working with financial institutions to put the necessary administrative mechanisms in place to allow them to offer RDSPs. The Budget materials also indicated that it was the objective of the government that RDSPs would become available in 2008.

The Budget materials also provide for measures to be put in place to ensure that the premature collapse of RDSPs will not occur. In order to qualify for a RDSP, a beneficiary must be eligible for the disability tax credit. If a

beneficiary ceases to be eligible for the disability tax credit, the RDSP rules require that the RDSP be collapsed and be paid out to the beneficiary. However, eligibility for the disability tax credit is a two prong test: (i) the individual must have a severe and prolonged impairment in mental or physical function, meeting specific criteria; and (ii) a certification from a qualified health practitioner must be filed with the Canada Revenue Agency (the “CRA”).

Concerns were raised that if a beneficiary of a plan rescinded his or her certification for any reason, the RDSP would automatically be collapsed and paid out to the beneficiary, contrary to the intentions of the person or persons who established the RDSP in the first instance (e.g., the beneficiary’s parents). The new proposals introduced in the Budget will provide for a mandatory collapse of the plan only where the beneficiary’s condition has factually improved to the extent that the beneficiary no longer qualifies for the disability tax credit.

4. Provisions Affecting Charities

(a) *Donations of Exchangeable Shares*

The Budget materials have extended the capital gains tax exemption available to donations of publicly listed securities to registered charities to “exchangeable shares”. Exchangeable shares are shares in private corporations that permit the shareholder to exchange the private company shares for shares in a publicly traded corporation. Previous to the Budget proposals, when a shareholder traded his or her exchangeable shares for publicly listed securities, and then subsequently donated the publicly listed securities to a registered charity, no capital gains tax relief was available due to the fact that the disposition giving rise to the capital gain arose on the exchange of the private share for the publicly listed security and not upon the donation of the publicly listed security to the registered charity.

The Motion materials provide that a capital gains exemption will apply to donations of unlisted securities where: (i) the unlisted securities include a condition allowing the holder to exchange them for the publicly listed securities; (ii) the publicly listed securities are the only consideration received by the donor on the exchange; and (iii) the publicly listed securities are donated to a registered charity within 30 days of the exchange. This tax relief may also be available in circumstances where the exchangeable securities are interests in partnerships; however, special rules will apply to ensure that only capital gains that reflect the appreciation of the partnership interests are exempted.

(b) *Amendments to the Excess Business Holdings Regime for Private Foundations*

The Budget also proposed changes to the excess business holdings regime applicable to private foundations that was introduced in 2007. The excess business holdings regime, which was designed to prevent self-dealing that could arise with the elimination of capital gains tax for donations of publicly listed securities to private foundations, applies only to private foundations, but with respect to both publicly listed and unlisted shares. In brief, the regime imposes monitoring, reporting and divestiture obligations on private foundations with respect to their corporate holdings and the holdings of “relevant persons” (i.e., generally, persons who do not deal at arm’s length with the private foundation).

The regime describes three ranges of shareholdings, all with different requirements, which can be very generally described as follows:

- (i) “The Safe Harbour Range” applies if a private foundation’s holdings in a corporation for each class total 2 percent or less of all outstanding shares of that class. No monitoring, reporting or divestiture is required by the private foundation;
- (ii) The “Monitoring Phase” applies if a private foundation’s holdings of one or more share classes exceed 2 percent of the outstanding shares of each class. In this range, private foundations must report to the CRA,

at the end of the year, shares of all share classes held by the private foundation and all relevant persons. Any material transactions (i.e. an acquisition or sale involving over \$100,000 worth of shares of a class or more than .5 percent of all outstanding shares of that class, during the year, by the private foundation or any “relevant” persons) must also be reported; and

(iii) The “Divestiture Phase” applies if a private foundation and all relevant persons hold more than 20 percent of all outstanding shares of any share class. In this range, the private foundation (within certain time periods) must reduce its shareholdings until the combined holdings of the private foundation and all relevant persons is reduced to 20 percent or less of that share class or until the holdings of the private foundation do not exceed 2 percent.

The Budget proposals will exempt certain unlisted shares that were held on March 18, 2007, from the divestiture requirements of the excess business holdings regime. The federal government’s explanation for this relief is the fact that unlisted shares can be difficult to sell, as they often represent unique assets with no ready market. As a result of the Budget proposals, unlisted shares held on March 18, 2007 by a private foundation will be considered “exempt” unless: (i) the private foundation owns, indirectly as a result of that shareholding in that corporation, an interest in listed shares of a class of another corporation; (ii) that indirect interest is held through a “controlled corporation”, being a corporation controlled by the private foundation, by a relevant person or group of such persons, or by the private foundation together with such relevant person or group of such persons; (iii) if the private foundation had instead owned those listed shares itself, it would, together with relevant persons, hold more than 20 percent of the listed shares; and (iv) the foundation, together with all controlled corporations, holds more than 2 percent of those listed shares. Other unlisted shares, held on March 18, 2007, will continue to be subject to the current excess business holdings regime.

The Budget proposals also introduced additional technical amendments to the excess business holdings regime dealing with provisions relating to substituted shares and entrusted shares, as well as the extension of an existing anti-avoidance rule with respect of the holding of an interest in a corporation via a trust.

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Re Decleva – Re Walters Rises from the Dead

Craig Ross*

In direct contradiction to the most recent case authority on the subject, and the commentary in Holden and Morawetz, *Bankruptcy and Insolvency Law of Canada* (3rd ed.), and in *Widdifield on Executors and Trustees* (6th ed.), Ontario's Registrar in Bankruptcy concluded that where a deceased dies following an assignment into bankruptcy, his or her funeral expenses will not be paid as a preferred claim in priority to creditors with unsecured claims. In *Re Decleva*, released April 16, 2008, Registrar Nettie reached the right conclusion given the plain words of s.136(1)(a) of the *Bankruptcy & Insolvency Act* and for policy reasons. Following an assignment into bankruptcy, the process of realizing the bankrupt's assets and distributing the proceeds to creditors simply cannot take into account the future funeral expenses of a much alive bankrupt. What is interesting about this case is that the previous view of the law remained wrong for so long.

In *Re Decleva*, the deceased made an assignment in bankruptcy on March 23, 1993, but then died on April 5, 1993. Instead of allowing the unopposed initial taxation, the Registrar asked that the Trustee in Bankruptcy reduce the \$7,812.06 spent on the deceased's funeral or speak to it. The Registrar was clearly motivated by the fact that the funeral expenses, which were modest by today's standards, would deprive the deceased's creditors of 25% of the bankrupt's estate.

Registrar Nettie reviewed two cases, *Re Walters* and *Re Bertram*. *Re Walters* is a 1934 decision of Registrar Cook where, following the death of the bankrupt four months after his bankruptcy, his wife and executrix claimed the funeral expenses in priority to the creditors' claims pursuant to the then s.125B of the *Bankruptcy Act*:

125B. In the administration of the property of a deceased insolvent debtor, the trustee shall have regard to any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in or about the estate and such claim shall be preferred and shall notwithstanding anything to the contrary in this Act, be payable out of the debtor's estate in priority to all other debts.

In finding that this language only contemplated priority respecting funeral and testamentary expenses of a deceased debtor who had not been declared bankrupt during his lifetime, Registrar Cook noted that this was the only reasonable interpretation of the British legislation on which the *Bankruptcy Act* was based. Registrar Cook also took issue with the logic of giving priority to a future claim for funeral expenses of a bankrupt, noting the following definition of a provable claim:

*** all debts and liabilities, present or future, to which the debtor is subject at the date of the receiving order or the making of the authorized assignment or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order *** shall be deemed to be debts provable in bankruptcy or in proceedings under an authorized assignment.

In *Re Bertram*, the amended language of the 1970 *Bankruptcy Act* provided Justice Houlden with grounds to conclude that the decision in *Re Walters* was no longer good law. Section 107(1) provided as follows:

107. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal personal representative of the deceased bankrupt.

Unlike the situation in *Re Walters*, in *Re Bertram*, the bankrupt died prior to bankruptcy. During the course of estate administration, the administrators realized there were insufficient assets to meet the estate's obligations and the administrators sought leave to file an assignment in bankruptcy. The accounts were passed and the trustee applied for directions as to whether or not the claims of the administrators and lawyers should rank in priority to the claims of secured creditors. After acknowledging that the decision in *Re Walters* would permit priority for the expenses in any event, Justice Houlden went on to conclude in *obiter* that s.107(1) which replaced the former s.125B, and in particular the words "deceased bankrupt" were intended to include both the situation where the debtor has died before bankruptcy and where he has died after the date of bankruptcy.

In *Re Declava*, Registrar Nettie was confronted with the *Re Walters* scenario of a bankrupt who dies after making an assignment. In interpreting the current s.136(1)(a) of the *BIA*, and in particular the words "in the case of a deceased bankrupt" he focused on the word "case" concluding that the word "case" refers to a deceased's estate which is assigned into bankruptcy thereby making it a case of a deceased bankrupt.

Registrar Nettie, like Registrar Cook, also noted that the funeral expenses of a living debtor cannot constitute a claim provable in the bankruptcy as they are not a debt to which the then alive individual was subject to at the date of bankruptcy. Conversely, the funeral expenses of a bankrupt estate are not speculative, but clearly exist at the date of bankruptcy. To interpret s.136(1)(a) as applying only in the latter circumstance is appropriate given that the other s.136(1) debts which are given priority are debts which exist at the date of bankruptcy.

Registrar Nettie's most cogent comment comes at paragraph 12 of his reasons where he states:

As well, this interpretation accords with the concept of the BIA that we, in effect, stop the clock for an insolvent person, and tally up all the assets, all the debts, and distribute them in accordance with the BIA. How could this exercise possibly include an accounting for funeral expenses for a death which had not occurred at the time of the tallying?

His observations concerning the difficulty of proper distribution become more obvious in the case of a bankrupt who does not die until several years after the bankruptcy.

In addition, Registrar Nettie did not find it equitable to burden the creditors with the costs of funeral expenses which are under the complete control of the estate trustee. This interpretation equally accords with the respective roles served by an estate trustee and a trustee in bankruptcy. The decision of an estate trustee as to the proper funeral to be given to the deceased is driven in part by the available resources of the estate. However, it is not the role of an estate trustee to maximize the assets of the estate for distribution to creditors. Nor would it be appropriate for the trustee or creditors of a deceased bankrupt to interfere with burial arrangements for the purpose of maximizing their return. As Registrar Nellie rightly points out, if the estate is unable to meet its obligations, it is open to the estate trustee to assign the estate into bankruptcy, in which case the existing funeral and testamentary expense will have priority pursuant to s.136.

Registrar Nettie had no problem attributing the comments in Houlden and Morawetz regarding funeral expenses of a person who dies after bankruptcy to the confusion caused by *Re Bertram*, and in the end awarded the trustee in bankruptcy sufficient additional trustee compensation to cover the funeral expenses, and \$4,000.00 in legal fees, but warned that future parties will not be entitled to the same leniency. Having clarified the law with respect to priority funeral and testamentary claims, Registrar Nettie expects trustees will now claim priority for such expenses only where the deceased has died prior to bankruptcy.

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Tax-Free Savings Account – Beneficiary Designation Problem

*Ann Elise Alexander**

1) Background

The February 2008 Federal Budget¹ proposes to introduce the Tax-Free Savings Account (“TFSA”), a registered savings vehicle which allows a resident individual 18 years of age and older (“Individual”) to contribute \$5,000 each year to the TFSA with income and gains to accumulate in and then be withdrawn from the TFSA on a tax free basis. Funds can be deposited, invested, pledged and withdrawn as the Individual chooses. The Individual is permitted to name his or her spouse or common-law partner (“Spouse”) as a successor holder of the TFSA (“Successor Holder”). Upon the Individual’s death, if the Successor Holder becomes the owner of the Individual’s TFSA, the Successor Holder is able to maintain the tax-exempt status of the deceased Individual’s TFSA without reducing the Successor Holder’s personal contribution room for the Successor Holder’s own TFSA. The Budget and draft legislation² does not refer to any other person who can be a Successor Holder.

2) Issues

The key issues arising from designations of Successor Holders are:

1. whether the designation of a Successor Holder/beneficiary is a testamentary disposition by the Individual;
2. whether the federal government has jurisdiction to allow for the designation of a Successor Holder/beneficiary; and
3. apart from a testamentary disposition through a valid Will, whether provincial legislation allows for designation of a Successor Holder/beneficiary of a TFSA.

3) Summary Conclusion

Since the TFSA contemplates preferred tax treatment for surviving Spouses who inherit TFSAs, it is contemplated most people who are part of a couple will leave their TFSA to the surviving Spouse. While this could be done by Will, because many people are used to the beneficiary designation available under registered retirement savings plans registered (RRSPs) and retirement income funds (RRIFs), we predict most people in a couple relationship will expect to be able to leave their TFSA by beneficiary designation outside a Will as well. (Generally speaking, beneficiary designations allow assets to pass outside the probate process, avoiding probate taxes and expenses.) The making of beneficiary designations outside a Will is within provincial, not federal jurisdiction. None of the provinces’ legislation currently contemplates a beneficiary designation for plans such as TFSAs, apart from TFSAs that are issued as life insurance.³

Unless the provinces change their legislation, people purchasing their TFSAs through banks, mutual fund companies and brokerages will not be able to make a designation of a beneficiary or name a Spouse as a Successor Holder, except in a valid Will.

This issue should be brought to the attention of the provinces, who should be lobbied to add TFSAs to the types of plans for which the owner is entitled to make a beneficiary designation.

4) Discussion

Jurisdiction over property rights

Property rights, including the succession of property on death of an individual, are within provincial jurisdiction.⁴ The naming of a Successor Holder or beneficiary deals with the succession of the property within the TFSA when the Individual dies. The tax exempt status of the property in the Individual's TFSA when it passes to the Successor Holder may be within the jurisdiction of the federal government and the federal *Income Tax Act*, but the means by which the property passes on death of the Individual is not.

Testamentary Nature of Designation of Plan Beneficiary

The issue of the testamentary nature of the designation of a beneficiary of a non-insurance plan was dealt with in *Re MacInnes Estate*, [1935] S.C.R. 200. The plan in question was an employee benefit plan. On the plan application the employee signed, he had named his wife to receive the value of his benefits from the plan when he died. One witness signed the form as well.

The significant attributes of the plan were:

- The employee could withdraw his contributions at any time;
- He could and had pledged the assets in the plan as security for a loan;
- He could revoke or change the beneficiaries or divert the money to his estate by instrument in writing or by Will;
- The naming of the beneficiary did not create any charge or trust in favour of the beneficiary against the employee; and
- The right of the beneficiary was dependent upon the death of the employee for its vigour and effect.

The Supreme Court of Canada confirmed: “if the person executing [the instrument] intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.”

The SCC agreed that, being a testamentary disposition, the disposition had to meet the requirements for a valid Will and since it did not, having only one witness instead of two, it was ineffective and the plan benefits formed part of the employee's estate and passed under his Will, to different beneficiaries from the one named in the plan document.

Provincial Response to Re MacInnes

Based on the finding in *Re MacInnes*, the provinces brought in legislation to specifically permit the naming of beneficiaries of employee plans in instruments (e.g., plan application forms) without the requirements of the formality of a Will.⁵ Designations in Wills were specifically permitted as well.

Later, amendments were made to these laws to specifically allow beneficiary designations for RRSPs and RRIAs and in certain cases, other specifically named registered plans under the *Income Tax Act*. However, TFSAs currently do not fall within the description of plans covered in this legislation.

TFSAs – Designation of Successor Holder/Beneficiary is Testamentary Disposition

The Individual who holds a TFSA has full rights to the TFSA prior to the Individual's death: e.g. ability to pledge the account as security, to withdraw from the account at any time, to leave it on death as chosen. The draft legislation specifically provides that the Successor Holder's rights as “holder” do not come into effect until

the Individual has died. Therefore, any instrument designating the Successor Holder does not take effect until after the death of the Individual. Thus, it is the intention of the Individual that the instrument should not take effect until after his or her death and it is dependent upon death for its “vigour and effect.”

The designation of a Successor Holder meets the test confirmed by the Supreme Court in *Re MacInnes Estate*, i.e., that it is a testamentary act. Therefore, the provincial laws of succession and Wills will apply.

Provincial laws

Most provincial succession laws currently allow for the designation of beneficiaries in instances involving a “plan,” without the formalities normally required for a Will. The Ontario *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (“*SLRA*”) has the following provision:

Designation of beneficiaries

51.(1) A participant may designate a person to receive a benefit payable under a plan on the participant’s death,

(a) by an instrument signed by him or her or signed on his or her behalf by another person in his or her presence and by his or her direction; or

(b) by will,

and may revoke the designation by either of those methods.

The definition of a “plan” in s.50 of the *SLRA* is:

“plan” means,

(a) a pension, retirement, welfare or profit-sharing fund, trust, scheme, contract or arrangement or a fund, trust, scheme, contract or arrangement for other benefits for employees, former employees, directors, former directors, agents or former agents of an employer or their dependants or beneficiaries,

(b) a fund, trust, scheme, contract or arrangement for the payment of a periodic sum for life or for a fixed or variable term, or

(c) a fund, trust, scheme, contract or arrangement of a class that is prescribed for the purposes of this Part by a regulation made under section 53.1,

and includes a retirement savings plan, a retirement income fund and a home ownership savings plan as defined in the *Income Tax Act* (Canada) and an Ontario home ownership savings plan under the *Ontario Home Ownership Savings Plan Act*.

The definition specifically includes RRSPs and RRIFs as defined in the *Income Tax Act*. A TFSA does not fall within the scope of this definition, so the beneficiary designation allowed under s.51 of the *SLRA* would not apply to a TFSA.

5) Conclusion

The Federal Budget 2008 and applicable draft legislation contemplates that Individual TFSA holders can name spouses as Successor Holders to acquire the Individual’s TFSA when the Individual dies. This is a beneficiary designation. The federal government lacks jurisdiction to give effect to such designations. That jurisdiction belongs exclusively to the provincial governments. Unless provincial legislation permits beneficiary designations of TFSAs, the only way to name a Successor Holder will be in a valid Will. The current status of provincial succession laws does not recognize such designations in the context of a TFSA. Beneficiary designations outside Wills can be more cost effective because often the transmission would not require an application for probate. The

Individual who owns a TFSA will likely expect to be able to use beneficiary designations in the plan document to deal with the testamentary succession of the TFSA. Provincial legislative reform is required to give effect to the designation of Successor Holders/beneficiaries of TFSAs outside Wills. Until such changes are made to provincial law, assuming the draft legislation is finalized and TFSAs become available after 2008, TFSAs must be dealt with specifically in Wills or they will pass as part of the residue when the Individual dies.

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¹ <http://www.budget.gc.ca/2008/plan/chap3b-eng.asp>; <http://www.budget.gc.ca/2008/plan/ann4a-eng.asp#personal>

² http://www.fin.gc.ca/drleg/wmmMarch08_e.html

³ The Insurance Acts allow for beneficiary designations of insurance products. See *Insurance Act*, R.S.O. 1990, c. I.8, s. 190

⁴ s.92 (13) of the *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c.3.

⁵ Quebec deals with beneficiary designations differently. Currently, no beneficiary designations are permitted for trusts governing RRSPs and RRIFs. The succession of these plans must be dealt with in Wills.

Costs of the Challenger in Unsuccessful Will Challenges

*Jordan M. Atin**

The awarding of costs is of fundamental importance when a person considers challenging a Will – not only to the challenger, but to the propounder as well. If the challenger is going to receive costs out of the estate, even if he or she loses, that will obviously change the manner in which negotiations take place for both parties.

Traditionally,¹ in most cases, all of the legal costs of the challenger were paid out of the estate, win or lose - such cost awards became virtually automatic.

Public policy considerations underlie this approach: it is important that courts give effect to valid wills that reflect the intention of competent testators. As well, “[a] judgment granting probate operates *in rem* and does not bind only the parties to the litigation. For this reason - as well as, perhaps, a continuation of the view that the court has a responsibility to the deceased - its function is not merely to adjudicate upon a dispute between the parties. It has always had inquisitorial features.”²

Much has been written about the “change” from the traditional view of costs in estate proceedings. The Ontario Court of Appeal wrote about it recently:

“...the traditional approach has been — in my view, correctly — displaced. The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation.

...

Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation.”³

However, if one or both of the following considerations apply, cost awards should recognize the public policy behind the traditional view:

1. Is the testator or the propounder at “fault” in causing or contributing to the Will challenge?
2. Is the inquiry as to the validity of the Will reasonable?

1. Fault of the Testator or Propounder

“Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution.”⁴

The case law suggests that there must be a substantial link between the testator’s actions and the actually need for litigation.⁵

Here are some examples of a testator being “at fault” or contributing to the litigation:

- Did the state in which the deceased left his testamentary papers give rise to the challenge?⁶
- Did the testator by his own conduct and habits and mode of life give reasonable ground for questioning his testamentary capacity?⁷
- Did the deceased wait until late in life to execute the Will?⁸
- Did the testator procrastinate in making his Will?⁹
- Did the deceased advise the non-beneficiaries of his/her intentions?¹⁰
- Did the deceased allow the beneficiaries to be involved in the making of the Will?¹¹

2. Proper/Reasonable Inquiry

“If there are reasonable grounds upon which to question the execution of the will or the testator’s capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will’s validity.”¹²

“When there appears to be a reasonable question of whether the deceased was mentally capable of making the will that is propounded, it imposes an obligation on the court to be satisfied that the will was the product of a capable testator before putting on it the imprimatur of the court.”¹³

Some of the factors that lead to a “reasonable” inquiry are:

- Were suspicious circumstances present?¹⁴
- Were the contents of the Will a surprise to the other non-beneficiaries?¹⁵
- Was this “a case that needed the court to investigate”?¹⁶
- Were there “moral” grounds to challenge?¹⁷
- Could the challenger have determined the strength of her case without resort to litigation?¹⁸
- Were the concerns about capacity “live issues”?¹⁹

Other Relevant Factors

Courts are clearly persuaded by additional factors which can affect the cost award for unsuccessful challengers even where reasonable grounds for the challenge existed at the outset. Courts will “carefully scrutinize the litigation”²⁰ when awarding costs. Here are some factors:

- Were reasonable settlement offers rebuffed by the challenger?²¹
- Were the challengers the deceased's next of kin?²²
- Did the propounder prevent the challenger from assessing their case?²³
- Should the challenger have abandoned her case sooner or did she continue with litigation after it became evident that the challenge was groundless?²⁴
- Did the challenger abandon the case properly after making the necessary inquiries?²⁵
- Did the challenger allege but not prove undue influence?²⁶

Suggested View

There is good reason for the “modern approach” to costs in unsuccessful Will challenges. It recognizes the need to restrict unwarranted litigation and protect estates from being depleted by litigation.

However, Courts should be aware of the reasonable expectations of children to be treated fairly in their parent's Wills. Where a parent treats his or her children differently in a Will, the parent ought to be aware of how the children are going to respond to being treated differently. Even if parents don't recognize this, Courts should. A child who is treated less favourably than his or her sibling is naturally going to be hurt and will often turn to challenging the Will. This is, in my view, understandable, if the parent has not explained that, in his or her own voice, to the child, either in writing or verbally, before the parent dies. The parent, by not being courageous enough to curb expectations while alive, contributes substantially to the Will challenge that inevitably arises in those circumstances. The costs of such a will challenge lie directly at the feet of the testator. In those circumstances, the reasonable costs for the challenger to complete a full investigation ought to be paid by the estate without hesitation.

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¹ *Mitchell v. Gard* (1863), 3 Sw. & Tr. 275, 164 E.R. 1280, 1 W.R. 773; *Spiers v. English*, [1907] P. 122, and *Hammond v. Meek* (1924), 26 O.W.N. 92 (H.C.).

² *Ettorre Estate, Re*, 2004 CarswellOnt 3618, 11 E.T.R. (3d) 208

³ *McDougald Estate v. Gooderham*, 2005 CarswellOnt 2407, 17 E.T.R. (3d) 36 (Ont. C.A.)

⁴ *McDougald Estate v. Gooderham*, supra

⁵ *Scramstad v. Stannard*, [1997] A.J. No. 302 (Alta. Q.B.); *Seward Estate*, supra; *Sinigoj Estate, Re* (2000), 269 A.R. 30, 2000 ABQB 549 (Alta. Q.B.); *Syrota v. Clark Estate* (1991), 77 Man. R. (2d) 250 (Man. Q.B.), aff'd on other grounds (1992), 83 Man. R. (2d) 21 (Man. C.A.).

⁶ *Scramstad v. Stannard*, supra

⁷ *Scramstad v. Stannard*, supra

⁸ *Babchuk v. Katz* (2007), 73 Alta. L.R. (4th) 232, 32 E.T.R. (3d) 223

⁹ *Babchuk v. Katz*, supra

¹⁰ *Babchuk v. Katz*, supra

¹¹ *Irwin v. Cupolo*, supra

¹² *McDougald Estate v. Gooderham*, supra

¹³ *Olenchuk Estate, Re* (1991), 43 E.T.R. 146 (Ont. Gen. Div.)

¹⁴ *Stevens v. Crawford*, 2000 ABQB 305 (Alta. Surr. Ct.); *Scramstad v. Stannard*, supra; *Howse v. Shapter* (1998), 525 A.P.R. 30 (Nfld. T.D.); *Syrota v. Clark Estate*, supra.; *Babchuk v. Katz*, supra;

“The Supreme Court of Canada in *Vout v. Hay* directed that in any case wherein there are suspicious circumstances, propounders of a Will must prove that the Will was properly executed on a balance of probabilities. To this extent, estate litigation is not “voluntary,” as would be the case in a lawsuit between parties who are free to either pursue a claim or not.

Given that estates must be properly distributed according to law, in circumstances wherein there are suspicious circumstances, propounders of a Will have no alternative but to bring action if one or more beneficiaries objects.

In this case, I held that there were suspicious circumstances; thus it must be accepted that there was a justiciable issue which had to be tried.” *Stewart v. McLean* (2003), 49 E.T.R. (2d) 294, 337 A.R. 164

¹⁵ *Babchuk v. Katz*, supra

¹⁶ *McCullough Estate v. McCullough* (1997), 202 A.R. 146 (Alta. Q.B.), aff’d (1998), 212 A.R. 74, 1998 ABCA 38 (Alta. C.A.)

¹⁷ *Scramstad v. Stannard*, supra

¹⁸ *Irwin v. Cupolo*, [1999] O.J. 3759

¹⁹ *Scramstad v. Stannard*, supra

²⁰ *McDougald Estate v. Gooderham*, supra

²¹ *Bahry v. Zytaruk*, 2002 CarswellAlta 955, 42 E.T.R. (2d) 1, [2002] A.J. No. 990, 2002 ABQB 716 (Alta. Q.B.); additional reasons 2002 CarswellAlta 1220, 50 E.T.R. (2d) 187, 323 A.R. 280, 2002 ABQB 858 (Alta. Q.B.); additional reasons 2003 CarswellAlta 640, 50 E.T.R. (2d) 192, 2003 ABQB 408 (Alta. Q.B.)

²² *Re Dool Estate*, 2007 ABQB 12 (CanLII)

²³ *Re Dool Estate*, supra

²⁴ It is possible to make different cost orders with respect to different periods of time. Therefore, if a challenge was reasonable up to a certain date, and unreasonable thereafter, a challenger could be awarded costs or merely bear his or her own costs before that date and be required to pay costs to the other side after that date: *Popke v. Bolt*, supra; *Bahry v. Zytaruk*, 2002 ABQB 858 (Alta. Q.B.); *Van Hecke v. Van Brabant Estate* (1987), 76 A.R. 204 (Alta. Surr. Ct.); *Popke v. Bolt*, supra

²⁵ *Re Dool Estate*, supra; *Weiner v. Elman* (2001), 43 E.T.R. (2d) 163 (Ont. S.C.J.)

²⁶ *McCullough Estate v. McCullough* (1997), 202 A.R. 146 (Alta. Q.B.), aff’d (1998), 212 A.R. 74, 1998 ABCA 38 (Alta. C.A.); However, the court may make separate and distinct decisions regarding costs with respect to individual issues related to the litigation. If an unsuccessful challenger makes one allegation that is reasonable while another allegation is completely unfounded, a different award of costs could be made for the costs incurred with respect to each allegation: *Olenchuk Estate, Re* (1991), 43 E.T.R. 146 (Ont. Gen. Div.).

Summary Trial – An Option Worth Considering

*Justin de Vries**

It is axiomatic to say that estate litigation is often expensive. However, some relief may be found in Rule 76 (Simplified Procedure) and, in particular, the provisions set out in that Rule for a summary trial. Counsel often overlook Rule 76, but there is no obvious impediment to invoking this Rule in the estate litigation context. Moreover, Rule 76 may be an important mechanism to control costs and achieve a timely result.

Public policy considerations underlie Rule 76. Simply put, Rule 76 is an attempt to keep costs down by providing less procedure for modest claims of \$50,000 or less, exclusive of interest and costs, while still delivering a substantive result. Interestingly, the plaintiff can opt to proceed by way of simplified procedure for a claim exceeding \$50,000 as long as the defendant does not object. However, if the defendant voices opposition, the claim proceeds by the ordinary procedure (nothing ventured nothing gained, as the old adage goes). In his long-awaited Report of the Ontario Civil Justice Reform Project released in November 2007, Coulter Osborne in fact recommended that the monetary jurisdiction for Simplified Procedure actions be increased to \$100,000.

Examinations for discovery are not allowed for actions governed by Rule 76. The same is true for cross-examinations of a deponent on an affidavit filed on a motion. However, parties are required to include, in their affidavit of documents, a list of the names and addresses of persons who might reasonably be expected to have

knowledge of transactions or occurrences at issue in the action. This added requirement is designed to disclose information that the parties might otherwise have discovered during an examination for discovery.

Pursuant to Rule 76, the parties can agree to an ordinary trial or a summary trial. If the parties cannot agree, the pre-trial conference judge or master can decide what mode of trial is appropriate. As set out in Rule 76.12, the procedure for a summary trial is as follows:

1. Evidence-in-chief is to be adduced by affidavit, not orally. (Drafting skills are obviously critical.)
2. The opposing party may cross-examine the deponent orally, which can be followed by oral re-examination. Oral re-examination is limited to 10 minutes. (As a general rule, re-examination is better avoided.)
3. A party wishing to cross-examine the deponent of an affidavit must notify the party at least 10 days before the trial date. The party who filed the affidavit must arrange for the deponent's attendance at trial and no summons to witness is required (Rule 53).
4. All of a party's cross-examinations can take no more than 50 minutes.
5. With leave of the trial judge, the plaintiff may adduce any proper reply evidence.
6. Each party is entitled to make oral closing arguments of not more than 45 minutes. Opening arguments are not specifically referred to in the Rule, but will likely be allowed by the trial judge who has the inherent jurisdiction to control the court process.
7. The trial judge may extend the time limits set out above.

In *McDougald Estate v. Gooderham*,¹ the parties opted to proceed by way of summary trial. The testator, Headley Maude McDougald, was a grand dame of society, widow of Bud McDougald of Argus Corp. fame, and friend to the Queen Mother, who stayed with Mrs. McDougald on several of her trips to Canada.

During her lifetime, Mrs. McDougald's attorneys for property sold 640 South Ocean Boulevard in Palm Beach, Florida pursuant to a power of attorney. In 1996, Mrs. McDougald had three attorneys managing her estate pursuant to her power of attorney. The Florida property was subject to a specific bequest in Mrs. McDougald's Will. The parties sought direction from the court as to whether the proceeds of that sale adeemed and became part of the residue at the date of death or whether section 36 (the anti-ademption section) of the *Substitute Decisions Act, 1992* applied to prevent ademption.

By way of a reminder, the doctrine of ademption is a common law rule dating back to the 18th century. Ademption occurs whenever a testator makes a bequest of a specific piece of property that is not found among the testator's assets at the time of his or her death. In such a case, the bequest is said to have adeemed and the bequest simply fails on the basis that "the thing meant to be given is gone". Any proceeds from a disposition of the property in question fall into the residue of the estate, unless the testator has indicated in his or her Will that the bequest includes any such proceeds.

According to section 36 of the *Substitute Decisions Act, 1992*, if Mrs. McDougald was incapable of managing her financial affairs when the Florida property was sold, or if the attorneys reasonably believed she was incapable, the proceeds of the Florida property would not fall into the residue of the estate. When the case first began by way of application, Wilson J. raised a concern as to whether she was able to determine the contested factual issues regarding Mrs. McDougald's capacity and the reasonable belief of the attorneys based upon affidavit material alone. Counsel sought instructions as to whether their clients were prepared to consent to a hearing before Wilson J. in order to determine the issues on the written record alone.

Upon consideration, the parties expressed their desire to cross-examine on the contested factual issues. In the ordinary course, the entire application would have had to be adjourned. However, according to Wilson J., a practical solution was for the parties to opt for a summary trial. Ultimately, the parties agreed, in essence, to follow the format of the summary trial set out in Rule 76 regarding Mrs. McDougald's capacity and the reasonable beliefs of her attorneys. There was affidavit material already before the court. The parties agreed to exchange further affidavit material and file a consolidated record. The affidavit material constituted the evidence-in-chief. After reviewing the extent of the affidavit material before her and hearing from counsel, Wilson J. imposed reasonable time limits on the cross-examinations. The process resulted in significant cost savings for the parties.

The issues of capacity and the reasonable beliefs of the attorneys were tried in two days. There was no delay as a result of the adjournment of the application for a trial of the issues and the parties obtained a more expeditious resolution from the court. The rights of the parties were protected, as they were provided with an opportunity to prepare affidavits and conduct cross-examinations, albeit within reasonable time limits. While the case was ultimately appealed to the Ontario Court of Appeal, the mode of trial or procedure employed was not in issue.

McDougald Estate v. Gooderham demonstrates that in the estate context, parties should consider utilizing Rule 76 if they want a comparatively quick result and to control their legal costs. This is especially true where applications are converted to a trial of issues. An obvious corollary is that by reducing the overall costs of the litigation, the parties reduce the amount they may be ordered to pay by way of a cost award.

What was the ultimate outcome in *McDougald Estate v. Gooderham*? Far be it from me to spoil the surprise. The decision of Wilson J. makes for interesting reading.

[Editors' Note: The issue of summary trials was given some attention by the bench in a recent OBA Trusts and Estates Section forum. At the April 2, 2008, presentation entitled "Emerging Trends in Estates and Trusts: What Does the Future Hold?" the Honourable Mr. Justice David M. Brown of the Ontario Superior Court of Justice spoke approvingly of the use of summary procedure under the simplified rules under Rule 76. Readers may want to consult the written materials (written materials!) provided by Mr. Justice Brown at that conference.]

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¹ [2003] O.J. No. 3106 (S.C.J), affirmed at [2005] O.J. No. 2432 (C.A.)

The Rule in *Cherry v. Boulton*

Sean Lawler*

When a beneficiary owes the Estate a debt, the Estate can sue, but is there also a ‘self-help’ remedy? Do the doctrines of legal or equitable set-off apply? What happens if the beneficiary’s debt to the Estate is unenforceable because of the expiry of a limitation period?¹

These questions are answered by reference to the Rule in *Cherry v. Boulton*.² In *Cherry v. Boulton*, the principal beneficiary of Catherine’s Estate was Thomas, her brother. Thomas owed Catherine a debt. Catherine’s Executors wanted to deduct the debt from his gift, and therefore pay him less than the Will prescribed. Lord Cottenham allowed the Executors to do so, saying that the Executor of a creditor has the right “*to retain a sufficient part of a legacy given by the creditor to the debtor, to pay a debt due from him to the creditor’s Estate*”. Although the rule was first articulated in 1839 in *Cherry v. Boulton*, it apparently is much older than that.

This is Different from ‘Set-Off’

The principle underlying the rule in *Cherry v. Boulton* is that “*where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed so to participate unless and until he has fulfilled his duty to contribute*”.³

This is different from the doctrines of ‘set-off’, of which there are two: ‘legal’ and ‘equitable’.⁴ In order to rely on the doctrine of legal set-off, (i) the obligations existing between the two parties must be debts for liquidated sums; and (ii) the debts must be “mutual cross-obligations”. For there to be equitable set-off, the cross-obligations need not be ‘mutual’, or even liquidated debts. However, the claims “*must be connected or inter-related in some manner which would make it unjust to permit one party to enforce payment without accounting for the existence of the other claim*”.⁵

The obligation of a testator to distribute a trust’s assets is not a “debt” of the Estate, but an equitable obligation. Legal set-off therefore does not apply. Moreover, in respect of either legal or equitable set-off, it would be unusual for a testator’s gift to a beneficiary to be ‘mutual’ or closely “*connected or inter-related*” with the beneficiary’s debt to the Estate. Otherwise, one would expect the testator to have forgiven the debt in her Will.

Does Not Apply to Certain Types of Gift

The Rule in *Cherry v. Boulton* has several features. The first is that it does not apply to demonstrative legacies. In the 1924 case of *Re Lasham*,⁶ the deceased made certain monetary gifts out of “*bonds in the Union Bank of Canada, at Goderich, in a parcel separate from my own securities*”. The testator had put \$20,000 in Dominion of Canada bonds in an envelope at the Union Bank of Canada. Samuel, one of the beneficiaries of this demonstrative legacy, owed the testator a debt. Justice Middleton held that the fund from which Samuel was going to benefit (i.e., the bonds) differed from the one into which he was required to contribute (i.e., the general assets of the estate). The Estate therefore had to give Samuel his entire gift.

Similarly, the Rule cannot be used to excuse an Estate from completing specific bequests of chattels or leaseholds. In *Taylor v. Wade*,⁷ Justice Chitty held that “*the two things* [i.e., the debt to the Estate and the leasehold or chattel] *cannot be measured one against the other*”. So, when the Will so provides, the Estate must still convey the deceased’s \$5,000 watch to the beneficiary who owes the Estate \$5,000.

Expiry of a Limitation Period

The other important feature of the Rule in *Cherry v. Boulton* is that the Estate trustee may deduct the debt even though it is otherwise unenforceable due to the expiry of a limitation period. In the 1942 Ontario Court of Appeal

decision of *Duckworth v. Duckworth*,⁸ the Estate trustee did not want to pay the Plaintiff his “full distributive share” because the Plaintiff owed the Estate an 18 year old debt. The Court of Appeal agreed that the Estate did not have to pay the Plaintiff his full entitlement notwithstanding the expiry of the limitation period.

The Court of Appeal did not refer to the rule in *Cherry v. Boulton*. However, *Widdifield on Executors and Trustees* cites *Duckworth* as standing for this proposition.⁹ Moreover, the decision is consistent with the view that the rule in *Cherry v. Boulton* authorizes the Estate Trustee to direct that the debtor “satisfy his entitlement to a share of the fund [i.e., the Estate] from a particular source [i.e., by extinguishing the debt]”. The expiry of the limitation period does not extinguish the debt owed to the Estate. It only eliminates the most common procedure, a law suit, to enforce the debt.

Damages Owed to the Estate

What if, instead of a liquidated ‘debt’, the beneficiary owes the Estate damages? Ontario cases are divided on whether the gift may be reduced by the damages award. In *Re Pressman Estate*,¹⁰ Justice Stinson allowed the Estate to make a deduction from the amount owing to a beneficiary on an intestacy. However, in *Canada (Attorney General) v. Confederation Life Insurance Co.*,¹¹ admittedly not an Estates case, Justice Blair said it would not “be equitable to extend the principle of *Cherry v. Boulton*”¹² to the facts of that case, even though he agreed that *Cherry v. Boulton* would have applied if the beneficiary owed the Estate a liquidated debt.

Where the Will expressly forgives a debt, then there is no need to resort to the rule in *Cherry v. Boulton*. However, the rule in *Cherry v. Boulton* gives the Estate trustee a powerful tool with which to administer the Estate when there is no such forgiveness in the Will.

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¹ This last question arose at the February, 2008 ‘Brown Bag Lunch’. The subsequent exchange between Charles Dunphy and Bary Corbin led me to this topic.

² (1839), 48 E.R. 651. I use this name because that is what the Ontario Court of Appeal called it in *Olympia & York Developments Co. v. Royal Trust Co.* (1993) 14 O.R. (3d) 1 (C.A.). It is also called the doctrine of ‘Retainer’.

³ *Olympia & York* at para. 42 quoting from S.R. Derham, *Set-Off* (1987: Oxford, Clarendon Press)

⁴ It is also possible to have set-off by contract.

⁵ *CitiBank Canada v. Confederation Life Insurance Co. (liquidator of)* (1996), 42 C.B.R. (3d) 288 (Ont. Ct. Gen. Div.)

⁶ (1924) 56 O.L.R. 137 (H.C.)

⁷ [1894] 1 Ch. 675.

⁸ [1942] 3 D.L.R. 1968 (C.A.)

⁹ at pg 5-31. *Widdifield* also cites *Noecker v. Noecker* (1917), 41 O.L.R. 296, and *Tillie v. Springer* (1892), 21 O.R. 585.

¹⁰ [2005] O.J. No. 2619 (S.C.J.)

¹¹ [2002] O.J. No. 4360 (S.C.J.)

¹² *Confederation Life* at paragraph 52.

Spelling and Grammar Query

Susan J. Stamm*

A reader of this column suggested I tackle this topic – his personal grammatical pet peeve.

i.e. or e.g.

The abbreviation **e.g.** stands for the Latin *exempli gratia*, which means “for example”. Using e.g. means that the list is not complete so it is redundant to use “etc.” at the end of the list.

The abbreviation **i.e.** stands for the Latin *id est*, which means “that is.” It is followed by an explanation. Many commentators suggest you replace it with “in other words” to see if your sentence makes sense.

When speaking, I find that using the contractions “e.g.” and “i.e.” sounds silly. Just use, “for example” or “in other words”.

Note that “**i.e.**” and “**e.g.**” are contractions of two separate words. Accordingly, each letter must be followed by a period. Although the words are Latin, they are a part of recognized English usage; therefore, they should not be italicized. Further, there is no space between the two letters, even though they represent a contraction of two words (go figure).

Most commentators suggest that “**i.e.**” and “**e.g.**” should be followed by a comma (I admit that I did not know this. I apologize to those I have irritated as a result of my neglect of this necessary comma!).

Further, before you use “**e.g.**” or “**i.e.**”, you can use whatever else you might have used before “for example” or “in other words”, such as a comma, open brackets or a dash.

Here are some examples of correct usage of “e.g.” and “i.e.”:

John admires cartoon characters, e.g., Superman, Batman and Spiderman.

Cathy likes warm colours (e.g., pink, orange and red).

Stephen plays many ball sports – e.g., soccer, tennis and golf.

John admires Batman’s sidekick, i.e., Robin.

Cathy likes one shade of pink only (i.e., hot pink).

Stephen only plays full contact ball sports - i.e., rugby and football.

To demonstrate the difference, note the following two sentences:

Cathy likes playing certain card games, i.e., bridge and poker.

John likes playing card games, e.g., bridge, poker and hearts.

In the first sentence, the games bridge and poker are the only card games Cathy likes. In the second sentence, the list of “bridge, poker and hearts” is an incomplete list of the card games John likes to play.

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

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Brown Bag Lunch Update

*Diane Vieira and Suzana Popovic-Montag**

Our Brown Bag Lunches continued on **February 19, 2008**.

At the outset of our discussions, one participant brought to our attention the interesting Alberta decision of *Re Jagos (Estate of)*, 2007 ABQB 56 (CanLii), which discussed issues of jurisdiction and the administration of foreign trusts.

We then turned to a broad discussion of an executor's duty to collect debts of the estate. In particular, we discussed a situation wherein an executor had been unsuccessful in his efforts to collect a debt owed by a residual beneficiary. The executor believed that the collection of the debt might be statute barred and he did not know if the beneficiaries would be supportive of using estate resources to continue to attempt to collect the debt. In this particular case, the debt owed to the estate exceeded the beneficiary's share of the residue. We also canvassed different ways that executors might collect upon debts.

Next, we discussed an email inquiry with respect to what executors should charge for their mileage costs. One participant referred the group to Canada Revenue Agency's mileage rates for employees, which currently allows Ontario employees to claim \$0.495 per kilometre.

We then had an interesting discussion with respect to s. 74.4(4) of the *Income Tax Act* and whether standard clauses in trust agreements would have to be reconsidered in light of a recent Interpretation Bulletin from Canada Revenue Agency. We promised to revisit the topic in the near future.

A very lively discussion then ensued concerning papers presented at the *2008 OBA Institute of Continuing Legal Education* with respect to assisted reproductive technology and its implications for estate planning.

Participants noted that, generally speaking, the standard clauses currently used in Wills do not contemplate the possibility of children being conceived after the death of a testator. It would appear that the legal system has not kept pace with technology, and the status of genetic materials remains uncertain. It is unclear whether genetic materials are considered property and form an asset of an estate. New clauses are needed which clearly indicate who is to benefit under the Will and who is intended to be excluded.

We also discussed the implications of timing and estate administration. Now that technology allows for children to be conceived after a testator's death, the period of administering an estate theoretically may be indefinite. One participant suggested putting an artificial date in the Will, so that executors do not have to hold back funds indefinitely. The implications of assisted reproductive technology and estate planning certainly sparked a lively discussion and promises to only grow in significance to estate planners as the number of people using assisted reproductive technology increases.

We then went on to discuss joint accounts and the presumption of a resulting trust. One participant suggested that Wills should contain clauses stating the testator's intention that the account pass to the joint account survivor. Others thought this could create a precedent in which if a Will did not include this clause, assets would not pass to the survivor. Generally, clients transfer funds into joint accounts to avoid probate tax, without professional advice and are surprised to learn that this may create problems they never anticipated. Everyone agreed that the issue of joint accounts was something that should be discussed with clients in detail.

We ended our lunch with a discussion concerning a participant's specific scenario, in which two Italian residents held a joint account in Canada. One of the joint account holders died without a Will, and the bank would not release the funds to the survivor account holder, without an estate trustee being appointed. We canvassed some interesting suggestions as to how to deal with this situation.

Our next Brown Bag Lunch was held on **March 18, 2008**.

We began this luncheon meeting by discussing a case in which a wife, administering the estate of her late husband, died before the administration of his estate was completed. The husband's Will named an alternate executor but, unfortunately, the wording of the relevant clause did not allow for the appointment of the alternate upon the death of the executor. It was suggested that a Litigation Guardian be appointed to finalize the administration of the husband's estate. It was also pointed out that it was likely that the remaining assets of the estate would fall into the estate of the wife in any event.

The discussion then turned to the issue of probate tax and the participants considered various creative means by which to limit or avoid such tax in estate planning. We also discussed some capital gains tax issues and means of dealing with them as well.

One of the participants raised an interesting issue with respect to the Ontario Disability Support Program ("ODSP"). A client, who was also a recipient of ODSP benefits, was pursuing a claim against an estate. His ODSP caseworker requested that he sign a release, stating that he would repay ODSP the benefits he received if he was successful in his claim against the estate. It was suggested that a review of the relevant legislation might reveal different exemptions that would allow the client to keep any money ultimately received.

We then continued with our discussion from the previous Brown Bag Lunch regarding assisted reproductive technology. A suggestion was made to limit the definition of "issue" in testamentary documents to issue born at the time of death. Another solution would be to include clauses in Wills that limit the liability of executors to search for heirs and limit dependant's relief claims and other types of support claims made by beneficiaries, who may not have been contemplated by the testator. It was generally agreed that the possibility of planning for "post-death issue" was something that now needed to be raised by an estate solicitor taking instructions from a client when drafting testamentary documents.

Next, we had an interesting discussion with regards to trustee compensation for interim accounts. A situation was discussed wherein releases were sent to beneficiaries with the interim accounts requesting compensation for the estate trustee, but the releases did not specifically refer to the accounts. The majority of the beneficiaries agreed to allow for interim compensation, but two beneficiaries did not. It was noted that the case law is unsettled in this area and it would be dangerous to rely on unreviewed accounts in terms of pre-taking compensation. A suggestion was made to include a statement of proposed distribution with the interim accounts for the review of the beneficiaries.

We then had a discussion with regards to healthcare providers and to whom they reported in situations where there is a guardianship dispute involving an incapable person. We followed that with a discussion of rollovers in spousal trusts and, in particular, considered whether it was possible to roll over a RIF into a spousal trust.

We ended our March lunch by discussing lapsed residuary gifts and, in particular, the recent decision of *Mladen Estate v. McGuire*, 2007 CarswellOnt 1976 (Ont. S.C.J.). In that case, the Court held that the lapsed residuary bequest went to the surviving beneficiaries of the estate and did not go out on intestacy. Certainly an interesting decision to consider in such situations.

Our next Brown Bag Lunch will be held on **May 20, 2008**. We hope to see you there!

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How Would You “Fix” the *Family Law Act*?

Mary Wahbi*

We are asking Section members to tell us about the issues you’ve encountered with the *Family Law Act* in the context of estate planning, administration or litigation.

In 2004, the OBA Family Law Section made a submission to the Attorney General for reforms to the *Family Law Act* (“FLA”). Recently, the OBA Family Law Section revisited several priority issues and in keeping with OBA policy, all Sections were surveyed on the issues and invited to constitute a working group.

A working group (the “FLA Working Group”) has now been constituted on which there are representatives from Family Law, Pensions and Benefits, SOGIC, Feminist Legal Analysis, Health Law and Trusts and Estates.

Up until recently, the mandate of the Trusts and Estates FLA Subcommittee was limited to dealing with issue #10 listed below. The forum has now been opened by the Attorney General for the FLA Working Group to make a wide-reaching submission for reform to the FLA and the Trusts and Estates FLA Subcommittee has been asked to expand its involvement and include all trust and estate FLA related issues. The timelines are tight as the submission is to be made in the next several months.

The Trusts and Estates FLA Subcommittee is seeking your input. If you have run into problems with the workings of the FLA in the context of estate planning, estate administration or estate litigation, **WE WANT TO HEAR FROM YOU**. Please send us your thoughts, anecdotes, problems and issues.

The list of issues currently being developed by the FLA Working Group includes:

1. To provide for the division of pension interests between spouses on marriage breakdown;
2. To remove the reference to “matrimonial home” from Part I of the FLA (but not from Part II);
3. To amend the threshold of eligibility of adult children for child support so as to harmonize it under s.31(1) of the FLA with that of the *Divorce Act* to prevent unequal treatment;
4. To consider the extension of property rights to unmarried spouses (**this is not supported by the Trusts and Estates FLA Subcommittee**);
5. To amend various definitions of parentage to reflect the different profiles of today’s families;
6. To enact provisions in the FLA to take advantage of s.25 of the *Divorce Act* regarding the implementation of routine child support variations through a provincial agency, to avoid a motion to court;
7. To amend the disclosure provisions under s.25 of The Child Support Guidelines to require annual income disclosure without the need for a request and to enact provisions to establish a presumption of retroactivity of child support;
8. To amend s.5(6) of the FLA to include a power to adjust an equalization payment even where NFP are equal or NIL and to incorporate a discretion to take into account post-separation events;
9. To change the treatment of gifts and inheritances under Part I of the FLA, to eliminate different treatment depending on whether they are received before or during marriage;
10. **To expand the credit provisions in s.6(6) of the FLA to prevent the windfall caused by the combination of the definition of “valuation date” under s.4(1) and ss.6(1) & 6(6);**
11. To amend s. 31(2) of the FLA to replace the reference to “16” with “18” such that the right to resist a support claim for a child who has withdrawn from parental control applies only to children 18 or older;
12. To amend Part II of the FLA to make it applicable to spouses as defined in s.29 (Part III), thereby extending possessory rights, the right to claim exclusive possession and other rights related to the matrimonial home (which would become “family residence”).

Please send your e-mail to any one of:

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** Mary Wahbi, Chair, FLA Subcommittee, Ontario Bar Association, Trusts and Estates Section.*

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