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Estate Litigation

February 2013

Estate Dispute Shows that Leaving an Unclear Will Can Have Serious Legal and Personal Consequences for Family Members and Estate Trustees

Wills are not always drafted with perfect clarity and it is sometimes difficult to be sure exactly how the deceased intended to dispose of assets. A recent Ontario Court decision, argued by Pallett Valo's Estate Litigation Group, demonstrates how, in interpreting an unclear will, a court may consider evidence about the character and experience of the deceased and the circumstances in which the will was prepared.

Gifts with Conditions

The facts in *Menecola v. Drzazga* were not complicated. Mr. D was an immigrant who started out in Canada delivering pizza and ended up as a real estate agent with significant assets. When Mr. D was diagnosed with a terminal illness, he had the foresight to meet with a lawyer to make arrangements to put his affairs in order.

Mr. D eventually died leaving a will which, among other things, provided for conditional gifts to each of his three adult sons. Each son was to receive $150,000, but subject to the condition that *"the amount shall be paid to him only if he purchases real property and the amount is secured by a no-interest second mortgage, with the said mortgage…being payable to [the] estate. If the property is sold and not replaced by another mortgage within ten years, then the amount is to be paid back to [the] estate. If [the] son owns the property, or a subsequent property, for a total of ten years, the mortgage is to be discharged by [the] Trustee and [the] son shall be allowed to keep the sum of $150,000.00"*. For the youngest son the will included a clause that the $150,000 would be paid to the son when he reached 24 years of age, with the same 10-year conditions applying to his gift.

A residue clause provided that the residue of the estate was to be held in trust and *"after ten years from the date of [Mr. D's] death, all money remaining held in trust shall be divided equally among [Mr. D's] grandchildren; provided that should [he] have no grandchildren...living at such date, then the amount remaining shall be divided equally among [his] three sons"*.

Interests and Obligations

Unfortunately, when it came time to administer the estate and give effect to Mr. D's plans, it became apparent that the conditions by themselves were unclear and, read together with the residue clause, were inconsistent and confusing. Over time the inconsistencies became increasingly apparent and the vagueness caused problems between the sons and the estate trustee, who was a friend of Mr. D. The sons had their own interpretation of their father's intentions, which were not supported by the plain language in the will.

The estate trustee had obligations not only to the sons, but also to Mr. D's grandchildren, born after his death, who were the residuary beneficiaries. To resolve these issues, the estate trustee needed to bring an application to the court for advice and directions about the interpretation of the will.

Generally, any person with an interest in an estate can apply to the court for advice and direction about how to interpret a will but most applications are brought by estate trustees when it is difficult or impossible to continue administering the estate. Notice of the application must be provided to everyone with a financial interest in the estate. It's best to retain counsel with experience in estate litigation to handle such applications, particularly where the legal issues are complicated or there is a potential for disagreement or acrimony between the estate trustee and the beneficiaries or amongst the beneficiaries.

At the time of the court application, which took place five

years after Mr. D's death, the grandchildren were infants and were therefore unable to consent to any interpretation of the will. Their interests needed to be protected and accordingly they were represented by the Children's Lawyer of the Province of Ontario.

One of the sons had purchased more than one property and, at the time of the court application, was planning to sell his second property and replace it with a third property. Another son had acquired property and sold it but had not acquired new property by the time of the application. The youngest son had not yet acquired any real property and had only just turned 24.

Circumstances in Which the Will was Made

It was not clear from the will when Mr. D's conditional gifts would vest in (or belong unconditionally to) the sons. When was the ten year period supposed to start? When would it end? Was it supposed to be a cumulative period of ten-years, or a continuous period? It was also not clear if the estate was required to advance the $150,000 even if there was less than $150,000 in equity available in the property. The court also had to decide how many properties could be purchased and sold during the period and who would pay the costs of preparation, registration and discharge of each mortgage each time. If a gift failed, who would the residual beneficiaries be?

In making its determination, the court had to consider Mr. D's intentions at the time he made the will, having regard to the language of the will as a whole. When it became apparent that Mr. D's intentions could not be determined solely from the plain meaning of the language used in the will, the court resorted to extrinsic or outside evidence of the surrounding circumstances known to Mr. D when he made his will. The goal of judges in such cases is to put themselves, as much as possible, in the same position as the testator when the will was made.

In this case the judge accepted the evidence that Mr. D was a full time real estate agent who believed strongly in real estate as an investment. He had a close relationship with all three of his children. The judge also accepted the sons' evidence that their father was a somewhat frugal man. But this examination of circumstances did not bring the judge any closer to understanding Mr. D's intentions.

Evidence of Intentions: A Last Resort

A court is permitted to consider extrinsic evidence of a testator's actual intentions if, after considering the words of the will as a whole and the available extrinsic evidence of the surrounding circumstances, there remains more than one reasonable interpretation of the will. If after that analysis the court is still unable to determine the testator's intention, then the gift in the will would fail for uncertainty, and the sons would not get the $150,000 gift.

The sons argued that the division of the residue of the estate ten years following their father's death reflected his desire to have a fixed date for the conclusion of the estate. Their view was that they should receive their gifts on the tenth anniversary of Mr. D's death, either by way of forgiveness of the loan (if they still owned real property and had given the estate a mortgage), or by receiving a payment of $150,000 if they had purchased but then disposed of real property before that time.

The solicitor who drafted the will and the estate trustee were both examined under oath prior to the hearing. The judge accepted that Mr. D wanted his sons to own real property for ten years before their gifts would become final and that Mr. D set up his will in this fashion because in ten years his sons would be older and presumably more responsible.

At the end of the day, the judge decided that each son was required to own real estate for a total of ten years before his gift would be final. The property had to be owned for a cumulative period of ten years, beginning from the date the son first acquired the property, provided that the first property was purchased within the first ten years of Mr. D's death. The court provided further directions and set out the circumstances under which the gift would fail. The court acknowledged that its interpretation would result in several lengthy periods of time during which the estate had to be held in trust.

Help for the Estate Trustee

Although all of the parties now had a better understanding of what Mr. D intended, by this time the relationship between the sons and the estate trustee was irreparably damaged. This, coupled with how long the estate trustee might now have to manage the trust (likely another 16 years, and possibly longer), led the estate trustee to bring a further court application to be discharged of his duties. The estate trustee also sought compensation for the work done thus far and to have another person or trust company to be appointed as his substitute. The will did not name a substitute trustee, nor was it clear about how much compensation should be paid to the estate trustee.

A second hearing was needed to determine whether the estate trustee should be allowed to resign and who should be appointed in his place. Generally, unless all of the parties agree, a trustee cannot resign without permission from the court and without passing the estate accounts. In this case, all of the parties approved the accounts but did not agree about whether the estate trustee, Mr. D's long-time friend, should be allowed to resign and who should take his place.

Interestingly, it was the Children's Lawyer who contested the estate trustee's resignation. The Children's Lawyer made several arguments: (1) the testator's choice of estate trustee should not be lightly interfered with; (2) a clear necessity for removal must be established; (3) the removal must be the only course to follow; (4) the removal must be guided by the welfare of the beneficiaries; and (5) friction alone is not a reason for removal. The Children's Lawyer argued that a professional trust company would charge fees which, over time, would deplete the estate to the detriment of the grandchildren. It would have been more economical to keep Mr. D's friend as estate trustee.

We successfully argued that, under the circumstances, the estate trustee ought not to be held hostage to the estate. The relationship between the sons and the estate trustee had deteriorated to the point where the situation was intolerable. The court agreed that in this case the well-established principle that no person should be compelled to remain a trustee applied. If that principle did not exist, no one would ever be willing to undertake the task of trusteeship.

At the conclusion of the hearings, the estate trustee had his accounts approved, was discharged from his duties to the estate and was granted compensation for acting as an estate trustee. The court had also provided its directions concerning the interpretation of the will for the future management of the trusts under the will. The court agreed that the issues were important and complex and awarded all of the legal costs of the estate trustee and the Children's Lawyer to be paid out of the estate.

Some Lessons to be Learned

This case illustrates how important a well-drafted will can be in avoiding litigation, particularly when the wishes of the testator are complex to carry out and enforce.

Estate trustees should also be aware that once they accept the responsibility of acting as an estate trustee, they are bound to fulfil their obligations until they are discharged. The discharge is not automatic and requires the estate trustee to produce a complete accounting of all actions taken to manage the estate. Unless all parties consent, permission from the court will also be required.

At Pallett Valo LLP, we take the time to understand the needs and wishes of our clients. Our extensive experience in administering estates and in dealing with pre-litigation disputes related to estate matters puts us in a strong position for giving our estate-planning clients valuable advice in drafting their wills and other testamentary documents to avoid the kind of conflict and expense demonstrated in the case of Mr. D's estate. We have the depth of experience to implement even the most complex estate plans. We help estate trustees in administering estates and passing of accounts and regularly accept referrals to administer wills that were drafted elsewhere.

Where formal conflict resolution is required or litigation is inevitable, our Estate Litigation Group is well-equipped to handle both simple and complex estate disputes. We can help with estate administration disputes, will challenges,

guardianship applications, support applications, consent and capacity hearings and with disputes with taxation authorities related to income and estate administration taxes. If you need help with an estate planning or dispute matter, please contact one of the members of our Estate Planning Group or our Estate Litigation Group.

Pallett Valo LLP Estate Planning and Estate Litigation Groups

Our goal is to help our clients arrange their personal and business affairs in the most efficient and advantageous manner possible.

We work closely with our clients and their other professional advisors to develop a customized estate plan. We use vehicles like tax-planned trusts and wills to accomplish our client's personal objectives while minimizing adverse tax consequences, including the reduction of probate taxes. We are experienced in the complex issues relating to business succession planning and ongoing wealth transfer. In this way, our clients are better prepared to deal with aging, illness, incapacity and death.

Upon incapacity or death, we represent and advise Estate Trustees, beneficiaries, heirs, surviving spouses and other family members. We have unique expertise advising families with disabled beneficiaries. When disputes arise in the administration of an Estate, we provide experienced counsel to assist in their resolution, whether by litigation or other dispute resolution mechanisms.

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This article provides information of a general nature only and should not be relied upon as professional advice in any particular context. For more information about Estate Litigation, contact a member of our **Estate Litigation Group** at **905.273.3300**.

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