Managing Unforeseen "Issues" in your Estate: *Koziarski Estate v. Sullivan*

In 2017, the Ontario Superior Court of Justice held that a grandchild born out of wedlock was not entitled to share in his late grandmother's estate because he did not fall within the definition of "issue" as used in her Will at the time the Will was signed.

The Deceased's Will dated December 14, 1977, provided that the remainder of her estate would be left entirely to her husband, and if her husband should predecease her, the remainder of her estate would be divided equally and distributed between her two children, Henry and George. In the case where one of her children predeceases her, that predeceased child's share would be divided into equal shares and distributed among his issue. The Deceased's husband and her son, George, both predeceased her.

George had one child of his marriage. However, before he got married, George was in a relationship with another woman and fathered the Respondent, Jesse Koziarski.

On the date the Deceased's Will was drafted and signed, common law applied a presumption that words such as "child" and "issue" did not include persons born out of wedlock unless rebutted by surrounding circumstances. However, on March 31, 1978, a mere three months after the Deceased signed her Will, the *Succession Law Reform Act* ("SLRA") was enacted in Ontario and immediately changed this presumption. Sections 1(3) & (4) of the SLRA now provides:

> 1. (3) In this Act, and in any will unless a contrary intention is shown in the will, a reference to a person in terms of a relationship to another person determined by blood or marriage shall be deemed to include a person who comes within the description despite the fact that he or she or any other person through whom the relationship is traced was born outside marriage.
>
> (4) Subsection (3) applies in respect of wills made on or after the 31st day of March, 1978.

In light of this change, the question before the court was whether Jesse fell within the class of George's "issue" since he was considered to be born out of wedlock under common law when the Will was signed, but is now considered to be included as the Deceased's issue under the new provisions of the SLRA.

The estate trustee took the position that as an illegitimate grandchild, Jesse was not considered George's issue and therefore not entitled to share in the estate. He argued that while the SLRA clearly expressed the legislature's intention to change the presumption of the use of the word "child" to include a natural person born out of wedlock, this change was to be effective only on wills made on or after March 31, 1978, when the law came into effect. Because the Deceased's Will was drafted and signed before this date, the estate trustee argued that the SLRA did not apply to the Deceased's Will and was meant not to include children and grandchildren born out of wedlock.

On the other hand, Jesse argued that the presumption that applied to the word "child" and similar terminology excluding children born out of wedlock was judge-made law, defined at a time when social mores towards illegitimate children were less progressive and emphasized the distinction between children born out of wedlock and those born within marriage. Additionally, the ordinary meaning of the word "child" includes both. Further, subsection 1(4) of the SLRA remains silent on the court's ability to change the common law presumption for wills executed prior to March 31, 1978.

In its decision, the Court ruled for the estate trustee "with great regret", taking a strict interpretation of the SLRA and finding that the legislation did not bring Jesse into the meaning of the word "issue" because the Deceased's Will was drafted and signed before the SLRA was enacted. As a result, Jesse was not entitled to share in the estate of Deceased and there was nothing in the surrounding circumstances in December 1977 to sufficiently displace the presumption that the term "issue" would not include persons born out of wedlock. The evidence submitted by Jesse demonstrating the familial relationship between the Deceased and Jesse after Jesse was born was deemed not to be relevant, with the Court specifically citing the fact that the Will was executed before the birth of any of the Deceased's grandchildren.

Lessons from *Koziarski*

While lawyers cannot predict unexpected circumstances and whether legislative changes will come into effect after a Will is finalized, precautions should be taken to carefully draft the Will to ensure that a testator's intentions remain as clear as possible regardless of what may come out of the woodwork after the execution of the Will or the testator's death.

A well-drafted Will should include a provision specifically addressing the definition of issue and *per stirpes* distribution to make it absolutely clear to estate trustees, beneficiaries and the court as to the testamentary intentions of the testator at the time that a Will is signed, including how the distribution is to occur and who specifically is included in the class of beneficiaries. This is especially significant for blended families if a testator intends to include children or grandchildren, as well as their issue, who are not legally adopted or from a second marriage or previous relationship.

A provision defining "issue" to include or exclude certain individuals should be abundantly clear to include or exclude a certain person in the distribution. Giftover provisions must specify what class of individuals are to have a beneficial interest in a gift if the original beneficiary had predeceased the testator, including among which persons the gift is to be divided, when (immediately or in trust), and in what proportions. As demonstrated by *Koziarski*, evidence submitted to the Court attempting to prove a familial relationship between the testator and a beneficiary is a high bar to meet if he or she is not explicitly included in the wording of the Will, either as an individual or by class. It is therefore critical that a Will is drafted in a way to maximize clarity to the estate trustees, beneficiaries and the court, and is prepared to withstand whatever surprises or circumstances that may arise.

Pallett Valo Wills, Estates & Trusts Practice

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.

Contact Members of our Wills, Estates & Trusts Practice:

Anne Kennedy
akennedy@pallettvalo.com • (905) 273.3022 ext. 204

Craig Ross
cross@pallettvalo.com • (905) 273.3022 ext. 231

Krystyne Rusek
krusek@pallettvalo.com • (905) 273.3022 ext. 312

Nozomi (Zoe) Smith
zsmith@pallettvalo.com • (905) 273.3022 ext. 258

Cecile Ko Brock
ckobrock@pallettvalo.com • (905) 273.3300

Ori Rubin
orubin@pallettvalo.com • (905) 273.3022 ext. 213

David H. Shlagbaum
dshlagbaum@pallettvalo.com • (905) 273.3022 ext. 264

Lisa C. Sticht-Maksymec
lsticht-maksymec@pallettvalo.com • (905) 273.3022 ext. 248

PALLETT VALO LLP
Lawyers & Trade-Mark Agents