OBITER
LEGAL UPDATES FROM ACROSS CANADA.

General Interest

Federal and Provincial Governments Respond to Covid 19

The federal government has important information available online about the temporary changes to EI eligibility, the requirements for federally regulated businesses, and work-sharing programs for employers and employees experiencing a business downturn. Learn more here. The provinces are also providing temporary assistance to small business and residents. People are encouraged to check the federal and relevant provincial websites online at regular intervals to keep abreast of initiatives and health directives.

Inheritances and Gifts from an Insolvent Will-maker/Giftor and the Federal Tax Collector ("CRA"): Section 160(1) of the *Income Tax Act*

People get carried away trying to avoid nominal provincial probate/estate tax (e.g., about $14,500 per net million in Ontario), and can end up with an insolvent estate that is unable to pay the federal tax liability owing at death. The tax collector is unlikely to be evaded as a result of an insolvent estate, particularly as the CRA is under increasing pressure to generate revenue by collecting taxes based on audits and reassessments. The tax liability the deceased tried to avoid, along with accumulated interest, is simply downloaded onto the beneficiaries who inherit – regardless of whether or not the inheritance is by will or beneficiary designation.

Dreger v The Queen, 2020 TCC 25 ("Dreger") concerned an inheritance received by two sisters who were designated beneficiaries of a life income fund owned by their father. Upon the father's death in 2011, he had an outstanding tax liability that was greater than the [approximate] $100,000 each daughter later received from the fund. Four years later, the daughters received a notice from the CRA. The CRA demanded that the inheritance be applied against the father's outstanding tax liability. Interest on the unpaid taxes had, in addition, been accumulating on the outstanding tax liability since the father's death in 2011.

One of the purposes of s 160(1) of the *Income Tax Act* is to "… prevent a tax payer from transferring his property to a related person in order to thwart the Minister's efforts to collect the tax that is owed by the taxpayer"; Dreger, para 8. The section captures direct and indirect (e.g., by the settlement of a trust) transfers between related parties. Related parties include: people related by blood, e.g., a descendant or sibling; a spouse/partner or someone who later becomes a spouse/partner; or to a minor child (biological or adopted). The amount available to the CRA is the full amount of the gift less any consideration paid by the beneficiary for the gift or the amount of tax owing, whichever is less. There is generally no consideration paid by a beneficiary and Dreger was no exception.

The daughters submitted on appeal that s 160(1) did not apply because they were no longer related to their father after the moment of his death. While it is true that a marriage or partnership (i.e., a statutory relationship) ends upon the death of the spouse/partner, the relationship between parent and child does not (i.e., a factual relationship). The daughters would be personally

subject to CRA enforcement options necessary to collect the lesser of the value of the inheritance or the taxes owing. Enforcement can include registering a lien against the beneficiary's home, garnishment of income, or access to the person's equal share of jointly owned property.

The same principle would apply to gifts while living from a related party who has tax liability at the time the gift is made. Examples would be a gift of a sum of money to a child to pay for their wedding, removing one owner's name from a registered, jointly owned asset (e.g., the family home), or the receipt of corporate dividends by a shareholder with tax liability who has 'control' of the corporation, either themselves or in combination with related shareholders.

Keep those Documents Handy: CRA Launched a Real Estate Task Force to Ensure Tax Compliance with New Reporting Requirements on the Sale of Real Property

Gone are the good 'ol days, as of 2016, when you didn't have to formally inform the CRA when you sold your primary residence. Now you'll not only want to tell the CRA, you'll want to keep the sale documents handy. Audits of real estate transactions now include … well, anyone that sells their home. Expect more audits in BC and Ontario where home prices are highest. Developers and promoters were targeted earlier for sales tax compliance, as well as taxpayers who 'flip' properties and real estate commission earners.

The government of Canada provides audit statistics, and a link to the T2091 form for filing upon a sale, online. Learn more here.

For those targeted for a CRA real estate audit, the audit questionnaire asks for extensive information about the property being sold and the property being purchased including:

- all your interests in a corporation, partnership and/or joint venture;
- the amount of any original mortgage, the lender and how the original purchase was financed; the date you signed the purchase and sale agreement, along with the purchase price and closing details;
- the type of property (e.g., home, cottage, etc.) and why it was purchased; whether you or a relative lived in the property or if it was rented to a third party, etc.

Proposed Changes to the Criminal Code: Medical Assistance in Dying ("MAID")

The proposed amendment received its first reading in the House of Commons on February 18, 2020. The Bill proposes to:

- No longer require that the person's natural death be reasonably foreseeable for eligibility;
- Permit access to MAID where the person was previously found eligible, their natural death is foreseeable, but they have since lost capacity to consent [again] prior to MAID being administered, provided they have a prior agreement with their medical or nurse practitioner;
- Permit access to MAID where the person is incapable of consent as a result of self-administration of a substance provided to them under MAID to cause their own death;
- Ensure that people whose only underlying condition is a mental illness are ineligible for MAID; and

- Create two sets of safeguards prior to MAID being provided.

The first three points appear related in that the current regime requires consent prior to administration of MAID. The 'second' consent requirement has been controversial since many illnesses, or their treatment, can negatively impact capacity. Points one and two permit a person to obtain eligibility for MAID while they have capacity to make that decision, and enter into an agreement with their practitioner for future administration of MAID, without having to worry that subsequent incapacity will thwart their prior capable decision.

Point four is interesting in that it is broadly worded and one can't help but wonder about a future Charter challenge based on an enunciated ground of discrimination, i.e., disability.

The full text of the Bill is available online. Learn more here.

NOVA SCOTIA

Leblanc v Cushing Estate, 2019 NSSC 360 ("Leblanc"): Common Law Couples Entitled to Support While Living but Not at Death Unless Registered

Sarah Leblanc and Russell Cushing were common law partners at the time of Russell's death. Russell's will was 3 years old when he and Sarah started living together. He did not leave anything for Sarah in his will, which was reasonable based on the point in time it was executed. Russell did not update his will after he and Sarah became common law partners. When Russell died, Sarah brought a claim against his estate for dependant's support. She submitted that she was a dependant under the *Testators' Family Maintenance Act*, 1989, c 465 ("TFMA", enacted in 1956) and if not, then the TFMA breached the *Charter* to the extent that it preclude[d] "… common law partners from claiming relief under the Act. …"; para 2.

The court held that it was not required to consider the application of the *Charter* where a statutory interpretation analysis found no ambiguity in the legislation. This is arguably an error of law since the *Charter* is to ensure, among other things, that government does not enact or permit discriminatory legislation based on enunciated grounds, e.g., discrimination based on marital status. Moreover, the *Charter* does not require ambiguity in the legislation for a court to conduct a *Charter*, or constitutional, analysis.

The court, however, decided that the definition of "widow" in the TFMA, by virtue of some legislative amendments now 20 years old, referred only to married spouses or common law partners who registered their domestic partnership under the *Vital Statistics Act* ("VSA"). The court held that if common law partners wanted dependant support rights at death, they were required to register, i.e., form over substance. The VSA is permissive in that it states the couple "may" register their partnership. The court found that there was no need to look to the *Charter* because the definition of "widow" in the TFMA reflected the intent of the legislature at the time of enactment; the definition was clear and unambiguous in that it excluded, when read in conjunction with the VSA, unregistered common law partners.

[1] *Some provinces, e.g., Québec, have legislation that prohibits an inheritance by someone who has been convicted of making an attempt on the life of the deceased by operation of law; art 620(1) CCQ..*

It seems irreconcilable to, on the one hand, provide a right of support (where legal requirements are met) at the end of a common law relationship and, on the other hand, extinguish that right at death by virtue of a mere formality, i.e., a failure to fill out and submit a registration form. How does a need for, and entitlement to, support at the end of a common law relationship evaporate at death when a partner is not provided for? The legislation's purported original intent, summarized from Leblanc, was to make sure spouses and partners provide for each other so as to ensure their support upon separation or at death does not become the responsibility of taxpayers and/or the state.

In stark contrast to the questionable reasoning in Leblanc, the case of *Lawren Estate v Nova Scotia (Attorney General)*, 2019 NSSC 162, found that permitting an adult, financially independent child to bring a claim against a parent's estate solely on moral grounds, i.e., entitlement based on biology, was an unacceptable constraint on testamentary freedom that rose to a level that constituted a Charter breach. There was no ambiguity in the impugned TFMA provision.

Nova Scotia's legislature, however, seems to be further ahead in its thinking than perhaps certain honourable members of its bench. In January 2020 the government initiated an online survey that invited constituents to share their views on how property is divided at the end of a common law relationship. The website narrative states that "… relationships and families today look different than they did 40 years ago when these laws were created…. [and that] most common law partners … do not register as domestic partners. …". The survey, which was to close February 20, and information about the review of Nova Scotia's family legislation, can be accessed online at: https://novascotia.ca/news/release/?id=20200123002 (accessed March 6, 2020).

For the time being at least, common law partners should review their estate planning to confirm that it still meets their needs and register their partnership. Information on how to register your partnership is available online. Learn more here.

Québec

Increased Daycare Fees? The Requirement of Constant Supervision for Children in Daycare: *Directeur des poursuites criminelles et pénales c Centre de la petite enfance Soulanges (CPE Soulanges),* C.Q. Beauharnois, 760-61-124110-199, January 15, 2020 ("Soulanges")

The ability of day care service providers to designate a single staff member to supervise two groups of napping children in adjacent rooms may have ended – at least temporarily. Soulanges arose as the result of a standard license review and a complaint about supervision during naptime. The facts of the case were that there were 7 children napping in one room and 10 in an adjacent room. One employee was supervising both rooms to permit the others to take a break. Each room had a partially obstructed view of the other. The service provider was found to have breached the legislated requirement that children be "constantly supervised" and a fine was imposed, which was disputed. Soulanges submitted a due-diligence defence at trial because they had an "auto-pause" policy/directive in place. The daycare provider asserted that pausing the requirement of constant supervision at certain times, i.e., an "auto pause", was a necessary and common practice.

The *Educational Childcare Regulation,* CQLR c S-4.1.1, r 2, s 100 requires the "constant supervision" of children, and s 21 identifies the required ratio of staff to children. The court held that constant supervision required both visual and auditory access to all children at all times, which was impossible with the layout of the rooms and partially obstructed view. The court found the concept of "auto-pause" troubling although conceded its proper application would depend on the facts of a particular case. The court decided, however, that it was inevitable that the lone employee would be called to care for a child that woke up early, and would therefore be unavailable to supervise the other children. In addition, and depending on the number and ages of the napping children, the ratio of staff to napping children may have required 4 staff members to be on duty to meet regulatory requirements.

Does this mean that daycare providers will have to increase staff, which would inevitably increase daycare costs to parents and/or the provincial government? It was reported that a notice of appeal was filed in February; an update will be provided when available.

Ontario

Significant Legal Fees after Successful Undue Influence Claim to be Paid by the Influencer: *Graham v Graham*, 2020 ONSC 784

Jackie died of cancer on January 8, 2016 and left behind four adult children. A couple of weeks before her death, Jackie signed an enduring power of attorney for property ("EPOAP") and made a will. She appointed one son, Robert, as attorney and executor, and left all her assets to him. Four days before Jackie's death, Robert transferred ownership of her home to himself as sole owner and moved himself and his family in. Jackie's home was her most valuable asset.

After Jackie's death, Robert asserted the will was valid and that he was the sole beneficiary of his mother's estate. Jackie's three other children brought a proceeding to have the EPOAP and will declared invalid and the home returned to the estate for intestate distribution, i.e., equal distribution among all four of Jackie's children. The three siblings challenged the validity of the EPOAP, the will and the transfer of the house to Robert.

The three siblings were successful at trial. The court found that Jackie had lacked capacity to execute the documents and had only done so as a result of Robert's undue influence. The legal fees of the successful siblings in the proceeding were around $87,000. They sought recovery of those costs from Robert personally.

To Robert's disappointment, and after asserting that a costs award would likely dissipate his inheritance, the court made an order for costs against Robert personally for $54,292. The estate would be responsible for an additional $23,730 because Jackie's imprudent decisions provided fertile ground for the litigation.

Estates litigation is one of the few areas of litigation that has, according to Statistics Canada, shown an estimated 20% increase over the last six years, which is expected to continue. In recent years, the courts have moved away from having the deceased's estate pay

all the legal fees of a proceeding, which was what historically was done. The factors traditionally used to determine costs in a civil proceeding now generally apply to estate proceedings. The *Rules of Civil Procedure*, RRO 1990, Reg 194, s 57 contain the factors the court should consider and include: The amount claimed and the amount recovered; the apportionment of liability; the complexity of the proceeding, and; a party's conduct in the proceeding, etc.

Alberta

Web-based Short Term Rentals of Condominium Units can be Restricted by a Condominium Corporation's Bylaws: *Condominium Corporation No 042 5177 v Kuzio*, 2020 ABQB 152

Three condo owners were offering short term rentals of their units on a web-based platform, e.g., Airbnb. The condominium corporation advised the owners that short-term rentals violated the bylaws of the corporation. The owners continued to rent the units and claimed that the bylaw restricting the short term rentals was outside of the corporation's authority under the *Condominium Property Act,* RSA 2000, c C-22, s 32(5) ("CPA").

The CPA does not expressly deal with short term rentals. Section 32(5), however, prevents the corporation's bylaws from restricting or preventing the "… devolution of units or any transfer, lease, mortgage or *other dealing* …". Did the phrase "or other dealing" include short-term rentals? The court decided that the phrase applied only to transfers, leases, mortgages and related dealings by which an interest in real property was capable of being enforced against third parties. A short-term rental, however, was found by the court to constitute a license to occupy the unit, and therefore s 32(5) did not restrict the corporation from enacting the bylaw.

Unit owners that use web-based platforms for short-term rentals should take note and check the bylaws of their condominium corporation.

British Columbia

Employers to Provide Paid Leave for Victims of Domestic or Sexual Violence

Bill 5 was introduced in March 2020 and will provide 5 days of paid leave, 5 days of unpaid leave and up to 15 weeks of additional unpaid leave for victims of domestic or sexual violence. The leave can be taken all at once or spread out over time. The new requirement is expected to come into force later this year despite the province inviting comment. The bill is available online. Learn more here.

Secret Trusts: *Bergler et al v Odenthal*, 2019 BCSC 1882 ("Bergler")

A secret trust can arise when someone gives property to someone else, tells the recipient how the property is to be dealt with when a specified event happens, and the recipient accepts the property and associated obligation. Of course, the 3 certainties required for a valid trust must also be present: 1) certainty of intention [to settle a trust]; 2) the subject, or property, of the trust must be certain; and 3) the beneficiary of the trust is certain.

Anjelika died without a will after a brief battle with pancreatic cancer. She had no children but was in a common law relationship with Bernd. Anjelika told Bernd that she wanted her niece, Susanne, to inherit her assets because she was not financially established and planned to return to school. The assets were to go to Susanne when Bernd began a new relationship. Bernd shared this information with Susanne and her sister, Anja. Anjelika had also shared her intention with her sister, Monika.

Bernd later submitted that he was entitled to Anjelika's assets until his death and not to the start of a new relationship. Bernd had a will drafted that divided the residue into 10 shares. Three of the shares, with a value of around $130,000 were left to Susanne. Bernd claimed that the amount reflected the value of Anjelika's estate at the time of her death. The court, however, did not find Bernd's submission credible. In addition, Bernd began a new relationship about 6 months after Anjelika's death and was married at the time of trial.

Where "… a person dies intestate relying on the fact that her intestate heir has accepted the trust, the law will compel the trustee to carry out the trust. …"; Bergler, para 16. Bernd was found to have breached his fiduciary duty by, among other things, failing to keep Anjelika's assets separate from his own. He told the court that he believed that he had a 'moral' obligation to fulfill Anjelika's intentions but not a legal one.

The court ordered Bernd to disgorge the trust assets still under his control and personally make up any shortfall. Susanne was also awarded $22,200.61 as damages for Bernd's breach of fiduciary duty as trustee, and her costs.

Don't Forget: The Employer Health Tax filing was due March 31st, and the deadline for compliance with the Transparency Register requirements for privately owned BC corporations is May 1st.

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