OBITER
LEGAL UPDATES FROM ACROSS CANADA.

General Interest

Maintaining Separate Residences will not Escape Spousal Support: *Climans v Latner*, 2019 ONSC 1311 ("Climans")

It is common knowledge that cohabitating for a minimum, continuous legislated period of time can give a common law partner entitlement to spousal support in most of Canada. But what if you don't technically live together full time at any point during the relationship – can you still be found to be a common law partner and obligated to pay spousal support? A growing line of cases indicate the answer is "yes".

In Climans, Lisa and Michael had been in a committed, conjugal relationship for about 14 years when the relationship broke down. They had always owned separate homes and never lived together. They each had children from a prior relationship. They held themselves out, and were perceived, as a couple in the community. Michael wanted Lisa to quit her job early in the relationship to be more "available" to travel and care for him, which she did. He gave her credit cards to use and paid her a monthly amount in addition to covering living expenses. The couple celebrated family birthdays and holidays together and had relationships with each other's children. They spent summers at Michael's cottage and winters in his Florida condo. Lisa and Michael frequently ate dinner together and enjoyed occasional sleepovers in each other's home. Michael had proposed a number of times and the couple wore rings they had exchanged. Domestic agreements had been drawn up but never signed.

"Cohabitation" in Ontario's *Family Law Act* is defined as two people living together continuously in a conjugal relationship for at least three years (subject to exceptions, e.g., the couple have a child together prior to reaching the three year cohabitation mark). Recent cases have held that cohabitation is not required to find the existence of a common law relationship. Rather, the focus is on the nature and attributes of the relationship, which reflects an emerging trend.

The Supreme Court of Canada in *M v H*, [1999] 2 SCR 3, identified certain, non-exhaustive factors that can support a finding of a common law relationship: shared shelter; sexual and personal behaviour; services provided to the partner; social activities; economic support; children and; the "societal perception" of the couple as, well, a couple. The court held that not every factor had to be present to find the existence of a common law relationship. A couple that established a long period of commitment and companionship, who were accepted as a couple in the community, could meet the requirements for "continuous cohabitation"; Climans at para 122. Michael and Lisa were found to be in a common law relationship for the purposes of support.

Takeaway: Avoiding cohabitation will not necessarily prevent you from acquiring the legal rights and obligations that accompany a common law relationship. This potentially includes the right to bring a dependant's support claim against a partner's estate.

CRA Changes Employers T4 Reporting Requirements in Preparation of Audits of CEWS, CERB and CESB Benefits [1]

Employers will be required to separately record employees' 2020 types of income on their T4s. Amounts of income earned and amounts of income received through a government benefit program are to be reported separately.

The CRA intends to use this information to audit employers (CEWS) and recipients (CERB, CESB) of the various government benefit programs to confirm eligibility for each benefit received. Interest is to be charged on ineligible payments until repayment, and fines and penalties may be imposed for improper claims. The CRA may extend those consequences to third parties, e.g., accountants or tax preparers. Fraudulent claims can lead to criminal charges.

It's reported that a pilot project started in September with audits of some employers' CEWS benefits. The information gathered from the pilot project will inform the larger audit that follows.

Employers can access government information on the CEWS benefit (e.g., relevant periods, eligibility, etc.) online here, and general information on benefit audits is available here.

And Speaking of Benefits …

Bill C-4 had its first reading on September 28, 2020 and introduced the *Canada Recovery Benefits Act* ("Act"). The Bill intends to respond, over the coming months, to the lingering economic hardship experienced by many Canadians as the pandemic winds down. The Act's purpose is to support Canada's overall economic recovery. If passed, the Act will see the implementation of a recovery benefit ($500 per week for each qualifying 2 week period where a person was unemployed due to Covid between September 27, 2020 and September 25, 2021), a recovery sickness benefit (for unpaid leave as a direct/indirect result of Covid), and a recovery caregiving benefit (for caring for a child or family member as a direct/indirect result of Covid). Each benefit would be available to eligible individuals. Bill C-4 can be viewed here.

Finally: The Supreme Court Aligns the Requirements for Retroactive Child Support Under the *Divorce Act*, RSC 1985, c 3 (2nd Supp): *Michel v Greydon*, 2020 SCC 24 ("Michel")

It is settled law that a parent cannot ask a court to vary an original child support order once the child no longer meets the definition of "a child of the marriage" under the federal *Divorce Act*. A child of the marriage is generally speaking: a child under the age of majority that has not withdrawn from a parent's charge or; a child that is over the age of majority but unable to withdraw from a parent's charge because of illness or disability or other cause.

Can a parent be prevented from obtaining retroactive support under the *Divorce Act* when the child no longer qualifies as "a child of the marriage"? The cases dealing with that issue are highly inconsistent across the country. The *Divorce Act* governs issues that arise after spouses are divorced. In comparison, provincial family law legislation generally permits an application for retroactive child support regardless of the status of the child at the time the application is made.

[1] The Canada Emergency Wage Subsidy, the Canada Emergency Response Benefit, and the Canada Emergency Student Benefit.

The Court, unanimous in the result and upholding the hearing judge's decision, held that a retroactive variation order is indeed available under the Divorce Act regardless of the child's status at the time the application is made. In Michel, the wife discovered that her ex-husband had deliberately underreported his income for over a decade to reduce the amount of child support paid. The payor's income commonly provides the basis for determining the child support amount. The court found that the child had experienced hardship growing up as a result of the reduced amount paid. The court decided that it would undermine the child support legislative scheme if a parent was able, without recourse, to misrepresent their income in order to pay a lower child support amount.

Takeaway: Aligning the interpretation of the federal and provincial legislation regarding retroactive support orders is a welcome clarification. However, it is reasonable to think that this decision may increase claims against a deceased payor's estate in order to recover retroactive support in cases where it is discovered the payor ex-spouse underreported her/his income.

NOVA SCOTIA

A Constitutional Right to Access Medical Assistance in Dying ("MAID"): *Y v Swinemar*, 2020 NSSC 225

The use of MAID is a deeply personal decision. Proponents and opponents often have strong opinions on the issue. But what if one partner/spouse's view of MAID conflicts with that of the other? This may be the first case to address the issue of whether a spouse can interfere with the other spouse's choice to access MAID.

The couple had been married for 48 years and were in their 80s in July of this year. Husband had dementia and chronic obstructive pulmonary disease, which severely impacted his quality of life on a daily basis. He informed his wife that he had decided to apply for MAID before submitting the necessary documents, which were later approved. The procedure was scheduled for July 20, 2020. His wife filed an application asking the court to declare that her husband did not meet MAID eligibility requirements. She also filed a motion requesting a permanent or temporary injunction to prevent her husband from accessing MAID. She disputed the medical assessments submitted, claiming that her husband did not suffer from a grievous and irremediable medical condition and that his death was not reasonably foreseeable. Those are two of the requirements necessary to qualify for MAID.

The wife did not succeed in her application or motion, which were dismissed by the court. Relevant medical evidence from the parties showed, on balance, that the husband did in fact meet the requirements for MAID. The court held that "… [T]his is not a proper case for an interlocutory injunction that would prevent [the husband] from continuing to exercise his constitutional right to the availability of MAID"; para 7.

The wife immediately filed an appeal and motion to stay that decision. The motion requesting a stay was subsequently dismissed by the court of appeal. The court of appeal held that it had no jurisdiction to review the stay decision because the order did not dispose of the appeal; *Y v Swinemar, 2020 NSCA 57.*

The appeal was dismissed in its entirety September 24th by a panel of the court. The court found that the legislature had deliberately rejected a role for judges in the pre-approval or review of MAID eligibility assessments. The wife, as a result, did not have standing to prevent or delay her husband's receipt of MAID. Moreover, the courts did not have institutional capacity to conduct reviews of decisions in a manner that would respect the [MAID approved] person's s 7 *Charter* rights; *Sorenson v Swinemar,* 2020 NSCA 62. It has been reported that the husband exercised his *Charter* right in October.

Takeaway: Saying goodbye is never easy but MAID is a personal decision to be respected and protected under the *Charter.*

QUÉBEC

Court of Appeal Strikes "Servitude Agreement" in Commercial Property's Registered Notarial Deed: *Société immobiliè Duguay inc. c 547264 Ontario Limited*, 2020 QCCA 571 ("Duguay")

Commercial property owners may now have an opportunity to strike out servitude agreements registered on real property that restrict the type of business that can be conducted on their premises.

In 2012 the original purchaser of two vacant lots sold the property to the appellant. The property was used to operate a business in a shopping centre owned by the respondent. The registered notarial deed of sale contained a servitude agreement. A servitude agreement is commonly used to register an easement on real property. An easement, in its simplest terms, permits others limited use of land owned by another for a specified purpose such as entry and exit, and to permit utility companies and other service providers to enter onto the land for maintenance and repair of underground cables. A servitude agreement attaches to the land and transfers with it when it is sold so as to bind a subsequent owner; *Civil Code of Québec*, CQLR c CCQ-1991, arts 1119 and 1182.

In this case, the servitude agreement contained a business non-competition clause (referred to as a "perpetual servitudes of restriction of use"; at para 7) that prevented an owner from operating a business that would compete with other businesses in the shopping centre. The shopping centre owner wanted to provide a diverse retail/service offering to customers.

The court was asked to determine whether the non-competition clause constituted a valid servitude agreement that could attach to and transfer with the land.

The court overturned the lower court's decision and held that the non-competition servitude agreement was a personal obligation between the parties. It was not an obligation within the scope of real property law that could attach to, and transfer with, the land because the restriction had no connection to the land. The court ordered the " … cancellation of the registration of the real and perpetual servitudes of restriction of use stipulated in …. the deed[s] …"; para 7. The respondent shopping centre was ordered to pay the costs on appeal and at first instance.

Takeaway: Shopping centre owners who want to impose non-competition terms may be wise to consider implementing stand-alone agreements with each individual retail/service provider in light of this decision. Legal advice is highly recommended.

ONTARIO

Ontario's **minimum wage increased** on October 1, 2020. A list of the hourly increase amount by sector is available on the provincial government's website here.

As of October 6, 2020, Ontario is permitting **probate applications** (and supporting documents) to be **submitted by email**. Applications filed prior to that date may be resubmitted by email. Instructions for email processes are available online here (point 6). A list of court houses by area and email addresses are located here.

Make Sure to Demand Occupation Rent if Family Won't Move Out: *Cormpilas v Ioannidis*, 2020 ONSC 4831

Gregory and Barbara were separated but continued to live together in the family home, which they owed as tenants in common. Gregory's will left his share of the family home to one son, John, and Barbara left hers to certain grandchildren, providing fertile ground for the conflict that followed. After Barbara died in 2012, John, his common law partner and children, moved into the home to care for Gregory. Barbara's grandchildren did not mind postponing the receipt of their inheritance until Gregory's death. They did not want to displace their grandfather from his home or charge him rent while he continued to live there. When Gregory died in 2017, John and his family refused to move out. John also refused to purchase the grandchildren's share of the home.

In early 2019 the grandchildren filed a court application and formally asked, for the first time and despite earlier discussions on the topic, for occupation rent from John. John consistently refused to pay rent. In January 2020 the proceeding settled. John and family agreed to move out of the home April 1 and transfer his interest to Barbara's grandchildren for an agreed upon sum. However, John did not move out. The grandchildren returned to court to enforce the settlement agreement and while doing so, sought an order to collect retroactive occupation rent.

The request for occupation rent, in this situation, fell within the equitable remedy of unjust enrichment. The remedy applies when there is a benefit received by one party (e.g., the rent-free occupation of the home), a corresponding deprivation experienced by the other party (e.g., the loss of the rental income), and no juristic reason preventing the deprived party from recovery (e.g., another fact affects the deprivation such as an oral agreement that rent would not be payable for a period of time).

The court found that John had been unjustly enriched to the detriment of the grandchildren. John, as one co-owner of the property, had unilaterally enjoyed the exclusive occupation of the home after Gregory's death. He had even gone so far as to bar his co-owners from the property.

Unfortunately, the grandchildren did not fully recover the full value of their deprivation. The court held that the grandchildren had not made a formal and "present" demand for the payment of rent until they filed the court application in 2019. The grandchildren were only entitled to rent from the date the demand was made to the date John and his family left the home.

Takeaway: Documented demands for occupation rent should be made promptly to protect recovery rights. This case may similarly apply to an executor dealing with someone who refuses to move out of the deceased's home. An executor's prompt, written demand for occupation rent would reduce the risk of personal liability for losses flowing from a late demand.

MANITOBA and SASKATCHEWAN

On March 19, 2020 **Manitoba's** Bill 34, *The Budget Implementation and Tax Statutes Amendment Act, 2020*, received its first reading. The Bill eliminates probate tax/fees in the province and was to take effect on July 1, 2020; however, it appears that the pandemic has halted the progression of the Bill through the legislative process. The amendment will take effect, assuming it is passed, when the Bill becomes law. In the meantime, probate tax/fees continue to apply in the province.

Saskatchewan amended its provincial sales tax act, expanding its application to the collection of provincial retail sales tax for e-commerce businesses. The legislation retroactively applies as of January 1, 2020. The obligation affects electronic distribution platforms (e.g., online retail sale of software), online accommodation platforms (e.g., Airbnb), and marketplace facilitators (e.g., Amazon, Etsy). This is an expansion of nonresident registration requirements. The obligation will apply regardless of whether business was carried on in the province, and there is no minimum threshold before the tax is to be collected and remitted. The underlying Bill 211 can be accessed on the provincial legislature's website here.

ALBERTA

Alberta joins a growing list of provinces that have eliminated the need for a minimum number of corporate directors of corporations to be resident Canadians (under the *Business Corporations Act*, RSA 2000, c B-9), or resident in Alberta (under the *Companies Act,* RSA 2000, c C-21). The amendments, made to stimulate the economy by making it easier for corporations to conduct business in Alberta, have received royal assent but are not yet in force.

The same amending act also dealt with the *Wills and Succession Act*, SA 2010, c W-12.2. The amendment permits a substitute decision maker, e.g., an attorney under a power of attorney for property, to re-appoint the same beneficiary on behalf of the incapable person when a plan is renewed, replaced or converted; s 71. By including authority in the act, it resolves the uncertainty arising from conflicting case law, and the differing internal policies of financial institutions and insurance companies. This amendment has already taken effect.

Thanks for the Litigation, Dad: Kirst Estate (Re), 2019 ABQB 767, aff'd 2020 ABCA 233

William Kirst died in 2010 and left his estate, by holograph will, to be equally divided among his surviving adult children. William's largest asset was his home where he had lived with his musician son, Whitehorn. William wrote that Whitehorn could remain in the home "for a while", as agreed upon by all siblings. Whitehorn asserted that the phrase permitted him to remain in the home indefinitely and that the estate would pay all associated costs including telephone, internet and cable television. His siblings disagreed. Litigation spanning almost a decade ensued, which deeply fractured the relationships among the siblings.

The lower court found that William's intention was clear. Whitehorn could stay in the home for as long as the siblings agreed and not indefinitely or as he alone decided. Since it was impossible for all of the siblings to agree, the court determined that Whitehorn would vacate the home in April 2020. The home would be sold and the proceeds distributed among the beneficiaries. Whitehorn unsuccessfully appealed.

Takeaway: A properly drafted will would have avoided the time, emotional and financial costs of litigation that William bequeathed upon his children, and supported positive relationships. Interestingly, there was no demand for occupation rent after 'a while' had passed and agreement couldn't be reached.

BRITISH COLUMBIA

Bound by a Contractual Promise to Designate a Named Residuary Beneficiary: *Munro v James*, 2020 BCSC 1348

This is a particularly interesting case, released in September, which includes some creative judicial analysis encompassing contract, estates and real property law.

In 2007 Jessie invited Fonda and Bruce to build a home on her Nanaimo farm and look after her horses and ponies until she died. The couple agreed and provided Jessie with a mortgage of $325,000 that she was to register on title. That amount reflected the cost of constructing the home on the property and protected the couple's investment. Fonda and Bruce would, in return, be the beneficiaries of her residuary estate in her will. About a year later, the oral agreement was put in writing. In January 2018 Jessie gave three months' termination notice to Fonda and Bruce. She informed them that she had changed her will. Saucy interloper, Ms Brown, had taken Jessie to get a new will drafted in which Ms Brown was the 'new' sole beneficiary of Jessie's estate. Ms Brown was instrumental in the relationship breakdown among the parties.

Fonda and Bruce commenced a proceeding to enforce the contract. They submitted that the written agreement was clear and did not provide for termination. Jessie counterclaimed for the expenses she incurred because of poor farm work by the couple. She submitted that this was a contract for personal services and could be terminated at any time with notice. Jessie was 95 years of age at the time of trial.

The court found that the agreement did not meet the requirements of a contract for personal service. There was no evidence that any party could terminate the agreement by notice. While the property maintenance might not have been quite up to standards, it was not so low as to be a breach of the agreement.

The court held that Jessie's notice of termination was a rejection of the terms of the agreement. It constituted an 'anticipatory breach', which provides the non-breaching party with a choice between treating the agreement as being at an end and suing for damages, or

keeping the agreement alive with the option to sue for specific performance or damages in lieu thereof. Fonda and Bruce chose the latter option.

Since Fonda and Bruce had substantially performed their obligations under the agreement, the court found that Jessie was reciprocally obligated to update her will to make them the beneficiaries of her residuary estate. Since the relationship was acrimonious and irreparable, the couple would not be permitted to continue to reside on the farm or make use of farm facilities. The court decided that the rent Jessie would receive from renting out Fonda and Bruce's home would set off her expenses for having to hire someone to maintain the farm. Jessie would be unable to encumber or transfer the property without the consent of the couple or court order.

Takeaway: A person is free to limit their testamentary freedom; be careful what you promise.

Real Property Beneficial Ownership Registration to Take Effect November 30, 2020

The government of BC has stated that some real property owners avoid provincial taxes by hiding their ownership through the use of numbered companies, offshore and domestic trusts (including bare trusts), partnerships and corporations (referred to as "reporting bodies" in the legislation). To prevent that avoidance, full disclosure of direct and indirect beneficial ownership will be required and stored in a register; *Land Owner Transparency Act,* SBC 2019, c 23. That would, for example, require information about certain shareholders, specifically those who own at least 10% of issued shares or 10% of voting shares, to be disclosed. The register will be publicly searchable on or after April 30, 2021 and is the first of its kind in Canada.

The act requires **everyone** to file a transparency declaration when registering a change of ownership. Reporting bodies will also have to file a "transparency report". The legislation will apply to "fee simple" ownership (i.e., full ownership of the land and/or buildings), leases that extend for more than 10 years, and life interests (e.g., a person has the right to reside in a property for the remainder of their life).

Reporting bodies who own real property must file their transparency report by November 30, 2021. The obligation to update registry information is ongoing, and penalties can be imposed for noncompliance. General information on the legislation is available here. Certain corporations and trusts (e.g., a testamentary trust, an executor administering an estate, or an alter ego trust) are excluded as reporting bodies in the legislation. A list of excluded reporting bodies is available here.