OBITER
LEGAL UPDATE FROM ACROSS CANADA.

General Interest

Executor Perils: The Miscalculation of *Muth Estate*, 2019 ABQB 922

Morely died in 2008 and the estate litigation that resulted continued for over a decade. He hadn't updated his will from the '70s after his separation and divorce from Freda. Freda was appointed as executor and, when Morely died, had to renounce her appointment and entitlement under the will as required under the *Divorce Act*. There was no alternate executor to take Freda's place. One of Morely's beneficiaries, Eunice, applied to the court to be the personal representative, i.e., executor, of his estate. She began administering the estate and retained an accountant to file the tax return and determine the amount to holdback for final taxes while the Canada Revenue Agency ("CRA") clearance certificate was pending. Eunice distributed the estate assets to the beneficiaries, other than the holdback amount determined by the accountant.

Unfortunately, the accountant she retained miscalculated the income tax amount by about half the amount due. The accountant also neglected to file the tax return. A second accountant was later retained and Eunice paid the additional tax plus the interest that had accrued from the late filing. She then asked the other beneficiaries to proportionately reimburse her for the taxes, penalties and interest paid. Eunice wanted, effectively, an indemnity from the beneficiaries. An executor and beneficiaries can agree to indemnification but this is generally required prior to the distribution of any estate assets. The beneficiaries declined to reimburse Eunice for the additional tax and associated charges.

Section 159 of the *Income Tax Act* ("ITA") imposes an obligation on executors. An executor must obtain a clearance certificate from the CRA before distributing any estate assets. In practice, there is often a partial distribution once the deceased's debts are paid, the terminal tax return is filed and an accountant has determined the holdback amount required to cover any additional taxes due after the CRA assessment.

The executor has personal liability for any shortfall in payment of the deceased's taxes. The liability arises from the fiduciary duty imposed on the executor, which is breached when they holdback an insufficient amount of assets for debts. There is no requirement that the beneficiaries repay or reimburse the executor where the executor has distributed estate assets prior to receiving the clearance certificate.

Eunice was left to pay the taxes, penalties and interest herself as a result of "… her failure to obtain a clearance certificate before distributing the estate." Executors may want to increase the holdback amount determined by the accountant … just in case.

Wine Anyone?

Have you ever wondered what happens to your wine when you die? Wine is considered to be personal property but how, or if, it will be taxed in your estate will depend on the amount and value of the wine. If you die and have a few bottles hanging around – no problem; your family can drink to your everlasting peace and there are no tax consequences. A collection with a value under $1,000? Also not a problem as this qualifies as “personal use property” and there are no tax consequences. However, grow your collection to include high end wine or spirits with a combined value above $1,000 and your estate may owe tax. In that case, the wine or spirits fall under the “listed personal property” treatment to which capital gains apply. The best way, of course, to avoid potential tax is to drink those expensive bottles of wine or spirits now while you’re around to enjoy it. If not, then remember to track the cost base of your expensive collection because it is assumed personal property will increase in value over time.

Anti-Lapse Legislation

Most provinces have anti-lapse legislation in place to prevent a gift by will from failing if the beneficiary predeceases the will-maker and there are no contingent beneficiaries to receive the gift. The legislation generally applies only to specified beneficiaries, i.e., family members such as a child, grandchild or sibling of the deceased. If the family member predeceases and there are no alternate instructions in the will, the legislation will step in to fill the gap rather than see the gift fail. The legislation commonly directs that the gift will go to the predeceased beneficiary’s spouse/partner and/or children. The will-maker’s daughter or son-in-law may not be a desired contingent beneficiary for the gift.

How can you stop this gift re-direction from happening? Do an estate review and update your will whenever a beneficiary dies. You can also: 1) oust the application of the provincial legislation by referring to it in the will and stating that it won’t apply to any gift, i.e., an expressed contrary intention; 2) simply require that a beneficiary be alive at the relevant time as a precondition to inheriting; or 3) name a contingent beneficiary or include a gift-over to the residue if the beneficiary has predeceased.

Federal

Ombudsman for Banking and Services and Investments ("OBSI")

How should an investment firm respond to a request from an attorney, under a valid power of attorney for property, which is not in the grantor's best interest? According to a recent decision from OBSI, the firm should refuse the request. The basis for the complaint was the firm's denial of a request from the attorney to liquidate her father's mutual funds and transfer the balance to a joint account. The joint account would be held by the attorney and her father. The firm requested the father's confirmation as a precondition for the transfer. The firm did not receive confirmation and the transfer didn't take place. The father died and the daughter demanded the pre-death transfer request be granted. The investment firm responded with a request for the grant of probate. Daughter declined and complained to OBSI about the firm's failure to complete the pre-death transfer.

OBSI found that the firm acted reasonably and fairly in denying the transfer. As it turned out, the attorney's subsequently stated purpose in requesting the transfer was to avoid probate tax – which courts have held is of no benefit to an incapable donor. The full summary is available online **here.**

2021: RDSP Update

Welcome amendments, in effect now (as of March 19, 2019) and as of January 1, 2021 include:

- A tax-deferred rollover from the registered plan of a deceased to the RDSP (i.e., registered disability savings plan) of an eligible beneficiary who has lost Disability Tax Certificate ("DTC") eligibility is permitted provided the beneficiary obtains the DTC before the end of the fifth taxation year. DTCs can be time limited (e.g., the person will need to renew the certificate after a specified period) or permanent. This amendment came into effect March 19, 2019.

- Budget 2019 announced that a RDSP will not have to be closed when the beneficiary becomes DTC ineligible. The ITA will be amended to permit indefinite registration where the beneficiary is no longer DTC eligible, subject to conditions. There will no longer be a need to file an election to extend the period that the RDSP will remain open, or to provide medical certification about the likelihood of future eligibility. Ineligible DTC beneficiaries will also be permitted to replace an existing RDSP with one issued by another financial institution. These changes take effect January 1, 2021.

- Where the beneficiary becomes DTC ineligible, the plan holder may permit the plan to remain open indefinitely or terminate the RDSP. No contributions to the plan can be made during ineligibility periods. If the holder terminates the plan, there will be no limit imposed on the amount that can be withdrawn upon termination. This amendment comes into effect January 1, 2021.

- If the beneficiary is ineligible on or after March 19, 2019 and before January 1, 2021, the plan does not have to be terminated despite any plan term to the contrary. If an election was made to enable the RDSP holder to maintain the RDSP for up to 5 years after the beneficiary becomes ineligible, the plan does not have to be terminated if the election becomes invalid between the dates noted above.

- As of November 1, 2019, RDSPs are protected in bankruptcy like other registered plans (e.g., RRSPs).

Upcoming Changes to the Divorce Act take effect July 1, 2020

Divorcing parents need to be aware of changes to the Divorce Act, which include:

- The only consideration regarding custody will be the best interests of the child and the amendments will include "various measures" to promote those best interests as well as the criteria to be canvassed in deciding custody.
- A change to the terms used in relation to the custody of a child, e.g., instead of a parent having "access", they will have "parenting time", which is intended to encourage parents to focus on the needs of the child. Easier said than done.
- Adding requirements to be complied with when a parent plans to change the residence of, or relocate, the child or themselves. The requirements include notice of the proposed change to the other parent, additional "best interests" of the child criteria, and the burden of proof a party will need to meet in certain relocation cases.

A detailed summary of the changes is available on the federal government's website **here.**

Privately Held Business Owners Need to Be Prudent About These Appointments

Small business owners need to be careful when accepting an appointment as executor or attorney under a power of attorney for property. If the deceased or the donor was also a small business owner, the executor or attorney may find the Income Tax Act has deemed the corporations related by virtue of the appointment. This appears to be a consistent position of the CRA and results in, among other things, a sharing of the small business deduction among the newly 'associated' corporations.

Diversity Disclosure Requirements for Publicly Traded Federal Corporations under the Canada Business Corporations Act

These requirements are said to be more onerous than the diversity requirements under Canada's securities law. In addition to disclosing the number of women in senior management and board roles, the representation numbers of Aboriginal, disabled, and visible minority persons will also be required. Corporations are required to identify the number and percentage of members of each group in the relevant roles, and their target level of representation for each group. The federal government intends to impose a "comply or explain" model to affected corporations. More information is available online **here.**

Borrowing Against Your Life Insurance Policy May Result in Taxable Income: *Neszt v The Queen*, 2019 DTC 1105

In this case, Neszt borrowed funds against his life insurance policies in an amount that exceeded the policies' adjusted cost base. The CRA decided to reassess Neszt and later, to include the loan proceeds as income to be taxed accordingly. Neszt appealed but was unsuccessful. All was not lost, however, as the rules permit an income deduction when the loan is repaid.

Alberta

Land Titles Office No Longer Registers Enduring Powers of Attorney for Property on Title

The Alberta Land Titles office ("ALT") no longer accepts an enduring (or any other) power of attorney for property ("EPOAP") for general registration. This means that the ALT will not retain a copy of an EPOAP nor will it register the document on title even when the donor becomes incapacitated. This could result in the potential opportunity for financial exploitation of, or poor decision making by, an incapacitated donor. Alberta residents should discuss this issue with their estates lawyer to investigate possible solutions such as expressly permitting the attorney to transfer registered ownership to themselves with appropriate safeguards in place.

The *Family Property Act* to Replace the *Matrimonial* Property Act

Alberta's new family property act which took effect January 1, 2020, provides property rights to adult interdependent partners ("AIP"), including common law partners. Generally speaking, the new act provides AIPs who meet requirements with the same property rights as married spouses upon the dissolution of the relationship. The time period governing the division of communal property will extend back to the commencement of the relationship rather than just the period of cohabitation. AIPs will also acquire the same rights to the family home as spouses.

AIPs may choose to enter into a domestic agreement to deal with property should the relationship later end. However, if the agreement does not state it survives a subsequent marriage, it will terminate upon marriage by operation of law.

This is also a change for married spouses who, for example, lived together for 2 years prior to marriage. The former act established the start date for the sharing of property at dissolution as being the date of marriage. The new act would extend the start date back to the first day of cohabitation. In other words, the "sharing" of communal assets will cover the full duration of the relationship.

The *Family Law Act* was also amended to permit continuing child support for adult children where the adult child is unable to withdraw from their parents' care (due to, e.g., a disability, full time attendance at school, or "other cause"). It's true what they say … parenting never ends.

A summary of the changes is available on the province's website **here.**

Saskatchewan

Saskatchewan's New Intestate Succession Legislation

As of October 1, 2019, Saskatchewan has new legislation governing intestate distribution. Since about 50% of Canadians do not have a will, this may be an impetus for Saskatchewan residents to have one drafted.

The new law provides that where the intestate was married and had common descendants (i.e., all descendants were the biological or adopted children of the intestate and his spouse/partner), the spouse/partner will receive the whole estate. Previously, the spouse was only entitled to the first $100,000, with the balance shared among the spouse/partner and biological children of the deceased.

If the intestate has a biological or adopted child with a former spouse/partner, then the surviving spouse/partner gets the first $200,000 or one half of the net estate value, whichever is greater. The spouse/partner will also get one half or one third of the remaining assets, depending on whether the intestate had one or more children from the prior relationship.

The new legislation clarifies that if the spouses/partners have been separated for the two years immediately prior to death, were involved in a family law [related] proceeding, have a separation agreement or court order in place, or the spouse/partner is living common law with someone new, the spouse/partner will receive nothing.

The presumption of advancement has been removed, i.e., the presumption that gifts while living to a spouse/partner or child are to be deducted from their inheritance.

Saskatchewan has maintained the right of a predeceased's child's surviving spouse/partner to receive the child's share of the estate if there was a biological grandchild (i.e., lineal descendant) from the relationship.

Quebec

There is no longer forgiveness:

On January 1, 2020 the province began imposing penalties on non-resident suppliers who are not compliant with the new QST regime that took effect January 1, 2019. The grace period has ended. In addition, Quebec lodging tax will apply to “digital accommodation platforms” (e.g., AirBnB) where the property meets requirements, and those service providers may have, in addition, an obligation to register for QST purposes.

“Rights Which Confer Use”, a Trust and the Division of Family Patrimony

The Supreme Court of Canada recently overturned a Quebec Court of Appeal decision that had excluded the family home, held in a trust controlled by the husband, from the division of the family patrimony; *Yared v Karam*, 2019 SCC 62 (“Yarad”). In Yarad the wife had separated from her husband but had died before the division of family patrimony had concluded.

The notion of “rights which confer use” (“Rights”) is found in art. 415 CCQ. The article was added to the Code to ensure that steps were not taken to avoid the family patrimony regime, e.g., one spouse owning the family home through a corporation. The Supremes have clarified that it can also apply to a trust that holds a family home where one spouse “… can control entitlement to the value of the assets as well as the right to control who may benefit from the use of the property …”.

Ontario

Access to Justice: Changes to Small Claims Court and Simplified Procedure

On January 1, 2020 the monetary limit for small claims court increased to $35,000 and the limit for simplified procedure claims was raised to $200,000. The stated goal is to make litigation of lesser monetary claims faster, simpler and less expensive.

The higher monetary limits may lead to an increase in litigation. For example, employers may find an increase in employment related litigation. Many wrongful dismissal cases would fall under the simplified procedure, or even small claims court, limit.

It is reasonable to expect that more claims will proceed to litigation now that associated costs and the time required have been reduced.

Refunds of Overpayments of Estate Tax -- Is it worth it?

Sometimes an executor overpays the amount of estate tax due. The process for requesting a refund of an overpayment changed January 1, 2020 and a refund request may lead to a reassessment.

If you are requesting a refund after receiving the grant of probate, then you will be required to make your request to the Ontario Ministry of Finance (“Ministry”). The Ministry has indicated that a refund request may trigger an audit of the estate information return originally submitted to determine whether or not the refund is warranted. Moral: Calculate carefully.

Toronto Bylaw Limiting Short Term Rentals Upheld

With a vacancy rate of around only 1.1% in Toronto, finding affordable rental accommodation is an onerous task. The Ontario Land Planning Appeal Tribunal recently upheld the city's regulation of the short term home rental industry (e.g., AirBnB), primarily on the basis of the shortage of rental accommodation in the city. A short term rental is considered to be 28 days or less.

Highlights of the proposed regulations include:

- Short term rentals will be permitted only in a person's primary residence, which includes a basement apartment
- There will be a limit on the total annual number of 'rental nights' of 180 nights per year, where the entire home/apartment is rented
- There is no limit on the short term rental of between one and three bedrooms in a home or apartment
- Registration, taxation (e.g., a 4% municipal accommodation tax), an annual fee, and reporting, etc., will be required of short term hosts
- Short term rental platforms will be required to be licensed and report, etc., as well as pay a fee for each night booked through their platform

There is no indication as to when the Toronto regulations will take effect although other municipalities have already started regulating the industry.

Some of the landlords that brought the original challenge to the Tribunal are pursuing a review of the Tribunal's decision with the Divisional Court. Stay tuned.