#isanyonereallywinning (other than the lawyers): Trends in Estate Litigation

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Overview

- From the Supreme Court of Canada
- For Font's Sake
- Meet the Family
- Administer This
- Where There are Two Wills, Is There Any Way?
- Who Does This Cost?

From the Supreme Court of Canada

Moore v Sweet, 2018 SCC 52

- Appeal from ONCA decision in 2017
- Court considering the issue of unjust enrichment and the imposition of a constructive trust
- Dealt specifically with the requirement for a lack of a "juristic reason" for a finding of unjust enrichment; the majority and dissent disagreed about what was required here

Moore v Sweet, 2018 SCC 52

- The Court was split on two key aspects of the case:
  1. Whether or not the Applicant's deprivation corresponded to the Respondent's enrichment; and
  2. Whether or not the "juristic reason" to be considered on the third branch of the test for unjust enrichment needed to justify not only the Respondent's enrichment, but the Respondent's enrichment *at the Applicant's expense*.
- Majority answered both of these questions positively.
- The Applicant had a contractual right to the proceeds of the life insurance policy pursuant to her oral agreement with the deceased, and the benefit gained by the Respondent is precisely what was lost by the Applicant, thereby establishing the correspondence.

Moore v Sweet, 2018 SCC 52

- Ontario's *Insurance Act* did not oust prior contractual or equitable rights held by third parties against the proceeds of a policy and did not justify the enrichment of the Respondent *at the expense of the Applicant*.
- **Held**: appeal allowed, judgment for the Applicant. Under the circumstances, the imposition of a constructive trust was warranted.
- **Dissent**: No requirement to show a juristic reason for the enrichment of the Respondent *at the expense of the Applicant,* and *Insurance Act* provided juristic reason for the Respondent's enrichment.
- *Insurance Act* also ousts the claims of creditors against life insurance proceeds, which would include the Applicant in this case.
- No correspondence to begin with; the Respondent's enrichment was not at the expense of the Applicant's deprivation because it was not *dependent* upon the Applicant's deprivation. The Applicant could have recovered if the deceased's estate had not been insolvent.

What Did We Learn?

- Put your deals in writing if you don't want to go to the SCC!
- Juristic reason can account for the effect on the claiming party

S.A. v Metro Vancouver Housing Corporation, 2019 SCC 4

- Applicant, S.A., was disabled woman with beneficial interest in an almost *Henson* trust
- Under trust, trustees had discretion to decide if and when trust funds would be disbursed to beneficiary
- Operative clause was "pay so much of the Trust's income and capital as the trustees decide is necessary or advisable for the care, maintenance, education, or benefit of S.A." (at para 12)
- S.A. applied for subsidized housing program offered by Respondent, MVHC, and refused to disclose value of trust, claiming that it was not an "asset" for the purposes of her application

S.A. v Metro Vancouver Housing Corporation, 2019 SCC 4

- MVHC tenants, like S.A., had no universal entitlement to rent subsidies, but majority of the Supreme Court found that MVHC had a contractual obligation to determine whether an adjustment should be made to her base rent
- Key to this decision was the fact that S.A. had no actual entitlement to the money in the trust; she was fully reliant on the discretion of the trustees
- Fact that S.A. was co-trustee was irrelevant; she was required to reach decisions unanimously with her co-trustee and had to exercise her discretion independently

S.A. v Metro Vancouver Housing Corporation, 2019 SCC 4

- Eligibility requirements associated with the Rental Assistance Program were intended to identify individuals for whom paying non-subsidized rent would be especially burdensome; S.A.'s contingent interest in trust was not relevant to this matter
- **Held**: majority allowed S.A.'s appeal and granted declaratory relief, declaring that S.A. had a right to have her application for rent subsidy considered by MVHC in accordance with the Assistance Application; interest in trust was not an "asset" for the purposes of this determination
- S.A.'s request for monetary relief returned to BCSC
- Rowe, J (**dissenting in part**, Brown, J concurring): Not appropriate circumstances for the granting of declaratory relief; MVHC had no contractual obligation to consider S.A.'s application for rent subsidy

What Did We Learn?

- Confirmation of effect of fully discretionary or Henson trusts on support eligibility for beneficiaries
- Would have been same result if the trust arose through father's will originally and not by a later court variation
- Would have been the same result if the trust had other potential beneficiaries who could have received income or capital on a discretionary basis in addition to S.A.

For Font's Sake

Re McGoey, 2019 ONSC 80

- At issue was whether or not trusts created by a bankrupt were "sham trusts" intended to protect his assets from creditors
- Several "red flags" were present indicating the creation of sham trusts, including an expert report indicating that the bankrupt lied about the dates that the trusts were created

Re McGoey, 2019 ONSC 80

- McGoey and wife owned a cottage in Muskoka and a farm in Caledon
- McGoey was the CEO of a failing company with a $5.6 million judgment against him
- He eventually went bankrupt and sought to protect cottage and farm by claiming they were held in trust for his children and wife's children

Re McGoey, 2019 ONSC 80

- McGoey produced 2 single-page homemade "trust deeds" dated 1995 for cottage and 2004 for farm
- Expert evidence by specialist in typology was lead by trustee in bankruptcy proved that the fonts used in the trust deeds were not available in 1995 or 2004
- Other "badges of fraud" were fact that McGoey and spouse treated properties as their own, mortgaged them, and mingled mortgage proceeds with their own funds
- **Held**: trusts were shams, and properties were assets subject to realization for the benefit of creditors

What Did We Learn?

- An intention to mislead others may mean there is no true intention to create a trust at all.

Also…

Lawen Estate v. N.S. (A.G.), 2018 NSSC 188

- Motion for summary judgment brought in application challenging the constitutionality of certain provisions of NS *Testators' Family Maintenance Act ("TFMA")*
- AGNS argued applicant executor and residual beneficiary did not have standing
- Court required to consider necessary elements of public interest standing

Lawen Estate, cont'd.

- Testator's estate was subject to *TFMA* claims by 3 of 4 adult children
- Executor and residual beneficiary of will challenged constitutionality of *TFMA* based on 2 *Charter* rights:
  - s. 2(a) (freedom of conscience only) and
  - s. 7 (life, liberty, and security of the person)

Lawen Estate, cont'd.

- s. 7 protects a sphere of personal autonomy involving "inherently private choices" if "they implicate basic choices going to the core of what it means to enjoy individual dignity and independence" (*R. v Malmo-Levine*, 2003 SCC 74)

Lawen Estate, cont'd.

- *Charter* remedies usually do not survive death of person whose rights are infringed
- In this case, only a deceased person has an actual, rather than hypothetical *Charter* infringement, and only once *TFMA* claim is made
- Testator who is still alive may yet change his or her will, and no certainty that *TFMA* claim would be brought

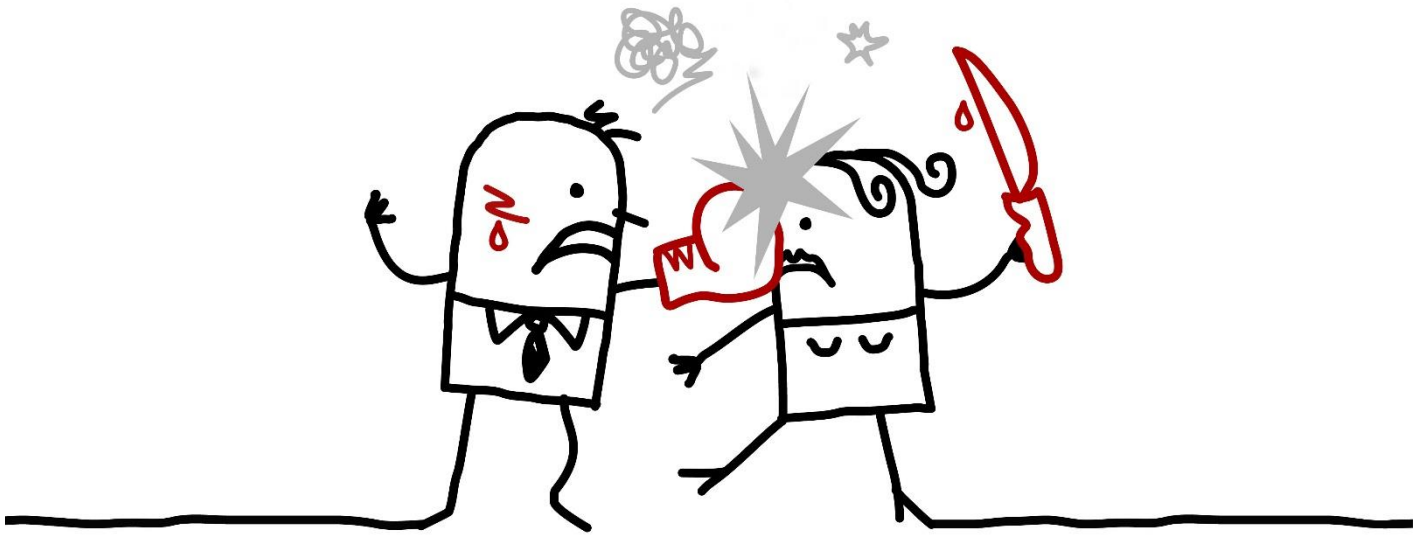
Lawen Estate, cont'd.

- Outcome:
  1. There was serious justiciable issue: determination of whether testamentary decisions are protected under s. 7 of *Charter* being core to individual dignity and independence
  2. Applicants were well-positioned to bring challenge since estate was subject to claims of adult children
  3. Challenge brought by an estate subject to *TFMA* claims was reasonable and effective way of bringing issue before the Court
- **Held**: motion for summary judgment was dismissed

What Did We Learn?

- Stay tuned for the decision on the merits!

Meet the Family



Zavet v Herzog, 2018 ONSC 3398

- Motion for interim support brought by deceased's former common law spouse, who was not provided for in his will
- The Applicant also sought payment of her company's taxes and of her legal bills, as well as the deceased's solicitors' records
- The deceased's estate conceded that the Applicant was entitled to support payments but contested the exorbitant amount that she claimed

Zavet v Herzog, 2018 ONSC 3398

- The deceased was very wealthy; he and the Applicant had been living a lavish lifestyle in an expensive condo previous to his death
- She claimed $122,000 per month in interim support, but her budget was overstated and unsubstantiated, and the Court granted her $30,000
- Lack of evidence also contributed to the failure of her claims for the estate to pay for outstanding taxes owed by a company that she owned, and for payment of her professional fees

Zavet v Herzog, 2018 ONSC 3398

- The Applicant had already been given access to the deceased's solicitors' records relating to his wills prepared in 2005; she wished to have access to the solicitors' records relating to a will he prepared in 1998, but the solicitor was dead and the file was missing
- The Court was also willing to restrict the Applicant's use of the condo in response to a motion brought by the estate. The estate had an interest in not having the condo opened to the public or pictures of the interior placed on social media, so the number of people allowed in the condo at one time was restricted to 15, and no one could post pictures of the interior to social media

What Did We Learn?

- Common law still not like marriage
- Don't crash the Ferrari!
- And don't host your parties in an Instagram world!

Charles v Junior and Estate, 2018 ONSC 7327

- Another motion for interim support brought under the *Succession Law Reform Act*
- Shortly before his death, the deceased executed a new will and entered into a number of transactions that had the net effect of greatly reducing the value of the assets in his estate
- The Applicant was the deceased's wife of 22 years; there was some evidence that they had separated prior to his death

Charles v Junior and Estate, 2018 ONSC 7327

- In the 15 days leading up to his death, the deceased significantly limited the value of the assets available to the Applicant after his death in a number of ways, including:
  - Collapsing RRSPs and drawing money from a line of credit secured against the matrimonial home, then placing the money in an account in his name;
  - Severing joint tenancies with the Applicant on one or more properties;
  - Transferring properties to his son; and
  - Drafting a new will that reduced the Applicant's entitlements
- The estate conceded that the Applicant was a dependent but contested her entitlement to interim support. The Applicant made more money than the deceased did during the final years of his life, and this was demonstrated on the evidence

Charles v Junior and Estate, 2018 ONSC 7327

- The Applicant was not in need of support and her motion was dismissed; she did not produce any evidence that her economic circumstances had worsened since her husband's death
- The Applicant's perceived entitlement to support had been conflated with her property-based claims – that is, those claims relating to the collapse of the RRSPs and the draw from the line of credit, which were not income-based
- The estate *was* willing to pay the majority of the interest on the line of credit

What Did We Learn?

- Document property arrangements between spouses if in doubt
- Don't overstate your needs – gets you off on the wrong foot with the court
- Keep good relations with the STEP kids!

Nicholas v Edgecombe Estate, 2018 NLSC 176

- Deceased had a number of joint accounts that he shared with his common law partner, Louise Nicholas
- Ms. Nicholas held legal title to the accounts following the death of her partner, but the question for the Court was whether or not she held beneficial title
- Court was required to determine whether or not the presumption of resulting trust was rebutted, which required a detailed inquiry into the facts of the relationship between the deceased, his children, and Ms. Nicholas

Nicholas v Edgecombe Estate, cont'd.

- The Court began by summarizing some principles relating to the disposition of funds in a joint account from *Pecore v Pecore*:
  - On the death of the first joint account owner, the survivor takes legal ownership of the joint account but beneficial ownership turns on the question of the intention of the account holder who made the deposits
  - The common law approach to ascertaining the intention of a deceased person holding an interest in a joint account involved concepts of resulting trust and advancement
  - The presumption of resulting trust is the general rule for gratuitous transfers; however depending on the nature of the relationship between the transferor and transferee, there may be a presumption of advancement instead
- An initial question to be determined by the Court was whether or not the presumption of advancement should apply to common law couples

Nicholas v Edgecombe Estate, 2018 NLSC 176

- Upon determining that the presumption of advancement should not apply to common law couples without a pronouncement to that effect from the Supreme Court of Canada, the Court went on to consider whether or not the presumption of resulting trust was rebutted in this case
- The Court painted a vivid picture of the family; the deceased and his common law spouse were deeply in love, and tragically, his relationship with his children had faltered
- The institutional paperwork on the accounts also indicated that the deceased intended the right of survivorship to apply
- **Held**: the presumption of resulting trust was rebutted; Ms. Nicholas held beneficial ownership of the accounts

What Did We Learn?

- Again, common law partners are different
- No presumption of advancement with common law spouses, but can still rebut the presumption of resulting trust on the facts of each case
- Document intentions!

Administer This

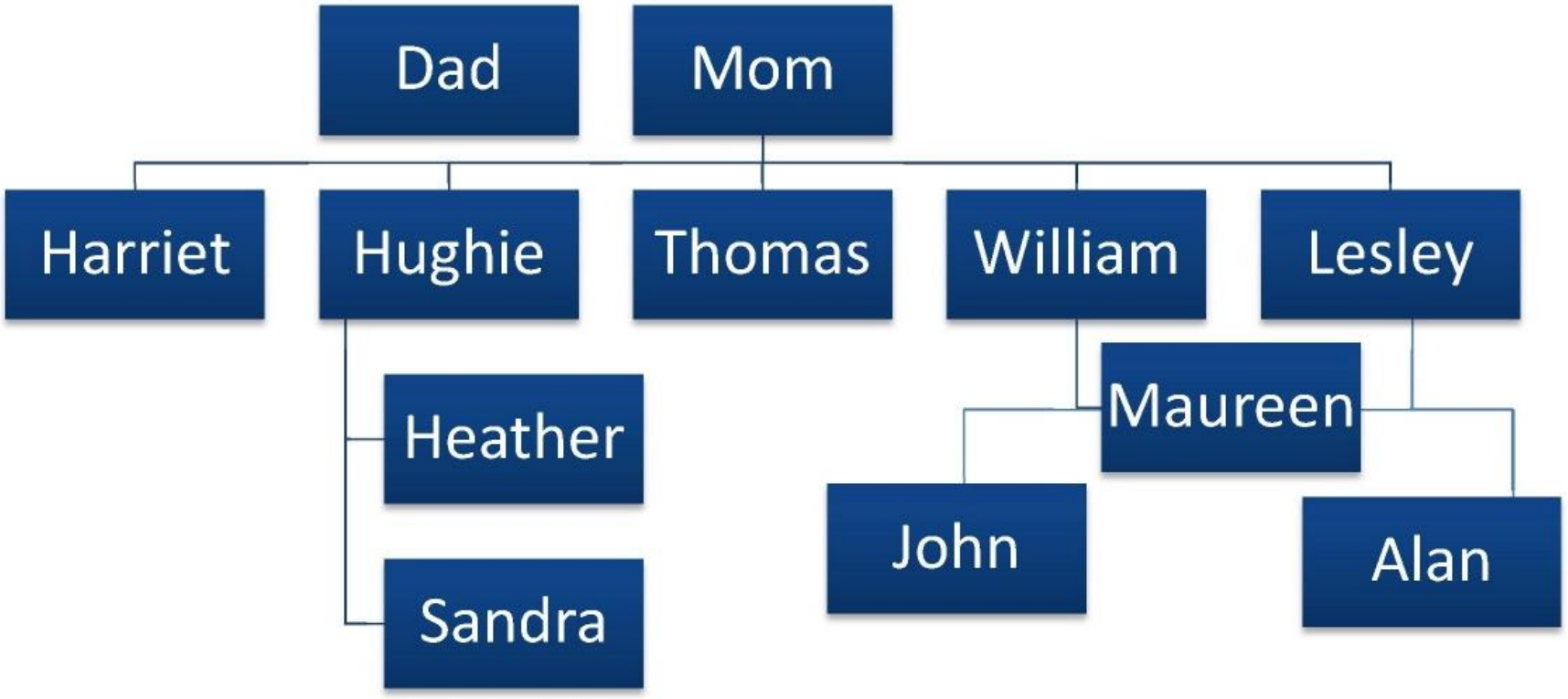
Steele v Smith, 2018 ONSC 4601

- Dealt with the granting of a *Benjamin* order
- one beneficiary (brother) named in will could not be located
- executor sought the *Benjamin* order, having gone to great lengths to find the missing brother
- Public Guardian and Trustee wanted the missing brother's share to be paid into Court while further efforts were taken to find him

Steele v Smith, 2018 ONSC 4601

- Testator divided 60% of residue equally among her three surviving brothers.
- Two had predeceased her and the other, William, was missing
- Executor conducted online searches, contacted family members, and hired a tracing company to locate William
- Executor sought a *Benjamin* order, which would have the effect of deeming William to have predeceased Harriet

Steele v. Smith Family Tree



Steele v Smith, 2018 ONSC 4601

- The Court considered the history of the *Benjamin* order, and noted following factors:
  - Is there specific evidence that there is or may be a missing beneficiary?
  - How much time elapsed since death of the testator?
  - What steps have been taken to answer the question?
  - Could pursuing search generate further information?
  - What is the amount at stake?
- **Held**: executor had exhausted all reasonable avenues of inquiry, and *Benjamin* order should issue

What Did We Learn?

- Good summary of what constitutes reasonable steps to take to locate a beneficiary
- There is a remedy other than paying the funds into Court or to Public Trustee when a beneficiary cannot be located

Re Evans Estate, 2018 NSSC 68

- Involved an insolvent estate for which the Public Trustee was appointed as personal representative
- 13 unsecured debts, including a CRA debt of around $8,000
- Registrar ordered the funeral expenses be paid in priority to the CRA debt per s. 83(3) of the Nova Scotia *Probate Act*

Re Evans Estate, 2018 NSSC 68

- Section 83(3) of the *Probate Act* provides that on the settlement of an insolvent estate, funeral expenses are given top priority
- Deceased's CRA debt would fall into the category of "all other debts", which has lowest priority
- *Probate Act* does not address debts owed to the Crown, and s. 159 of the *Income Tax Act* creates a priority in favor of CRA in respect of any monies held in an insolvent estate
- The circumstances engaged constitutional law issues of Crown prerogative and federal paramountcy

Re Evans Estate, 2018 NSSC 68

- **Crown prerogative**: *Probate Act* does not mention or purport to bind federal Crown
- **Federal paramountcy**: *Income Tax Act* must take priority over *Probate Act* to the extent of a conflict between the two priority schemes
- These principles provided two separate bases for ruling that the CRA debt must take priority
- **Held**: the CRA has first priority against whatever assets are in the insolvent estate

What Did We Learn?

- Payment of tax debt takes priority over funeral expenses in Nova Scotia
  - Might extend to other provinces with similar legislative structure
  - Exceptions - BC and PEI (due to their *Interpretation Acts*)
- Does it matter when the tax debt arose (pre-existing or on terminal filing)?
- Any different if the estate begins as insolvent, or becomes insolvent during the administration and some expenses are already paid?

Atlantic Jewish Foundation v. Leventhal Estate, 2018 NSSC 297

- Dispute over executor's commission
- Executor proposed to take 5% commission – almost $900,000
- 5% approved by Registrar of Probate
- Residual beneficiary under the deceased's will challenged 5% commission as excessive and appealed to judge of Supreme Court

Leventhal Estate, cont'd.

- Court considered factors under s. 62(3) of the *Probate Regulations* for setting commission:
  - **size** of the estate;
  - **time** involved;
  - **skill, ability, and success** of the executor; and
  - **complexity** of the estate
- No particular factor should take precedence, which would emphasize size of the estate in all cases.

Leventhal Estate, cont'd.

- Executor performed his job diligently and admirably, but estate was larger than it was complex
- Executor spent a total of 77 hours administering estate, had help of lawyers and accountants, and took a hands-on role in certain aspects
- **Held**: in the circumstances, a commission of $450,000 was appropriate (just over 2.5%)

What Did We Learn?

- Magnitude of the estate can result in 5% being a windfall even for the best of executors
- Get a compensation agreement!

Where There are Two Wills, Is There Any Way?

Re Milne Estate, 2018 ONSC 4174

- "Is a will that grants the executors the discretion to determine what property is subject to the will a valid will?"
- Testators were married couple who created identical primary and secondary wills with one distinction: the primary wills contained a clause settled upon the executors all property except certain named assets and "**any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for a transfer or realization thereof**"
- Was this too uncertain to be valid?

Re Milne Estate, 2018 ONSC 4174

- The Court determined that a will is a form of trust and therefore must satisfy the three certainties:
  1. Certainty of intention to create trust;
  2. Certainty of subject matter of trust;
  3. Certainty of object or purpose of trust.
- The Court was not convinced that the primary wills satisfied the requirement of certainty of subject matter
- Certainty of subject matter went to the essential validity of the will, and the Court was required to examine questions related to the matter

Re Milne Estate, 2018 ONSC 4174

- The Court determined that there was no objective criteria upon which the executors could decide what did and did not pass under the will, and therefore it could not be valid
- The impugned clause in the primary wills essentially vested in the executors the discretion to determine retroactively whether any particular assets were included under the will
- **Held**: the primary wills were invalid in that they failed to describe with certainty any property that was subject to them. Only the secondary wills could be submitted to probate

What Did We Learn?

- Shockers still can happen!
- But read on….

Re Panda Estate, 2018 ONSC 6734

- More or less a direct response to *Re Milne Estate*
- Testator used very similar language in his will as the husband and wife in *Re Milne Estate*
- The Estate Trustees applied for a Certificate of Appointment of Estate Trustee With a Will Limited to the Assets Referred to in the Will, were denied, and made a motion for directions
- The Court was unconvinced by *Re Milne Estate*

Re Panda Estate, 2018 ONSC 6734

- *Re Milne Estate* raised three major issues:
  1. Whether, on an unopposed application for a certificate of appointment as estate trustee, it is appropriate to inquire into substantive questions of the will's construction;
  2. Whether the validity of the will depends upon satisfying the "three certainties"; and
  3. Whether a testator can confer on their personal representatives the ability to decide which assets in respect of which they will seek probate
- In considering the first issue, the Court determined that the role of the court on such an application is to determine the formal validity of the will

Re Panda Estate, 2018 ONSC 6734

- The Court was unequivocal about one aspect of *Re Milne Estate*: **a will is not a trust.** It does not have to satisfy the three certainties
- While the Court declined to make any pronouncements about the scope and validity of the particular powers conferred on the Estate Trustees, they noted that it is not clear that the sorts of powers sought to be conferred on the Trustees in this case and in Re Milne Estate were any more uncertain than other, well-established discretionary choices conferred on Trustees
- **Held**: application for certificate of appointment granted

What Did We Learn?

- A will is not a trust!
- And sanity can prevail

Re Milne Estate, 2019 ONSC 579

- Appeal being heard by the Ontario Superior Court of Justice (Divisional Court)
- The Appellants raised the following issues:
  1. Did the Application Judge err in holding that a will is a trust?
  2. Did the Application Judge err in holding that the "Three Certainties" determine the validity of a will?
  3. Did the Application Judge exceed the Court's inquisitorial jurisdiction?
- The Court raised, and agreed with, the determination in *Re Panda Estate* that **a will is not a trust**

Re Milne Estate, 2019 ONSC 579

- There was no authority for the proposition that a will is a trust; in fact, there is authority stating that there is no distinguishing between or separating legal and beneficial ownership of property disposed of under a will, which would suggest that a will is not a trust
- Section 2(1) of the *Estates Administration Act* vests all real and personal property of a person who has died in the deceased's personal representative – if this provision *does* create a trust, it is a statutory trust and **not subject to the three certainties**

Re Milne Estate, 2019 ONSC 579

- Finally, the language being used in the will in this case *does* satisfy the three certainties, including certainty of subject matter:
  - "The property in the Primary Wills can be clearly identified because there is an objective basis to ascertain it; namely **whether a grant of authority by a court of competent jurisdiction is required for transfer or realization of the property**" (para 49, emphasis added)
- **Held**: appeal was allowed; orders of the Application Judge were set aside and Certificates of Appointment were granted

What Did We Learn?

- Multiple wills still work in Ontario (and elsewhere but not NS) as probate avoidance tools
- Basket clauses are OK

In re Scandalios, 2019 N.Y. Slip Op. 30113

- Executor (wife) petitioned Court for Apple, Inc. to turn over photographs stored in testator husband's iTunes and/or iCloud account
- No provision in will expressly authorizing executor to access testator's digital assets

In re Scandalios, 2019 N.Y. Slip Op. 30113

- "In this age, a decedent's property—which is defined as 'anything that may be the subject of ownership,' real or personal—must include assets kept in a digital form in cyberspace."
- Court noted legislation electronic communications, unlike other digital assets, requires proof of user's consent or a court order
- Apple, Inc. ordered to give executor ability to reset the testator's password on his Apple ID

What Did We Learn?

- Include a digital assets clause or encourage clients to use an online tool granting access to digital property
- Even then, court order may still be required if executor is seeking access to electronic communications (depending on jurisdiction)
- Caution should be exercised when storing important information in the Cloud

Quinn Estate v Rydland, 2019 BCCA 91

- Appeal of prior BCSC decision related to estate of the late hockey coach, Pat Quinn
- Planning had been done by a US lawyer who had created a "pour-over" will moving the residue of estate to an amendable, revocable *inter vivos* trust
- Very common planning in the US (many states have specific legislation that permits this) but not in Canada (Uniform Law Conference of Canada released draft legislation in 1968!)

Quinn Estate v Rydland, 2019 BCCA 91

- Testator and spouse were trustees
- A year after will executed, trust was amended to add in bonding/other requirements to ensure Trust would qualify in US as a "QDOT" – amendment did not comply with *Wills Act*
- No substantive amendment to trust

Quinn Estate v Rydland, 2019 BCCA 91

- Chambers judge determined that pour-over clause was invalid (following some prior Canadian decisions) and was not saved by:
  - Incorporation by reference
  - Doctrine of facts of independent significance
  - Substantial compliance provision in BC *WESA*

Quinn Estate v Rydland, 2019 BCCA 91

- Court followed decision of Kellogg and held that the clause invalid – because the gift was to a revocable, amendable, *IV* trust.
- The nature of the amendments was noted as not determinative (i.e. administrative in nature)
- Goes further than prior cases: seems to say that even if no amendments actually made, gift to a revocable, amendable trust would fail

Quinn Estate v Rydland, 2019 BCCA 91

- Court of Appeal – upheld Chambers decision and dismisses appeal
- Doctrine of facts of independent significance not valid to uphold pour-over wills in BC (*WESA* when updated did not include this principle)
- Did not meet test for incorporation by reference since the later trust amendment meant document on those terms not in existence when will signed

Quinn Estate v Rydland, 2019 BCCA 91

- *WESA* substantial compliance provision not applicable as could not be used to uphold the will when the problem was the later trust amendment

What Did We Learn?

- Avoid drafting a will clause that pours over into a trust that can be amended after the execution of the will!
- Or (1) ensure that if any amendments are made to trust, they are in compliance with formalities of will execution – re-sign will if amend trust
- Or (2) incorporate by reference the trust as it exists at date of will as a default if amended later and will not re-signed

Who Does This Cost?

Newlands Estate, 2018 ONSC 2952

- Two sibling executors sought declaration that a painting held by 3rd sibling, also an executor, was an asset of the estate

Newlands Estate, 2018 ONSC 2952

- Not only did two siblings lose, the Court was shocked at their bad faith and the arbitrariness of litigation
- Decision issued on costs payable to the third sibling, John

Newlands Estate, 2018 ONSC 2952

- Joan and Brian acted unreasonably and vexatiously throughout the course of the proceedings:
  - Turned down 5 settlement offers from John, including one to pay the entire appraised value of the painting;
  - Refused to attend court-ordered cross-examinations; and
  - Lied to get the hearing adjourned (Joan claimed to be sick when she was travelling in Europe)
- Application itself was not necessary for proper administration of the estate, but rather was brought out of animosity
- Joan and Brian made a late counter-offer, which would have entitled John to the painting, but did not offer to pay his costs

Newlands Estate, 2018 ONSC 2952

- **Held**: John entitled to costs on a substantial indemnity basis. Given Joan and Brian's reprehensible conduct, it would have brought administration of justice into disrepute to order otherwise
- The estate would not be paying the costs; Joan and Brian personally responsible for paying John's costs and disbursements, and for reimbursing the estate for any money it paid to John for disbursements
- John's counsel's fees and time spent on the file were reasonable. He was entitled to costs of $203,589.

Sabetti v Jimenez, 2018 ONSC 4727

- Costs decision requiring an unsuccessful applicant to pay substantial indemnity costs to deceased's wife estate
- Again, application was found to have been frivolous; applicant made several meritless arguments
- Costs award was increased due to applicant's groundless allegations of misconduct and wrongdoing on the part of the executors

Sabetti v Jimenez, 2018 ONSC 4727

- Court followed Ontario Court of Appeal decision in *McDougald Estate v Gooderham* and stated that now, in estate litigation, as in other forms of civil litigation, "loser pays" principle applies
- Court found that the Applicant had acted like he was "paying with the house's money" throughout the proceedings
- Fact that he pursued groundless claim so aggressively and inefficiently, combined with the baseless claims of misconduct he made towards executors, exacerbated costs award against him

Zavet v Hertzog, 2018 ONSC 3398

- Both parties claimed full indemnity costs from the other, with estate seeking partial indemnity costs
- Court found that the estate had been successful in respect of the motion, and was entitled to partial indemnity costs
- Costs for the motion were fixed at $40,000
- No costs were awarded in respect of the estate's motion regarding occupancy of the condo

Zavet v Hertzog, 2018 ONSC 3398

- The executor and beneficiaries were not entitled to costs in their personal capacities, as they were not parties
- Estate would be receiving the costs award

Nicholas v Edgecombe Estate, 2018 NLSC 176

- parties to this action were common law spouse, children of the first marriage, and the executor, who initiated the action at the direction of the Court
- children were correct about the presumption of resulting trust, but were unsuccessful because presumption was rebutted
- common law spouse had made an offer to settle, but it was nominal, representing less than 2% of value of joint accounts at issue

Nicholas v Edgecombe Estate, cont'd.

- Common law spouse should not automatically be entitled to additional costs because she made a nominal settlement offer
- Court held that children's action was not frivolous, but they should have known they were going to fail after documentary disclosure and discovery

Nicholas v Edgecombe Estate, cont'd.

- **Held**: no reason to depart from the general rule that estate should pay the executor's costs on a solicitor-client basis
- effectively split the costs among other parties, who were all residual beneficiaries
- children ordered to pay common law spouse's costs on a party and party basis following her settlement offer

Atlantic Jewish Foundation v Leventhal Estate, 2019 NSSC 30

- If estate has to pay executor's costs, then the AJF, successful party and residual beneficiary under the will, would essentially be paying unsuccessful party's costs
- But if executor has to pay costs to estate, this would run counter to the principle that reasonable professional fees incurred by executor are payable out of the estate

Leventhal Estate, cont'd.

- Per *McDougald Estate v Gooderham,* days are gone when all parties to estate litigation would have their costs paid from estate
- modern approach is to carefully scrutinize the litigation and, unless court finds that one or more public policy considerations apply, to follow costs rules that apply in civil litigation.
- Executors, though, should not have to worry about being personally responsible for paying legal fees associated with discharging their duties

Leventhal Estate, cont'd.

- Executor might be disentitled to costs where they have advanced a claim for commission that is ill-advised, improvident and unreasonable, but that was not the case here—Mr. Stern's performance as executor was admirable
- **Held**: estate should pay executor's costs on party and party basis, even if this amounts to an indirect charge on successful litigant

What Did We Learn?

- Trend toward loser pays rule usual in civil litigation continues in estate litigation

Also…

That's a Wrap

What are the takeaways?

- No sign of estate litigation slowing down—in fact, it's increasing
- Novel arguments being advanced, even in areas of the law once thought settled
- Family friction still motivates much of the action
- Where there's money involved, parties still finding their way to court
- This notwithstanding movement toward usual costs rules in civil litigation

Plus ça change, plus c'est la même chose.

Questions?

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