

Aging population affecting estates law

Capacity issues and litigation top trends

BY BEV CLINE
For Law Times

Estate lawyers are seeing a number of emerging trends in their practices, with capacity issues and litigation at the top of the list, the Ontario Bar association's trusts and estates section chair tells *Law Times*.

"With the aging population and the fact that people are living longer, the opportunity for family dissension over caring for elderly parents, financially and as far as their care is concerned, is growing," says Jordan Atin, senior associate counsel at Hull & Hull LLP in Toronto.

Public awareness of issues surrounding estate matters is having an effect, too, says Atin. "As the public gets more informed about the obligations and liability of attorneys and guardians, I think we will see more attorneys seeking legal advice early in their mandate — the way, historically, executors have done."

As well, estates law is spilling over into other fields such as personal injury cases, says Atin, noting another trend. "In those cases, parties are becoming more aware of the necessity of seeking guardianship orders as well as considering the costs of guardianship in determining damage awards," he explains.

"Another trend that we have seen is the use of multiple wills,

not only for private company shares, but now for other classes of assets for which a certificate of appointment is not necessary," says Atin.

"For example, joint accounts or other assets made joint with one child can be an effective manner of avoiding probate fees if the proper documentation is in place," he notes. "Firstly, in light of the Supreme Court's recent decision in *Pecore v. Pecore*, proper evidence of intention as to whether the asset is held on a resulting trust for the estate or intended as a gift is crucial. Secondly, a separate will may be necessary to avoid having to declare the value the asset held on a resulting trust when it comes time to apply for a certificate of appointment."

Estate lawyer Irit Gertzbein, an associate in the trusts and estates section at Torkin Manes Cohen Arbus LLP in Toronto, also sees a number of trends emerging.

"As the baby boomers continue to age — and remarry — many clients find themselves dealing with estate decisions in the context of a reconstituted family," says Gertzbein.

"There are serious legal issues that arise with reconstituted families, inherent conflicts of interest, primarily between the client's adult children and his or her new spouse who may also have adult children as well." She also points



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out that a hot topic these days revolves around joint retainers and issues of possible conflicts of interest in advising spouses of these families.

The increasing number of reconstituted families reveals a growing complexity in estate planning advice lawyers have to give to their clients, says Gertzbein. Clients need assistance in making what are often very hard decisions and choices, she says.

"Sometimes, these are significant estates, which include assets which the client has inherited from their family of origin; for ex-

ample, the family cottage. These clients struggle with decisions they must make regarding succession of both personal and business assets," she says. "The decision to alienate assets with a long family history from the line of ancestry can be very difficult for these clients," she says.

So too are decisions relating to powers of attorney, says Gertzbein. "When granting powers of attorney for property or personal care, should they choose the new spouse or their adult children?"

"I think as trust and estate lawyers we can best serve the interests of our clients by advising them about the legal issues that are likely to arise if there is insufficient communication upfront to all the parties involved on both sides of the client's relationships," she says.

"There needs to be explanation regarding the client's wishes, intentions, and the reasons behind the decisions. For example, in the case of succession of business assets where a client decides to undergo a reorganization, all parties involved should be consulted and told why this is being done and the reasons for it," she concludes.

Fogler Rubinoff LLP's Tammy Ankiewicz suggests that a real trend in estate law — pertinent to 30 to 50 per cent of her clients — are cross-jurisdictional issues.

"Most typically these are

cross-border, U.S.-Canada issues, whether it involves assets such as a recreational property in Florida or Arizona, a client, or a client's child marrying someone from the United States," says Ankiewicz, a wills, trusts, and estate administration lawyer.

"In earlier generations we weren't as mobile a society," she says. "Also fuelling the trend is the fact that the baby boomer generation has a lot more capital, and therefore, the resources to buy assets out of Canada."

What this means for lawyers is, "The need to identify and familiarize ourselves with U.S. law, including, for example, estate and tax requirements — and assessing when to bring in U.S. counsel," she says. And, she notes, this trend to cross-border estate planning and administration itself crosses into other legal sectors as well, for example, matrimonial or immigration law.

Ankiewicz, who has been practising estate and trust law for more than 20 years, also sees a definite trend toward more litigation. "I think there's so much more money at stake and as a result, more estate litigation," she says.

Also, she points out, "People are living longer; as a result, when a client creates a trust, for example, its administration could be 20 years or longer, a long time period for people to be unhappy with it."

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