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# The Continuing Power Of Attorney For Property:<sup>1</sup> To Exercise Or Not To Exercise

*Irit Gertzbein\**

Every estates practitioner should be prepared for the day a client to whom a CPOAP under the *Substitute Decisions Act*, 1992 (the "SDA")<sup>2</sup> had been granted ("Attorney"), likely by a parent, calls to ask:

What can I do, what should I do, with the CPOAP granted to me, if I believe my mother/father is "losing it" but he or she disagrees with me and wants to maintain independence? May I override her/his decisions? How can I avoid liability if I act against the wishes of my mother/father in order to protect her/him from exploitation and imprudent decisions?<sup>3</sup>

This article identifies some of the legal issues which may arise in cases similar to the hypothetical scenario described above, and outlines for the estates practitioner the recommendations he or she may make to the Attorney in such circumstances, based on the applicable law.

## (IN)CAPACITY

It is settled law that the presence of mental illness or cognitive impairment is not, in and of itself, sufficient grounds to override decisions or actions of the grantor.<sup>4</sup> However, if it can be demonstrated that the illness or impairment interferes with the grantor's ability to manage his or her property (distinct from the ability to grant or revoke a power of attorney for property), or if there is evidence by way of an assessor's report that the grantor is not able to understand information that is relevant to making a decision or to appreciate the reasonably foreseeable consequences of a decision or lack of a decision in the management of his or her property ("Incapacity"),<sup>5</sup> the Attorney has a duty to make decisions and take actions in the stead of the grantor, in the best interest of the grantor.

## TO EXERCISE OR NOT TO EXERCISE

Essentially, in any circumstance, the Attorney must make best efforts to strike the right balance between the two (often competing) principles

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which are the cornerstones of the SDA, namely, promotion of the grantor's autonomy and protection of the grantor's vulnerabilities.

### **Incapable Grantor:**

Where there has been a finding of Incapacity, the CPOAP has been engaged<sup>6</sup> and the Attorney has full authority as substitute decision maker. In these circumstances, the Attorney should become familiar with all of the grantor's assets and financial matters and provide a copy of the CPOAP (and optionally, the assessment report or medical letter indicating that the grantor no longer has capacity to manage property) to the appropriate entities<sup>7</sup> as part of the notice to these entities that from that date, on a go forward basis, the Attorney shall be acting on behalf of the now incapable grantor. The Attorney should ensure compliance with statutory and common law duties and obligations of a fiduciary (discussed below). An Attorney who does not receive compensation for managing the grantor's property is expected to exercise a standard of care, diligence and skill that a person of ordinary prudence would exercise in managing his or her own property. In comparison an Attorney who receives compensation is expected to exercise a standard of care that a person in the business of managing others' property is required to exercise.<sup>8</sup> Where the grantor is incapable and the CPOAP which names two or more persons as Attorneys has been exercised, all named Attorneys are under a duty to turn their minds to decisions made and actions taken. Where the CPOA provides for decisions by a majority in the event of disagreement, all Attorneys must turn their minds to every decision and where there is a disagreement, the decision of a (simple, or specified) majority of the Attorneys shall govern.<sup>9</sup> Where there is a majority clause, but no requirement for disagreement, third parties may transact with, act on the instructions of, a (simple or specified) majority of the Attorneys. If these decisions are later held to have breached the fiduciary duty to the grantor, all Attorneys may be liable.

### **Capable Grantor:**

Where Incapacity has not been established but the Attorney believes the grantor's ability to manage his or her property is significantly impaired, the Attorney should initiate a discussion or discussions with the grantor, perhaps with other close family members, regarding the grantor's deteriorating capacity. The purpose of the discussion is to canvass the grantor's own perception, recognition, if any, of the extent of his or her cognitive deterioration and to ascertain whether he or she wishes to maintain autonomy or will consent to the Attorney taking over fully, as substitute decision maker. Where the grantor wishes to maintain autonomy notwithstanding the opinion of the Attorney that the grantor no longer possesses capacity (increased vulnerability to influence from others may be an indication of impaired capacity), the Attorney should raise with the grantor, again, perhaps at a joint meeting with others who play a significant role in the grantor's life,<sup>10</sup> the matter of having a formal capacity assessment performed.<sup>11</sup> It is recommended that a capacity assessment occur prior to the exercise of the CPOAP. If the grantor is found to be capable, it is recommended that the Attorney refrain from exercising the CPOAP in order to avoid potential personal liability.

## **THE REQUISITE CAPACITY TO MANAGE PROPERTY**

An individual is presumed to possess the capacity to manage his or her own property.<sup>12</sup> The SDA's "ability to understand and appreciate" (as set out in section 6 of the SDA, cited earlier) test sets a high bar for evidence sufficient to rebut this presumption. For purposes of the SDA, the ability to understand and appreciate is not a global one but rather involves cognitive functioning specific to certain decisions,

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or to a class of decisions, based on an understanding of the relevant information that must be considered in making a decision and an appreciation of the consequences of such a decision or of not making that decision. Intermittent memory failure, delusions, poor judgment, or any other type of cognitive impairment that does not interfere with the ability to understand the relevant information and to appreciate the consequences of the decision (or lack of decision), does not, in and of itself, constitute Incapacity. Based on case law, unless there is compelling evidence of inability to understand and appreciate, there can be no establishment of Incapacity.

### **The Nature of the Capacity to Manage Property:**

The nature and degree of mental incompetence necessary for a determination of Incapacity leading to deprivation of the assessed person's right to live as he or she chooses is articulated in case law. According to *Re Koch*, cognitive impairment, mental illness, or the need for assistance from others in carrying out decisions, does not constitute Incapacity.

As is noted in *Re Koch*, there is a distinction between failing to act on the basis of an understanding and appreciation and being unable to understand and appreciate. A person may fully understand and appreciate but choose (perhaps foolishly) to accept the attendant risks. Only the inability to understand or the inability to appreciate, not the failure to do so, can lead to a finding of Incapacity. Thus where a person is able to recognize situations of potential exploitation yet decides to respond in a manner other than to protect his or her property from exploitation, such a decision must be respected and the person cannot, by virtue of an unpopular or foolish decision, be said to be incapable to manage his or her property.<sup>13</sup>

### **The Nature of the Assessment:**

Only a capacity assessment performed by a registered assessor as prescribed by the SDA and Ontario Regulation 460/05 where a finding of incapacity to manage property is reported, is evidence of Incapacity sufficient to meet section 6, SDA, requirements. As the capacity to manage property and the capacity to grant or revoke a power of attorney for property are distinct types of capacity,<sup>14</sup> the assessment must address the capacity in issue (in many cases both types of capacity are in issue). Importantly, while it is not necessary to obtain the consent of the grantor, non-refusal of the grantor is necessary.<sup>15</sup> In any event, the grantor must be informed by the assessor of the significance of a capacity assessment and the effect of a finding of Incapacity ("Warnings").<sup>16</sup>

### **THE NATURE OF THE EXERCISE**

The course of action to be taken by an Attorney where there has been a finding of Incapacity is straight forward. In these circumstances, the triggering event has occurred and the CPOAP is in play. The grantor no longer has legal capacity to enter into contracts or manage his or her affairs. The Attorney has full authority and responsibility to exercise the CPOAP and to act as substitute decision maker. However, an Attorney who overrides a capable grantor's decisions albeit with good intentions to protect a vulnerable grantor, could face personal liability.

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## **Fiduciary Relationship between Incapable Grantor and Attorney**

Where there has been a finding of Incapacity, the fiduciary relationship between the Attorney and the grantor is in full force and effect, and the Attorney must conduct himself or herself, as substitute decision maker, in accordance with all the statutory and common law obligations of a fiduciary and substitute decision maker. In these circumstances, some of the obligations of the Attorney are:

- to act with honesty, integrity, and in good faith;
- to keep proper records;<sup>17</sup>
- to account and explain to the grantor;
- refrain from mingling assets;
- to act in a manner that will benefit the grantor and the grantor's dependants;
- to act according to the known (or ought to have been known by the Attorney) wishes of the grantor;
- to encourage the grantor's participation in the decision making;
- to act according to the known (or ought to have been known by the Attorney) testamentary intentions of the grantor;<sup>18</sup>
- to involve close family members and friends in the grantor's life;
- to exercise the appropriate degree of standard of care;<sup>19</sup> and
- to refrain from acting in a self interested manner.<sup>20</sup>

### **Relationship between Capable Grantor and Attorney akin to Agency:**

Where Incapacity has not been established but there has been an observable deterioration in the grantor's cognitive functioning, the Attorney should consult with the grantor and those close to the grantor, and counsel, to determine what course of action should be taken by the Attorney which will both attend to the needs of the grantor yet also ensure that the Attorney's protection from personal liability is not jeopardized. If it is agreed that a capacity assessment should be performed, the Attorney should keep in mind the non-refusal and Warnings requirements prescribed in section 78(2), SDA. The Attorney should also inform the grantor that he or she may choose to have a lawyer, friend or relative present during the assessment.

In looking to case law to illuminate what course of action should be taken by the Attorney where a grantor's Incapacity has not been established, one is reminded that the two competing principles cited earlier (promotion of autonomy and protection of vulnerabilities) are, in certain circumstances, irreconcilable. When faced with such difficult circumstances, it is recommended that the Attorney consult with counsel. Contradictory decisions indicate that it is possible that an Attorney who exercises the CPOAP prior to evidenced cessation of capacity to manage property, may incur personal liability for his or her actions as well as for those taken by the grantor.<sup>21</sup>

## **CONCLUSION**

Observable deterioration in cognitive functioning of a grantor who wishes to maintain autonomy is insufficient grounds for the Attorney to override the grantor's decisions without jeopardizing the Attorney's protection from personal liability. To avoid potential claims for damages by the grantor, or by others, it is recommended that the Attorney not act while a grantor is legally capable to manage his or her property. However, once the grantor is found to be incapable by way of a formal capacity

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assessment, the Attorney, so long as he or she adheres to the duties and obligations of a fiduciary at common law and those of a substitute decision maker pursuant to the SDA, may act with full authority without jeopardizing his or her protection from liability.

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<sup>1</sup> Hereinafter referred to as “CPOAP”

<sup>2</sup> S.O. 1992, c. 30 (“SDA”). A CPOAP is one which authorizes the appointed Attorney to exercise the CPOAP during the grantor’s incapacity to manage property (SDA s.7(1)). The CPOAP may explicitly state that the Attorney is to have authority only when the grantor becomes incapable (postponed effectiveness, SDA s. 7(7)). Most CPOAPs, however, do not provide such a contingency, thus may be exercised at any time after the date of execution. Where the CPOAP provides authority to the Attorney contingent upon the grantor losing capacity to manage property without outlining the method for determining whether that situation has arisen, the CPOAP comes into effect when notice is given to the Attorney in the prescribed form of a finding of incapacity by an assessor, or, when notice is given to the Attorney that a certificate of incapacity has been issued regarding the grantor, under the *Mental Health Act* (SDA s. 9(3)).

<sup>3</sup> This memo addresses issues regarding the management of property, however, the test for (in)capacity for personal care (SDA s. 45) is similar; it is also a test of the ability to understand relevant information and appreciate consequences of decision or lack of decision.

<sup>4</sup> *Starson v. Swayze*, [2004] 1 S.C.R. 722; *Re Koch* (1997), 33 O.R. (3d) 485 (Gen. Div.); *Clark v. Clark* (1982), 40 O.R. (2d) 383 (Co. Ct.); *Re Young*, [1942] O.R. 301 (C.A.). Case law emphasizes that a person has the right to make foolish, risky choices.

<sup>5</sup> SDA s. 6

<sup>6</sup> SDA s. 7

<sup>7</sup> Banks, accountants, lawyers, CRA, corporations in which the grantor has shareholdings, doctors, credit card providers, etc.

<sup>8</sup> SDA ss. 32(7), 32(8), and 38(1)

<sup>9</sup> *Banton v. Banton* (1998), 164 D.L.R. (4th) 176 at para 183-185. The Supreme Court of Canada indicated that based on the SDA (particularly sections 32 and 38), an Attorney is a “...fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person’s benefit.” The status of such an Attorney is much closer to that of a trustee than an agent, where the grantor is incapable. Also see *Harris v. Rudolph*, 2004 CarswellOnt 2634 (S.C.J.) and *Lander v. Lyall*, 2006 CarswellMan 252 (Q.B.). In Newfoundland, the high standard of care expected of an Attorney as a fiduciary has been codified: section 6(2) of the *Enduring Powers of Attorney Act*, R.S.N.L. 1990, c. E-11 states that “an attorney shall be considered to be a trustee of the property of the donor.” (See *Burling, Re* (1993), 112 Nfld. & P.E.I.R. 91 (Nfld. T.D.))

<sup>10</sup> The SDA encourages such consultation (see sections 32(5), 38(1)).

<sup>11</sup> In accordance with sections 1(1) and 78(2), SDA, and O. Reg. 460/05, and the “Guidelines for Conducting Assessments of Capacity”, Capacity Assessment Office, Ministry of the Attorney General (Ontario), May 2005.

<sup>12</sup> SDA s.2(1)

<sup>13</sup> *McMullen v. McMullen*, [2006] B.C.J. No. 2900 (B.C.S.C.)

<sup>14</sup> SDA s. 9(1). Onset of incapacity to manage property may have occurred prior to the execution of a valid CPOAP. The 7-criteria test to determine (in)capacity to grant or revoke a power of attorney is provided in section 8.

<sup>15</sup> Generally, a candid discussion with the grantor to explain the reason for the assessment is sufficient to enlist his or her cooperation. In more extreme circumstances, where the capacity of the grantor is in issue in a proceeding under the SDA and the grantor refuses an assessment, it is possible to obtain a court order to have an assessment performed (SDA s. 79).

<sup>16</sup> SDA s. 78(2). According to *Re Koch*, absent clear and convincing evidence that the Warnings were given to the person whose capacity was assessed, a finding of Incapacity will be rendered a nullity.

<sup>17</sup> Pursuant to SDA ss. 32(6) and 38(1), the Attorney must keep accounts of all transactions in accordance with the Regulations. Section 2(1) of Ont. Reg. 100/96 sets out the specific components of the accounts to be maintained by an Attorney. The form of accounts is very similar to estate accounts and, for purposes of passing of accounts, should be consistent with the form set out in Rule 74.17 and the procedure to be followed according to Rule 74.18 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

<sup>18</sup> The Attorney should familiarize himself or herself with the contents of the grantor’s Will.

<sup>19</sup> An Attorney who receives compensation will be judged by other family members and subsequent to the grantor’s death the ultimate beneficiaries, according to a higher standard of care in the management of the grantor’s property. It is recommended that in certain circumstances the Attorney should retain professionals to assist in financial management of the property.

<sup>20</sup> Requirement to avoid conflict of interest, is found at common law.

<sup>21</sup> In *Fareed v. Wood*, [2005] O.J. 2610 (S.C.J.), the judge held that where a grantor is capable, an Attorney who assumes any decision-making functions triggers full responsibility for all actions with respect to the grantor’s property, whether the actions were taken by the Attorney or the grantor. In *Fareed*, the court imposed liability on the Attorney for transactions which were undertaken by the grantor without the knowledge of the Attorney. The court was critical of the Attorney for failing to monitor gifts made by the grantor to third parties under suspicious circumstances. In contrast, *McMullen v. McMullen*, *supra* at note 14, while not binding in Ontario, instructs that an Attorney may be held liable for losses, including legal fees or other costs associated with actions taken to protect the capable grantor’s property, if those actions are taken without the grantor’s consent. The court held that even where the Attorney is acting in the best interests of the grantor (perhaps where the Attorney perceives suspicious circumstances to be the basis of transactions contemplated or undertaken by the grantor vis-a-vis third parties), the Attorney must not act without the knowledge and consent of the capable grantor. If the Attorney fails to obtain the grantor’s consent, he or she breaches the duty to account, the duty to act in accordance with the grantor’s intentions and wishes, and the duty to not undermine the grantor’s independence.

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#### Book of Authorities

*Substitute Decisions Act*, 1992, S.O. 1992 c.30

ONT. REG. 460/05

"Guidelines for Conducting Assessments of Capacity", Capacity Assessment Office, Ministry of the Attorney General (Ontario), May 2005

*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

*McMullen v. McMullen*, [2006] B.C.J. No. 2900, 27 E.T.R. (3d) 304, 49 R.P.R. (4th) 112 (B.C.S.C.)

*Lander v. Lyall*, 2006 CarswellMan 252 (Q.B.)

*Fareed v. Wood*, [2005] O.J. 2610 (S.C.J.)

*Starson v. Swayze*, [2004] 1 S.C.R. 722

*Harris v. Rudolph*, 2004 CarswellOnt 2634 (S.C.J.)

*Re Koch* (1997), 33 O.R. (3d) 485 (Gen. Div.)

*Banton v. Banton* (1998), 164 D.L.R. (4th) 176 (Gen. Div.)

*Burling, Re* (1993), 112 Nfld. & P.E.I.R. 91 (Nfld. T.D.)

*Clark v. Clark* (1982), 40 O.R. (2d) 383, 3 C.R.R. 342, 4 C.H.R.R. D/1187 (Co. Ct.)

*Re Young*, [1942] O.R. 301, [1942] 3 D.L.R. 185 (C.A.)

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## New Year, New Rules: Amendments to the *Rules of Civil Procedure* and their Impact upon Estate and Trust Litigation

\**Marni Pernica*

Significant amendments to the Ontario *Rules of Civil Procedure* will take effect on January 1, 2010. Reflecting the over-arching theme of proportionality (i.e. that the costs associated with litigating a matter should reflect the interests at issue in the dispute), the amendments are aimed at decreasing the costs associated with civil proceedings thereby making it easier and faster for litigants to navigate the judicial system. The amendments are likely to be keenly felt in claims involving estates insofar as they are often fuelled by emotion prompting the parties involved to lose sight of the risk and cost analysis relative to the likely reward.

The following amendments are most likely to impact estate and trust litigation: Rule 1.04 (dealing with the concept of proportionality), Rule 20 (relating to motions for summary judgment), Rule 4.1.01 (relating to expert reports), and Rules 29 and 31 (dealing with discovery).

### **Interpretation**

New Rule 1.04(1.1) provides that the Court will make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in a specific proceeding. This amendment is likely to have a significant impact on all areas of estate litigation including the awards of costs.

### **Summary Judgment**

Rule 20 currently empowers the Court to grant summary judgment where the moving party demonstrates there is "no genuine issue *for* trial." As of January 1, 2010, the Court will be entitled to grant summary judgment if the moving party demonstrates that there is "no genuine issue *requiring* a trial." While the amendment appears subtle, it is likely to make it easier and less risky from a costs

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perspective to secure summary judgment. As importantly, a judge's power on a Rule 20 motion will be substantially expanded to include:

- the ability to make assessments of credibility;
- the ability to weigh evidence;
- the ability to conduct "mini-trials" and obtain oral evidence; and
- the discretion to award substantial indemnity costs against either party if the party acted unreasonably by making or responding to the motion, or if the party acted in bad faith or to delay the proceedings.

### **Expert Evidence**

Rule 4.1.01, relating to experts and their reports, takes effect on January 1, 2010. The amendment is aimed at eradicating the practice of experts being retained as "hired guns" and provides that experts have a duty to the Court and not to a particular party. Rule 4.1.01 further provides that a written declaration must be attached to each and every expert report wherein the expert acknowledges:

- their duty is to provide an opinion that is fair, objective and non-partisan;
- they will provide opinion evidence related only to matters within the expert's area of expertise; and
- they will provide the Court with additional assistance that is reasonably required.

Amendments to Rule 53.03 (dealing with the timing of the filing of expert reports) provides that unless the parties agreed otherwise:

- expert reports must be filed not less than 90 days before the *pre-trial* conference; and
- a responding expert report must be served 60 days before *pre-trial* conference.

### **Discovery**

Under new Rule 29.2 the concept of proportionality will inform all issues relating to discovery. Specifically the new rule provides that in making a determination as to whether a party or other person must answer a question or produce a document the Court will consider whether:

- the time required to comply with the request is unreasonable;
- the expense associated with the request is unjustified;
- complying with the request would cause the party or person undue prejudice;
- requiring compliance would interfere with the orderly progress of the action; and
- the information or document is readily available to the party requesting it from another source.

Rule 31.06(1) currently provides that the scope of an examination for discovery shall extend to any proper question "*relating* to any matter in issue." On January 1, 2010 individuals being examined for discovery will only be required to answer proper questions "*relevant* to any matter in issue." This amendment will likely limit the scope of examinations for discovery.

New Rule 31.05.1 will also impact the discovery process. It provides that each party is limited to 7 hours of examination regardless of the number of parties or other persons to be examined, unless all parties

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consent or the Court orders otherwise. In making a determination as to whether or not to grant leave to grant more time the new rule provides a list of factors the Court shall consider including:

- the amount of money at issue;
- the complexity of the issue as a factor of law;
- the amount of time reasonably required in the action for all examinations;
- the financial position of each party;
- the conduct of any party; and
- any other matter that is in the interest of justice.

Come January 1, 2010 another addition to the rules regarding discovery will be implemented. New Rule 29.1 will impose a requirement that parties agree to, and update, written discovery plans. The inability of parties to agree on a plan may result in the Court refusing to grant any relief or to award any costs. The rule also imposes time limits on the filing of the discovery plan and sets out the specific content requirements of the plan.

#### **What does this mean for estate litigation?**

The amendments scheduled to take effect in January are long overdue. They should reduce the time and cost associated with preparing cases for trial, thereby improving access to justice in civil matters, including estates. It remains to be seen how the concept of proportionality will inform the behavior of litigants and their counsel.

A useful summary of the new Rules, prepared by Garry Watson for Carswell, is set out at [www.carswell.com/NR/rdonlyres/34BE674F-057D-4739-AD40-4CCC22336E18/0/Amendments\\_to\\_the\\_RulesL77981585TG.pdf](http://www.carswell.com/NR/rdonlyres/34BE674F-057D-4739-AD40-4CCC22336E18/0/Amendments_to_the_RulesL77981585TG.pdf).

*\*Marni Pernica, Student-at-Law, Aird & Berlis LLP*

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## **New Year's Resolution: Stay on Top of the New Rules of Court**

On Wednesday, January 6<sup>th</sup>, the Trusts & Estates Executive will be hosting an informal Q& A with Justices Brown and Roberts of the Superior Court of Justice and experienced litigator Suzana Popovic-Montag. This lunch-time session will offer a unique opportunity to get candid advice from the bench on how changes to the Rules will impact the conduct of Estates Litigation and to raise questions and concerns about how to incorporate the changes into ongoing and new litigation files.

Highlights of the changes which will affect estates disputes range from the straightforward (the time for service of an Application or Motion will extend to 7 days) – to the conceptual (the court must now make its orders and directions proportionate to the importance, complexity and amount involved in a proceeding).



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Start 2010 off right! Join us at 12:30 on January 6th, 2010, at the Ontario Bar Association 20 Toronto Street, Toronto, for lunch and an invaluable dialog with two notable members of the bench. [Click here](#) to register. For further information, please feel free to contact Jane Martin at Eisen Graham, Barristers & Solicitors at 416-204-9909.

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## Ontario Bill 212 “*Good Government Act*”

Ann Elise Alexander\*<sup>1</sup>

The Ontario Government introduced Bill 212 “Good Government Act, 2009” on October 27, 2009. The bill passed Second Reading on November 18, 2009 and is now before the Standing Committee on Finance and Economic Affairs for consideration. It amends or repeals over 300 pieces of legislation and runs over 300 pages.

A high level summary of the amendments of most interest to estates and trusts practitioners is set out below. The text is drawn from the Explanatory Notes issued with the First Reading of the Bill, with some commentary from the writer **[commentary]**.

The Bill can be found at

- [http://www.ontla.on.ca/bills/bills-files/39\\_Parliament/Session1/b212.pdf](http://www.ontla.on.ca/bills/bills-files/39_Parliament/Session1/b212.pdf)
- [http://www.ontla.on.ca/web/bills/bills\\_detail.do?locale=en&Intranet=&BillID=2235](http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2235)

### Accumulations Act

The Act is to be amended to provide for the non-application of the rules of law and statutory enactments relating to accumulations to charitable trusts.

### Charitable Gifts Act

The Act is to be repealed. Subsection 4 (3) of the *Local Health System Integration Act, 2006* and subsection 14 (2) of the *Toronto Islands Residential Community Stewardship Act, 1993* are also to be amended as a result. **[This Act requires a person vested with more than a 10% interest in a for-profit business for charitable purposes to divest the portion exceeding 10% within 7 years of the death of the testator or the making of the inter vivos instrument that caused the vesting. This Act was a political response by the then government to the owner of the Toronto Star leaving his shares of the newspaper to a charitable foundation. It appears the Act has outlived its usefulness. Note that CIBC has been informed by representatives of the Attorney General and the Public Guardian and Trustee (the “PGT”) that it is expected there will be certain amendments made to the Act before it is repealed to clarify that any existing orders under the Act will cease to have effect with the repeal of the Act.]**

### Charities Accounting Act

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The *Act* is to be amended to expand the power of the PGT to make inquiries and to demand information or documents respecting entities in which an executor or trustee holds a substantial interest. The amendments would provide that upon application by the PGT, the Superior Court of Justice could make specified orders, including orders compelling a person required to provide information or documents to do so and orders relating to the management, operation, ownership or control of the entity. It would be an offence to obstruct an inquiry of the PGT or to not provide required information or documents.

Section 8 of the *Act* is to be re-enacted to provide that a person who holds an interest in real or personal property for a charitable purpose must use the property for the charitable purpose. A number of statutes are also to be amended to reflect this re-enactment. **[E.g. a person who holds an interest in real or personal property for a charitable purpose will be subject to ss. 27-31 of the *Trustee Act* (the investment provisions).]**

In addition, various technical amendments are to be made to the *Act*. **[The *Act* currently deals with the PGT's power of inquiry and the court's supervision of executors and trustees who hold property for a charitable purpose, particularly a controlling interest in a corporation. The proposed amendments are intended to clarify certain terms, e.g. "control", and to expand the application of the legislation to other types of entities (e.g. partnerships and trusts in which an executor or trustee might have an interest). However, the proposed wording of the amendments is problematic in that no reference is made to "charitable purposes". Thus on a plain reading of Bill C 212, the PGT powers of inquiry would apply to any executor and trustee in Ontario and the court's supervisory powers would apply to any executor or trustee in Ontario who held a 20% or more interest in a corporation or partnership or any interest in a trust.]**

This was an issue of concern to the OBA Trusts & Estates Section Executive and we made a submission to the Ministry of the Attorney General and the PGT through the OBA pointing out that this could not have been the intention of the legislation, to expand the scope of inquiry to include executors and trustees who do not hold property for a charitable purpose, and we are informed we were correct. Accordingly, we have been told to expect that the proposed legislation will be amended to make it clear that references to executors and trustees in the proposed amended sections will continue to refer to executors and trusts who hold such property for charitable purposes.

We also pointed out that, as drafted, the proposed amendments would allow the PGT to inquire into and the Court to make orders concerning the management of any trust in which the executor or trustee holds an interest. This would mean that the powers of the PGT and the Court would extend to include commercial mutual funds or income trusts if the executor or trustee held just one unit in such a trust. Once again, we were assured that it was not the intention of the legislators that the *Act* would be used in this way. We were told no changes to the legislation were planned; however the issue would be considered.]

#### *Crown Administration of Estates Act*

The *Act* is to be amended to add a new section 5.1, dealing with compensation agreements. The section deals with the enforceability of compensation agreements, and outlines the circumstances in which the PGT may pay an heir's interest in the estate directly to the heir, despite a compensation agreement or any power of attorney or direction for payment relating to the compensation agreement. The section would provide that the PGT or a party to a compensation agreement could apply to the Superior Court

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of Justice for a determination of any question or dispute regarding the operation of the section. **[This provision was likely added to address concerns about compensation arrangements entered into by heirs of deceased persons whose estates were being administered by the PGT.]**

#### Escheats Act

Subsection 6 (2) of the *Act* is to be re-enacted and would provide that the PGT could transfer, assign, discharge or otherwise dispose of personal property which it takes possession of under the *Act*. **[The current provision provides that the PGT may “sell it at such price and upon such terms as seem proper”. Note the *Escheats Act* covers not only property where a person died without heirs and intestate, but also the property of a corporation dissolved for failure to make proper filings.]**

#### Estates Administration Act

Various technical amendments are to be made to the *Act*. **[The amendments, found in a number of other Acts, eliminates the use of the term “mental incompetency” and its derivations, and replaces them with “mentally incapable” and its derivations, linking it to terminology describing “incapacity” in the *Substitute Decisions Act*, 1992. Note: The revised wording: “mentally incapable person” means a person who is incapable as defined in the *Substitute Decisions Act*, 1992, whether or not the person has a guardian or an attorney for property under a continuing power of attorney for property.]<sup>2</sup>**

#### Evidence Act

Subsection 17 (1) of the *Act* is to be amended to remove the criteria for making an affirmation or declaration instead of taking an oath. **[As well, s. 14 is to be amended to update the description of a person where corroborative evidence is required.]**

**14. An opposite or interested party in an action by or against one of the following persons shall not obtain a verdict, judgment or decision on the party's own evidence, unless the evidence is corroborated by some other material evidence:**

1. A person who has been found,
  - I. incapable of managing property under the *Substitute Decisions Act*, 1992 or under the *Mental Health Act*,
  - II. incapable of personal care under the *Substitute Decisions Act*, 1992, or
  - III. incapable by a court in Canada or elsewhere.
2. A patient in a psychiatric facility.
3. A person who, because of a mental disorder within the meaning of the *Mental Health Act*, is incapable of giving evidence.]

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### Family Law Act

The Act is to be amended to clarify the applicability of contingent tax liabilities when calculating “net family property”. **[Contingent tax liabilities will be taken into account when calculating NFP.]** The Act is also to be amended to provide authority for a guardian of property or an attorney under a continuing power of attorney for property for a mentally incapable person to enter into domestic contracts or give waivers or consents under the Act on the incapable person’s behalf. Technical amendments will also be made to the Act. **[S. 59.5 of the FLA is repealed: “A family arbitration award may be enforced or set aside in the same way as a domestic contract.”]**

### Health Care Consent Act, 1996

The Act is to be amended to increase the time allowed for the Consent and Capacity Board to issue written reasons for its decision, from two days to four days. The Act is also amended to permit the Board to direct Legal Aid Ontario, instead of the PGT or the Office of the Children’s Lawyer, to arrange for legal counsel for a person who may be incapable in respect of treatment, managing property, admission to a care facility or a personal assistance service. The Act is to be further amended to include specific authority for an incapable person’s attorney or guardian of property to assess, review and challenge a solicitor’s bill under the *Solicitors Act*.

### Religious Organizations’ Lands Act

Section 10 of the Act is to be amended to remove the limit on the term for which a religious organization may lease specified land.

### Substitute Decisions Act, 1992

Section 3 of the Act is to be amended to state that nothing in the section affects the right of a person, or of a guardian of property or attorney under a continuing power of attorney for property on the person’s behalf, to an assessment or review of legal fees payable by the person in respect of a proceeding to determine the person’s capacity.

Section 16.1 of the Act is to be amended to include rules which apply if a statutory guardianship of property is terminated because an attorney of property is appointed and the attorney resigns within six months of their appointment. Various complementary amendments will be made to the Act as a result.

Section 35 of the Act is to be re-enacted to clarify the PGT’s powers in respect of an incapable person’s property in circumstances where the PGT is the person’s guardian of property immediately before the person’s death. **[The PGT may, but does not have to, exercise the powers of an executor over all, or only part of, the deceased’s property.]**

Section 83 of the Act is to be amended to provide that in order to be entitled to access to a record relating to an alleged incapable person the PGT must reasonably believe the record is relevant to its investigation. The amendments will also impose a duty upon the PGT to provide notice to the person alleged to be incapable of the attempt to access the record, unless notice would not be appropriate in the circumstances.

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*\*Ann Elise Alexander, Certified Specialist in Estates & Trusts, Senior Counsel, CIBC Legal*

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<sup>1</sup>The comments and opinions expressed in this article are solely those of the writer and do not purport to be those of any other individual or entity.

<sup>2</sup>“General Technical amendments are made to various statutes to update language relating to mental incapacity and mentally incapable persons.”

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## Law Society of Upper Canada Releases Consultation Paper on Continuing Professional Development

*Robert Coates\**

The Law Society of Upper Canada (“LSUC”) has issued a consultation paper on the subject of Professional Development and Competence (“PDC”). The committee has proposed a requirement that each member of the profession shall complete 12 hours of Continued Professional Development annually. The full report can be found at the LSUC website.

Activities which will be *eligible* for the PDC requirement are set out in Paragraph 61 of the consultation paper. These will include attendance in person, online or by telephone at continuing education programs and courses, either original or archived. However, to qualify there must be an opportunity to interact with colleagues and instructors and two or more participants must be involved at the same time. Completion of an online or self-study course is also eligible but a formal assessment must be conducted at the end of the course. Teaching law related materials and writing law-related books or articles up to a maximum of six hours will also be eligible.

Paragraph 62 sets out *ineligible* activities. These will include, acting as an adjudicator, member or chair of a tribunal or board, pro-bono work, marking law school materials, attendance at LSUC meetings of convocation and attendance at a legal association’s (for example the OBA) board or committees, among others.

The OBA has formed a committee to provide a unified response to the consultation paper. Most professional organizations now require their members to complete a certain number of hours of PDC annually. This is not currently required for many members of the LSUC but is required for certified specialists and new members, among others. It appears that the LSUC intends to move forward on these proposals. The matter is to be debated by the LSUC on December 4, 2009 and our committee of the LSUC will meet soon after that date to formulate a united response.

If you have comments with respect to this issue that you wish to be considered by the OBA committee, please email them to [robert@rgcoates.com](mailto:robert@rgcoates.com).

*\*Robert Coates, R.G. Coates Estate Law, Professional Corporation*

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# Grammar Lesson: The Proper Use of the Semicolon

Sean Lawler\*

A semicolon (;) is a 'supercomma', which "*separate[s] sentence parts that need a more distinct break than a comma can signal, but that are too closely connected to be made into separate sentences*".<sup>1</sup> Semicolons have two uses.

The first use is to separate items in a series where any element in the series contains an internal comma. For example: "*Maud, the violinist; Herbert, the flutist; and Grace, the noted harpist, were waiting for their instruments to arrive*".

The second use is the more difficult: use a semicolon to "*unite two sentences that are more closely connected than most others*".<sup>2</sup> For instance:

- a) He did not lead; he followed.
- b) The dam broke; the area flooded.

None of the sources I consulted explained the criteria for determining when two sentences were so "*closely*" connected so as to require a semicolon. However, the rules included:<sup>3</sup>

1. Do include a semicolon before transitional, explanatory, or enumerating words.<sup>4</sup> For example:
  - i. Both jobs can be filled by a man already in our employ; namely, Fred Jackson.
  - ii. Some colours blend together very well; for example, brown and yellow.
2. Do not use a semicolon when the two sentences are properly joined by a conjunction (i.e.: 'and', 'but'), unless each sentence contains internal commas.<sup>5</sup> Examples include:
  - i. (do not include a semicolon) The man stepped into his car and drove away.
  - ii. (do include a semicolon) He overhauled the engine, repaired the dent, and replaced the tires; and when he had finished, he sold the car.
3. Do not use a semicolon in a sentence where one clause is 'dependent' on the other (ie: where one of the clauses cannot 'stand on its own'). The sentence, "*As the sun was setting; lights came on in all the houses*" is incorrect. "*As the sun was setting*" cannot stand on its own and is not an 'independent clause'. It is better to write, "*The sun had set; lights came on in all the houses*".<sup>6</sup>

Semicolons are common in Wills; they are uncommon in correspondence. Perhaps people are reluctant to use semicolons because they must be used carefully, while commas and periods are adequate, easier, substitutes. Nonetheless, the semicolon can be useful, and should be part of every writer's toolkit.

\*Sean Lawler, Shibley Righton LLP

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<sup>1</sup> B.A. Garner, *A Dictionary of Modern American Usage*, (New York: Oxford University Press, 1998) [hereinafter "Garner"] at page 542; P. Tasko, ed., *The Canadian Press Stylebook*, 12th ed. (Toronto: The Canadian Press, 2002) at 304.

<sup>2</sup> Garner at 542.

<sup>3</sup> These rules are also described in W. Morris, ed., *The American Heritage Dictionary of the English Language* (New York: American Heritage Publishing Co. Inc, 1969) at page 1175.

<sup>4</sup> <http://en.wikipedia.org/wiki/Semicolon>.

<sup>5</sup> [www.gprc.ab.ca/library/Homepage/Help%20With/LSC/LSC%20pdfs/Semicolon%20and%20Colon%20Usage.pdf](http://www.gprc.ab.ca/library/Homepage/Help%20With/LSC/LSC%20pdfs/Semicolon%20and%20Colon%20Usage.pdf)

<sup>6</sup> *Ibid.*

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## Capacity Law Questionnaire Update

*Jan Goddard\**

Fifty-six members of our section responded to the capacity law questionnaire distributed in the late spring. As promised, there was a draw among all respondents for a \$100 bookstore certificate, donated by Jan Goddard and Associates, and the lucky winner was Wendy Templeton of Toronto. Thanks to everyone who took the time to complete the questionnaire.

The Capacity Law Working Group is still reviewing the questionnaire results, and a summary and analysis of these will be published in a future issue of *Deadbeat*.

The Capacity Law Working Group is an *ad hoc* committee of our section executive, with the following terms of reference:

- To consult with and provide a forum for section members regarding their experience with and views on the capacity laws of Ontario, specifically the *Substitute Decisions Act, 1992 (SDA)* and the *Healthcare Consent Act, 1996 (HCCA)*
- To identify and report on legal and other issues arising from the application of the *SDA* and *HCCA*
- Where appropriate, to advocate for improvements in the *SDA* and *HCCA* or in their application

The Group's chair is Jan Goddard, who can be reached at (416) 928-6685.

*\*Jan Goddard, Jan Goddard and Associates*

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## Some Further Thoughts on Costs in Estate Litigation

*John O'Sullivan\**

In the October 2009 edition of *Deadbeat*, Elizabeth Seo provided a helpful survey of recent costs decisions in estates litigation. A decision released by Justice Pitt in late October 2009 throws additional light on the issue of costs.

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The decision in *Estate of Elizabeth Gyetvan*<sup>1</sup> is consistent with the message in *McDougald Estate v. Gooderham*<sup>2</sup> and *Salter v. Salter*<sup>3</sup> that costs will not be routinely ordered out of the Estate and that parties "cannot treat the assets of the estate as a kind of ATM bank machine...".

In *Gyetvan*, Justice Pitt awarded full indemnity costs against the unsuccessful respondent, to be paid from his interest in the proceeds of sales of real estate devised to him under the will.

Elizabeth Gyetvan had left three parcels of real estate to her two sons who were the co-executors and sole beneficiaries of her estate. The properties had still not been transferred to the sons more than four years after Elizabeth's death because of bitterness between them.

One brother applied for a declaration that the properties had vested by virtue of s. 9 of the *Estates Administration Act*, for an order requiring the Land Registry office to register the brothers' ownership, and for an order for the sale of all three properties under the *Partition Act*.

The conduct of the respondent brother during the litigation lent credence to the applicant's affidavit evidence of the respondent's failure or refusal to cooperate since the death of their mother.

Justice Archibald on the first attendance ordered the vesting declaration and registration of the real estate in the names of the brothers, on consent. He adjourned the balance of the application, urging the respondent to retain counsel, and recorded in his endorsement that the respondent was going to retain counsel. The respondent brother did not approve the draft order, or retain counsel. On the second attendance, the court ordered a settlement conference. This was held a month later, but no settlement resulted.

The respondent brother did not attend court on the ensuing motion to fix a peremptory return date for the application. When the application came on for hearing before Justice Pitt, his Honour noted in his endorsement that the respondent had filed no evidence and "had seen fit not to retain counsel". He also noted that applicant brother had done "everything within his power" to have the real estate sold and the proceeds divided. He granted the application and gave the applicant brother carriage of the sales, stipulating that the signature of the respondent brother was not required in respect of the listing of the properties or the acceptance of offers. He also ordered the proceeds of the three sales to be paid to the applicant brother's solicitors in trust.

As to costs, Justice Pitt ordered "costs of and incidental to the application on a full indemnity basis" in an amount to be approved by the Court on notice to the respondent, to be charged against the interest of the respondent brother in the sale proceeds. In addition, His Honour removed the respondent brother as an estate trustee. It was clear that the respondent brother's conduct (outlined above) factored heavily in the making of the costs award.

The message in the *McDougald Estate* and *Salter* cases echoes throughout Justice Pitt's decision in *Gyetvan*.

\*John O'Sullivan, Weir & Foulds LLP

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<sup>1</sup> Unreported decision of Justice Pitt of the Ontario Superior Court.

<sup>2</sup> *McGougald Estate v. Gooderham* (2005), 17 E.T.R. (3d) 36, 2005 CarswellOnt 2407, 999 O.A.C. 203, 255 D.L.R. (4th) 139 (Ont.S.C.J.)



## *In the Matter of the Estate of William Woodrow Charles, Deceased: Communicating with the Toronto Estates List Office by Email*

*Susannah B. Roth\**

Estates and trust solicitors dealing with the Toronto Estates Office should take note of the recent endorsement of Justice D.M. Brown in *In the Matter of the Estate of William Woodrow Charles, deceased* (Court File No. 01-3632/08, endorsement dated October 23, 2009). In the context of an application for confirmation by resealing of appointment of estate trustee with a will, the Toronto Estates Registrar, pursuant to Rule 74.14(2) of the *Rules of Civil Procedure* (Ontario), sought direction from Justice Brown as to whether the Toronto Region Estates Office could communicate by email with the applicants for certificates of appointment to inform them of corrections required and to receive corrections from applicants. In his endorsement, Mr. Justice Brown stated that he saw no reason why the Registrar could not communicate by email (see para. 9) noting that to do so would enhance the public's access to justice (see para. 13), and that allowing only paper-based communications via mail runs contrary to Rule 1.04(1), which provides that the *Rules of Civil Procedure* "shall be liberally constructed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits" (at para. 14). Justice Brown went on to direct the Registrar to contact applicants and to give them the choice of receiving email communications from the Toronto Region Estates Office, in addition to the traditional paper-based mail communications option.

Justice Brown's decision in this case is a welcome one. On a practical note, any person wishing to deal with the Toronto Estates Office by email should make a specific written request in their initial correspondence with the Court.

*\*Susannah B. Roth, O'Donohue & O'Donohue, Barristers & Solicitors*

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## *Pyramids, The Wizard of Oz, Garron and Antle*

*Ed Esposto\**

Have you ever watched a young child try to construct something out of wooden blocks? Generally, the child collects blocks of different shapes and sizes and they are not so much assembled into a coherent plan as simply piled one atop the other. And if you, an adult, try to assist in implementing a better-engineered plan, you will likely be rebuffed. Children (like managing partners) largely don't welcome corrections. If you help a child play with blocks, you act more as a servant than design partner.

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Let's compare these playtime construction projects to, say, the Pyramids. There are actually some superficial similarities. Both involve construction and in both a (occasionally) benevolent dictator keeps a firm grip on control. But in one significant respect the two projects are quite different: the Pyramids were intended to last forever, largely successfully (looters notwithstanding). Their architectural design and engineering competence have stood the test of time. The playtime structures of a child's design, on the other hand, are not so much built to last as to temporarily entertain.

All of which naturally leads us to a discussion of two recent tax court decisions: *Garron Family Trust v. The Queen*, 2009 TCC 450, September 10, 2009, a decision of the Honourable Justice Judith Woods ("*Garron*") and *Antle v. The Queen*, 2009 TCC 465, September 18, 2009, a decision of the Honourable Justice Campbell J. Miller ("*Antle*").

Quite a bit has already been written about these two fairly recent decisions and no doubt countless further pixels will be illuminated in consideration of them. *Garon* and *Antle* have significant income tax ramifications, which I will touch upon. But (spoiler alert) the trust aspects of the cases are my main focus. These cases have important things to say to tax, trust and estates lawyers (not the least of which is "beware"). My intention here is to ensure that these cases are brought to the attention of Deadbeat readers regardless of one's interest in the tax ramifications. These cases may be questionable trust decisions, but you will need to be aware of them, as you would warily note an erratic driver in the lane next to you: not as a lesson of what to do but out of self preservation.

### **Garron**

The facts of *Garron* (or as I like to call it "Pay No Attention to the Man Behind That Curtain") are reasonably simple and I will simplify them further by leaving out any inconvenient details. You should read the case if you actually want to understand the nuances. But be warned that the judgment is monumental in length. Sarah Palin's entire political philosophy can be described in fewer paragraphs than this judgment. Maybe that's not the best comparison.

A Canadian resident taxpayer owned an operating company (in reality there was more than one taxpayer, but let's not let the facts get in the way of a compelling narrative). The taxpayer carried out something resembling an estate freeze. The Canadian taxpayer conveniently had a friend living in the Caribbean island of St. Vincent and that friend settled a trust. The Trustee of that trust was a corporation resident in Barbados. The new common shares of a holding company were issued to that Barbados trust. As is typical in an estate freeze, at the time of subscription the common shares had nominal value but were entitled to all future growth.

And grow they did. Soon a purchaser came forward to buy the company. A sale of the company (including the common shares owned by the trust) resulted in a capital gain in the Barbados trust of - and I believe this is an exact quote - a kazillion dollars.

The trust, being ostensibly resident in Barbados, was ostensibly subject to the Barbados tax regime. There was no capital gains taxes payable under Barbados tax law, so the trust claimed that the proceeds were received tax-free. And due to the provisions of the Agreement Between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital (the "Treaty"), the trust claimed that the Treaty prevented Canada from taxing any of the

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gains. The money from the sale was accordingly stacked in high piles in a vault in Barbados where the taxpayers would gather and giggle. Yes, I am making that up.

The Minister of Revenue had a number of things to say about this plan, none of them very complimentary. Primarily the Minister asserted that the trusts were residents of Canada and that the Treaty exemption therefore did not apply.

The key question was the residency of the trust, thereby bringing into play the famous decision of *Dill and Pearman, Trustees of the Thibodeau Family Trust v The Queen*, 78 DTC 6376 (FCTD) ("*Thibodeau*"). The Honourable Justice Woods of the Tax Court of Canada was not persuaded of the precedential value of the *Thibodeau* decision. *Garron* did not so much overturn *Thibodeau* as it strangled the relevance out of it.

In *Garron*, the court held that *Thibodeau* does not stand for the proposition that the residency of a trust is in all circumstances exclusively a matter of identifying where the trustee resides. The court further held that *Thibodeau* is not authority for the proposition that the "central mind and management" test for corporations is never applicable to a trust. In fact, in *Garron* the court found that it would promote consistency, fairness and predictability in tax law if we were to apply a central management and control test to trusts. *Garron* did not overturn *Thibodeau*, it merely distinguished it out of existence.

These conclusions will no doubt be the subject of a relentless attack on appeal. But there are reasons why, on the particular facts of *Garron*, the correct decision may have been reached regardless of the court's trust law adventures. This court ruled that there was not sufficient evidence before the court that the corporate trustee in Barbados was, in fact, the trustee of the trust. Instead, there was plenty of direct evidence, circumstantial evidence and glaring omissions of evidence that pointed to the Canadian taxpayers (or their Canadian advisors) being the trustees. The court found many things to indicate that the corporate trustee was trustee in name only, with the Canadian taxpayers largely imposing their will on the trust.

Much of the commentary on this case has focused on how the court was seemingly incorrect on the trust law principles. For example, there is criticism of the application of the central management and control test to determine the residency of a trust. There is criticism of the court attaching significance to the fact that the corporate trustee in Barbados did little other than dutifully sign documents as and when required. Some are concerned that the court seemed to draw an adverse inference from the fact that the corporate trustee was essentially a division of the Canadian accounting firm advising the taxpayers. With respect, some of that commentary misses the mark because it fails to acknowledge what the court explicitly says caused it the most stress.

This was a case where the taxpayers, the taxpayers' advisors and the Barbados trustee did all they could to make it very difficult for the court to reach a finding of fact that the Barbados trustee was, in fact, the trustee. It was not so much a case of the court going off the rails with a failed appreciation of trust law, but rather a case where the actions of the parties did not give the court enough facts upon which to hang a more traditional judgement. You could almost hear the court pleading with the taxpayers "throw me a frickin' bone here!"

The court found that the corporate trustee's work consisted largely of administrative tasks. That alone was not fatal to this or any other trust (it is entirely possible for a trustee to have the relatively simple

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task of “holding the assets”). But the taxpayers seemed unable to point to any actual trustee-like acts this particular trustee performed. The Canadian taxpayers apparently played a dominant and leading role in the negotiation and sale of the business, to the complete exclusion of the trustee. The Canadian taxpayers and their advisors largely ran the investment management of the trust. There was internal documentation that suggested that the duties and powers of the trustee were actually more limited than what was set out in the terms of the trust indenture.

Interestingly, the court made an adverse inference based upon the list of witnesses chosen to testify (or not testify) for the taxpayers. None of the professionals called as witnesses by the taxpayers were the principals involved at the time the events played out. The taxpayers failed to call upon a host of witnesses (lawyers, accountants, investment advisors) who were the primary players at the relevant times and whose first-person testimony would have been most useful. It just seemed too obvious that the taxpayers did not want to subject the actual professional participants in the action to a cross examination.

It would have been interesting to see how the court would have interpreted the facts if the trustee was a human being rather than a corporation. Because the court was concerned with the residency of a corporate trustee, the “central management and control” test did not seem entirely unreasonable where the taxpayers, and the trustee, were unable to point to anything that this trustee actually did. The court needed to know who was running the trust, if this trustee wasn’t.

Some are critical of the tax court’s criticism of the fact that the corporate trustee was an arm of the Canadian accounting firm advising the clients. That corporate trustee seemed largely created for the purpose of supporting the planning services offered by the Canadian advisors to their clients. But the court was not critical of that simple symbiotic relationship between the corporate trustee and the accounting firm. What really seemed to bother the court is that this particular “trustee” did not actually seem to have a group of people employed that actually had experience administering trusts. And no evidence was presented to challenge that appearance. The corporate trustee was entirely reliant upon the assistance provided by the members of the accounting firm. The court seemed to place some weight on the fact that there was no evidence presented that this trust company was particularly experienced at, you know, actually administering trusts.

In the end, in reviewing what the corporate trustee was actually doing, the court decided that there was simply no “there” there. If the real masters of the corporate trustee were resident in Canada, not Barbados, then the trusts themselves were resident in Canada. If so, the trusts were taxable in Canada simply by virtue of that residency. The Treaty was irrelevant at that point in avoiding Canadian income tax on the capital gains.

For tax keepers (you, in the back, with no life) the *Garron* decision also had a few other important findings. In very summary form, the other notable results (some being *obiter*) are:

- 1) The phrase “directly or indirectly”, which is as pervasive in the *Income Tax Act* as Republicans at a gun show, is to be construed narrowly.
- 2) The court found that even if (old but not yet dead) section 94 of the *Income Tax Act* successfully deems a trust to be resident in Canada, a tax treaty does prevent the trust from being subject to tax in Canada.

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- 3) Similarly, it was suggested that a tax treaty takes precedence over the attribution provision in subsection 75(2).
  - 4) On the GAAR argument, the court concluded that relying on a treaty to avoid tax under an anti-avoidance provision is not by that reason alone an abuse or misuse for the purposes of the GAAR.

From the perspective of a trust lawyer, there is much not to love about this judgement. The court is far too quick to conflate a trust and a corporation. Justice Woods brushes off the differences with little trouble or even analysis. It seems unlikely that this simplistic expansion of the “central management and control” test to trusts will survive appeal.

But for trust and estates lawyers, even those who do not pretend to offer sophisticated offshore tax plans to their clients (actually, even those who do pretend to offer sophisticated offshore tax plans to their clients), the consequences may yet be significant. There is quite a bit of domestic trust planning that relies on inter-provincial tax plans, such as Alberta trusts. The efficacy of these plans may be called into question where the actual management of the trusts does not match the documentation.

Even a plan designed for the “simple” purpose of probate planning may be affected by this decision. If the real trustee is not the person named on the trust document, does the plan still work? Is there an unintended income tax consequence if the real trustee is someone other than the nominal trustee? Will the CRA try to use this decision to look through other trusts?

### **Antle**

The facts of *Antle* (or as I like to call it “If it Looks Like a Pig, it Probably Is”) are a little more complicated than *Garron*. In *Antle* the taxpayer husband (let’s call him, “Husband”) purportedly rolled shares of a private company into a Barbados spousal trust. The spousal trust then sold those shares to the taxpayer’s wife (let’s call her, “Wife”) in return for a promissory note. Similar to *Garron*, the Barbados trust claimed that the gain on the sale to the wife was tax free in Barbados. The Wife immediately sold the property to a third party who was waiting in the wings all along (starting to smell a bit, no?). The Wife allegedly used the sale proceeds to retire the promissory note (which by this time had been rolled out to her).

A clever tax ploy was at work here. (I believe CRA used a word other than “clever”.) The taxpayers were relying on the provisions of clause 94(1)(c) of the *Income Tax Act* to deem the trust to be resident in Canada in order to be able to take advantage of the spousal trust rollover provisions in paragraph 73(1)(c). And then, notwithstanding the *deeming* of the trust to be resident in Canada for the rollover purposes, then the taxpayers claimed that this trust was *actually* resident in Barbados and thereby not taxable on the gain due to the Treaty. From a legal perspective, the taxpayer Husband and Wife were sucking and blowing at the same time. (Somehow, that sounds naughtier than intended).

And what did the revenue authorities have to say about this? There were several arguments but we will touch on only the most important for our purposes.

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The Minister argued that the Barbados trust was never validly constituted and hence the gain on the sale to the third party was taxable in Canada. In this respect, the Minister's argument was that the trust never actually owned anything because it never came into existence (largely because it never owned anything). On this point the Minister was successful. The contrast with *Garron* is noteworthy. In *Garron*, the trust was validly created, but the nominal trustee was found not to be the trustee, but rather persons in Canada. In *Antle*, the finding was that the trust never really existed (for reasons described below), so the property never really left the country.

The Minister also alleged that the trust in *Antle* was a sham. Not quite the same point as the one above, but rather its ugly sister. Perhaps surprisingly, the Minister lost on this point. In *obiter*, the court was able to determine that there was no sham. The court realized that the taxpayers designed a clever but smelly trust scheme and never tried to disguise the fact that it was a clever but smelly trust scheme. There was no deception. Sometimes, the court concluded, if you put lipstick on a pig you just have a lipstick-wearing pig. (I am, you may have guessed, paraphrasing).

The Minister, necessarily but paradoxically, argued that rollover provisions of paragraph 73(1)(c) were not available to this trust since it was resident in Barbados. If so, no rollover to the spousal trust was possible. (This was the Minister's turn to suck and blow, since the Minister was also alleging that the trust was deemed to be resident in Canada). On this point the Minister again lost. Such a trust, if it existed, could rely on the rollover provisions.

And then there was GAAR. Like an old Looney Tunes cartoon, the court held that the taxpayer's elaborate device malfunctioned and resulted in a large "Acme GAAR Anvil" falling atop them. The taxpayers were found to have abused subsections 73(1), 74.2(2) and clause 94(1)(c).

There was a hodgepodge of facts that contributed to the results. I would like to focus on the parts that dealt with the creation and constitution of the trust. It is those aspects of the case that should be of most interest to trust lawyers.

In the classic old movie "The Sting", Robert Redford and Paul Newman act as two slick fraudsters who design an elaborate hoax and execute it to perfection. In *Antle*, the taxpayers' advisors clearly concocted a very ingenious and elaborate tax plan. But with all due respect to the advisors involved, the execution of the plan was apparently entrusted to Homer Simpson. For example:

1. There was an unrelated party ("Mr. Unrelated Party") who had a security interest in the shares owned by the Husband. The share certificates were always in the possession of Mr. Unrelated Party, endorsed in blank. Much time was spent in the negotiation of the deal trying to satisfy the claims of Mr. Unrelated Party before he would release the shares. The court found that the shares were never actually transferred to or held by the trustee. While those shares may have been the subject matter of the trust, they never found their way into the trustee's hands.
2. The documentation surrounding the creation of the trust and the purported share transfers was less than pristine:
  - The trustee (a lawyer who had just been admitted to the Bar in Barbados) originally signed the trust deed on October 27th, but on the direction of Canadian advisors later entered the

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date of December 5th on the document. The settlor Husband did not actually sign the trust deed until December 14th, but the date on the document remained December 5th.

- Despite the fact that the trust was not signed by the Husband until December 14th, the trust had purportedly been settled with the shares and the trustee purportedly sold the shares to the Wife sometime between 5th and 14th of December.
- On December 14th the Husband signed the director's resolution transferring the shares to the trust. But that resolution was dated effective December 5th (the ostensible date of creation of the trust).

Evidently, time travel was an essential part of this plan.

3. The Husband never met or communicated with the trustee. It appeared that the Husband did not fully understand what a trust was (notwithstanding being the settlor).
4. The purported sale was to close on December 14th,, 1999. Until virtually the day of the sale, there was some confusion as to who the actual seller would be: Husband, Wife or a trust.
5. No money ever made its way to the trustee. All funds were simply handled by the Husband's lawyer in Canada for all parties.

Did the Husband *intend* to create a trust?

The court found that the Husband signed all the documents recommended by counsel, but did so simply in order to achieve the result counsel had prescribed. He never actually intended to give up control of the shares or transfer them to the trustee. The destination of the shares was preordained. The Husband's intention was focused only on securing the desired tax result, not the intervening legal steps. Even though the trust document had all the necessary language confirming an intention to create a trust, the other facts put this in doubt.

There was also doubt about the trustee's role. The court ruled that the trustee was akin to an agent for the taxpayer, dutifully signing the documents for the sale that had already been negotiated and concluded, without any significant discretion or authority. Some have criticized the court's language in this respect because it suggests a trustee's duties must be very sophisticated in order to have a trust. But in light of the other findings, this conclusion was not determinative of the decision.

Was there certainty of subject matter?

There was a measure of ambiguity of subject matter as well. As noted above, the court spent quite a bit of time examining the inconvenient hold Mr. Unrelated Party had on the shares until the moment they were sold to the third party. And the documentation itself, and the order of execution, made it unclear what, if anything, the Husband was attempting to transfer to the trustee. The certainty of subject matter was less than certain.

There was no discussion of certainty of objects in the judgement, so we can assume the taxpayers nailed that one.

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Was the trust constituted?

Most importantly, the court found that the trust was never constituted because there was simply no transfer of shares to the trust. For the reasons touched upon above, there was not enough clarity in some of the most fundamental, if elemental, parts of the transaction. The documentation and event sequencing made it impossible for the court to actually see that the intended steps were carried out. While the taxpayers pointed to the many things that were clearly done to execute the plan, they were never able to provide cogent evidence that all the essential (even mundane) steps were carried out.

It was the court's view that there was no trust created because there was no evidence of assets transferred to the trust. The natural consequence of that decision was that the Husband continued to own the shares and he must have de facto gifted or rolled the shares to his Wife (not the spousal trust). Hence, either the Husband triggered a gain on the gift to his wife, or when the wife sold the shares, the gain was hers and was attributed back to Husband.

A sampling of the court's language will suffice to demonstrate the court's frustration with the opaque paper trail:

- "Simply stating that the plan was always that the steps would be sequential is not sufficient. Show me." Paragraph 57.
- "...[T]he trust never came into existence. This conclusion emphasizes how important it is, in implementing strategies with no purpose other than avoidance of tax, that meticulous and scrupulous regard be had to timing and execution." Paragraph 58.
- "In short, if you are going to play the avoidance game, it is not enough to have brilliant strategy, you must have brilliant execution." Paragraph 58.

Similar to *Garron*, commentators have criticized this decision for simplistic trust law analysis. Similarly, that criticism misses the mark. The court did not need to engage in a doctorate level trust analysis. The court was merely saying: "show me that you did what you say you did". To be frank, the court was admonishing the taxpayers and the advisors by asking a rhetorical question "Is it too much to ask that you can demonstrate that a dot was placed above every "i", a cross placed upon every "t" and that all of that happened in the right order?"

## Conclusion

Perhaps these cases will be successfully appealed. Perhaps some of the analysis on the trust law points could have been tighter (or less ridiculous). But it is not a stretch to see tax courts adopting this type of analysis in the future. More significant is the fundamental issue that trust lawyers should not ignore.

It is impossible to know if, on the right facts, the taxpayers would have been successful. But what is certain is that the (lack of) evidence regarding the drafting, execution and administration of the trusts gave the Minister the opening to attack the tax plans. The taxpayers in *Garron* and in *Antle* clearly had experienced, sophisticated and (likely) expensive advisors. Yet, the major weakness of both plans was the part that reasonably should have been the easiest and most certain: the creation and administration



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of the trust. The creation and administration of the trust is the “easiest” because everything necessary to achieve it is within the control of the clients and advisors.

We have all seen examples where a trust is created with a wink and a nod, knowing that the “real” trustee is the client. Paperwork can be sloppy. Trust formalities are sometimes glossed over. (How often have you seen corporate documents drafted with the signatory being “The XYZ Trust”, rather than “Mr. X, Trustee of the XYZ Trust”?) Trusts themselves do not always get the respect they deserve from the clients and the clients treat them as unwelcome but necessary speed bumps in the plan. It is our job to instill that respect in the client. A failure to do so will render the structure unstable. Perhaps it is not respect that is required, but fear.

In a world where clients can be like imperious little children, only the master craftsman builds a project that will endure.

*The opinions expressed in this article are most certainly those of the author and no other sentient being.*

*\*Ed Esposto LLB, Blaney McMurtry LLP*

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## *Re Kaptyn Estate Case Comment*

Clare Sullivan\*

*Re Kaptyn Estate* (2008), 43 E.T.R. (3rd) 219 (O.S.C.J.) was decided in October, 2008. The case involved a challenge to the validity of a codicil to a Secondary Will where the testator had used the multiple Will technique to reduce the estate administration tax otherwise payable when probating a Will.

Justice Lederer’s decision in this case is interesting in many aspects. The applicant lost the challenge and there was a separate hearing and judgment to determine out of which assets governed by which Will the significant costs of the litigation to the estate would be paid. Justice Lederer’s comments with respect to how multiple wills are used to govern different assets are of particular note.

Some practitioners have expressed the view that the *Granofsky* decision (156 D.L.R. (4th) 557, 21 E.T.R. (2d) 25 (Ont. Gen. Div.)), which lead to the use of a Secondary Will to reduce the estate administration tax, has limited scope. In that case, the Secondary Will not submitted to probate dealt only with a specifically identified corporation and any monies owing to the testator from that corporation (shareholder loans). The question remained following *Granofsky*:

How far can a draftsman go in defining the assets to be governed by the Will not submitted to probate? Do the assets have to be specifically identified, as they were in *Granofsky*, or can the Will refer to assets by class, such as the shares of any corporation not offering its securities to the public or real estate for which a grant of authority by a court of competent jurisdiction is not required for the transfer, disposition, distribution or realization thereof?

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In paragraph 14 of his Judgment, Justice Lederer described the structure used by the testator to save the probate taxes and said the following:

The Primary Will deals with those assets which are required to be subject to probate. The Secondary Will provides direction with respect to all other assets...The Secondary Will is not intended to be probated. As such, the value of the assets it deals with is not subject to probate taxes. This approach has been confirmed by the case of *Granofsky Estate v. Ontario* (1998), 156 D.L.R. (4th) 557, 21 E.T.R. (2d) 25 (Ont. Gen. Div.) and has been widely utilized since that time.

It appears from the foregoing statements that using a Will which refers generally to “assets requiring probate” is acceptable. It follows that using a Will which refers generally to assets “for which probate is not required” is also acceptable.

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## *Ignagni Estate, 2009 CanLII 54768 (ON. S.C.)*

*Ameena Sultan\**

In his endorsement dated September 30, 2009, Justice D.M. Brown addressed the issue of orders for assistance brought on an ex parte basis. The ruling has a real implication on estates practitioners as it imposes the requirement of notice for motions that have typically been brought without notice.

The moving party had sought an order for assistance requiring the respondents to accept or refuse appointment as estate trustees with a will. In addressing the motion, Justice Brown took the opportunity to deal with the question of when it is appropriate for a court to grant an order for assistance when it is brought without notice to the responding party.

Rule 74.15 of the *Rules of Civil Procedure* outlines motions for assistance that can be brought by persons who have a financial interest in an estate. These motions – with the exception of motions for further particulars after a statement has been provided pursuant to an order under Rule 74.15(d) – can be brought without notice. Rule 74.15(2) clearly states that these motions “may be made without notice”. They are a continuation of citations that had previously been issued by the Surrogate Court. The Surrogate Court Rules allowed these citations to be issued ex parte and such citations typically did issue without notice. As for the current Rule 74.15 motions without notice, in practice, most practitioners tend to bring them without notice.

In comparing orders for assistance with the Surrogate Court citations, Justice Brown contrasted the wording of the current Rule 74.15(2) which provides that these motions “may” be made without notice, to the Surrogate Court Rules which provides that “a citation shall be by an order granted ex parte by the Judge...” [emphasis added] He also distinguished the serious potential effects of orders for assistance as compared to citations which dealt with administrative matters.

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Justice Brown also looked to Rule 37.07 of the *Rules of Civil Procedure* which provides that, in general, motions may be brought without notice “where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary” or “where the delay necessary to effect service might entail serious consequences”. Justice Brown also referred to the body of case law on *ex parte* motions that generally restricts the use of motions without notice. As an example, Justice Brown cited Justice Southey who wrote in *Launch! Research & Development Inc. v. Essex Distributing Co.*<sup>1</sup> that “a plaintiff should only apply for an injunction *ex parte* where it is genuinely impossible to give any notice to the defendant of the order sought without defeating the purposes of the order”. He also cited Justice Corbett’s observation in *Robert Half Canada Inc. v. Jeewan*<sup>2</sup> that a party must demonstrate some element of “extraordinary urgency” in order to obtain an *ex parte* injunction.

In view of the general limits placed on *ex parte* motions by the Rules and case law, Justice Brown has imposed a requirement that motions for orders for assistance may only be brought without notice in cases of “extraordinary urgency”. Without evidence of “extraordinary urgency”, such motions ought not to be granted, according to this endorsement.

And so, with this decision, Justice Brown has extended the restrictions on *ex parte* motions found in the Rules and the case law to motions for estates. The Estates bar is advised that the general rules limiting the use of *ex parte* motions applies equally to orders for direction that they had previously typically sought and obtained without notice.

*\*Ameena Sultan, Whaley Estate Litigation*

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<sup>1</sup> [1977] O.J. No. 1452 at paragraph 5

<sup>2</sup> (2004), 71 O.R. (3d) 650 (S.C.J.)

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## Seeking the Bounty of Another: A Tale of Two Estate Cases Involving Insurance

*Blair L. Botsford\**

When is a person, other than the named beneficiary, entitled to the proceeds of a life insurance policy? This is an intriguing question, addressed in part, by two recent decisions of the Ontario Court of Appeal: *Richardson Estate*<sup>1</sup> v. *Mew and Madore-Ogilvie*.<sup>2</sup>

The facts in *Richardson Estate* are familiar. Man and woman meet. They subsequently marry and have children. The husband, Michael Richardson, toils diligently at his career and is rewarded by rising in the ranks and eventually becoming the president of the company employing him. Stephanie Mew, the wife, gives up her job to manage the household and raise the couple’s children.

Around the time Mr. Richardson’s career reaches its pinnacle, he begins a relationship with the somewhat younger Anne Ferguson. Things go well between them resulting in Mr. Richardson and his wife separating and then divorcing followed shortly thereafter by the marriage of Mr. Richardson and Ms. Ferguson.

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As part of the initial Separation Agreement completed in March of 1994, Mr. Richardson was to maintain Ms. Mew as the irrevocable beneficiary of his \$100,000 Canada Life policy (the “Policy”) up to February 28, 1995. The Separation Agreement contemplated that the insurance coverage might be continued after that date as it was left as an issue to be determined in a future variation proceeding referenced in the Agreement.

In 1993, Mr. Richardson misplaced his copy of the Policy and asked the insurance company to issue a replacement naming Ms. Ferguson as the beneficiary. Fortunately, this new beneficiary designation would not have the effect of revoking the previous irrevocable designation in favour of Ms. Mew. In March 1994, Mr. Richardson located the missing copy of the Policy and restored Ms. Mew as the beneficiary of record. No further changes to the beneficiary designation were made and the Policy was maintained in force until Mr. Richardson died in 2007. All premiums were paid from his funds up to 2006. Ms. Ferguson paid the 2007 premium, believing she was the beneficiary, as Mr. Richardson’s assets had been exhausted due to a lengthy illness.

Following Mr. Richardson’s death, Ms. Mew refused to release her claim to the proceeds of the Policy and Ms. Ferguson objected. On the original motion, Ms. Ferguson asserted that she was entitled to use the power of attorney for property granted to her by Mr. Richardson to correct the beneficiary designation and would have done so had she known of the alleged error regarding Ms. Mew’s designation on the policy post February 28, 1995. The judge rightly rejected her argument stating that a beneficiary designation under a life insurance policy is akin to a testamentary disposition and as such, beyond the power of an attorney for property.

The motion judge recognized that he had the power to rectify the Policy, including rectification of the beneficiary designation, but was not satisfied there was sufficient evidence to support the claim that Ms. Mew had been maintained as a beneficiary by mistake. In determining Mr. Richardson’s intent, the motion judge made note of the fact that he had not changed the beneficiary designation after February 28, 1995 and that he continued to pay the premiums on the Policy.

Ms. Ferguson also challenged Ms. Mew’s entitlement claiming unjust enrichment. The motion judge rejected her assertion finding that juristic reasons for Ms. Mew’s designation as beneficiary. On appeal, Ms. Ferguson argued that the motion judge erred in failing to find that Ms. Mew was unjustly enriched as a result of her receipt of the death benefits. After considering the law relating to unjust enrichment and the facts of the case, Justice Gillese dismissed the appeal.

While this decision confirms what many would assume, that paying one year’s premium on a life insurance policy does not constitute a sufficient deprivation for the purposes of finding unjust enrichment, it does not give clear guidance as to what might constitute a corresponding deprivation. The result was not surprising given the disparate financial positions of the two women. Whereas Ferguson lived in Forest Hill, an upscale neighbourhood in Toronto, Ms. Mew, devastated by her divorce, lived in a modest one-bedroom apartment with limited income.

While Ms. Mew was not a spouse for the purposes Part I of the *Family Law Act* (“FLA”)<sup>3</sup> she was a dependant for the purposes of Part III of the FLA which deals with support. There was a Separation Agreement that contemplated ongoing variation and, hopefully, an order confirming the Agreement. Therefore, before Mr. Richardson’s death, Ms. Mew could apply pursuant to section 37(1) for a variation

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of support. Following his death the proper procedure would be to apply under the *Succession Law Reform Act* (“*SLRA*”)<sup>4</sup> for dependant’s relief. Ms. Ferguson also had this option but did not avail herself of it.

It is curious that neither party made a claim for support pursuant to Part V of the *SLRA*. Section 72 of the *SLRA* expressly empowers the Court to bring amounts payable under a policy of insurance affected on the life of the deceased and owned by him or her back into the estate for the purposes of satisfying an order for support. There is no doubt that Mr. Richardson owed obligations to provide financial support to both Ms. Mew and Ms. Ferguson. Had a dependant’s support claim been made, the Court could have determined what support, if any, Ms. Mew and Ms. Ferguson should each receive and how the support award ought to be satisfied. Asserting a claim for unjust enrichment was an awkward way to approach the issue of entitlement.

Interestingly, Justice Gillese addressed competing interests in the proceeds of a life insurance policy in the context of a claim for support under the *SLRA* in *Madore-Ogilvie*. In that case, the life insurance policy at issue was owned jointly by the deceased and his spouse and the guardians of the minor children brought an application for support pursuant to Part V of the *SLRA* in an attempt to claw back a jointly owned policy for the purposes of satisfying support claim.

The judge presiding over the application in *Madore-Ogilvie* held that the jointly held policy was available to satisfy the claim for support pursuant to section 72(1)(f) of the *SLRA*. A majority of the Divisional Court, however, took a contrary view and reversed the lower court’s decision. In so doing, the Divisional Court relied largely on section 199 of the *Insurance Act*.<sup>5</sup> On a further appeal to the Ontario Court of Appeal, Justice Gillese agreed with the Divisional Court but did not see section 199 as having any application. She was of the view that the legislature intentionally did not include jointly owned life insurance in section 72. While I agree that section 199 has no application since it deals with transfers of ownership and the rights of successive owners, I respectfully disagree that a joint first to die policy is not caught by section 72 of the *SLRA*.

Part of the difficulty with the analysis regarding section 72 of the *SLRA* in *Madore-Ogilvie* is the assumption that the surviving spouse receives the proceeds of the policy by virtue of her joint ownership. The decision in this case did not make any mention of whether there was a beneficiary designation on the policy but the existence of a beneficiary designation is quite relevant.

Consider a policy owned by A and B on their joint lives, either first to die or last. The policy could have both of them as beneficiaries or it could have C as the beneficiary. If the policy is first to die and B passes, then A receives the proceeds as beneficiary not as the surviving joint owner. Alternatively, if the policy was last to die, when B dies his/her ownership rights cease. Now you would have a policy owned by A on A’s life with A as the beneficiary or possibly someone else such as C. When A passes, he/she cannot collect the proceeds obviously and, without a different beneficiary designation, the proceeds would fall into A’s estate. Clearly with a joint last to die policy, the last survivor will not receive the proceeds by virtue of the beneficiary designation since you cannot designate yourself as the beneficiary of a policy according to the definition in the *Insurance Act*.

With a joint first to die policy, such as the one in the *Madore-Ogilvie* case, the only way the survivor of A and B receives the proceeds as a result of ownership is if there is no beneficiary designation in which case section 194(1)(c) of the *Insurance Act* applies so that the proceeds are payable to the owner of the

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contract. The provision also says “or their personal representative” which addresses the situation where you have a joint last to die policy. If there had been another person designated then section 194(1)(a) of the *Insurance Act* applies and the proceeds go to the surviving beneficiary. The order in which insurance proceeds are distributed is first to beneficiaries and then to owners if there is no beneficiary regardless if the policy is joint first to die, joint last to die or single life.

Some may argue that with a joint first to die you do not have valid beneficiary designations. This conclusion would be based on the assumption that each owner is naming themselves as beneficiary. However, as shown above, there is cross designation which should not be a problem. This is the same as A taking out a policy on him/herself and naming B as the beneficiary. Similarly B could take out a policy on him/herself and name A as a beneficiary. The survivor receives the proceeds as the beneficiary and likely cancels the policy they own since it is no longer needed or they change the beneficiary designation. With a joint policy, the results should not be any different than two single policies nor should there be an assumption that the proceeds are received as a result of the joint ownership. Insurance is not like other assets. Ownership rights have a different purpose than transferring value. The primary purpose is control of the policy.

Following this reasoning, a joint first to die policy does come within section 72(1)(f) of the *SLRA* and is available to satisfy an order for dependant’s relief under section 63(2)(f). The existence of another owner is not expressly precluded and should not lead to anomalous results compared to a single life policy. A joint last to die policy would also be covered since the section does not state any requirement about the beneficiary designation. A review of the other clauses in section 72 does not alter the conclusion. Clause 72(1)(f.1) deals with group insurance. A multi-life policy is similar to a group policy.

You could take the view that the comprehensive listing in section 72 necessarily excludes multiple-life policies from 72(1)(f) since they are not listed but the converse is more likely given the gaps in the *Insurance Act* itself. For instance, the creditor protection provisions in section 196 would not apply to joint policies, which is illogical. The section reads as follows:

**196.** (1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.

*Contract exempt from seizure*

(2) While a designation in favour of a spouse, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the rights and interests of the insured in the insurance money and in the contract are exempt from execution or seizure.

If our fictional couple above, A and B, were to buy two separate policies on their own lives and designate the other as beneficiary they would clearly get the benefit of these provisions. Does it make sense to deny creditor protection just because the policies are melded into one? To this author’s knowledge there is no case law on point but optimism abounds that reason will eventually prevail. It is reasonable to conclude that joint policies should not result in less favourable treatment than a similar strategy using single life policies.

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While neither of these two cases provides a definitive answer regarding when someone other than the named beneficiary will be entitled to insurance proceeds, taken together they do bring us closer to an understanding of when such a claimant may not be entitled to the proceeds of a life insurance policy. Thanks to Bruce Dawe and Chris Clemmer, who respectively are a partner and an articling student in our Waterloo Region office, for their assistance.

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<sup>1</sup> *Richardson Estate v. Mew*, 2009 ONCA 403 (CanLII)

<sup>2</sup> *Madore-Ogilvie (Litigation Guardian of) v. Ogilvie Estate*, 2008 ONCA 39 (CanLII).

<sup>3</sup> *Family Law Act*, R.S.O. 1990, c.F.3.

<sup>4</sup> *Succession Law Reform Act*, R.S.O. 1990, c.S.26.

<sup>5</sup> *Insurance Act*, R.S.O. 1990, c.I.8.

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## Mark Your Calendar: Institute 2010

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Pre-register today at [www.oba.org/Institute2010](http://www.oba.org/Institute2010)

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## Estates Bar Mourns the Passing of Rodney Hull, QC LSM

The OBA sadly notes the passing of Rodney Hull who died on December 5th, 2009. His funeral will be held on December 11, 2009 in Toronto. A fulsome tribute to Rodney will be provided in the next *Deadbeat* issue. Rodney's obituary, published in the Globe & Mail, can be found on line at: <http://www.v1.theglobeandmail.com/servlet/story/Deaths.20091208.93216471/BDAStory/BDA/deaths>

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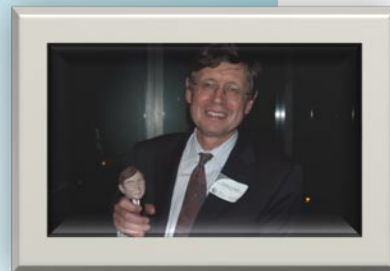
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