ESTATE LITIGATION

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The Basics of Estate Litigation:

Claims under *The Family Property Act*

and *The Dependants' Relief Act, 1996*

and Challenges to Testamentary Documents

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Introduction

In this paper and the presentation accompanying it, we will be reviewing some of the statutory and common law claims that can be brought against an estate. This is not intended to be an exhaustive overview of all of such claims (the length of a teleseminar would not permit that type of review). We will be focusing on four main issues: *Family Property Act* claims, *Dependants' Relief Act* claims, testamentary capacity and undue influence.

At the conclusion of our presentation, we would be happy to take any questions that you may have.

Claims against Estates under *The Family Property Act*

Statutory Provisions

Sections 30 to 37 of *The Family Property Act* ("FPA") provide the statutory basis for making a family property claim against an estate. Some of the important considerations flowing from those sections are:

1. There is, in effect, a limitation period to bring a family property claim against an estate. Such a claim must be made within six months from the date of probate: Section 30(2);
2. The personal representative of a deceased can be held personally liable to the surviving spouse if the personal representative distributes the estate before the six months has elapsed from the date of probate, unless there is consent of the surviving spouse: Section 33;
3. An estate cannot commence a claim for a division of family property: Sections 30(1) and 36;
4. An estate can continue an action already commenced by a spouse prior to their passing: Section 30(1); and

5. An estate cannot be enlarged by virtue of a family property claim, unless it is continuing an action commenced by the deceased in his or her lifetime: Section 30(1) and 36.

Leading Case Law

There are a number of decisions considering Sections 30 to 36 of the FPA or its predecessor sections under *The Matrimonial Property Act*. Three leading cases are:

1. *Donkin v. Bugoy*, [1985] 2 S.C.R. 85 (S.C.C.);
2. *Edward v. Edward Estate* (1987), 57 Sask. R. 67 (Sask. C.A.); and
3. *Sibley v. Sibley*, 383 Sask. R. 5 (Sask. Q.B.).

In *Donkin v. Bugoy*, the Supreme Court considered a decision of the trial judge ordering an unequal division of family property on the basis that one of the parties had died during the conduct of the matrimonial proceedings. The trial court ordered that the majority of the family property be vested in the surviving (respondent) spouse. The Supreme Court overturned that decision and ordered an equal division of the family property. The Court indicated that an estate continuing a family property action steps into the shoes of the deceased. Further, the death of one of the parties is not a proper ground to unequally divide the family property.

In *Edward v. Edward Estate*, the Saskatchewan Court of Appeal set out the procedure to evaluate a family property claim against an estate. In particular, the Court stated:

> 46 … The proper approach, in my view, requires that all of the matrimonial assets, that is the assets of both the husband and wife less the respective debts, be taken into account. The judge then determines the surviving spouse's share of those assets as if the deceased spouse had not died (*Donkin v. Bugoy*). If that share is less than the value of the assets which the surviving spouse has already received, he or she is entitled to a matrimonial property order for the difference out of the deceased spouse's estate. If that share is the same as or more than the value of the assets the surviving spouse has already received, then the judge must simply dismiss the application. The judge in that case, however, would not make a

> matrimonial property order in favour of the deceased spouse's estate. Section 36 precludes such an order.

As can be seen from the foregoing, in assessing the amount to be received by the surviving spouse, the Court is to:

1. Evaluate the property owned by each of the parties as if neither party had died;
2. If the surviving spouse has received less than what he or she is entitled under the FPA, the judge would make a family property order in favour of the surviving spouse;
3. If the surviving spouse has received more than his or her entitlement under the FPA (generally 50% of the family assets), the judge would dismiss the family property action. The judge would not order a distribution of family property to benefit an estate.

This issue was further addressed in the *Sibley v. Sibley* decision of Justice Dufour. In that decision, the Court determined that the wife had received more than her share of the family property by her right of survivorship on the husband's pension and a joint bank account. As a result, the wife's application for a division of family property was dismissed. The Court also commented on the fact that it could not make an order that would enlarge the estate by dividing the assets already received by the wife. The facts of the *Sibley* decision are interesting and worthy of review.

Considerations in Making a Family Property Claim

The primary factor in determining whether your client should assert a family property claim against an estate is whether your client is receiving less than his or her share of the family property through the operation of the Will or intestacy. In making that assessment, you must look at the net assets in the possession of the surviving spouse and the estate; what assets were or will be received by the surviving spouse by virtue of the rights of survivorship; and what the surviving spouse is entitled to through the Will or by way of intestacy. If the total of the amounts to be received by the surviving spouse is equal to or greater than than the surviving

spouse's likely entitlement under the FPA, there would be no benefit to making a claim under the FPA.

If the surviving spouse is receiving less than his or her entitlement under the FPA, the spouse should be entitled to a division of family property.

Claims Against Estates under *The Dependants' Relief Act, 1996*

The Dependants' Relief Act, 1996 ("DRA") provides a statutory basis for "dependants" of a deceased to make a claim against an estate for reasonable maintenance.

Timing – An application must be made within six months of probate. However, the court has discretion to extend this time frame where appropriate: Section 4. An application made after 6 months can only be made against any portion remaining undistributed at the date of the application.

Step One – Determine if the applicant is a "dependant"

Section 2(1) of the DRA defines "dependant" to include:

- (a) The wife or husband of the deceased;
- (b) A child of the deceased who is under 18 at the time of the deceased's death;
- (c) A child who is over 18 at the time of the deceased's death where:
  - (i) By reason of mental or physical disability they are not able to earn a livelihood; or
  - (ii) By reason of need or other circumstances he or she ought to receive a greater share of the estate;
- (d) A person who cohabitated with the decease as spouses:
  - (i) Continuously for a period of not less than two years; or
  - (ii) In a relationship of some permanence, if they are the parents of a child.

The approach to assessing whether a couple was "cohabitating as spouses" is similar to the approach taken in spousal support cases under *The Family Maintenance Act* or similar legislation. The seminal case in this area is *Molodowich v. Penttinen* ((1980), 17 R.F.L. (2d) 376), where the court listed a number of factors to determine what constitutes

"cohabitating": shelter, sexual and personal behaviour, services, social, societal, support (economic), and children.

"Some permanence" has been held to be present when there is a serious intent to get married, and is distinguished from dating couples or situations where the parties have lived together off and on for brief periods of time, with other "relationships" intervening (*D.E.D. v. B.I.A.* [1994] S.J. No. 731).

In *Romanchuk v. Robin* (2003 SKCA 50), the Court of Appeal upheld the finding of the trial judge that a couple who cohabitated for 12 years were not cohabiting as "spouses". The trial judge found that the cohabitation was for the convenience of their daughter.

Step Two – Determine if maintenance should be provided

Pursuant to section 6(1) of the *DRA*, a Court will only make an order for maintenance from an estate where it is satisfied that the testator did not make reasonable provision for the dependant in question.

Section 7 provides the court with discretion to make maintenance orders by way of:

(a) An amount payable annually or otherwise;
(b) A lump sum;
(c) Specified property to be transferred or assigned, either absolutely or for life or for a term of years; or
(d) Creation of a trust fund.

Section 8(2) provides factors to consider in making an order for maintenance:

(a) Any past, present or future capital or income from any source of the dependant;
(b) The conduct of the dependant in relation to the deceased;
(c) The claims that any other dependants of the deceased may have; and
(d) Any other matters that the court considers appropriate.

The Supreme Court of Canada addressed the issue of dependants' relief in *Tataryn v Tatryn Estate* ([1994] 2 SCR 807 [*Tataryn*]). Justice McLachlin (as she then was) held that dependants' relief legislation is not designed to ensure maintenance for dependants who are in need, but

allows redistribution of the capital of the estate if that is required to give effect to the testator's legal and moral duties toward his or her dependants.

In summary, the test for determining what constitutes appropriate relief is two-fold: first, the Court must determine the legal obligations of support that the law would have imposed on the deceased during his lifetime; second, the Court must augment the inquiry with reference to moral considerations, being "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards" (*Ibid* at para 28).

<u>Challenging a Will on the basis of lack of capacity</u>

To challenge a Will on the basis that the testator lacked capacity, the challenging party needs to bring an application in chambers seeking an order that the Will be proven in solemn form (Rule 16-45).

In Saskatchewan an application to challenge a will on the basis of lack of testamentary capacity involves two levels of hearings. The first is chambers hearing, based on affidavit and documentary evidence, to determine if there is sufficient merit in the challenge to warrant a trial. The second (if the applicant is successful) is a trial to determine the issue itself. The issue before the court at either level is the same. The main difference is the scope of the hearing, the ability to determine credibility respecting contradictory evidence, and the relief that is granted. The chambers judge decides if there will be a trial, the trial judge decides if the testator had capacity.

In *Dieno Estate v Dieno Estate* (1996) 147 Sask R 14, Justice Baynton summarized the onus of proof as follows:

> 1. The propounder of the will has the burden of proof (the civil standard on a balance of probabilities) with respect to its due execution, the knowledge and

approval of its contents by the testator, and the testamentary capacity of the testator.

2. The propounder is aided by a rebuttable presumption that the testator knew and approved of the contents of the will and had the necessary testamentary capacity. The presumption arises upon proof that the will was duly executed with the requisite formalities after having been read over to or by the testator who appeared to understand it.

3. The presumption simply casts an evidentiary burden on those attacking the will. This burden can be satisfied by adducing or pointing to some evidence which, if accepted at trial, would tend to negative knowledge and approval or testamentary capacity. If the chambers judge finds that this burden has been met then evidentiary burden reverts to the propounder at the trial to prove capacity.

It is often noted that a testator has capacity to make a Will, if they are sufficiently clear in their understanding and memory of:

(a) the extent and value of their property;
(b) the persons who are natural beneficiaries;
(c) the testamentary provisions that they are making;
(d) the nature of the claims of others whom he/she is choosing to exclude;
(e) how these elements relate to form an orderly plan of distribution of property.

Boughton v Knight ((1873) LR 3 P & D 64 at 66)
Re: Schwartz (1970), 1970 CanLII 32 (ON CA), 10 D.L.R. (3d) 15 at 32 (Ont. C.A.) [aff'd 1971 CanLII 17 (SCC), [1972] S.C.R. 150]

It is possible for a testator to slip in and out of testamentary capacity and the focus needs to be their capacity at or proximate to the signing of the will. For example, the question of whether or not persons who suffer from delusions have testamentary capacity has been considered in numerous cases. In general, for a delusion to invalidate a will, it must:

(a) be a belief in a state of facts that no rational person would believe;
(b) affect the disposition of the will;
(c) not be attributable to misinterpretation, capricious whims or idiosyncrasies short of an insane delusion, because a person has a right, subject to fulfilling specific legal obligations to dependants, to dispose of his or her estate in an absurd and capricious manner, whatever others think of the fairness or reasonableness of the dispositions.

Challenging a Will on the Basis of Undue Influence

To challenge a Will on the basis of undue influence, the challenging party must seek an order requiring that the Will be proven in solemn form in the same manner as with a challenge on the basis of testamentary capacity.

In *Deneve v. Kadachuk Estate*, 2007 SKCA 145, the Court of Appeal determined that the *Dieno Estate, supra,* two-part test is equally applicable to a challenge on the basis of undue influence. To obtain an order requiring that a Will be proven in solemn form, a challenger must demonstrate that there is a "genuine issue to be tried".

Although the "genuine issue to be tried" test appears to be a relatively low threshold, the Court of Appeal in *Royal Trust Corp. of Canada v. Ritchie* (2007), 293 Sask. R. 238, indicated that there must be probative evidence and a sufficient evidentiary foundation to require proof in solemn form. The Court considered the cost and delay associated with proving a Will in solemn form in determining that a challenger must set a sufficient evidentiary foundation before the matter proceeds further.

"Undue influence" is described by *Halsbury's Laws of Canada*, *Food/Gifts*, 1st ed. (Markham, ON: LexisNexis Canada, 2014) at p. 299, as follows:

> Undue influence is influence which overbears the will of the person influenced so that in truth what he or she does is not his or her own act. The domination of another person's will may occur through manipulation, coercion or outright but subtle abuse of power. [Footnotes omitted]

Historically, courts have indicated that the burden of proof is on the challenger to establish that there has been undue influence in the context of a testamentary disposition. Thus, one would traditionally have to call evidence showing that the recipient put undue pressure or coercion on the donor at or around the time of the execution of the testamentary document. This was a difficult test, as others may not have actually witnessed the abuse of power.

However, in the decisions of *Re Quandt Estate*, 2011 SKQB 345, and *Thorsteinson v. Olson*, 2014 SKQB 237, Saskatchewan courts have indicated that there can be a presumption of undue influence in a testamentary context based on the relationship between the donor and the donee. In *Re Quandt Estate*, the relationship of child and dependent parent was sufficient to attract a presumption of undue influence. Thus, if a relationship of dominance can be established between the donor and donee, the donee may be required to prove that the gift was not made as a result of undue influence. This has been the case with respect to *inter vivos* gifts for some time, but it is relatively novel in the testamentary context (see the commentary in the CBA newsletter regarding the *Quandt* decision here: http://www.cba.org/CBA/newsletters-sections/2012/PrintHTML.aspx?DocId=49101#article2).

Conclusion

Estate litigation issues are becoming increasingly prevalent with an aging population and an increase in "self-help" Will kits. As a result, we hope that you will find this paper and presentation helpful in your day-to-day practices.