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1. Poorly Worded Codicil Creates Uncertainty

Estate of Gordon Austin Wittick, 2009 MBQB 140 concerns an executor's application under s.84 of *The Trustee Act* for directions on the interpretation of a codicil written by the deceased. The codicil read: "I want my will to be changed so my estate will be divided according to the law all my brothers & sisters to share." The executor and some of the respondents argued for a literal interpretation of the codicil, which would create an intestacy with respect to 50% of the residue. The court disagreed with this approach, concluding that it should "make all reasonable efforts to determine the subjective intent of the testator and take reasonable steps to avoid conclusions of uncertainty or intestacy when it is reasonably certain (as opposed to speculative) that a testator knew what he wanted done with the residue of his estate and took steps to prepare a will or codicil." Taking all the evidence into account and honouring the probable intent of the testator, the court found the codicil to be a residuary clause, thus avoiding an intestate distribution.

2. Timeliness Waived by Delay

In *Peg-Man Ltd. v. Pallen*, 2009 MBQB 120 the court granted the plaintiff's application for an order of specific performance of a transfer of land which was the subject of an option to purchase. The vendor argued that the purchaser's failure to tender the purchase proceeds on the closing date contravened the time is of the essence stipulation in the option agreement and thereby voided the transaction. The court found that neither the purchaser nor the vendor was in a position to conclude the agreement on the closing date. The documents tendered by the vendor were incorrect and therefore acted as a form of estoppel to prevent the vendor from relying on the timeliness clause. In addition, the 3-year delay from the exercise of the option until the vendor was in a position to transfer title amounted to a waiver of the timeliness clause.

3. Bona Fide Purchasers Entitled to Discharge of Pending Litigation Order

In *Schellmann v. Schellmann*, 2009 MBQB 70 the court granted a non-parties' motion for removal of a pending litigation order filed against a cottage they had purchased from the defendant. The non-parties were unquestionably *bona fide* purchasers for value without notice. They had no inkling of the plaintiffs' interest, which arose from an alleged twenty year old agreement that the defendant would hold the property in trust for his daughter.

4. Constructive Trust Criteria: ONCA

Disagreeing with the trial judge's finding that the testator had been unjustly enriched by the services and benefits provided by the respondent, the Ontario Court of Appeal in [*Belvedere v. Brittain Estate*](#), 2009 ONCA 1 overturned a \$1.75 million constructive trust award in the respondent's favour. The court found that the trial judge had erred in finding that intent was relevant to the establishment of a constructive trust and had failed to balance the benefits conferred and received by the parties to determine whether the claimant's contribution was sufficient to entitle her to compensation. The court also rejected the resulting trust and proprietary estoppel remedies put forward by the respondent.

5. Recent Publications

The June 2009 edition of [*The Last Word*](#), the Canadian Bar Association [National Wills, Estates and Trusts](#) section's new newsletter, is available online. It contains several items of interest to solicitors, including two articles by local practitioners:

- [*The Western Canada Law Reform Agencies Report on Enduring Powers of Attorney*](#) by Cynthia Hiebert-Simkin, Taylor McCaffrey LLP;
- [*Case summary: Collins v. Moss*](#) by John Delaney, Ted Crane, John Poyser, and Jacob Giesbrecht of the Wealth & Estate Law Group of Inkster Christie Hughes LLP.

The following two publications both originate in British Columbia and reference primarily B.C. legislation and case law, but contain some practical information for estates and property lawyers:

- [*Dealing with the Problem Executor*](#) by Roger D. Lee, posted June, 2009 on CLE BC's [Practice Points](#);
 - [*Real Estate MATTERS*](#), a June 2009 publication of McCarthy Tétrault's B.C. Real Property & Planning Group.
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