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New season, new look. We've switched to a different service to create and deliver eLaw. Your feedback, especially regarding technical issues, is welcome.

Contact us at elaw@lawsociety.mb.ca.

Partition and Sale Test: MBCA

In [Simcoff v. Simcoff](#), 2009 MBCA 80 the Court of Appeal found that a mother who had transferred title to property she owned into joint tenancy with her son was not entitled to a declaration of resulting trust when she later sought to transfer the property to another child. The court agreed with the conclusion of the applications judge that when she originally transferred the property she intended a gift of a one-half undivided interest to the son. The court went on to find, however, that the applicant was entitled to an order of partition and sale, since "the fact that a "complete gift" may have been given and that this gift included a right of survivorship does not, *prima facie*, prevent a donor from dealing with the retained joint interest while alive. The right of survivorship is only to what is left." (para.63) The onus is on the person opposing an application for partition and sale to prove oppression, vexatiousness or unclean hands, which the son in this case failed to do.

The court also made some pointed comments about solicitor/client privilege and the use made of an affidavit filed by a former solicitor of the applicant. (paras. 13-33)

Deference Owed to Tribunal Expertise: MBCA

[Guinn v. Manitoba](#), 2009 MBCA 82 deals with the proper standard of review to be applied in an appeal from an order of a motions judge overturning a decision of the Farm Lands Ownership Board. The Board found that the appellant, an American citizen, contravened the provisions of

The Farm Lands Ownership Act restricting the ownership of farm lands by non-residents of Canada, when he purchased two quarter sections of land in Manitoba for recreational use. The tribunal relied on the conclusions reached by a specialist in a land use assessment report. According "little if any deference" to the decision of the Board, the motions judge concluded that the land was not reasonably capable of being farmed. The Court of Appeal overturned that result, finding that the correct standard of review (reasonableness) requires deference to the expertise of the Board, a specialized tribunal dealing with farm ownership issues.

Testators Change Their Minds

In [*Evelyn Elizabeth Sawatzky v. The Estate of Harry Leonard Sawatzky*](#), 2009 MBQB 222 the court dismissed an application under s.23 of *The Wills Act* for an order that an unsigned typewritten document be fully effective as the last will of the deceased notwithstanding that it was not executed in compliance with the formal requirements imposed by the Act. The court reviews the guiding principles for a s.23 application outlined in the leading Manitoba case *George v. Daily*, [1997] M. J. No. 51 and concludes that the requirement that the subject document express the testator's deliberate or fixed and final expression of intention as to the disposal of his property upon death was not met.

Credible Evidence Required to Establish *Inter Vivos* Gift

In [*Konrad v. Gamble*](#), 2009 MBQB 184, the court granted the executors' claim for repayment of three loan agreements because the borrower failed to prove on a balance of probabilities that the testator intended to forgive the loan as an *inter vivos* gift with immediate effect while she was alive. The court questioned the credibility of the borrower's evidence.

Residential Tenancy Changes

Several sections of [*The Residential Tenancies Amendment Act*](#), S.M. 2009, c. 10 came into force June 11, 2009, including a provision allowing certain matters to be heard by one commissioner instead of three ([s.70](#)). The remaining sections will become law when the required regulations are in place.

The 2010 rent increase guidelines have been set at 1% as [announced](#) by the government September 4, 2009.

Real Estate Fraud Alerts

Real estate practitioners are particularly vulnerable to fraud scams. The Law Societies of both [Alberta](#) and [B.C.](#) have recently issued fraud alerts to their members detailing new variations of fraud transactions taking place in their provinces and linking to related resources. Learning how to recognize and avoid these scams is the best prevention and a wealth of information exists to that end. As noted below, the Law Society of Manitoba is presenting a program on fraud prevention on September 23, 2009. See also:

LawPRO's [Fraud Practice Aids webpage](#), which contains a collection of articles on fraud related topics. Particularly helpful are the new [Fraud Fact Sheet](#), which lists the red flags to look for in the typical fraud scenarios: bad cheque scams (business loan and debt collection fraud), real estate scams (identity theft and flip value fraud), and employee fraud; and *The Many Faces of Fraud*, a special report on identity and value frauds.

Recent [LawPro magazine](#) articles on fraud such as [Lawyers as targets of fraud: the common misconceptions](#), September 2009, or [Fraud: claims put pressure on premiums](#) and [Anatomy of](#)

Property Registry Notice

The Registrar-General issued two new directives over the summer: [Electronic Bill Payment Option for Personal Property Registry Account Holders](#) and [Mortgage Sale Proceedings Involving Personal Property Subject to Security Interest](#). The latter directive concerns the election under s.55 (5) of [The Personal Property Security Act](#) to proceed against both land and personal property in the same process. In these cases the secured party acting as mortgagee must give notice of the election (including a reference to s.55 (5)) in both the Notice of Exercising Power of Sale and the Auction Sale Conditions.

Recent Publications

The following articles may be of interest to property and estates practitioners:

[Commercial Leasing: Structuring and Managing Lease Relationships in a Recession-Tools and Strategies in Lease Drafting](#) by Peter J. Anderson and Catherine Gibson, posted August 2009 on [Practice Points](#)

[Seller Remedies in a Collapsing Deal](#) by Simon Coval, posted June 2009 on Practice Points

[Dealing with the Problem Executor](#) by Roger D. Lee, posted June 2009 on Practice Points

[Alter Ego and Joint Spousal Trusts: 10 Years On](#) from Clark Wilson website newsletter *Your Estate Matters*, Spring 2009

Fall CPD Programs: LSM

Mark your calendars now to attend these continuing professional development programs offered by the Law Society:

[Frauds, Scams and Stings: Lawyers Beware!](#) - Learn how to deal with the increasing threat of scams targeting lawyers at this lunch program, featuring law enforcement and insurance specialists who know what to do. The program takes place at the Law Society classroom from noon to 1:30 p.m. on September 23, 2009.

[Improving Your Powers of Attorney](#) - Presenter Cynthia Hiebert-Simkin looks at current issues in this growing practice area on November 20, 2009.

[Death bed Wills: Estate Planning Where Capacity is at Issue](#) - Presenter John Poyser will review the case law on capacity and suggest best practices in this difficult area at a lunch hour program presented on December 8, 2009.

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