



## eLaw - Property & Succession Update

October 2009 - No. 38

ISSN 1916-3894

### In This Issue

Brilliant Execution Required for Successful Tax Avoidance

Jurisdiction in Residential Tenancy Disputes

Mutual Intention Necessary to Sever Joint Tenancy

New Regulations Prohibit Sewage Ejectors

Upcoming CPD: LSM

Society of Trust and Estate Practitioners

## Brilliant Execution Required for Successful Tax Avoidance

Two recent decisions of the Tax Court of Canada consider the use of offshore trusts as tax and estate planning vehicles. In both cases the court found that the trusts failed. In [Garron Family Trust v. The Queen](#), 2009 TCC 450, the court rejected the longstanding test of trust residency (that a trust is resident where the trustees reside and operate) and found central management and control to be the correct test. In [Antle v. The Queen](#), 2009 TCC 465 the court found that the trust had not been validly constituted and commented as follows on the issue of tax avoidance strategies:

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. Backdating of documents, fuzzy intentions, lack of transfer documents, lack of discretion, lack of commercial purpose, delivery of signed documents distributing capital from the trust prior to its purported settlement, all frankly miss the mark - by a long shot. They leave an impression of elaborate window dressing. In short, if you are going to play the avoidance game, it is not enough to have brilliant strategy, you must have brilliant execution. (para.58)

The following articles discuss the import of these decisions:

[Tax Court of Canada Decisions Relating to Non-Resident Trusts](#) Janette Pantry & Rebecca Levi, a [Blakes](#) Legal Bulletin posted October 9, 2009

[Garron: Determining Residence of Trusts](#) by Ahsan Mirza, posted September 28, 2009 on [The Court](#)

## Jurisdiction in Residential Tenancy Disputes

In [\*J & R Property Management v. Kenwell\*](#), 2009 MBCA 102, the court granted a landlord leave to appeal a Residential Tenancies Commission decision awarding compensation to a tenant for wrongfully disposed of property belonging to a friend of the tenant. Leave was granted on three questions only:

- (1) Must a landlord/tenant relationship exist, with a tenant the claimant, in order for the Commission to have jurisdiction to consider the claimant's claim against a landlord?
- (2) If there is a landlord and tenant relationship in existence, does the Commission have jurisdiction to consider and award compensation in respect of the claim of a third person who is not a tenant, but is the owner of abandoned property under Part 7 of the Act?; and
- (3) If the answer to question (2) is "yes," must the third person advance a claim in order for the Commission to have jurisdiction to consider and make such an award?

## Mutual Intention Necessary to Sever Joint Tenancy

In [\*Davison v. Davison Estate\*](#), 2009 MBCA 100 the court upheld the motion judge's finding that the respondent's request for partition and sale in her divorce petition was insufficient to establish either intention or mutuality and therefore did not sever the joint ownership of the marital home of the respondent and her deceased husband.

## New Regulations Prohibit Sewage Ejectors

Lawyers who handle real estate transactions (especially cottage properties) should be aware of the new rules in effect for sewage disposal announced in a recent government [news release](#). Regulation 156/2009, the [Onsite Wastewater Management Systems Regulation, amendment](#) came into force September 28, 2009. Effective immediately, the new regulations will prohibit the installation of new sewage ejectors and eliminate existing sewage ejectors at the time of any property transfer, and prohibit the use of disposal fields for new systems in sensitive areas. Buyers of property with sewage ejectors will be required to remove the ejector and replace it with another approved sewage system. They may also be responsible for costly clean-up costs from the former system.

## Upcoming CPD: LSM

The Law Society is presenting the following continuing professional development programs on property and estates topics:

[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 this lunch hour program on December 8, 2009.

[Annual Hot Topics in Real Estate Practice](#) - a half-day program on January 14, 2010 examining the latest issues facing real estate practitioners. Topics to be discussed include: revenue property issues, internet lenders, new condominium legislation and Land Titles Office concerns.

And, mark your calendars now for ['Til Death Do Us Part and Beyond](#), a program exploring the intersection of family law and death, scheduled March 5, 2010.

For more information or to register [contact](#) the Education and Competence Department.

## Society of Trust and Estate Practitioners

The [Society of Trust and Estate Practitioners](#) (STEP) is an international organization for trust

and estate practitioners, including lawyers, accountants, financial planners, insurance advisors and trust professionals. The [Winnipeg branch](#) of STEP is very active. They are offering a full slate of [educational sessions](#) this year, open to members and non-members. The next program, [Dealing with Registered Investments at the Time of Death](#), takes place October 22, 2009.

*The Law Society of Manitoba provides this service solely for the benefit of and to support the competence of its members. Members should exercise their professional judgment in using or adapting any content.*