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Common Element Use a Balancing Act

In [*Wentworth Condominium Corp. No. 198 v. McMahon*](#), 2009 ONCA 870 the Ontario Court of Appeal upheld a lower court finding that a condo owner did not require board approval to install a hot tub in the exclusive use common element area on his patio. The court agreed that a hot tub is not an addition (joined to), alteration (change to structure) or improvement (enhanced value) within the meaning of [s. 98\(1\)](#) of the *Condominium Act*. The court also dismissed arguments that the hot tub installation was an unreasonable or dangerous use of the common elements contrary to [ss.116 and 117](#) of the Act. Condo corporations will have to reconsider how they exert control over common elements if the decision stands, as noted in the *Law Times* article [Ruling on hot tubs sparks debate](#). The case should also serve as a reminder of the importance of discussing the limitations of condominium living with purchaser clients.

Why Fighting Doesn't Pay

Two recent Manitoba decisions, [*The Estate of Sophie Zelezniak*](#), 2009 MBQB 326 and [*The Estate of Mathew Edward Dylan Darichuk*](#), 2009 MBQB 301, illustrate how family dysfunction can complicate the passing of accounts, deplete the limited resources of small estates, and try judges' patience. In *Zelezniak*, an appeal of a master's decision on a passing of accounts, the judge makes it clear that the almost 10-year delay in winding up the estate must end. He indicates at the outset that the decision is "not only a decision on the appeal but also directions... as to how th(e) estate may be wound up." (para.5) He remains seized of the matter and he directs the parties to proceed as expeditiously as possible (para. 62) and insure that any further litigation be case managed prior to coming to hearing. (para. 64) Similar frustrations are expressed by the master in the *Darichuk* decision, in which a 106-page affidavit ("rambling, rude, offensive and laced with argument") is let in unchallenged in order to facilitate closure and prevent further depletion of the small estate.

The Last Word

The National Wills, Estates and Trusts section of the Canadian Bar Association recently

published the second issue of its newsletter [The Last Word](#). It contains articles analysing two recent decisions of the Tax Court of Canada which will impact tax and trusts practices: [Garron Family Trust v. The Queen](#), 2009 TCC 450 and [Antle v. The Queen](#), 2009 TCC 465 (both discussed in our [October eLaw](#)). Another article, [Costs - no longer a free ride](#), discusses the [Fiacco v. Lombardi](#) decision (referred to in our [November eLaw](#)) in which the court restates the current law on costs in contentious estate litigation.

Developments in Charities Law

The January 2010 issue of [Charity Talk](#), the National Charities and Not-for-Profit Law CBA section newsletter, contains a number of articles which will be of interest to solicitors representing not-for-profit and charitable organizations, including a review of the new *Canada Not-for-Profit Corporations Act*, a summary of newly passed Ontario legislation concerning charities, and two articles detailing updates to Canada Revenue Agency guidelines on foreign activities and fundraising.

Upcoming Education Opportunities

The following winter programs may be of interest to wills and estates practitioners:

['Til Death Do Us Part and Beyond](#), a joint Family Division Judges, LSM, and MBA program exploring the intersection of family law and death. Topics to be covered include: agreements contemplating death, resulting trust and the presumption of advancement, and grandparent access and guardianship. The program will be held March 5, 2010 at the Radisson Hotel.

For more information or to register contact the Education and Competence Department of the Law Society.

The [Society of Trust and Estate Practitioners](#) (STEP) is presenting programs on Common Drafting Errors in Wills (February 18, 2010) and A Potpourri of Legal Issues (March 18, 2010). See the [Winnipeg Branch](#) section of the website for further information.

And, mark your calendars now for the Canadian Bar Association online program [Everything Old is New Again: Troubleshooting in a Wills and Estates Practice](#) to be presented by local lawyers Jennifer Pfuetzner and Cynthia Hiebert-Simkin) on April 21, 2010.

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