



eLaw - Property & Succession Update

October/November 2010 - No. 48

ISSN 1916-3894

In This Issue

Clear Intention Required to Override a Written Beneficiary Designation: MBCA

Meaning of Issue Derived From Context: MBQB

The Meaning of "Sellers' Lawyer's Approval" Condition: MBQB

Incorrigible Condo Owner Forced to Sell Unit: ONSC

Requirement to Report Abuse Extended

Recommended Reading: Rogue Attorneys, Mutual Wills and More

Upcoming MBA Programs

Clear Intention Required to Override a Written Beneficiary Designation: MBCA

The Court of Appeal decision in [Chanowski v. Bauer](#), 2010 MBCA 96 highlights the need to review beneficiary designations in insurance contracts when circumstances change and to comply with all formalities when alterations are required. In this case, a former common law wife of the deceased (who had had no relationship with him for 13 years) was found to be entitled to the proceeds of his work life insurance policy over his common law wife of many years. Both the insurance policy and ss. 167(2) and 147(1) of *The Insurance Act* required written notice of a change, which the deceased had not made. While sympathetic to the position of the current wife, who argued that other documents executed by the deceased evidenced his intention to alter the designation to make her the beneficiary, the court could not find "the necessary clear and express intention" to override the original written designation. The court also agreed with the applications judge that the doctrines of mistake and rectification did not apply, as they require a mutual mistake by both insured and insurer. Even the equitable remedy of remedial constructive trust was of no assistance, since "(s)peculation (as to the deceased's intentions) is not sufficient. The law requires a fair degree of certainty in this area to avoid encouraging litigation." (para. 44) In addition, the unjust enrichment required to warrant the remedy of constructive trust could not be made out.

Meaning of Issue Derived From Context: MBQB

The testatrix intended to benefit grandchildren only when she used the term issue in her will according to the court in [Smith v. Smith](#), 2010 MBQB 236. The court rejected the argument of the Public Trustee (the litigation guardian of other descendants) that "the word "issue" means all of the testatrix's lineal descendants." The court found:

...the ordinary or dictionary meaning of a word, referred to as the primary meaning, must give way to any modified meaning or secondary meaning required by the context....So the ordinary meaning of a word used in a will must be modified by the context of the will as a

whole, read in the light of the circumstances known to the testator at the time the will was made. The meaning is determined not only from the will, but also from the will as read in light of the surrounding circumstances under the "armchair rule"...(para.20)

In this case, both the will itself and the trust agreements signed as part of a larger estate plan supported the conclusion that the testatrix intended to refer to no more than the second generation.

The Meaning of "Sellers' Lawyer's Approval" Condition: MBQB

In [Draper v. Morrow](#), 2010 MBQB 231 the court dismisses a purchaser's motion for specific performance of a real estate sales agreement, finding that non-fulfillment of a condition precedent (approval by the sellers' lawyer) protected the vendor/defendants from being forced to complete the transaction. The court rejected the purchaser's argument that the lawyer had to have made an objective assessment of the agreement and could not withhold approval based solely on the vendors' instructions. At paragraph 31 the court notes that appeal courts in both Manitoba and Alberta have found that the approval clause "provides the party so stipulating with wide protection." The Alberta court went further, indicating (albeit in a dissent) that "unless restrictive terms are placed within the parties' proposed agreement limiting the lawyer's function, no such restriction can be imputed."

Incorrigible Condo Owner Forced to Sell Unit: ONSC

The court granted a "rare" order directing a condominium owner to sell and vacate her unit in [Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh](#), 2010 ONSC 4448. Among other things, the owner was accused of physical assaults and threats against other unit owners, property mischief, racist and homophobic slurs, and using her Rottweiler to intimidate those who challenged her. Describing the case as "a perfect storm" where the misconduct is serious and persistent, where its impact on a small community has been exceptional and where the Respondent appears to be incorrigible or unmanageable," the court ordered both sale within three months and a ban preventing the owner from purchasing, leasing or residing in any other unit. The following two articles discuss the decision:

- [Court boots out unit owner for "extreme behaviour"](#), posted September 7, 2010 on The Ontario Condo Law Blog;
- [Condominium case delivers challenges](#), *Law Times*, October 25, 2010.

Requirement to Report Abuse Extended

The Protection for Persons in Care Amendment Act, S.M. 2010, c 33 ([Bill 32](#)) came into force on September 30, 2010. The amendments extend the reporting of abuse requirements concerning health facility patients to cover patients of geriatric day hospitals and emergency rooms.

Recommended Reading: Rogue Attorneys, Mutual Wills and More

Courts will likely see more cases involving misuse of powers of attorney as the population ages and dementia becomes more widespread. Both litigators and solicitors who draft these instruments will find the article [Dealing With the Rogue Attorney](#), posted September 2010 on Practice Points, a good starting point for examining the potential for abuse, tactics to prevent it, and the remedies to stop a rogue attorney.

For a thorough review of the case law and materials on mutual wills, see the Practice Points publication [Mutual Wills](#), an update of an earlier paper prepared by UBC Law Professor Keith Farquhar. The Farquhar paper is appended to the publication, as is an article on Mutual Wills by Albert Oosterhoff, originally published by Canada Law Book.

The *Canadian Lawyer* article [Growing pains](#), by Judy van Rhijn, discusses why collaborative

law practice has failed to catch on in estate matters as it has in the family law realm.

Upcoming MBA Programs

Representatives from Pinchin Environmental will speak on the topic [Ascertainment of "Environmental" Problems/Hazards and Remediation of Same](#) at the next meeting of the Real Property section of the Manitoba Bar Association, to be held at 5:00 p.m. on November 24, 2010 at the offices of Pitblado LLP. Those who plan to attend should call 956-0560 to confirm.

Mark your calendars now for the 2011 Mid-Winter meeting, to be held January 20-21, 2011 at the Fairmont Hotel. The CPD program schedule is still being developed, but at least one session, Removing Personal Representatives: A Manitoba Perspective, will be of interest to solicitors.

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.