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***Forum Non Conveniens* a Discretionary Decision: MBCA**

Appellate interference on the issue of *forum non conveniens* "is justified only if the motion judge committed a reversible error of fact or law or arrived at a decision so clearly wrong as to amount to a truly unjust result" according to the court in [Henry Estate v. Henry](#), 2012 MBCA 4. The court upheld the motion judge's decision that Manitoba, not Jamaica, was the most appropriate jurisdiction to hear a dispute over the net proceeds of an estate probated in Jamaica and involving parties in England, Canada, the US and Jamaica. The court reviewed the criteria to consider in determining which forum is most convenient at paras.48-51 of the decision.

***Slobodianik* Standard Applies to Preparation of Power of Attorney: MBQB**

Although the test for capacity in the preparation of a will is more stringent, the "concept of suspicious circumstances and the resulting obligation of a lawyer to ask questions to ensure that a donor has the necessary degree of competence apply equally to the preparation of a power of attorney" according to the court in [Young v. Paillé et al.](#), 2012 MBQB 3. In this case, suspicious circumstances were raised by the donor's medical condition and by evidence of her variable level of functioning, both of which called into question her capacity to understand the nature and effect of the power of attorney. The lawyer, who was contacted by a family member, was therefore required to make a serious attempt to determine capacity. Since he had no specific recall of the meeting and no notes on file to confirm he followed his standard practice when taking instructions, the court was left with no specific information about the donor's capacity and therefore declared the power of attorney void.

Duty to Account Applies Only During Incompetency: MBQB

The attorney's obligation to provide an accounting to a named recipient under s. 22(1) of *The Powers of Attorney Act* applies only during the donor's mental incompetency according to the court in [Ranville v. Campbell](#), 2011 MBQB 315. Although proceeding on a consent order directing a reference for a passing of accounts, the court was not persuaded that the named recipient had a right to the accounting since there was no evidence as to the donor's incapacity. In the end, finding no evidence of wrong doing, the court relieved the attorney of any personal liability under s.81 of *The Trustee Act* and ordered her costs to be paid by the estate on a solicitor/client basis. The applicant was ordered to pay her own costs.

Undocumented Loan Unenforceable: MBQB

An undocumented oral agreement by a real estate broker/agent to lend his client \$5000 to facilitate a house purchase was illegal under s.29(1)(d) of *The Real Estate Brokers Act* and therefore unenforceable according to the court in [Reimer v. Friesen](#), 2012 MBQB 32. The court rejected both the purchaser's assertion that the loan was a gift and the agent's argument that, while technically illegal, the contract was not void *ab initio* and could be enforced. Commenting on the purpose of the legislation the court said:

Brokers, authorized officials or salespersons, although entitled at law to lend money to prospective purchasers in order to induce or complete a sale, must do so only in accordance with the legislation; that is, in writing and signed by the broker, authorized official or salesperson. The fact that the Legislature saw fit to make this type of verbal promise, undertaking or guarantee enforceable by a promisee (the defendant in this case) and chose not to make these verbal promises, undertakings or guarantees enforceable by a broker or salesperson, supports, in my opinion, a conclusion of unenforceability. (para. 20)

Rebutting the Presumption of Resulting Trust: MBQB

The presumption of resulting trust applied to the gratuitous transfer of \$408,000.00 from the deceased to his daughter in [Estate of Emiel Cyrille Van De Keere](#), 2012 MBQB 33. The money had been transferred in large sums over a three year period and the court could see no reason why the deceased would prefer the one daughter over his other four children. The daughter was unable to establish an intention to gift the money, which comprised over 90% of the deceased's estate.

Court Confirms City's Broad Power Concerning Zoning Variation Applications

The court struck sections of a statement of claim seeking declaratory relief from the City in [Mahon v. Pokrant](#), 2011 MBQB 306, finding no legal basis for the court to direct the City as to the facts it should take into account when considering a future application for a building permit. The City and the Appeal Committee had previously rejected the plaintiffs' application for a zoning variance, and, by choosing not to appeal, the plaintiffs were precluded from challenging the decision to deny the variance in a separate action.

Renovations Run Aground: MBQB

Engaging contractors on the basis of oral agreements is a risky business, as two recent trials involving "renovations run aground" so vividly illustrate. In both [Moryl v. Leslie](#), 2012 MBQB 16 and [Lafreniere v. Barr-Jones](#), 2011 MBQB 322 the homeowners were successful in proving their claims against the contractors, but not without considerable effort and cost.

Recommended Reading

The Canadian Centre for Elder Law published its 178-page report on [Elder and Guardianship Mediation](#) on January 12, 2012. The report, the culmination of three years of research and consultation, is the first comprehensive study of elder and guardianship mediation in Canada. Among other things, it outlines the legal framework and background of elder mediation, reports on a comparative analysis of select US court-annexed guardianship mediation programs, and discusses the ethical issues that arise in such mediations.

The British Columbia Law Institute's comprehensive guide, [Recommended Practices for Wills Practitioners Relating to Potential Undue Influence](#), aims to assist practitioners in recognizing and dealing with situations of potential undue influence and sets out guidelines to help avert undue influence challenges. The impetus for the creation of the guide was forthcoming changes to BC legislation which will shift the onus of proof in some instances where undue influence is alleged to the defender of the will and may result in lawyers having to testify to rebut the new presumption. Chapter 4, on the Red Flags of Undue Influence, and Chapter 5, on Recommended Practices in Screening for Potential Undue Influence, are particularly useful, as are the checklists contained in the Appendix to the guide.

The Slaw post [Catalyst Paper Corp v North Cowichan: Reasonable Enough](#) discusses the Supreme Court of Canada decision in [Catalyst Paper Corp. v. North Cowichan \(District\)](#), 2012 SCC 2, in which a unanimous court confirmed the wide range of social, political and economic factors municipal councils may consider when enacting bylaws. The disputed bylaw imposed grossly disproportionate property taxes on Catalyst, a paper mill operating in an area with a growing residential population.

The CBA National Elder Law section newsletter [Sage Advice](#), published February 2012, contains a variety of articles on developments in elder law across the country, and two comments on decisions from Alberta and the Ontario Court of Appeal.

Upcoming CPD: LSM

Gordon Lillie, District Registrar of the Portage Land Titles Office, will present the program [Real Property Act Amendments: Changes Effective December 5th, 2011](#) at the Central Bar Association Winter session on March 9, 2012, in Portage la Prairie, Manitoba. The session will highlight the important changes to real estate practice resulting from recent amendments to *The Real Property Act*.

[Challenges to Wills & Gifts](#) - this popular program from last December will be presented a second time on April 24, 2012, from 1:00 to 4:00 p.m. in the Law Society classroom. Presenters John Poyser and Ralph Neuman will address the grounds for attacking and defending wills, trust settlements, *inter vivos* gifts and other voluntary wealth transfer instruments. [Register](#) soon to reserve your spot.

[Annual Hot Topics in Real Estate](#), scheduled for March 8, 2012, is now sold out, but you can add your name to a waiting list by registering [here](#).

Upcoming MBA/CBA Programs

The Elder Law section of the MBA will present the noon hour program [Home Care for Seniors](#) on March 2, 2012 at the Law Society classroom. Julie Donaldson of "Home Instead" Senior Care will provide an overview of their services and the concept of self managed care.

The Canadian Bar Association is hosting the following online programs in March:

- [Elder Law Mediation: A New and Growing Field](#), which takes place on March 13, 2012; and
- [Trusts and Estates: Income Tax Update](#), a March 27, 2012 webcast reviewing the latest judicial, legislative and administrative trends in estates and trusts tax law.

Passing of Accounts Program: STEP

The Winnipeg branch of STEP, the [Society of Trust and Estate Practitioners](#), is presenting the program [Administration of Estates and Accounts - What you need to know in order to have accounts approved by the courts](#) on March 13, 2012, from 9:30 to 11:30 a.m. at the Fairmont Hotel. The presenters will review the passing of accounts process under the Court rules and the present practice at the initial hearing and on a contested passing of accounts.

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