



## eLaw - Property & Succession Update

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### NEPS Tolls Limitation Period: MBCA

In [\*Abalon Holdings Ltd. v. 74486 Manitoba Ltd.\*](#), 2012 MBCA 15 the Court of Appeal upheld the [lower court decision](#) declaring a mortgage statute barred and extinguished under [s. 106](#) of *The Real Property Act*. The appeal court agreed with the application judge's conclusion that filing a notice of exercising power of sale tolls the 10-year limitation period under [s.21\(1\)](#) of *The Limitation of Actions Act*, but, where the NEPS is spent due to remedying the default and a further default occurs, the limitation period starts to run again. The court also agreed with the lower court finding that the mortgagee had the onus to provide evidence concerning the status of the mortgage (in this case there was scant evidence as to what payments were made after the NEPS was filed and, by not filing its records, the mortgagee failed to rebut the inference that the default had been remedied).

### Assessing Property Values "Extremely Complex": MBCA

The appeal court found no error in the Municipal Board's interpretation and application of the ss. [18](#) and [60\(2\)](#) "equity provisions" of *The Municipal Assessment Act* in [\*Gardentree Village Inc. v. Winnipeg\*](#), 2012 MBCA 34 and dismissed the apartment block owner's appeal concerning the methodology for assessing property values for tax purposes. Among other things, the owner disputed the Board's finding that the legislative scheme in Manitoba envisages the consideration of equity in relation to all other properties and not to a type or class or sub-stratum of similar properties. In the end the court found this was not a live issue since the Board had already substantively considered the owner's position and still found the assessment was not inequitable.

### Joint Accounts a Poor Estate Planning Vehicle: MBQB

[\*Sawchuk Estate v. Evans\*](#), 2012 MBQB 82, a dispute between two sisters over their mother's estate, highlights "the difficulties that can arise when a deceased person does not direct the disposition of his or her estate by means of a testamentary document." (para.1) In this case, the entire estate was in joint accounts in the name of the deceased and the daughter who took care of her. The court found a resulting trust in favour of the estate, and ordered that the account monies be distributed pursuant to *The Intestate Succession Act*. The court commented on the difficulty of overcoming the presumptions of undue influence and resulting trust and decried the use of joint accounts as estate planning vehicles at paras. 52 and 53:

I recognize that family members oftentimes deal informally with each other on monetary matters. However, I am of the view that where it is alleged that an elderly and partially disabled parent makes what amounts to a disposition of her estate and favours the child upon whom she is at least partially dependent to the exclusion of other children and especially where historically, equal treatment was exercised by the deceased, the court should require some rigour to the evidence which is adduced to try and rebut the presumption of undue influence as well as the presumption articulated in *Pecore*. Evidence from the donee and people close to the donee does not carry great weight in my opinion. It should be viewed with suspicion...

In the face of offspring who are not on good terms with each other, parents who use a joint account as a vehicle of estate planning may do a disservice to the child that they wish to favour. I recognize that families often set up their affairs for simplicity and to avoid legal and probate fees, but those arrangements are made with the risk that the two presumptions may not be easily rebutted.

### Easement of Necessity Denied: MBQB

The court dismissed a farm land owner's application for a declaration of an easement of necessity over CFB Shilo land in [\*Outhwaite v. Attorney General of Canada\*](#), 2012 MBQB 99 because the applicant was unable to prove that there was a transfer of property from a common owner which resulted in a parcel of property with no legally enforceable means of access. The court also found that CFB Shilo was within its legal rights under [s.12](#) of the *National Defence Act* and regulations to require the applicant to sign a licence agreement concerning access.

### Right of Survivorship Cannot Be Withdrawn Without Clear Evidence: MBQB

The court disagreed with the bankrupt's argument in [\*Bankruptcy of Sherry Gauthier\*](#), 2012 MBQB 101 that property transferred to her without her knowledge (joint tenancy of her elderly mother's home) should be exempt from distribution to her creditors. The court found no evidence of the kind of trust relationship required to establish a resulting trust and nothing which contradicted the mother's desire to convey the right of accretion to the bankrupt many years earlier. As such the indefeasibility provision in s. 59 of *The Real Property Act* could not be overcome.

### Documents Online

A new property registry service, Documents Online, will allow online access to available documents from all six Land Titles Offices. The service will "allow people to search, view, download and print available documents in the Property Registry database from the convenience of their own computer...within minutes" according to this [government news release](#). Plans are also underway to allow for online title searches and electronic registration of documents.

### Recommended Reading: "All Obligations" Mortgages and More

[Potential Problems With "All Obligations" Real Property Mortgages](#) - Ned Brown examines the risks of "all obligations" mortgages which are becoming more popular because they facilitate the use of home equity to obtain reduced interest rates.

[Till death do us part Difficult questions arise when joint tenants kill](#) - this *Lawyers Weekly* article discusses the December 2011 decision of the High Court of Ireland in [Cawley v. Lillis](#) [2011] IEHC 515, in which the court, following Canadian precedent, severed a joint tenancy in equity to prevent a husband who had killed his wife from acquiring her share of the properties they held in joint tenancy.

[Wills and Estates Refresher: Cocktail Party Questions](#) - this Practice Points article deals with the issues arising at the intersection of criminal activity and wills and estates law.

### Upcoming CPD: LSM

[Passing of Accounts - What You Need to Know](#) - Presenters Master Joy Cooper and Peter Glowacki will discuss the most effective way to keep and present accounts at this lunch program from 12:00 noon to 2:00 p.m. on June 14, 2012 at the Law Society classroom. [Register](#) to attend in person or by teleconference.

### MBA Programs

[Planning for Disabled Beneficiaries](#) - The Wills and Estates Law section is presenting this program on strategies to assist individuals with disabilities and their families to plan for the future on May 11, 2012 from 12:00 noon to 1:30 p.m. in the Law Society classroom. Contact the Manitoba Bar Association to RSVP or for further details.

### Cottage Planning: STEP

The Winnipeg branch of STEP, the Society of Trust and Estate Practitioners, is presenting the program [Cottage Planning](#) on May 17, 2012, from 2:00 to 3:30 p.m. at the Fairmont Hotel. Speaker Florence Carey will discuss how cottage ownership affects estate plans. Register [online](#) or on [paper](#).

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