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WIDDIFIELD ON EXECUTORS AND TRUSTEES, 6TH EDITION

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Release No. 5, June 2024

This seminal work of Canadian legal literature is reviewed and updated by a team of authors drawn from the front ranks of the profession from across Canada. In keeping with the original, the sixth edition of Widdifield on Executors and Trustees offers a comprehensive exposition of the law relating to the exercise of the duties and prerogatives of executors and trustees in Canadian estates and trusts law.

What's New in This Update:

This release contains amendments and updates to the commentary in Chapter 2 (Assets); Chapter 3 (Claims Against the Estate for Debts); Chapter 5 (Bequests and Beneficiaries); Chapter 15 (Resignation, Removal and Appointment of Trustees); and Words and Phrases.

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Highlights of This Release, Include:

Resulting Trust — Avoidance of *Planning Act* — Not a Bar to Presumption of Resulting Trust — In this case an application judge had found that where title to a property was taken jointly with another party to avoid the title merging with the neighbouring property under the *Planning Act*, R.S.O. 1990, c. P.13, a resulting trust in favour of one of the parties could not also exist. Either the beneficial ownership is held on resulting trust (with the effect that the property merges) or the registered owner of the property holds title in his or her own right. This decision was reversed on appeal. The majority on the Court of Appeal held that the application judge had erred in making the presumed operation of the *Planning Act* determinative of the question of whether the transferor intended to make a gift of the purchase money or retain a beneficial interest in the property. The proposition that having a third party take title to avoid merger under the *Planning Act* was a bar to relying on the presumption of resulting trust was not supported by the case law and was inconsistent with general principles. Where a resulting trust was presumed, the onus was on a party seeking to rebut that presumption to establish that the purchaser intended to make a gift. This was not a matter of constructive or deemed intention, but of establishing actual intention, requiring a case-by-case evaluation of the evidence to ascertain the transferor's actual intention on the balance of probabilities: *Falsetto v. Falsetto*, 2023 ONSC 1351, 2023 CarswellOnt 2377 (Ont. S.C.J.), reversed 2023 ONSC 1351, 2023 CarswellOnt 2377 (Ont. S.C.J.), reversed 2024 ONCA 149 (Ont. C.A.).

Rectification of Will — Test — Test in *Fairmont Hotels* — The Court of Appeal disagreed with the respondents in this case that *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56, 2016 CarswellOnt 19252, 2016 CarswellOnt 19253 (S.C.C.), at paras. 12-20, 34-38, set out a new and different test for rectification of a will. It stated that the court in *Fairmont Hotels* held that rectification could only be used to correct an error in the recording of the agreement, not to rectify situations where an agreement produced an undesirable or unintended outcome, and invoked the concept of rectification "to restore the parties to their original bargain". It found that this holding in *Fairmont Hotels* was consistent with *Robinson Estate v. Robinson*, 2010 ONSC 3484, 2010 CarswellOnt 4576 (Ont. S.C.J.), additional reasons 2010 ONSC 3484, 2010 CarswellOnt 6026 (Ont. S.C.J.), affirmed 2011 ONCA 493, 2011 CarswellOnt 5819 (Ont. C.A.), leave to appeal refused 2012 CarswellOnt 1518, 2012 CarswellOnt 1519 (S.C.C.), which held that "Anglo-Canadian courts will not rectify a will to correct the testator's mistaken belief about the legal effect of the words he reviewed and approved". The court observed that in the case before it, the question was not whether the wording of the will had the intended legal effect. Rather, rectification was available because the will did not conform to the deceased's instructions — that it did not accurately set out the specific bequests that the deceased communicated to his solicitor — hence, there was a different outcome from the one in *Robinson*. In *Robinson*, the drafting lawyer deposed that he believed that the testator had not directed her mind to the revocation clause in an Ontario will and did not intend her Ontario will to revoke her Spanish will. However, he had not received instructions to that effect and the will was drafted in accordance with the testator's instructions. Accordingly, there was no drafting error and no basis for rectification of the Ontario will: *Ihnatowych Estate v. Ihnatowych*, 2024 ONCA 142, 2024 CarswellOnt 2421

(Ont. C.A.).

Claims Against the Estate — Set-aside of Default Judgement — Estate Entitlement to Bring Application — The respondents had made an offer to purchase a parcel of land, which had been accepted by deceased. The deal fell through and they sued the deceased for the return of their deposit. When she did not defend, they obtained a default judgment against her. Many years later, the deceased passed away, and her estate applied to have the default judgment set aside so that it could defend the action. Relying on *The Survival of Actions Act*, S.S. 1990-91, c. S-66.1 [SAA], the chambers judge dismissed the estate's application on the ground that the right to bring such an application did not survive the deceased's death. An appeal by the estate was allowed. The Court of Appeal found that ss. 3 and 4 of the SAA provide for the survival of claims in relation to a cause of action that is vested in a person who dies (s. 3) and a cause of action existing against a person who dies (s. 4). The term cause of action is defined by s. 2 of the SAA as (a) a right to bring a civil proceeding, or (b) a civil proceeding commenced before death. Given that definition, it held that the chambers judge had framed the issue as being whether a right to apply to set aside a default judgment was a "civil proceeding", and "therefore a cause of action as defined in s. 2(a) which survived by operation of s. 3". However, the cause of action here was not the estate's application, it was the respondent's claim for breach of contract. The estate was not asserting its own new cause of action; it was taking a procedural step in the context of that action. The respondents also argued, *inter alia*, that a final judgment had been issued and the doctrine of merger applied. The Court of Appeal noted that the doctrine of merger did not prevent a living person from bringing an application to set aside a default judgment, so it seemed incongruous that an executor should be prevented from doing so. The availability of relief under Rule 10-13 meant that a default judgment was not final in the same manner as a judgment issued after trial or by consent, because there was always the possibility that it might be set aside on the application of a defendant: *Zbitnew Estate v. Park*, 2024 SKCA 4, 2024 CarswellSask 9 (Sask. C.A.).

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