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ESTATE ADMINISTRATION

Armstrong

Release No. 2, February 2025

Estate Administration: A Solicitor's Reference Manual is a how-to guide dealing with all aspects of estate administration in Ontario. Text is augmented by up-to-date forms, precedents, letters and checklists. Commonly used statutes and regulations are reproduced in full. All aspects of estate administration are examined, including the conveyancing of real property and the income tax implications arising upon death.

What's New in this Update:

This release updates to Chapter 3 (Realization of Assets, Settlement of Liabilities and Distribution of Estate), Appendix C (Authored Special Instructions) and Appendix E (Special Instructions Digests).

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Highlights

This release contains updates to this work that include the Authored Special Instructions and their related digest sections. These include:

- § C1:7. Special Instruction 4A—Release of Original Wills or Related Documents and the Solicitor-Client Privilege
- § C1:19. Special Instruction 12A—Life Insurance Designations
- § C1:22. Special Instruction 14—Competency of Executors or Estates Trustees
- § C1:37. Special Instruction 24—Step-Children
- § C1:45. Special Instruction 29A—Rectification of Wills
- § C1:52. Special Instruction 33—Distribution on Intestacy
- § C1:73. Special Instruction 47B—Joint Ownership—Bank, Investment Accounts, and Real Estate
- § C1:74. Special Instruction 47B.1—Application of the Presumption of Resulting Trust to Land Transfers Under the Torrens System
- § C1:76. Special Instruction 47D—Mutual Wills
- § C1:85. Special Instruction 47M—Options to Purchase

Among the caselaw highlights in this release, are the following:

- **Determination of ownership of property—Resulting Trust—Interaction with *Planning Act***—An application judge 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. The court cited *Zacher v. Zacher*, 2019 ONSC 1450, 2019 CarswellOnt 3080, 46 C.C.P.B. (2nd) 93, 2019 C.E.B. & P.G.R. 8311 (headnote only) (Ont. S.C.J.) and *Styres v. Martin*, 2021 ONSC 1072, 2021 CarswellOnt 1838 (Ont. S.C.J.) which supported the conclusion that a party cannot achieve one result for the purpose of avoiding a legal consequence prescribed by statute and achieve an opposite result for other purposes. This decision was reversed on appeal. The majority on the Ontario Court of Appeal held that the application judge 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* is 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: *Lattimer v. Lattimer*, (1978), 18 O.R. (2d) 375, at p. 378 (H.C.). 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 gratuitous transferor's actual intention on the balance of probabilities: *Schwartz v. Schwartz*, 2012 ONCA 239, 349 D.L.R. (4th) 326, at paras.

42–43. The intention to avoid merger did not necessarily entail the intention to make a gift: *Falsetto v. Falsetto*, 2023 ONSC 1351, 2023 CarswellOnt 2377 (Ont. S.C.J.), reversed 2023 ONSC 1351, 2023 CarswellOnt 2377, 166 O.R. (3d) 385, 2023 A.C.W.S. 746, 85 R.F.L. (8th) 85, 86 E.T.R. (4th) 239.

- **Rectification of Will—Test—Test in Fairmont Hotels**—The Ontario Court of Appeal disagreed with the submission of the respondents that *Canada (A.G.) v. Fairmont Hotels Inc.*, 2016 SCC 56, [2016] 2 S.C.R. 720, 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 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 is, 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.
- **Estates—Intestate succession—Definition of Children—Adopted Children**—In this case, the deceased died without a will. He had no spouse, and left no children surviving him. His adoptive parents had predeceased him. During their lifetime, his parents had also adopted other children. The respondent was a foster child of the parents. She was one of 136 children fostered by them over the years. However, she was never adopted by them. She had been fostered by different foster parents before coming into their care as a pre-teen, and by other foster parents after she left them a few years later. The respondent did, however, maintain a close relationship with the father as she grew older. He walked her down the aisle at her wedding. He regularly referred to her as his “daughter”. He named her as his Attorney for Property in 2000, jointly with the deceased, and he named her as a co-executor of his will with the deceased and one of his other adoptive children whom he collectively referred to as his “children”. She was also a residual beneficiary in his will. The respondent argued that she came within the definition of “sister” in s. 47(4) of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (“SLRA”), and had a legal entitlement to share in the deceased’s estate as a surviving “sister”. The respondent alleged that the only reason she was not adopted was because she had multiple congenital deformities and, at the time, the many medical services she required had to be paid for privately, but her status as a foster child

meant that she would get these services for free. Adoption would have ended that, and for that reason, she says she was never adopted. The court found however, that the respondent was not a child of the father within the meaning of the Act. It found that even if the father had demonstrated the strongest possible intention to treat her as his own child, the harsh, but inescapable, reality was that she did not qualify because she was a foster child who has never been adopted. This was a matter of statute, the plain language of which it found to be very clear, and which was binding and determinative. The court noted that it was not disposed to ignore the statutory provisions in the guise of “doing justice”: *Estate of Sydney Monteith v. Monteith et al*, 2023 ONSC 7246, 2023 CarswellOnt 20381 (Ont. S.C.J.), additional reasons 2024 ONSC 800 (Ont. S.C.J.).

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