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ESTATE LITIGATION

Brian A. Schnurr

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Estate Litigation, 2nd Edition, is a comprehensive, practical work covering all facets of estate litigation including mental incompetency disputes, challenges to wills, *Family Law Act* claims, passing of executors' accounts, presumption of death and dependant support claims. The publication includes extensive precedents along with relevant statutory material.

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What's New in this Update:

The following Issues in Focus memos have been updated: IF:10 “Will the clause, ‘I revoke all former wills & testamentary dispositions’, contained in a will, have the effect of revoking beneficiary designations?”, IF:11 “Is there a duty on an estate trustee (or executor) to advise a surviving spouse of his or her right to elect equalization?”, IF:16 “Under what circumstances will a court find that a continuing power of attorney for property is invalid due to it having been executed in circumstances of undue influence?”, IF:26 “What is the burden of proof when challenging the validity of a will?”, IF:27 “Will a remedial constructive trust be found where a policyholder orally requested a change of beneficiary designation and the insurer issued an amended policy, but the insured died before he could sign it?”, IF: 28 “Have there been any decisions where a court honoured the testator’s wishes by ordering that the estate go to the alternate (contingent) beneficiary where the original beneficiary died after the testator but before receiving his inheritance?”, IF:43 “How will the compensation of an estate trustee be impacted if the estate trustee resides outside of Canada?”, IF:44 “Will a court consider extrinsic evidence if the testator’s will contains a vague charitable bequest?”, IF: 45 “Will a charitable bequest fail if the testator has not specified the amount of the gift?”, and IF:47 “Will a bequest to a charitable institution lapse if the institution ceased to exist in the testator’s lifetime?”

Highlights Include:

Issues in Focus — Is there a duty on an estate trustee (or executor) to advise a surviving spouse of his or her right to elect equalization? —

While estate trustees have a positive duty to advise surviving spouses of their rights under the *Family Law Act*, they have the corresponding duty not to advise the surviving spouse of what he or she ought to do (such as to avoid any potential conflict with his or her duty to the beneficiaries, and/or any imprudence toward the surviving spouse), and should instead recommend that the surviving spouse consult independent legal counsel in that regard.

Issues in Focus — Under what circumstances will a court find that a continuing power of attorney for property is invalid due to it having been executed in circumstances of undue influence? —

Where there are “suspicious circumstances” of undue influence surrounding the execution of a power of attorney, the presumption of capacity does not operate and the burden of proof with respect to capacity shifts to the grantee of the power of attorney. Three categories of suspicious circumstances have been recognized by the courts: (1) circumstances surrounding the preparation of the will; (2) circumstances tending to call into question the capacity of the testator; or (3) circumstances tending to show that the free will of the testator was overborne by acts of coercion or fraud. Each case must be dealt with on its specific facts.

Issues in Focus — Have there been any decisions where a court honoured the testator’s wishes by ordering that the estate go to the alternate (contingent) beneficiary where the original beneficiary died

after the testator but before receiving his inheritance? — The golden rule in interpreting wills is to give effect to the testator’s intention as ascertained from the language that was used. Where the testator’s intention cannot be ascertained from the plain meaning of the language that was used, the court may consider the surrounding circumstances known to the testator when he made his will — the so-called “armchair rule”. Under this rule, the court sits in the place of the testator, assumes the same knowledge the testator had of the extent of his assets, the size and makeup of his family, and his relationship to its members, so far as these things can be ascertained from the evidence presented.

Issues in Focus — Will a bequest to a charitable institution lapse if the institution ceased to exist in the testator’s lifetime? — Canadian courts have found that a bequest to a charitable institution may lapse if the institution ceased to exist in the testator’s lifetime. Whether an institution has ceased to exist is a question of fact. If the gift is construed as one to a specified body, it will lapse; however, if it is construed as one for the benefit of a charitable purpose, it will not lapse. If the testator had a general charitable intention the bequest may be applied cy-pres. However, if there was no general charitable intention then the bequest may lapse.

ProView Developments

Your ProView edition of this product now has a new, modified layout:

- The opening page is now the title page of the book as you would see in the print work
- As with the print product, the front matter is in a different order than previously displayed
- The Table of Cases and Index are now in PDF with no searching and linking
- The Table of Contents now has internal links to every chapter and section of the book within ProView
- Images are generally greyscale and size is now adjustable
- Footnote text only appears in ProView-generated PDFs of entire sections and pages