Highlights of Recent Developments in Estates and Trusts

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September 20, 2018

Ontario Disability Support Program (ODSP)

- *Ontario Disability Support Program Act,* Income Support
- Purpose is to help people with disabilities who are in financial need pay for basic living expenses
- To be eligible, person must be:
  - at least 18 years old,
  - an Ontario resident,
  - meet the program's definition of a person with a disability or be a member of a Prescribed Class, and
  - Meet severe income and asset limit requirements

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ODSP –April 18, 2018 Proposed Amendments

- Ontario Regulation 281/18 to amend O. Reg. 222/98
- The original amendments would have changed:
  - Investments in RRSP and TFSA accounts would be exempt from asset limit
  - The $10,000 limit on gifts in any 12-month period would be removed, allowing unlimited gifts and distributions from an estate or trust without affecting income limit
  - Income threshold limits would be increased
- The amendments would have been effective beginning September 1, 2018

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ODSP – Amendments Cancelled

- On July 31, 2018, Ontario government announced that it would not proceed with certain initiatives in the previous government's 2018 Budget
- Proposed amendments have been cancelled
- Government July 31, 2018 press release said, "Over the next 100 days, Ontario will work on a plan to reform social assistance…"
- What will the new plan look like?

https://news.ontario.ca/mcys/en/2018/07/helping-people-with-a-plan-to-reform-social-assistance.html

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ODSP: Henson Trusts and Inheritance Trusts

- Henson trusts are discretionary trusts that can be used to control the amount of income (and assets) included in the hands of a beneficiary for the purpose of qualifying for ODSP and other benefits
- Henson trusts will continue to be an important tool for families supporting an ODSP recipient
- For the time being, trust and estate distributions and gifts continue to be limited to $10,000 in any 12-month period unless the payments are used to pay for certain expenses
- Inheritance Trust – up to $100,000 of inherited funds may be contributed without losing ODSP benefits

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Trust Reporting:
Trust Tax Return Reporting Developments

- February 27, 2018: the Department of Finance released its 2018 Federal Budget, which contained increased tax reporting requirements for trusts
- July 27, 2018: the Department of Finance released draft tax legislation that would implement the new trust reporting requirements
- The new trust reporting rules will be effective for tax years that end after December 30, 2021 (e.g., beginning for the December 31, 2021 tax year)
- Inevitable that some trustees will not be aware of these new rules

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Trust Reporting:
Section 150 and Historic CRA Policy

- Subsection 150(1.1), of the *Income Tax* Act: a trust is not required to file a tax return if it has no tax payable
- CRA's T3 Guide: a trust tax return is only required if the trust has any of:
  - tax payable,
  - a taxable capital gain,
  - income more than $500,
  - a benefit to a beneficiary of more than $100,
  - income allocated to a non-resident,
  - holds property subject to 75(2),
  - or is a deemed resident trust,
- Typically trusts with no income might not file until 21st year (e.g., principal residence trust; estate freeze trust).

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Trust Reporting: New Subsection 150(1.2)

- New subsection 150(1.2): any "express trust" that is resident in Canada or deemed resident in Canada must file a T3 return
- "Express trust" is not defined but is suggested to arise from the instructions of a settlor or testator, as opposed to an equitable trust imposed by a court
- Will a bare trust be required to file?
- S. 104(1) deems a trust to not include arrangements where the trust is considered to act as agent for the beneficiaries – but it is not at all clear if/when a bare trust must file

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Trust Reporting: Exceptions

- Subsection 150(1.2)- Trusts that are exempt from filing a return:
  - a) Those in existence for less than 3 months
  - b) Those having less than $50,000 of liquid assets only throughout the year
  - d) A registered charity or not-for-profit club under 149(1)(l)
  - e) A mutual fund trust
  - i) A graduated rate estate
  - j) A qualified disability trust
  - k) An employee life and health trust
  - m) A DPSP, RSP, RDSP, RESP, RPP, RRIF, RRSP, or TFSA

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Trust Reporting: Penalties

- New subsections 163(5) and (6) impose a penalty on:
  - A person who knowingly makes a false statement or omission in a return, or
  - A person who fails to file a return for a trust that is not exempt under subsection 150(1.2)
- The penalty is equal to the greater of (a) $2,500 and (b) 5% of the highest fair market value at any time of all the property held by the trust

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Trust Reporting: Section 204.2 of the Regulations

- New section 204.2 of the Regulations requires a person acting in a fiduciary capacity (the trustee) to provide:
  - the name, address, date of birth, jurisdiction of residence, and tax identification number

  for each
  - trustee, beneficiary, settlor, and person who can exert influence over the appointment of income or capital of the trust (e.g., a "protector")

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Trust Reporting: Section 204.2 of the Regulations

- The requirement for information in respect of the beneficiaries is met if
  - (a) information is provided for each beneficiary whose identify is known or ascertainable with reasonable effort, and
  - (b) sufficiently detailed information to determine with certainty whether any particular person is a beneficiary is provided
- Where the class of beneficiaries is extensive, this will be an onerous responsibility for trustees

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Importance of Confirming Domicile
Sato v Sato, 2018 BCCA 287

- Testator born in Japan, obtained a BSc and MBA in BC, worked in BC, Ontario, Cayman Islands, Tokyo, Guernsey, and finally Luxembourg
- Testator executed his last will in BC in 2011, while visiting, leaving estate to sisters
- Testator subsequently married in Luxembourg in 2013
- As of 2013, most assets and friends were in Luxembourg and he filed taxes there
- Testator died in Japan in 2015 seeking medical treatment
- Under BC's former *Wills Act*, marriage automatically revoked a will (the *Act* is since amended so this is no longer true)

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Importance of Confirming Domicile
Sato v Sato, 2018 BCCA 287

- If Testator was domiciled in BC in 2013, his will would have been revoked, and estate would pass to widow on intestacy; domicile in Luxembourg, would not revoke will
- Domicile determined by both residency and intention
- Court considered Testator's 1999 CRA residency determination form stating intention to retire in Canada – trial judge called this the "Key Document"
- Court concluded Testator's domicile in 2013 was BC
- As a result, Testator's BC will was revoked, and intestacy rules applied
- Shows the importance of written and verbal expressions of domiciliary intention in determining domicile

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Post mortem interest on unpaid legacies
Rivard v Morris, 2018 ONCA 181

- Testator's will favoured son over two daughters, giving son residue including 3 valuable, appreciating farms
- Daughters given legacies of $530,000 each
- Daughters challenged will unsuccessfully and costs were awarded against them
- Daughters then sought interest to be paid on their cash legacies
- 3 Year delay in payment of legacies was caused, at least in part, to challenge by Daughters (who also acted as estate trustees)

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Post mortem interest on unpaid legacies
Rivard v Morris, 2018 ONCA 181

- Court ruled that common law "rule of convenience" applied to allow interest on cash legacies because they were payable with no conditions under the will
- Awarded 5% simple interest from the first anniversary of father's death based on the rate of interest carried by the rule of convenience at common law
- Shows importance of testator addressing interest payments on legacies if delay in payment anticipated
- Son seeking leave to appeal to the SCC

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Joint accounts and Resulting Trust disputes
Brathwaite v Harding, 2018 ONSC 2488

- Deceased added H as joint owner of bank account to allow H to provide assistance and pay for bills
- Deceased sold home and deposited proceeds in joint bank account
- Deceased gifted $250,000 out of proceeds to B
- After Deceased's death, H withdrew $250,000 from joint account
- B argued that H's withdrawal should be considered an asset of the estate on the principle of resulting trust

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Joint accounts and Resulting Trust disputes
Brathwaite v Harding, 2018 ONSC 2488

- H had onus to show that proceeds were intended as a gift and to rebut the presumption of a resulting trust
- H presented Court with Deceased's authorization of joint account at Bank, evidence of Bank employee involved in opening joint account, and statements by Deceased made while alive
- Court satisfied with H's evidence that the joint account constituted a gift passing outside estate
- Shows the importance of documenting transferor's intention in writing when establishing joint accounts

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Testamentary Freedom and Public Policy
Free Expression v McCorkill, 2015 NBCA 50

- Testator's will left residue of estate to a white supremacist organization in the US
- Discussion on public policy and what may be considered to be a violation of public policy in terms of estate planning
- Court found that communications of the residuary beneficiary were illegal and in violation of public policy
- Court ruled that bequest was invalid because the purpose and activities of the beneficiary organization contravened Canadian public policy
- Shows courts are prepared to interfere with testamentary freedom on general moral grounds

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Obligation to Disclose Trust Interest to Beneficiary

Valard v Bird, 2018 SCC 8

- Bird required subcontractor to obtain a labour payment bond. Bond allowed work provider who was owed money by subcontractor to sue surety company.
- Subcontractor hired Valard to provide construction work. Subcontractor became insolvent, leaving Valard's invoices unpaid.
- Bird did not notify Valard of the bond.
- Valard asked Bird about bond and filed a claim outside of specified notice period. Surety company denied claim.
- Valard sued Bird for breach of trust

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Obligation to Disclose Trust Interest to Beneficiary

Valard v Bird, 2018 SCC 8

- SCC held that bond created an express trust
- Beneficiary of trust has right to hold trustee accountable for administration of property and to enforce terms of trust
- In some circumstances, this right can only be exercised if the beneficiary is informed of the existence of the trust
- "In general, wherever 'it could be said to be to the unreasonable disadvantage of the beneficiary not to be informed' of the trust's existence, the trustee's fiduciary duty includes an obligation to disclose the existence of the trust."
- This principle is expected to be applied in the private trust context, raising the trustee's responsibility to be proactive

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Proprietary Estoppel
Cowper-Smith v Morgan, 2017 SCC 61

- Sister promised Brother that if he moved back to the family home and provided care for their aging mother, Sister would sell her share of mother's estate to Brother
- Sister reneged on her promise
- Trial Court found all elements of proprietary estoppel had been established:
  - Sister made the promise
  - Brother relied on the promise to move in with mother
  - Brother suffered as a result of his reliance leading to an unfair result

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Proprietary Estoppel
Cowper-Smith v Morgan, 2017 SCC 61

- BC Court of Appeal ruled that proprietary estoppel could not be applied because Sister did not have an interest in the estate property when she made her promise
- SCC restored trial judge's decision and concluded that ownership at the time of representation is not a prerequisite to the doctrine of promissory estoppel
- As soon as G received interest in the property, promisory estoppel would attach
- Expect more disappointed beneficiaries to plead this remedy

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Priority of CRA Over Other Claims in Insolvent Estate

Re Evans Estate, 2018 NSSC 68

- Insolvent estate owed debts to creditors and CRA
- Under *Probate Act* (NS), tax debts appear to rank after certain other expenses including funeral expenses, probate taxes, and trustee and professional fees
- Common law also prioritizes funeral and testamentary expenses in insolvent estates
- Under *Income Tax Act* (Canada), tax debt must be paid or trustee is held personally liable

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Priority of CRA Over Other Claims in Insolvent Estate

Re Evans Estate, 2018 NSSC 68

- Court cited principle of Crown Prerogative, which presumes that government is not bound by statute unless otherwise expressly stated
- Principle of paramountcy – federal law takes priority over provincial law where there is a conflict
- Court ruled that income tax debt should be paid in priority to other debts, overruling probate court instructions
- Creates practical challenges for insolvent estates in debt to CRA if trustees, professionals and funeral cannot be paid from the estate assets

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Uncertainty Leading to Invalidity of Multiple Wills

Milne Estate (Re), 2018 ONSC 4174

- Testator's Primary (probate) Will: "all property owned by me at the time of my death EXCEPT … [certain named assets and] any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for a transfer or realization thereof". (emphasis added)
- Testator's Secondary (non-probate) Will: "all property owned by me at the time of my death INCLUDING … [certain named assets and] any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for a transfer or realization thereof" (emphasis added)

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Uncertainty Leading to Invalidity of Multiple Wills

Milne Estate (Re), 2018 ONSC 4174

- Held Secondary Will covers ALL property of Testator
- Primary Will grants the executors the entire discretion to determine retroactively which assets are (not) vested under it
- Secondary Will found to be valid; Primary Will found to be invalid
- Primary Will found to lack certainty of subject matter
- Part of probate process is for the court to examine the validity of a will

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Uncertainty Leading to Invalidity of Multiple Wills

Milne Estate (Re), 2018 ONSC 4174

- "The testator must settle upon the Estate Trustees assets that are specifically identified or are *objectively* identifiable by reference to the intention of the testator and not the subsequent decision of the Estate Trustees."
- Principle of certainty of subject matter offended
- Technique of excluding assets which do not require a certificate of appointment (probate) from the will to be probated is a commonly employed drafting style

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Uncertainty Leading to Invalidity of Multiple Wills

Milne Estate (Re), 2018 ONSC 4174

- "The Primary Will seeks to carve out a variable subset of the property that is and remains subject to the Secondary Will without subtracting such property from the secondary estate and to do so based upon the subsequent, subjective determinations of the Estate Trustees as to what is desirable. In my view, this cannot be done." (emphasis added)
- "If multiple wills are to be employed … the property that is subject to each must be ascertainable objectively based upon the expressed intent of the testator without regard to discretion of the Estate Trustees exercised afterwards." (emphasis added)

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Uncertainty Leading to Invalidity of Multiple Wills

Milne Estate (Re), 2018 ONSC 4174

- Question remains, if the determination of assets disposed of under each Will was not expressly delegated to the discretion of the Estate, would the Will still be invalid on the basis that the subject was uncertain?
- Certainty dilemma best illustrated where the residual beneficiaries under the two Wills are different
- Meanwhile, countless multiple wills with similar language have successfully gone through the probate process in Ontario and Certificates of Appointment have been issued for only the intended "probate" will

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