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2013 – ESTATE CASES IN REVIEW

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2014 is upon us! It's a great time to reflect on a year that saw British Columbia's trial and appeal courts decide some important cases in the area of estate law. The courts addressed such issues as: settling trusts via power of attorney, survivorship of land in joint tenancy, the long lost doctrine of proprietary estoppel, and forcing distributions from estates. Below we consider four noteworthy cases from 2013.

***Easingwood v. Cockroft,* 2013 BCCA 182 – Settlement of a Trust by Power of Attorney**

In *Easingwood,* the deceased had adult children from his first marriage. Following his death, his second wife challenged a trust he had settled during the second marriage. The second wife's

purpose was to get the trust assets back into the deceased's estate which might allow her a remedy under the *Wills Variation Act.* The wrinkle in *Easingwood*, and the first line of attack by the second wife, was that the trust was actually settled via an enduring power of attorney (POA). This step was taken by two of the deceased's children from his first marriage, acting under an enduring POA after the deceased had been diagnosed with Alzheimer's disease and was considered incapable. The threshold issue, therefore, was whether an inter *vivos trust* can ever be validly settled in these circumstances (ie: under an enduring POA). Our Court of Appeal held that it can, provided that "the trust created does not otherwise step into territory prohibited by other general principles of law or statutory prohibitions." As expected, the other avenues of attack looked to such prohibited territory. For example, the second wife argued the trust was in truth a testamentary disposition, taking effect at death like a will, and as such – like a will – could not be created under the authority of a POA. The Court of Appeal disagreed. The trust was attacked also as being the product of hanky panky, wherein the attorneys were alleged to have acted in breach of fiduciary obligations by benefitting themselves through the trust. This argument failed because (1) *all* the beneficiaries stood to gain from the creation of the trust, not just the attorneys, and (2) the trust was designed to mimic the deceased's intentions in a previously executed will, and was therefore not contrary to the deceased's previously stated intentions. This case reminds us that trusts can very capably withstand attack if they are properly settled, including even settlement via a POA. **IMPORTANT NOTE**: The facts in *Easingwood* arose

before certain amendments were made to British Columbia's *Power of Attorney Act* in 2011. These amendments include new limits on the authority granted by an enduring POA. As a result, the precedential value of *Easingwood* must be considered in the context of these legislated changes.

***Bergen v. Bergen*, 2013 BCCA 492 – Land in Joint Tenancy, Survivorship and Intention**

Bergen is a case involving the legal fallout after the severing of a joint tenancy in land. At issue, in particular, was whether a transferee of a joint interest in land retained any realizable interest after the severance of the joint tenancy. The Bergens, during happier times, had transferred to their son a one third joint interest in an acreage in the interior of British Columbia, where they intended to retire. The son was to build them home on the property. The Court of Appeal, summarizing the trial decision, stated that the parents had placed one-third of the property in the son's name as joint tenant because it was a "more secure way of ensuring that he would succeed in title than leaving it to the hazards of testamentary disposition". They had also allowed the son to choose the kind of house that would be built on the property, partly "in recognition of an intention that someday it would be his". When the relationship soured, the parents severed the joint tenancy, and sought a court order allowing them to sell the property and distribute the sale proceeds to themselves alone. The son responded with an action seeking an order that the parents held their interests in the property in trust for him. The son argued that once a "right of survivorship" is conferred, there is a perfected *inter vivos* gift of the property, including the beneficial interest therein, which vests immediately in the transferee. The Court of Appeal disagreed, reminding us that the presumption of resulting trust (in this case, of course, in favour of the parents), can only be displaced by evidence that the transferor *intended* to make a gift (*Pecore v. Pecore* 2007 SCC 17). Therefore, a gratuitous transfer of an interest in land, joint or otherwise, will only truly transfer beneficial interest where there is evidence of an intention to gift. Further, as joint interests in land are subject to unilateral severance of the joint tenancy, we must recognize that a right of survivorship is only a right to "what is left" at death. The case is a helpful reminder (of what should be quite obvious since *Pecore*), that gratuitous gifts between adults are not gifts at all without the requisite evidence of intention, and that joint interests in land are no different. An interesting aspect of *Bergen* is how the trial court got around the evidence of intention in order to find for the parents. As stated above, the parents had admitted more than once that they intended the property should one day belong to the son (which strikes one as compelling evidence of intention to gift). But they also wanted to retain "control" over the property, which the trial judge apparently equated with an intention to retain beneficial ownership. One assumes that the evidence supporting an intention to gift may well have rebutted the presumption of trust, absent this expressed wish by the parents to retain control. And one wonders if the court seized upon – if not elevated – the issue of control in this case because the court did not look favourably upon the son and was looking for a way to circumvent the obvious evidence of an intended gift.

In any event, it will be interesting to see whether in future cases similar evidence of a transferor's intention to retain "control" will trump what might otherwise appear to be sufficient evidence of an intended gift.

***Sabey v. Beardsley,* 2013 BCSC 642 – Proprietary Estoppel**

This dispute involved a farm in Langley. The owners had mutual wills that gave the farm to a Ms. Rommel. Evidently, they later changed their minds, both signing codicils in order to give the farm to their young friend and riding companion, Mr. Sabey. Unfortunately, the two codicils were invalid because they were witnessed by a single witness, contrary to the formal requirements of the *Wills Act* which requires two witnesses. Mr. Sabey brought an action claiming that the failed gift should be resurrected under a little used equitable doctrine called "proprietary estoppel". Estoppel, an equitable doctrine most commonly applied to in contract law, arises where a promise has been made to a person, who relies on that promise to his detriment. Proprietary estoppel acts to give a claimant not a contractual right, but an equitable interest in property. The evidence in *Sabey* revealed that the owners communicated on a number of occasions that the farm property would be Mr. Sabey's one day. Further, the court found that Mr. Sabey organized his own career to maximize his time at the farm, under the belief it would be his in the future, and these facts supported the elements of reliance and detriment. In the result, the court granted the farm to Mr. Sabey. The case is interesting for a number of reasons. First, this fact pattern is not rare, and it is remarkable that the doctrine has not been advanced more frequently. Second, something akin to the remedy provided by proprietary estoppel is soon to be enacted under the new *Wills Estates and Succession Act* (aka *WESA*) later in 2014. Under s. 58 of *WESA*, wills that do not comply with all technical requirements (such as the need for two witnesses) may be cured, provided that the court can be satisfied of the testator's true intentions. One expects that the curative power of s. 58 may be wider than is found in estoppel, since there will be no need to prove reliance, detriment or even a promise.

***Reznik v Matty* 2013 BCSC 1346 – Forcing an Interim Distribution**

Sometimes beneficiaries struggle in vain to get funds due to them out of an estate. When the estate cannot be finalized, but there is no good reason for an executor's refusal to pay, common sense suggests the beneficiaries ought to have a simple remedy. Oddly, until recently, there has been little guidance from our courts or legislature respecting when and how beneficiaries can compel an executor to make an interim distribution. In *Reznik,* released in the summer of 2013, Peter Lightbody of RBS brought an application before the British Columbia Supreme Court seeking an order for an interim distribution, in circumstances where final distribution of the estate was being held up by delays selling real property but the estate had money in the bank to allow an interim distribution. Rejecting the executor's argument that the Court lacked jurisdiction to make the order sought, the Court then turned to the law of "assent" for legal authority.

Generally, assent is the executor's acknowledgement that an asset is no longer required to secure payment of an estate debt. Importantly, according to *Reznik*, assent may be forced upon an executor. Satisfied that the estate was "liquid" and a forced assent would not put the executor at risk, the Court ordered cash payments to each beneficiary.