STILLMAN LLP'S

LegalEye

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Presenting Legal News, Views and Updates from
Stillman LLP
Barristers & Solicitors

EDITOR'S NOTE

PLEASE NOTE THAT COMMENCING JANUARY 1, 2008, OUR FIRM'S NAME WILL CHANGE TO STILLMAN LLP.

Our office will be closed during the holiday season from 1:00 pm December 21, 2007 to December 26, 2007 inclusive and we will be closed January 1, 2008. Our office is open during regular business hours on December 27 and 28, 2007.

We wish you all the best this holiday season and a safe and happy New Year!

Should you have any questions, concerns or suggestions for future articles please contact Greg Bentz by phone at 930-3630, or email at gbentz@mcgregorstillman.com or gbentz@stillmanllp.com

HEADS UP

Heads Up is a column which appears in each issue of the Stillman LLP Legaleye, highlighting new or upcoming legislation and legal issues in the Province of Alberta.

Stronger Stance Against Vexatious Litigants – Recent Amendments to the Judicature Act, R.S.A. 2000, c. J-2.

By Samantha Brodersen

Vexatious litigants are those who engage in legal proceedings without having a legitimate claim. They use the judicial process to annoy, harass or financially punish others. Vexatious litigants can have a significant effect on the efficient function of our judicial system. They place undue strain on the Courts' time and resources, which prevents other legitimate claims from being dealt with efficiently. In addition, they force unnecessary stress and expense on those faced with a vexatious claim. Even if the claim is vexatious, the person the claim is made against must still defend the claim or risk losing the case by default. Even more troubling is that people faced with a vexatious claim may end up settling the vexatious claim to avoid the added expense of defending the matter further.

Historically, those faced with a vexatious claim had to seek the Attorney General's consent to bring an application to have a person declared a vexatious litigant before the court. In addition, in Provincial Court, where many litigants proceed without a lawyer and the potential for vexatious litigation is therefore high, those who sought such an application had to do so in the Court of Queen's Bench or Court of Appeal.

Albertans now have a stronger stance against vexatious or frivolous claims brought against them thanks to the enactment of the *Judicature Amendment Act*, S.A. 2007, c. 21 by the Alberta Government on June 19, 2007. The *Judicature Amendment Act* amends the *Judicature Act*, R.S.A. 2000, c. J-2, empowering the judiciary to deal more effectively with applications to have a person declared a vexations litigant.

The amendments have expanded the ability to hear vexatious litigant applications to all three levels of Court in Alberta: the Provincial Court, Court of Queen's Bench and Court of Appeal. In addition, the requirement of obtaining the Attorney General's consent to make vexatious litigant applications has been removed and replaced with a requirement that the Attorney General be given notice of such applications.

INSIDE:

The category of individuals able to bring forth vexatious litigant applications has also been broadened. A vexatious litigant application can be made by a party to vexatious proceedings, a clerk of the Court or the Minister of Justice and Attorney General or, with leave of the Court, any other person.

Previously, in order to be successful in having someone declared a vexatious litigant, the applicant had to rely on common law definitions of vexatious litigation and prove to the court that it was "plain and obvious" or "beyond a doubt" that the claim has no cause of action and that allowing the action to proceed would amount to an abuse of process. This has been clarified by the amendments. A non-exhaustive list of factors that the courts may use as a guide to determine what constitutes vexatious behaviour has been outlined. Vexatious behaviour includes but is not limited to:

- Persistently bringing proceedings to determine an issue that has already been determined by a court of competent jurisdiction;
- Persistently bringing proceedings that cannot succeed or that have no reasonable expectation of providing relief;
- Persistently bringing proceedings for improper purposes;
- Inappropriately using previously raised grounds and issues in subsequent proceedings;
- Persistently failing to pay the costs of unsuccessful proceedings on the part of the person who commenced those proceedings;
- Persistently taking unsuccessful appeals from judicial decisions;
- Persistently engaging in inappropriate courtroom behaviour.

The amendments allow the judiciary to deal with those placing undue strain and burden on the judicial system, without limiting access to those with legitimate claims. Individuals who file claims without merit or behave unreasonably in furthering their claim can be dealt with by the courts in a more efficient manner, allowing for court time and resources to be devoted to addressing legitimate claims.

FIRM NOTES

McGregor Stillman LLP's third annual Superbowl Bowling Extravaganza took place on October 26, 2007 and was an unprecedented success, raising, in excess of $16,000.00 for International Child Care. One hundred percent of the proceeds go to further improve the health and well being of children and families in Haiti and the Dominican Republic. We wish to thank those of our clients who contributed in some fashion to this worthy cause.

Minnie Drews joined our firm as an assistant in our accounting department in October of this year.

We are pleased to announce that our firm will be changing its name to Stillman LLP effective January 1, 2008.

CAUSE CÉLÈBRES

Who will inherit your joint bank accounts and *Pecore v. Pecore* [2007], S.C.J. No. 17

By Elizabeth Caines

It sometimes becomes necessary for people to require assistance in the management of their daily affairs, including the management of investments, retirement income, and the payment of income taxes. Often, the elderly appoint Powers of Attorney, or transfer certain assets or bank accounts into joint ownership with their adult child so that the children can freely manage the assets of the parent. However, joint ownership has also become an increasingly popular means of estate planning, where an elderly parent transfers an asset into joint ownership with the intent to gift that asset to an adult child upon death.

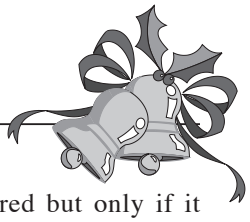
The distinction between the potential intent behind the use of joint accounts has led to substantial litigation in Canada. Historically, two presumptions have been applied by different courts when dealing with joint accounts:

(1) Presumption of Advancement: the assumption that a gift was intended by the parent to the adult child; and,
(2) Presumption of Resulting Trust: the assumption that when a parent gratuitously transfers property to an adult child, the parent retains beneficial ownership to the property and gifts only the legal title to the child.

In the context of this article, the difference between these two presumptions is important. With the presumption of resulting trust, if the parent retained beneficial ownership, the value of the assets, upon death, is subject to probate. Conversely, the presumption of advancement provides that the surviving joint account owner (typically the child) will retain the assets upon the death of the parent.

The Supreme Court of Canada reviewed the law surrounding joint accounts in two judgments released in May 2007 and clarified which of the presumptions will apply.

In *Pecore v. Pecore* [2007], S.C.J. No. 17, an elderly father transferred assets into a joint account, with the right of survivorship, held with his adult daughter. Survivorship clauses are commonplace in banking documents and provide that upon the death of one or more of the joint account owners, the surviving owner(s) will continue to have the right to independently deposit, withdraw, and deal with the funds held in the account. However, in Pecore, the father's Will made no mention of the joint accounts but made specific bequests to his daughter and several other parties. Further, the Will provided that the residue of the father's estate was to be divided equally between his daughter and her husband. Following the father's death, the daughter did not include the funds held in the joint account in the distribution of the estate. Her husband commenced proceedings, following their divorce, to have the



assets included in the residue of the estate and distributed according to the father's Will.

The Supreme Court found that the daughter took legal ownership of the balance in the accounts upon the death of her father. However, the Court recognized the distinction between beneficial and legal ownership and determined that the real issue in the case was whether the father intended to make a gift of the beneficial interest in the accounts upon his death to his daughter alone, or whether he intended that his daughter hold the assets in the accounts in trust for the benefit of his estate to the distributed according to his Will.

The Supreme Court held that in cases involving transfers to joint ownership with adult and independent children, it is presumed that the adult child is holding the property in trust for the parent. However, the Court acknowledged that there are situations in which a parent intends to gift the joint asset to an adult child upon death. Accordingly, in such circumstances, the child must rebut the presumption, and prove that the transfer was a gift.

Therefore, the Court in *Pecore* held that the presumption of a resulting trust means that it will fall to the surviving joint account holder to prove that the deceased intended to gift whatever assets are left in the account to the survivor. Otherwise, the assets will be treated as part of the deceased's estate to be distributed according to their Will. Under the specific circumstances in Pecore, the Supreme Court was satisfied that the father's intention was for the balance in the accounts to go to his daughter.

In *Madsen Estates v. Saylor* [2007], S.C.J. No. 18, an aging father placed his mutual funds, bank account and income trusts in joint accounts, including the right of survivorship, with his daughter, one of his adult children. Once transferred into joint ownership, the father retained control over the accounts and the funds were used solely for his benefit during his life. Further, he declared and paid all taxes on income made from the accounts. Following the father's death, the daughter, acting as the executor of his estate, did not include the accounts in the distribution of the father's estate which led the other children to commence legal proceedings.

The Supreme Court applied the same principles as in *Pecore* and held that in cases of transfers of this nature, the appropriate presumption of law is that of resulting trust, not of advancement. Accordingly, the daughter had the burden of rebutting the presumption of a resulting trust by showing that her father intended to gift the assets in the accounts to her.

Neither case provided an exhaustive list of evidence that would be considered in determining the intent of the deceased. However, both cases make reference to evidence at the time the assets are transferred into joint ownership. Evidence arising following the transfer can also be considered but only if it relates to the parent's intention at the time of creating the joint account. Other considerations include the level of control the parent maintains over the assets and whether the parent continues to pay tax on the income generated from the joint account. Further, the Court will consider the existence of a Power of Attorney, the wording of the Will, and the wording used in the bank documents. Such indicators can provide strong evidence of the intention of the parent regarding how the balance in the accounts should be treated upon their death.

Accordingly, while joint accounts are used by many Canadians for a variety of reasons, including estate planning and financial management, it is imperative to clearly state your intentions. Failure to make your intentions known at the time of transfer can carry significant consequences; including lengthy estate litigation and a subsequent distribution that may not live up to your true wishes. Protect yourself and seek legal advice when considering your estate planning or financial management options.

AS WE SEE IT

Non-Competition Agreements
By Geoffrey W. Coombs

In the super-hot Alberta economy, the demand for labour far exceeds its supply and employees are regularly exposed to opportunities to move between jobs, seeking better wages, benefits, or working conditions. In turn, employers find themselves having to make significant investments in attracting and retaining employees. Naturally, employers want to safeguard the investment that they make with their employees and limit the extent to which their employees can take their learned skills and training out of the company and across the street to the competition.

More frequently, employers are implementing employment agreements that include restrictive covenants. Restrictive covenants are also known as noncompetition clauses, non-solicitation clauses, or confidentiality clauses. Essentially, the employee is asked to make a commitment not to compete against the employer, entice the employer's customers/employees, or to divulge the employer's confidential information/trade secrets. Employment agreements can include any or all of these commitments and the commitments are typically set to run, post-employment, for a particular length of time, and in a particular geographic area.

Restrictive covenants can seriously limit an employee's mobility and right to earn a livelihood. An employee could be in a situation where they have agreed with the employer that they will not work for any other competitor. For an employee with a unique skill set, this could create a serious problem if the employee ever wanted to or had to change jobs.

To prevent the creation of such untenable situations, the Courts often determine that restrictive covenants that are not reasonable

are unenforceable in employment agreements. What is considered reasonable often depends on the specific facts of the particular situation. The Courts start with the premise that noncompetition agreements restrain trade and are therefore not in the best interests of the general public. Consequently, the Courts look carefully at whether the restrictions are reasonable in light of protecting the interests of the employer and the employee, but also the general public at large.

In this regard, the courts have established a three-fold test for determining the enforceability of restrictive covenants:

1. Does the employer have a legitimate proprietary interest in the employee that it is entitled to protect;
2. Is the restraint of trade reasonable in terms of length of time, geographical area, the nature of the activities prohibited and overall fairness; and
3. Is the restraint reasonable with reference to the public interest.

Factors that Courts look into when determining the "reasonableness" of a restrictive covenant include:

- Generally, non-competition clauses in employment contracts are void as being a restraint on trade;
- However, while it is important to discourage the restraint on trade and allow free and open competition, there is also a need to enforce contracts freely entered into by knowledgeable persons of equal bargaining power;
- Non-competition clauses, non-solicitation clauses and confidentiality clauses may be enforced if reasonable in the interests of the contracting parties and also reasonable in the public interest;
- A non-competition clause will not likely be enforced where a non-solicitation clause would suffice;
- Depending on the specific circumstances, restrictive covenants lasting more than 12 months post-employment are often considered unreasonably too large.
- Restrictive covenants that cover a geographic area larger than what is necessary to protect the employer's legitimate business interests are often considered unreasonably too large.
- Employers must have something that legitimately needs protecting.
- A restrictive covenant that goes beyond the minimum level of protection - in terms of duration, geographic reach, and scope of activities - is unlikely to be enforced.

Employers are increasingly using restrictive covenants to protect their corporate assets and investments in their employees. However, it is important to note that courts will interfere with the parties' right to contract where the terms are too onerous. Consequently, whether an employer wishes to incorporate such clauses into an employment agreement or an employee is being asked to sign an agreement with such a clause, it is recommended that legal advice is sought.

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Stillman LLP is a general law firm formed in 1993 with emphasis on Civil Litigation, Corporate and Commercial matters, Real Estate, and Wills and Estates and Family Law. The firm represents clients throughout Alberta, and has also represented clients from British Columbia, Saskatchewan, Manitoba, Yukon, Northwest Territories, Ontario, Quebec and various parts of the United States.

The firm has a well established network of agents in Canada, including Vancouver, Vancouver Island, Calgary, Regina, Saskatoon, Winnipeg, Toronto and Montreal. Stillman LLP also has established affiliations with various law firms throughout the United States and Great Britain.

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