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EDITOR'S NOTE

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

The New Wills and Succession Act

By Ara McKee

The Alberta legislature recently passed a new Act titled the *Wills and Succession Act*. The Act is to come into force on proclamation, expected in early 2012. This new Act consolidates the current *Wills Act, Intestate Succession Act, Survivorship Act, Dependents Relief Act* and s.47 of the *Trustee Act*. It will also result in significant amendments to the *Matrimonial Property Act* and minor amendments to the *Administration of Estates Act* and *Family Law Act*. The following article highlights key changes in five different areas of wills and estates practice as a result of the new Act.

Survivorship:
If two or more people die at the same time, and the order of death cannot be determined, the current survivorship rule is that the older is deemed to have predeceased the younger. Survivorship is significant when the deceased persons are beneficiaries of each other. Applying the current rule, the oldest deceased person's estate, or part of it, would go to the younger deceased person to be distributed according to that younger person's estate. Under the new Act, if two or more people die at the same time and the order of death cannot be determined, property is distributed as if each had predeceased the other. This means that each estate is distributed as if the other deceased person had predeceased.

The same situation occurs when property is held jointly by deceased persons where the order of death cannot be determined. Applying the current survivorship rule, the older deceased person's share in the property would be distributed according to the younger deceased person's estate. Under the new Act, property owned jointly by the deceased persons is deemed to be held as a tenancy in common rather than as joint tenants thereby allowing each deceased person's share to be distributed as if the other deceased person had predeceased.

Wills:
Currently, a Will is revoked upon marriage or upon entering into an adult interdependent partnership agreement. Under the new Act, marriage or the entering into an adult interdependent partnership agreement will no longer revoke a Will. This rule is intended to apply regardless of whether the Will was made before or after the coming into force of the new Act.

Under the new Act, a divorce that occurs after the Act comes into force may revoke a gift to a former spouse. A similar rule applies to adult interdependent partners. This is intended to apply regardless of whether the Will was made before or after the coming into force of the new Act.

There are changes in the distribution of an estate in the situation where a beneficiary has predeceased or has disclaimed or been disqualified from receiving a gift under a Will. Under the new Act, the gift will be distributed, firstly, to an alternate beneficiary, secondly, to descendants of the intended beneficiary if the beneficiary is a descendant, thirdly, to residual beneficiaries and, lastly, the gift is distributed as if the deceased died intestate (without a Will).

INSIDE:

HEADS UP:
-a review of some recent and upcoming legislation and legal issues

FIRM NOTES:
-update on the happenings at Stillman LLP

CAUSES CÉLÈBRES:
-some recent case law to be aware of

AS WE SEE IT:
-semi-annual commentary on a current legal issue

Distribution of Intestate Estates:
In the situation where a person has died without a Will, the estate will be distributed in a particular manner as set out by legislation. Currently, an intestate estate is distributed according to the *Intestate Succession Act*. The new Act will include a similar distribution sequence however there are some changes to be aware of.

The new Act introduces the "all to the spouse" rule. This means, if a person dies intestate, leaving a spouse or adult interdependent partner and children of the relationship, then everything goes to the spouse or adult interdependent partner. This is a change from the current rule that the estate is shared between the spouse and children. If there are children of more than one relationship, a preferential share will be given to the spouse or partner with the remainder going to the children.

Under the new Act, spouses are disinherited if they have been living separate and apart for two years, the parties have a declaration of irreconcilability or a court order or agreement that is intended to permanently finalize their marital affairs.

The estate of an intestate person with no spouse, partner or descendants to inherit the estate, is distributed in the following manner:

Step One: The estate goes to either or both parents. If there are no living parents, the estate goes to siblings and their descendants, ending with grand nieces and grand nephews.

Step Two: If there is no one living to inherit under step one, 50% of the estate goes to each of the maternal and paternal sides, to either or both grandparents on that side. If there are none, the estate goes to aunts and uncles on both sides. If there are none, the estate goes to the aunts' and uncles' children, but no further.

Step Three: If there are no relatives on one of the maternal or paternal sides, then 100% of the estate goes to the other side.

Step Four: If there is no one living to inherit under step three, the process is repeated for great-grandparents.

Step Five: If there is no one living to inherit under the great-grandparents line, the estate is then distributed pursuant to the *Unclaimed Personal and Vested Property Act*.

The important changes with this new parentelic system of inheritance are that the estate is split between the relatives on the maternal and paternal sides of the family and inheritance only goes to the fourth degree of relationship with the deceased. This means that grandnieces and grandnephews can inherit by representation and those beyond the fourth degree can make a claim to the estate under the *Unclaimed Personal Property and Vested Property Act*.

Family Maintenance and Support:
As with the current law, family members, formerly defined as "dependents" under the *Dependents Relief Act*, may claim support from the estate of the deceased. However, there are some additions to the law as follows:

Firstly, an adult interdependent partner or spouse of a deceased has an automatic right to stay in their shared home for three months after the death.
Secondly, an adult child under age 22 who is in school full-time can apply for support from the estate of a deceased parent.

Thirdly, a minor grandchild or great-grandchild who is dependent on a deceased grandparent or great-grandparent can apply for support from the estate.

Fourthly, a family member (formerly "dependent") and the personal representative can request financial information from each other without the requirement of a court order.

Advancement:
In the situation where a deceased advanced a share of the estate to a beneficiary during the time the deceased was alive, an application can be made to the court by the personal representative or any interested person to determine whether the transaction is to be deducted from the beneficiary's inheritance. This section of the legislation removes the common law presumption of advancement.

The changes brought about by the new *Wills and Succession Act* will modernize wills and estates law in Alberta. These changes have been long awaited and much anticipated by legal practitioners in the area. Should you have questions as to how the new changes may impact your current Will, you should discuss your situation with a lawyer.

This article highlights key changes to the new Act, and does not purport to be an extensive review of all changes in the area of wills and estate. As this Act has not been proclaimed, changes may be made prior to coming into force.

FIRM NOTES

Mark Stillman recently acted as an assessor for the interviewing and counselling competency evaluation section of the 2011 Canadian Centre for Professional Legal Education program.

Ara McKee (our articling student), has accepted a position with our firm as an associate lawyer. Ara's expected Bar call date is August 26, 2011. We are also pleased to welcome Alison Mazoff, who started with our firm as a student-at-law on June 1, 2011.

We also welcome the following new staff members to the Stillman LLP team:
Shannon Gibson – Legal Assistant
Kristy Turner – Legal Assistant
Tiziana Roberts – Receptionist

As well, Marilynn Waddell, our receptionist of 16 years who retired at the end of October 2010, to our delight, has agreed to come back to work with us on a part-time basis.

The 7th Annual Stillman LLP Superbowl Extravaganza has been set for Friday, October 21, 2011. Monies raised at this year's Superbowl will again be donated to the Skills program, a local charitable organization providing community support to children and adults with developmental disabilities and adults with acquired brain injuries.

Anyone wishing to participate in the Stillman LLP Superbowl, or to donate items as prizes, or for our silent auction held at the Superbowl, should contact Greg Bentz of our office to find out more. All friends and clients of Stillman LLP are invited to assist in this worthwhile cause.

CAUSE CÉLÈBRES

Working Past Your Welcome
by Jim Chronopoulos

The employee-employer relationship can create interesting legal dynamics in the workplace even as it continues to evolve under the watchful eye of our court system. The recent Ontario case of *Russo v. Kerr Bros. Ltd.* represents an interesting twist in the area of constructive dismissal – the area of law where an employer, by its poor treatment of an employee, including a serious reduction in compensation, is deemed to have dismissed its employee.

Background
Kerr Brothers Ltd. ("Kerr") had been operating as a candy manufacturer for the past 114 years. Recent economic hardships had required the company to restructure its operations. Over the last nine fiscal years, for example, Kerr had reported a loss of over $7.4 million.
Lorenzo Russo ("Russo") was 53 years of age and had been with Kerr for 37 years. In fact, Russo had worked for Kerr and only Kerr his entire life. From the age of 16 years old, Russo quit school to work full time with Kerr and worked his way up in the company from a shipping clerk to his present position as a warehouse manager where he took home a salary of $114,000 annually.

In an effort to turn the company around, Kerr hired a new president to assess and remedy the company's viability. As a result, Kerr underwent a companywide restructuring in the summer of 2009 which required all employees to take a 10% reduction of their salary and elimination of their pension plan. This restructuring significantly reduced Russo's salary and he was no longer eligible to receive a bonus or participate in the pension plan. Russo did not agree to the reduction and told Kerr that the changes amounted to, at law, the termination of his employment or constructive dismissal. Then, in an unorthodox and unprecedented move, Russo elected to continue to work for Kerr under the reduced terms and filed a lawsuit for wrongful dismissal seeking the reduction in compensation as damages during his entitled notice period.

Decision
The Ontario Superior Court found that the reduction in Russo's compensation indeed gave rise to a constructive dismissal by Kerr. At issue, however, was the question of how to characterize Russo's continued employment. The Court dismissed Kerr's argument that Russo's continued employment was evidence that he accepted or condoned the new terms of employment. Instead, the Court found that Russo was only continuing to work for Kerr in order to mitigate his damages and awarded him $81,965 plus interest.

By the Court's reasoning, there was no reason why Russo could not remain in his employment under the changed terms as a means of mitigating his damages. That said, the Court noted that if Russo had continued to work for Kerr after the period of reasonable notice expired, and not filed a claim, he may have been found to have accepted the new terms of employment.

Commentary
Prior to *Russo v. Kerr Bros Ltd.* there were three recognized possible outcomes an employee was faced with in when confronted with a change in her terms of employment – those being:

1) Accept the change and continue employment on the new terms;
2) Reject the change and claim constructive dismissal; or
3) Reject the change and insist on the adherence of the original employment terms.

It would seem that *Russo v. Kerr Bros Ltd.* espouses a fourth alternative, namely:

1) Reject the change, continue employment for the duration of the reasonable notice period, and claim constructive dismissal. Whether this principle will be adopted in Alberta remains to be seen. However, as the Ontario Court's reasoning appears compelling, Alberta employers and employees alike would do well to tread carefully when faced with a similar sticky situation. After all, some circumstances, as this candy manufacturer found out, may not be as sweet as they appear.

AS WE SEE IT
by Erik Bruveris

Kerr v. Baranow, 2011 SCC 10: "Unjust Enrichment and the Joint Family Venture"

When an unmarried couple's relationship breaks down, it is normal to find disputes regarding property arise. In the absence of legislation, property disputes between common law couples are or were often decided pursuant to unjust enrichment or resulting trust actions.

The Supreme Court has issued a new analytical roadmap for unmarried spouses in property disputes in *Kerr v. Baranow,* 2011 SCC 10 ("*Kerr*").

The first key aspect of the decision in *Kerr* is that resulting trust claims have been abandoned in the family law sphere. The "common intention" resulting trust was previously a method by which one common law partner could seek a proprietary remedy against the other. It had been the primarily legal vehicle through which common law spouses claimed proprietary relief several decades ago, and had not, for nearly two decades been the principal or common method by which redress was sought. In labelling the "common intention" resulting trust as "doctrinally unsound" (at para. 25), "highly artificial" (at para. 26), and having been evolved from a "misreading of early authorities" (at para. 27), the Court has made it abundantly clear that this approach should no longer be taken.

The approach endorsed in *Kerr* is that claims in unjust enrichment, provide a much more realistic, more comprehensive, and more principled basis upon which to address the wide variety of circumstances that lead the myriad of claims arising out of domestic partnerships.

The law of unjust enrichment and the remedies available are restitutionary in nature. The test to establish an unjust enrichment claim is simple enough. First, the plaintiff must show that the defendant has been enriched by virtue of the plaintiff's efforts or actions. Second, there must be a corresponding deprivation to the plaintiff. Finally, there must be no "juristic" reason for the retention of the benefit by the defendant. Simply put, the absence of juristic reason means that there is no reason in law or equity for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances.
Key to understanding the decision in *Kerr* is the nature of the remedies which individuals are available to receive upon successfully establishing their claims in unjust enrichment. The first type of remedy is monetary in nature. There are two recognized methods by which to determine the appropriate monetary remedy available to a successful claimant. The first is termed the "value received" approach. The value received approach looks at the efforts that

one has put into a relationship and values the contribution on a fee-for-service basis. The second approach of valuation is the "value survived" approach which considers the value of the property a couple had at the beginning of a relationship and at the end, then divides the two in some proportion. The latter method can be easily likened to the approach that is mandated in matrimonial property legislation which considers the net family property of spouses and thereafter direct that it be divided equally between the spouses.

The proprietary remedy in unjust enrichment actions is called the constructive trust and occurs where the law deems that the claimant is entitled to an interest in disputed property itself. The preferred remedy set out by the courts for some time had been the monetary remedy, turning to the proprietary remedy only if necessary.

The problem which had developed in various appellate courts in Canada, and which, to a large extent was the focus of the decision in *Kerr* was the approach that was being taken with respect to monetary remedies. Specifically, if a claimant's contribution could not be linked to specific property, a money remedy must instead be assessed, and it must be assessed on a "value survived" or fee-for-service basis. This approach was clearly rejected by the Supreme Court.

Instead, the court set out that where the unjust enrichment was best characterized as an unjust retention of a disproportionate share of assets accumulated during a "joint family venture" to which both partners had contributed, the remedy must reflect that fact. Where the parties had engaged in a joint family venture and the claimant's contributions can be linked to the accumulation of family wealth, and then a monetary award should be calculated by considering the claimant's proportionate contributions. Therefore, to be entitled to an award of this nature, the claimant must prove the existence of a joint family venture and show that there was a connection between the contributions and the accumulation of assets. Whether a joint family venture exists is a question of fact, and should be assessed according to all of the relevant circumstances, including: mutual effort, economic integration, actual intent as evidenced through behaviour, and priority to the family.

While the foregoing is helpful, the matter does not end there. The final analysis if often complicated in domestic situations by virtue of the fact that there had been a mutual conferral of benefits between the parties, with each party conferring benefits upon the other (at para. 101). The answer, to the Court is that the monetary remedy should be a share of the family wealth proportionate to the claimant's contributions. The Court does acknowledge that mutual benefit conferral is not an exact science and it will be based upon the evidence before it when considering its remedy. The mutual conferral of benefits may also be looked at during other stages such as the defence stage (i.e., if or where the defendant pleads a counter-claim or set-off), or less frequently, the juristic reason stage of the analysis (at para. 104).

By virtue of its decision in *Kerr*, the Court has now established a fact driven framework within which to evaluate claims. While *Kerr* does help clarify the analysis which trial judges are to take, the case has only been applied in two reported decisions in Alberta. What is clear is that clients, lawyers, and judges have now been handed a framework within which to better evaluate property claims as between unmarried couples.

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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 jurisdictions in France, Ireland the United States.

The firm has a well established network of agents in Canada, includingVancouver, 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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