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EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact Erik Bruveris by phone at 930-3639, or email at ebruveris@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 *Estate Administration Act*: Duties, Roles and Responsibilities of Personal Representatives

By Ara McKee

The Alberta legislature passed a new Act on March 20, 2014 titled the *Estate Administration Act*. The Act is to come into force on proclamation, expected in spring of 2015, to correspond with the commencement of the reformed Surrogate Rules of Court. This new Act consolidates the current *Administration of Estates Act*, R.S.A. 2000, c. A-2 and *Devolution of Real Property Act*, R.S.A. 2000, c. D-12. It will also incorporate some of the sections of the former Surrogate Rules of Court.

The intention of the *Estate Administration Act* ("EAA") is to set out in plain language how an estate is to be managed by the personal representative after a person dies. In many situations, estates are administered by personal representatives without the assistance of a lawyer. The EAA is intended to make the law surrounding estate administration more easily understandable by personal representatives who find themselves without legal guidance. The following article highlights the duties, roles and responsibilities of the personal representative as outlined in the EAA.

The EAA sets out that the personal representative has all the powers that the deceased person would have had to manage the estate, essentially 'stepping into the shoes' of the deceased. As a result of the high degree of trust placed in a personal representative, the personal representative has always been held to the common law standard of a fiduciary. This fiduciary role is defined in plain language in the EAA as acting honestly and in good faith in accordance with the testator's intention and with the Will, if one exists, and with the care, diligence and skill that a prudent person would exercise.

The duties of the personal representative are currently set out in the Surrogate Rules of Court. In the EAA, four core tasks of a personal representative in administering an estate are set out and detailed in a schedule to the Act. These four core tasks include: identifying the estate assets and liabilities, administering and managing the estate, satisfying the debts and obligations of the estate and distributing and accounting of the estate to the beneficiaries. Specifically in relation to distributing the estate, the personal representative must adhere to specified notice requirements in order to provide the proper notice to beneficiaries. In addition, the personal representative is required to distribute the estate to the beneficiaries as soon as practicable. It is important to note that the duties and core tasks as well as the specific notice requirements must be adhered to even if an application for a grant of probate is not being made to the court.

INSIDE:

Should a personal representative refuse or fail to perform a duty or core task or provide the specified notice as required, the EAA allows a court application to be brought to address the refusal or failure of the personal representative. To ensure the duties, roles and responsibilities of the personal representative are properly met and complied with, the personal representative may retain a lawyer to assist in the estate administration process. Even if a grant of probate is not required, a lawyer can assist the personal representative in properly satisfying the specific notice requirements.

Administering an estate is a significant responsibility for a personal representative. This new legislation helps to clarify the roles, responsibilities and duties of the personal representative in an easily comprehensible way.

Should you have any questions relating to the administration of an estate, any of the estate lawyers in our office may be contacted.

This article outlines some highlights of the new legislation but does not purport to be an extensive review of all changes in the area of estate administration. As this legislation has not been proclaimed, changes to the legislation may be made prior to coming into force.

FIRM NOTES

For the first half of 2014 our firm has been busy and continuing to grow. Frank Mackay, a practicing lawyer of 43 years at the law firm Cummings Andrew MacKay LLP has joined our firm and brought his assistant Marilyn Kammer. Frank brings more than four decades of legal experience in the areas of real estate, corporate/commercial and wills and estate planning and administration. We wish to welcome Frank and Marilyn to our team.

We'd like to welcome back Sara Boulet who has returned to be a summer employee in between semesters at the University of Ottawa. We are also pleased to announce the arrival of three new assistants: Christine Rainville, Skye Gerro and Shauna LeBlanc.

Also, we are pleased to welcome, as a summer Law Student Researcher, Alexander Manolii who is in first year law school at the University of Alberta.

Stillman LLP continues to support the West Edmonton Business Association (WeBA) and is pleased to announce that the WeBA Golf Tournament of June 3, 2014 was a huge success. If you have any questions about how to get involved in WeBA please contact Greg Bentz at (780) 930-3630 or email at gbentz@stillmanllp.com.

CAUSE CÉLÈBRES

The Effect of Express Agreements on the Duty to Disclose Financial Information in Divorce

By Melissa MacKay & Alexander Manolii

Going through a divorce or separation can often be a stressful time – it is a time of uncertainty and change. This is especially true for couples who have children and for which child support is either being paid or received by one of the parents. The case of *Goulding v Keck* 2014 ABCA 138 ("Goulding"), recently heard in the Alberta Court of Appeal, addresses the issue of retroactive child support payments in light of an agreement between the parties to disclose financial information. Prior to Goulding, the factors to be weighed by the Courts when evaluating a claim for retro-active child support were guided by the decision in *DBS v. SRG*., and included: 1) whether there was a reasonable excuse for why support was not sought earlier 2) the conduct of the payor, and whether the payor engaged in "blameworthy conduct" 3) the circumstances of the child, and 4) any hardship occasioned by a retroactive award.

Generally speaking the date of which the payor was given notice of the application, would be the date to which the retro-active award would be applicable, and typically, applicants may seek retro-active child support for three years prior to the date of the application.

The Court in *Goulding* distinguishes the decision in *DBS* and advises that while the factors in DBS still apply to the analysis of a retro-active child support claim, if there is a written agreement in place, the Court must evaluate the application in light of the agreement.

The parties entered into a Child Support Agreement in May 2010 which established the amount of Child Support payable by the father of the child according to his annual income at the time. In *Goulding*, the agreement stipulated that both parents would review the Child Support amounts every two years to ensure that it was appropriate according to the Federal Child Support Guidelines. In addition, the parties were required to disclose their income information to make such adjustments.

In December 2012, the mother requested disclosure of the father's most recent financial statements for the first time and discovered that, every year since 2009, the respondent was earning a salary ranging between $117,000 and $134,000. The mother filed a claim seeking an increase in child support and retroactive payments between 2009 and 2012, when there was a discrepancy between actual earnings and the $40,000 used as the father's initial income in the agreement. The trial judge denied the application for retroactive support, which was the subject of the appeal.

The Appellate Court determined that the father accepted contractual obligations to both (1) disclose his income every

year and (2) to pay child support that followed the *Guidelines*. Unlike in *DBS*, the respondent had a clear contractual obligation of disclosure and payment of support. The respondent knew the terms of the agreement and could rely on them to predict his obligations. The respondent was bound by the conditions of the agreement even if he unknowingly forgot to follow its terms. Therefore, the "blameworthy conduct" factor in the context of a child support agreement becomes less influential, given the Court's strict interpretation of the agreement, provided that the agreement adequately addresses the needs of the child and has not been found to be an unconscionable. In light of an agreement, it becomes unnecessary to determine if a party failed up uphold their obligations intentionally.

The Court declined to make a determination as to whether or not an award of greater than 3 years was applicable in this case, given that the application was made only for three years of retro-active child support.

Goulding ultimately advises that agreements regarding child support will be strictly interpreted, failing any evidence of unconscionability, for retro-active child support claims as well as ongoing obligations. This interpretation continues to uphold the goal of predictability, but diminishes the requirement to prove "blameworthy conduct". Although the Court failed to address the typical three year retro-active period, it would seem that the Court has left the door open to argue for extensions beyond that period of time, when an agreement is in place. The factors which have typically been applied to applications for retro-active child support are still relevant when an agreement is in place, however, they will be viewed in light of the terms of the agreement.

AS WE SEE IT

Diminished Value: *King & Kemp v. Satchwell et al (2013 ABPC 358)*
by John Hagg

In Alberta, Motor Vehicle Accident ("MVA") claims provide the basis for not only one of the most common, but also most dynamic areas of law. There are a number of aspects to MVA claims which are not addressed here. Rather, the more narrow purpose of this article is to provide an update into one specific area of frequent concern, namely that of quantifying losses for a vehicle's diminished value resulting from an MVA.

The issue of recovering damages for diminished value to your vehicle after an MVA was recently discussed by Judge Skitsko in the Provincial Court of Alberta case of *King and Kemp v. Satchwell et al.*(2013 ABPC 358). Historically, the general rule is that you cannot claim for the diminished value of your vehicle unless you have concrete evidence. That is, if prior to the accident you could sell your vehicle for $20,000 and afterwards could only sell it for $15,000, it is very difficult to be obtain compensation for the difference unless you can show actual diminished quality.

Judge Skitsko identified the three forms of diminished value: (1) inherent or 'stigma'; (2) repair related; and (3) insurance related. Claims for repair related and insurance diminished value are much easier to prove than inherent diminished value. *King*'s significance is that Judge Skitsko left the door open for that to change.

A breakdown of the three types may be helpful to clarify the distinction. First, inherent means that simply the fact that a vehicle was in an accident decreases the fair market value, even if the car is identical post-accident. That is, the depreciation is based on stigma alone rather than tangible evidence.

Second, repair related diminished value means that you must consider the extent to which a vehicle has been repaired, considering: vehicle age, location of damage, the damages sustained, quality of repair, and the 'prestige' or unique nature of the vehicle. Repair related damages are much easier to prove and quantify because of the tangibility of evidence.

Third, insurance diminished value is when an insurer chooses to replace 'name brand' parts with generic ones. Judge Skitsko gave the example of a BMW windshield attracting a higher market value than a generic one. This type of diminished value would apply less to cases where one driver is receiving damages from another, and more to cases involving insurance companies.

On inherent diminished value, Judge Skitsco drew from several other cases in order to arrive at his opinion. He considered the result in the British Columbia case of *Miles v Mendoza* ([1994] B.C.J. No. 359). The vehicle was a 1987 Honda Prelude purchased new and damaged in 1991. The claimant drew upon expert evidence using a common sense approach which submitted that the 'stigma' alone would cause a 15% reduction of the value from $9,500 'Gold Book Retail Value' to $8,000. The BC Supreme Court found it insufficient to say that common sense 'stigma' is enough to amount to proof of diminished value. The claim was dismissed.

The argument was made in the Nova Scotia case of *Moffit v. Harris* (2013 NSSM 33) that inherent diminished value would result from "a theory that the actual repair cost would be the probable amount of depreciation in the future." The Court rejected that argument based on the fact that the theory was sourced from "someone at the Volkswagen dealership": *King* at paragraph 97.

The British Columbia Supreme Court also found the evidence to be insufficient in *Lee v. Hawkins* ([1990] B.C.J. No. 2215) despite an expert witness for the plaintiff declaring at paragraph 5 "that it is "virtually impossible" to sell a vehicle that displays the damage declaration without discounting the price substantially."

Judge Skitsko discussed that while the approach may seem like common sense to a purchaser choosing between two identical vehicles, one accident free, one not, he suggested that the current law will not let it translate into damages without further reliable evidence. Judge Skitsko stated that will be "insufficient to express an opinion that the vehicle is worth less simply due to the 'stigma' that it carries as a result of an accident...this type of claim must be decided on facts" and therefore, "saying it so does not make it so:" *King* at paragraph 94.

Although the evidence presented in *King* did not support making a ruling on inherent diminished value, Judge Skitsko went on to say that he would leave it open to further interpretation on another day. He also cited numerous Supreme Court of Canada authorities to support the longstanding principle that difficulties in calculation of damages is not a valid reason to excuse the wrongdoer of paying damages. It seems that a change has been set in motion to adapt the law on diminished value to incorporate the principle of inherent diminished value, and perhaps someday soon, the stigma your vehicle carries after an accident will be the guilty driver's problem, not that of a plaintiff who has already suffered a host of problems associated with a typical motor vehicle accident.

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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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