EDITOR'S NOTE

Should you have any questions, concerns or suggestions for future articles please contact Erik Bruveris by phone at 930-3639 or, or by email at ebruveris@stillmanllp.com.

HEADS UP

Heads Up

The Representation of Corporations in the Court of Queen's Bench: 908077 Alberta Ltd. v. 1313608 Alberta Ltd.

By Melissa MacKay

The decision of Associate Chief Justice Rooke in *908077 Alberta Ltd. v. 1313608 Ltd.* reviews how the current Rules of Court change the jurisdiction of the Court to permit a non-lawyer to represent a party to litigation.

The "Old" Rules of Court provided that a non-lawyer agent could represent a party to litigation, by virtue of "Old" Rule 5.4. When the "New" Rules of Court came into effect on November 1, 2010, this particular discretionary provision was notably absent. In its place was Rule 2.23 which outlines the circumstances in which a non-party may provide "assistance" to a party to an action. Rule 2.23, however, also provides that no assistance may be permitted that would contravene section 106(1) of the *Legal Profession Act*. The *Legal Profession Act* advises that unless a person is a member of the Law Society of Alberta, they are not permitted to practice as a Barrister or a Solicitor. There is an exception provided in the *Legal Profession Act* for a party who is representing themselves, which is also codified in the "New" Rule 2.22.

The main question which was being answered by Associate Chief Justice Rooke in this matter was whether or not a corporation could be represented in the Court of Queen's Bench by its directors in a Court proceeding. The decision of the Court is this matter was ultimately that a corporation must be represented by a lawyer in the Court of Queen's Bench. Consequently, directors, agents or representatives of a corporation are not permitted to represent a corporation in legal proceedings in the Court of Queen's Bench.

Associate Chief Justice Rooke reviewed the past jurisprudence regarding the "Old" Rules and compared it to the wording of the "New" Rules regarding representation or assistance in the Court of Queen's Bench and concluded that the common law and codified discretion the Court previously had in allowing a non-party to represent a litigant was now extinguished. Associate Chief Justice Rooke also noted that this was deliberate as the absence of an equivalent to Old Rule 5.4 in the "New" Rules was obvious.

Associate Chief Justice Rooke also reviewed whether or not the inherent jurisdiction of the Court to determine its own procedure would allow the Court to carry on its discretion to allow corporate representation by non-lawyer in the Court of Queen's Bench, even in the face of the "New" Rules. It was ultimately determined that the inherent jurisdiction of the Court could not be exercised in this situation, as the inherent jurisdiction of the Court cannot be applied in such a manner as to condone or authorize a breach of legislation- which, in this case, would occur as a breach of Section 106 of the *Legal Profession Act.*

It is important to note that the “New” Rules of Court, are enacted by regulation, and upon noting that if there is ever a contradiction between a Statute and a Regulation, the Statute prevails, the exception provided for in the *Provincial Court Act* allowing litigants to be represented in the Provincial Court of Alberta, prevails over the “New” Rules. As such, parties to litigation, including corporations, continue to be permitted to be represented by an agent in the Provincial Court of Alberta.

Associate Chief Justice Rooke concluded by providing the following guideline summary regarding representation in litigation:

1. An individual may represent themselves in the Court of Queen’s Bench of Alberta;
2. An Estate, Corporation or Litigation Representative must be represented by a lawyer in the Court of Queen’s Bench of Alberta;
3. The “New” Rules of Court have extinguished the Court’s use of its inherent jurisdiction or discretion to allow representation by a non-lawyer in the Court of Queen’s Bench of Albera; and
4. The “New” Rule 2.23 only allows for passive assistance in Court proceedings.

Prior to the decision being reported, the Court was occasionally allowing corporations to make representations in Court by way of a corporate representative, absent counsel via a non-strict reading or enforcement of the Rules. However, since the decision of Associate Chief Justice Rooke has been reported, the Courts are enforcing the rule that corporations must be represented by counsel in the Court of Queen’s Bench. In the end, this is an important consequence that has flowed from the amendments to Rules of Court that is only recently being enforced with a high degree of consistency. It is also important that individuals carrying on business via a corporation or an estate in the province of Alberta consult with counsel to ensure that they are appropriately protected.

FIRM NOTES

Members of Stillman LLP continue to be active in the community through our involvement in professional and community organizations, as well as making a number of donations to various causes and community events, all while having a slow pitch team that is the envy of many. In addition, much like the first half of 2015, our firm continues to grow and in so doing, has some new valuable additions.

Katie Kenny has joined our firm as an associate lawyer, practicing primarily in the areas of wills, estates and real estate. We are also pleased to welcome Braden Nehring who has recently begun his articles. Last, but certainly not least, we are pleased to welcome a number of new assistants, including Victoria Heise and Valanie Belton who have joined our litigation department, and Amanda Bentley who has joined our real estate department.

CAUSE CELEBRES

The Pitfalls of Intestacy for Stepparents and Stepchildren: *Peters v Peters*

By Katie Kenny

The passing of a family member is very a trying and tumultuous time for many. Clear instructions from the deceased regarding the distribution of the estate in the form of a legally valid will helps ease the transition and provide clarity for family members. In absence of a will, the distribution of the deceased’s estate is determined by the rules set out in the *Wills and Succession Act,* SA 2010, c W-12.2 (the “Act”).

The *Act* provides a standard set of distribution rules that stand in place of the deliberate directions that would have otherwise been set out in a will. These rules are the legislature's best guess at the deceased's intentions for the distribution of his or her estate. However, the intestacy provisions are not the best fit for some families, particularly so in the case of so-called "blended families", including children from previous marriages (stepchildren).This issue came to bear in a recent decision at the Alberta Court of Queen's Bench – *Peters v Peters* ("*Peters*").

Ileen and Lester Peters were married for 43 years. Before they were married, Lester had four daughters from a previous relationship. After they were married, they added a son to the family. Gordon Peters is the only biological child of both Ileen and Lester. Although they were not related by blood, Ileen treated her four stepdaughters as though they were daughters of her own in every respect. When Lester passed in 2009, all five of his children gave up any interest they may have had in his estate in favour of Ileen.

Ileen Peters died intestate (without a will) in 2013. Pursuant to the rules set out in the *Wills and Succession Act,* her estate would first go to her spouse or adult interdependent partner if she had one. She did not. Next in line, the estate goes to her "descendents". Were Ileen's four stepdaughters her "descendents" for the purposes of the *Wills and Succession Act*?

On March 10, 2015, Justice Jerke decided, with some reluctance, that they were not. One of the stepdaughters, Marette Peters, made an application for the estate to be split equally between the five children and stepchildren. The application was unsuccessful, and the whole of the estate of Ileen Peters went to her only son, Gordon Peters.

"Descendents", Justice Jerke explained, only includes lineal descendents – blood relatives in the direct line of descent including children, grandchildren and great grandchildren. Marette argued that the stepsisters should be included because of section 68(b) of the *Wills and Succession Act,* which states "descendants of the half-kinship inherit equally with those of the whole kinship." This argument was rejected by Justice Jerke. Had Lester Peters died after his wife, this section would have applied to split the estate into five equal shares. However, the stepsisters are neither a relationship of half-kinship nor whole kinship with Ileen.

Upon delivering this harsh outcome, Justice Jerke commented that "[t]his case is an example of the personal difficulties and harm to relationships which can occur when individuals do not have a will. The distribution of this ... estate has become an instrument with the potential to create, enhance or perpetuate ill will amongst five family members at a time when they should instead be benefitting from good memories of their mother and father."

On September 11, 2015, Marette appealed Justice Jerke's decision in *Peters* to the Alberta Court of Appeal (*Peters v Peters,* 2015 ABCA 301). Three Justices of the Court of Appeal affirmed Justice Jerke's decision and interpretation of the *Wills and Succession Act.* They commented that other legislation (including the *Fatal Accidents Act*) specifically includes a stepchild in the definition of a "child", reasoning that the fact that the same was not done with the *Wills and Succession Act* indicates a clear legislative intention to exclude stepchildren from the definition. The Court also considers that "the relationships between stepchildren and stepparents are too variable to support a presumption that a majority of stepparents intend their stepchildren to inherit their estate" (at paragraph 13).

The default intestacy provisions in the *Wills and Succession Act*, for better or for worse, are designed after the traditional model of a family that was more prevalent in the 20th century and earlier. In 2015, the portion of Canadian families that include children from previous relationships is significant, and it continues to grow. It is important for all families to consider drafting wills to address the interests of all family members. This is especially so when some of the family members or intended beneficiaries are not blood relatives of the deceased (also known as the "testator").

If the intention is simply to split the estate equally between the stepchildren and children of a couple, this may be accomplished by including a provision that defines the "children" of the testator as including "my wife's children" or "my husband's children", as the case may be. If the aim is not to treat all of the children and stepchildren equally, the task becomes more challenging. Careful consideration should be given to the possible outcomes that the future may hold, and how the contents of the estate and the needs of the beneficiaries may differ for each outcome.

Regardless of the distribution, the goals of will drafting are to achieve certainty and clarity, and to ensure that the testator's intentions may come to fruition after his or her passing. Particularly for stepparents, having an effective will is an important tool to give peace of mind now and to encourage harmony within the family in the future.

AS WE SEE IT

The Impact of the Downturn in the Alberta Economy on Severance Packages: *Lederhouse v. Vermilion Energy Inc.*

By Chris Younker

It should come as no surprise to Albertans that the economy has suffered since the dramatic drop in oil prices last fall. What may come as a surprise, however, is that the drop in oil prices, and the resulting downturn in the local economy, may entitle recently laid off employees to a larger severance package.

In Alberta, employees who are dismissed without cause have the legislated right to notice or pay in lieu of notice (severance) pursuant to the *Employment Standards Code* (the "*Code*"). Depending on an employee`s length of service, the minimum varies from one to eight weeks. Persons employed less than three months are considered on probation and not subject to any legislated minimum notice period. In addition to the legislated minimums, Alberta Courts have the ability to set a greater period of reasonable notice for some employees as established through jurisprudence at common law. The key factors the Court must consider when it is determining the appropriate length of notice or pay in lieu of notice, are as follows:

(a) The employee`s age at the time of termination;
(b) Length of service with the employer;
(c) The employee`s responsibilities;
(d) The employee`s experience, status, training, and qualifications; and
(e) The availability of equivalent alternate employment, having regards to the employee`s experience, qualifications and training.

The Alberta Court of Queen's Bench was asked to consider the last factor in the recent case of *Lederhouse and Vermilion Energy Inc.* ("*Lederhouse*"*).* (In that case, Ms. Lederhouse had been employed

as a professional geologist at Vermilion from January of 2011 until her termination without cause or notice on July 21, 2014. Initially Ms. Lederhouse was paid only the two weeks minimum severance as a three year employee pursuant to the *Code.* In the month that followed, Ms. Lederhouse attempted to find new employment (and therefore mitigate her damages). Unfortunately for Ms. Lederhouse, she found herself looking for work just as the bottom was falling out of Alberta`s oil fueled economy. Ms. Lederhouse elected to sue her former employer for additional pay in lieu of notice.

When the Court heard Ms. Lederhouse`s case, Ms. Lederhouse`s unsuccessful attempts to find similar alternative employment in the oil and gas industry from August 2014 to January 2015, were taken into consideration. Justice Yamauchi took judicial notice that by January 2015 current oil prices had resulted in hiring freezes in some companies. Both parties agreed that the economic downturn in the oil and gas industry was a factor that the Court needed to consider. Unsurprisingly, Ms. Lederhouse argued that the economic downturn should increase the notice period, while Vermilion argued to the contrary. Ultimately Justice Yamauchi accepted Ms. Lederhouse`s submissions and ordered Vermilion to pay Ms. Lederhouse nine months pay in lieu of notice. Justice Yamauchi stated that a seasoned industry professional should not be expected to accept work as a junior geologist or be required to find work outside her field. At the time of Ms. Lederhouse`s dismissal she was 56 years of age and had been working in the industry since 1979 in relatively senior exploration roles.

It is important that recently dismissed employees and employers be aware of their obligations and each should consider seeking legal advice. Both employers and employees need to be aware of the fact that current severance packages may be insufficient for some employees most affected by the downturn in the oil and gas sector.