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Wills, Estates and Estate Litigation Newsletter

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Ontario Government Establishes Conditions for Remote Commissioning of Affidavits

A new regulation has come into effect under the *Commissioners for Taking Affidavits Act*, R.S.O. 1990, c. C.17 (the "CTAA") which sets out the conditions for remotely commissioning affidavits through electronic means.

In our previous issue of this Newsletter, we discussed the *COVID-19 Response and Reforms to Modernize Ontario Act, 2020* (also known as "Bill 190"), which received Royal Assent on May 12, 2020, and made amendments to the CTAA to permit the use of remote commissioning. However, the conditions for remote commissioning were to be set out in a subsequent regulation.

On August 1, 2020, O. Reg. 431/20 came into effect under the CTAA. This Regulation sets out the conditions that must be met when remotely commissioning documents.

First, the electronic method of communication being used must permit the person administering the oath or declaration and the deponent or declarant to see, hear and communicate with each other in real time throughout the entire transaction.

Second, the person administering the oath or declaration must confirm the identity of the deponent or declarant.

Third, a modified version of the jurat or declaration must be used, indicating that the oath or declaration was administered in accordance with this Regulation, and providing the locations of both the person who administered the oath or declaration and the deponent or declarant at the time it was administered.

Fourth, if the commissioner's appointment is limited pursuant to section 5 of the CTAA, the information on the stamp required to be used under that section must appear on or in the document being signed.

Fifth, the person administering the oath or declaration must take reasonable precautions in the execution of his/her duties, including by ensuring that the deponent or declarant understands what is being signed.

Finally, the Regulation provides that every person who administers an oath or declaration in accordance with this Regulation must keep a record of the transaction.

This Regulation provides helpful guidance as the legal profession, as well as the rest of society, continues to practise social distancing to help reduce the spread of COVID-19. Remote commissioning allows legal professionals to continue serving their clients while they are unable to meet in person. A similar regulation setting out the conditions on remotely notarizing documents is expected to be made under the *Notaries Act*, R.S.O. 1990, c. N.6, but has not yet been released.

Alex Smith, Associate

— KC —

Ontario Court of Appeal Provides Guidance on Principles for an Extension of Time for a Surviving Spouse's Election

In *Trezzi v. Trezzi*, 2019 ONCA 978, the Ontario Court of Appeal upheld an application judge's discretionary decision to grant a surviving spouse an extension of time to file a surviving spouse's election under s. 6(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*") and in so doing provided guidance on the principles applicable for such an extension.

Background

Peter Trezzi passed away on January 8, 2016. He was survived by his wife, Gina, their two daughters, Bianca and Emily, and his son from a previous marriage, Albert. Peter operated a successful construction business through two Ontario corporations, ACC and Trezzi Construction. In Peter's will, Albert was given all of Peter's interest in ACC, and the real property, equipment, and chattels owned by Trezzi Construction. Albert, Gina, Bianca and Emily were given equal shares of all other real property owned by Peter, all other assets owned by Trezzi Construction, and the residue of the estate.

A dispute arose about whether Peter could bequeath Trezzi Construction's assets and whether Gina owned 50% of the shares of ACC. In two decisions, the application judge held that Peter could bequeath Trezzi Construction's assets and Gina had not established that she owned 50% of ACC's shares. The application judge also granted Gina an extension of time to file a surviving spouse's election under s. 6(1) of the *FLA*, in order to choose whether to receive her bequests under the will or under her statutory entitlement as a surviving spouse pursuant to s. 5(2) of the *FLA*.

Gina, Bianca and Emily appealed the application judge's decisions with respect to Trezzi Construction's assets and the ownership of ACC's shares, while Albert appealed the decision to grant Gina an extension of time to file a surviving spouse's election under the *FLA*.

The Court of Appeal's Decision

The Ontario Court of Appeal dismissed all three appeals. With respect to Albert's appeal on the extension, the Court summarized the relevant rules from the *FLA*. Section 5(2) provides that when a spouse dies, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them. However, s. 6(1) provides that when a spouse dies leaving a will, the surviving spouse shall elect to take under the will or to receive the entitlement under s. 5(2). Section 6(10) requires the surviving spouse to make that election within 6 months of the spouse's death.

Section 2(8) of the *FLA* provides that a court may extend this time for filing a surviving spouse's election if it is satisfied that: (a) there are apparent grounds for relief; (b) relief is unavailable because of delay that has been incurred in good faith; and (c) no person will suffer substantial prejudice by reason of the delay. Gina filed for an extension about 18 months after the deadline under s. 6(10) had expired.

The application judge held that Gina met the statutory test under s. 2(8) of the *FLA* because (a) she had a right to elect for an equalization payment under the *FLA*, but it was not possible to determine the amount (if any) of that payment until the court determined the entitlement and valuation issues under the will. It would therefore be unfair to require Gina to make an election before these critical ownership and valuation issues were resolved; (b) any delay had been incurred by Gina in good faith; and (c) no one would be prejudiced by the delay.

The Court of Appeal noted that the application judge's discretionary decision to grant an extension was entitled to substantial deference and the party seeking to challenge such a decision must show an error in the application of the principles relevant to the exercise of the discretion.

The Court of Appeal rejected Albert's argument that s. 2(8) required the surviving spouse to prove that he/she had a right to an equalization payment in order to receive an extension. The "relief" referred to in s. 2(8) is the right to elect for an equalization payment, rather than the right to the equalization payment itself. To hold otherwise would deprive a surviving spouse of the right to choose the more favourable financial outcome as between a will and under the *FLA* simply because he/she lacks information necessary to make an informed choice between the two.

The "good faith" requirement in s. 2(8) merely requires the party seeking an extension to show that he/she acted "honestly and with no ulterior motive". There was no evidence that Gina was aware, or reasonably ought to have been aware, of her rights prior to consulting with a family lawyer, and before it became clear that the estate issues would not be resolved consensually.

Finally, the Court of Appeal upheld the application judge's finding that no one would be prejudiced by the delay, as there had been very little administration of the estate to date, and the estate would not be able to make a distribution until the ongoing ownership and valuation issues were resolved.

As a result, the Court of Appeal held that there was no basis for it to intervene, as it was entirely open to the application judge to reach these conclusions based on the evidence before him.

Takeaways

This case demonstrates that an application judge's discretionary decision to grant an extension of time for the surviving spouse to file an election under the *FLA* is entitled to substantial deference. The Court of Appeal's decision also serves as a helpful guide to the interpretive principles underlying the statutory test for the extension under s. 2(8) of the *FLA*.

Alex Smith, Associate

— KC —

Court Finds That a Deed to Transfer an Interest in a Property Cannot be Registered After the Death of the Transferor

The Courts have recently attempted to clarify whether a transfer of land signed prior to a person's death can be registered after the person's death.

Background

In *Sproul Estate v. Sproul*, [2015] O.J. No. 598, Ann Sproul ("Mrs. Sproul") executed a deed to transfer her interest in a property to her son, James. She delivered the signed deed to her lawyer and instructed him to register it. Her lawyer discovered, upon attempting to register, an execution in the sheriff's office against the name Sproul, and sought instructions before proceeding. Before the execution was dealt with and the transfer registered, Mrs. Sproul passed away.

James claimed that he should be declared by the court to be the owner of his mother's interest in the property, notwithstanding that the transfer was never registered. Her estate trustee claimed that the property transfer was invalid because Mrs. Sproul lacked capacity and it was not registered.

The Court held that Mrs. Sproul had capacity to transfer the property and that the failure to register the transfer deed did not have the effect of voiding it, relying on the case of *Carson et al. v. Wilson et al*., [1961] O.R. 113, to reach this conclusion. In *Carson*, the Court of Appeal held that essential to the validity of a deed is delivery of the instrument; the grantor must manifest his or her intention that the deed shall presently become operative and effectual through delivery of it. If the grantor, by words or conduct, expressly or impliedly, acknowledges his or her intention to be immediately and unconditionally bound by the deed, that will constitute sufficient delivery in law. Delivery will not be effectual though unless it amounts to clear proof that the grantor intended to part with his or her dominion and control over the instruments and thereupon to immediately vest such right, dominion and control in the grantees. If the grantor delivered the deed, but instructed counsel to wait for further directions or some triggering event (such as the grantor's death) before registering it, then there would not be sufficient delivery.

The Court found sufficient evidence to conclude Mrs. Sproul delivered the executed transfer deed with full intention that it be registered, and that her ownership interest was intended to pass immediately to her son. The court noted that the fact that the transfer was not registered may be relevant in respect of a claim by a third party without notice, but it did not impair her son's claim that the transfer to him was validly completed when she executed and delivered the deed for registration.

Even though *Sproul* did not involve the registration of instruments after Mrs. Sproul's death, some lawyers have relied on that decision to knowingly retain deeds/transfers in their files on the instruction of their clients and to register them after the date of death of the transferor (usually for the purpose of avoiding estate administration taxes).

However, in contrast to the *Sproul* decision, the Superior Court in *Thompson v. Elliott Estate*, [2020] O.J. No. 1052 recently came to a similar conclusion, but cast considerable doubt on the ability of relying on an executed deed after the grantor has died.

In the *Elliott* case, Mrs. Elliott signed and delivered to her lawyer an Acknowledgement and Direction (*"A&D"*) in order to register a transfer to sever her joint tenancy with her spouse, Mr. Thompson. Mrs. Elliott's intention was to have her one-half interest in their matrimonial home pass under her will to her children, rather than to Mr. Thompson, on her death.

Due to inadvertence, her lawyer did not register the transfer until after he learned of her death. Mr. Thompson claimed the transfer was voided due to Mrs. Elliott's death and could not subsequently be registered.

The Court held, notwithstanding the failure to register the deed, that the joint tenancy was severed when Mrs. Elliott executed the *A&D*. In keeping with the *Sproul* decision, and the reasoning in *Carson*, Mrs. Elliott was

considered to have done everything necessary to sever her joint tenancy when she delivered the executed *A&D* and gave instructions for the transfer to be registered. At the time Ms. Elliott signed the *A&D*, she had the clear intention to sever the joint tenancy immediately and unconditionally, as well as the expectation that the document would be registered immediately by the lawyer, so as to sever the joint tenancy.

While the decision is in line with the *Sproul* decision, the Court was very critical of the lawyer who registered the transfer after Mrs. Elliott's death. In *Sproul*, no such post-mortem registration was made. In *Elliott*, the Court noted that the lawyer had to make false and inaccurate *Family Law Act* and age "law statements" (as they are called), stating that as of the registration date of the transfer, Ms. Elliott was "at least 18 years of age, a spouse and I am transferring to myself to sever joint tenancy, and that this document is not authorized under Power of Attorney" by her, even though the lawyer knew or ought to have known that this was clearly not the case. While the statements may have been accurate as of the time of Mrs. Elliott's execution of the *A&D*, the lawyer must make a statement that the transfer documents are accurate as at the time of registration.

Had the fact that Mrs. Elliott was deceased been properly disclosed, the registration of the transfer would have been rejected by the Land Registry Office as attempted registration of instruments by dead persons are rejected for registration by the Land Registry Office as they are clearly not in compliance with the current Government of Ontario registration regulations and requirements. The Director of Titles has commented that an *A&D* is better considered to be a special purpose power of attorney, rather than a testamentary instrument, and is revoked automatically on the grantor's death. In *Elliott*, the Court held that a client's instructions in an *A&D* do not survive the client's death, and a lawyer cannot act upon those instructions given prior to death.

Takeaways

As a result of the decision in *Elliott*, lawyers will now find themselves unable to register those deeds/transfers. Rather, lawyers who wish to effectually transfer title to land in similar circumstances as were present in *Sproul* or *Elliott* cases, must instead satisfy the court on an application that the deed/transfer was delivered and then retained in their file through inadvertence or some other legitimate reason and request a declaration of an interest in land from the court. The Court specifically noted that the proper procedure the lawyer in *Elliot* should have followed was to, immediately upon the discovery of the inadvertence and error made, bring an application in the Superior Court of Ontario requesting a certificate of pending litigation, a declaration of an interest in land and a vesting order under s. 100 of the *Courts of Justice Act*, as lawyers cannot attempt to cure their failure to register the instrument before their clients' death by making false statements in der to register the instrument.

Buck Sully, Associate

— KC —

News

Keel Cottrelle is pleased to announce that Christopher Wirth and Bob Keel have been recognized by Best Lawyers in Canada for 2021. Chris Wirth has been recognized in the areas of Corporate & Commercial Litigation and Labour & Employment Law, and was also recognized in these areas in 2019 and 2020. Bob Keel has been recognized in the area of Education Law.

Keel Cottrelle is also pleased to announce that several of its lawyers will serve on Canadian Bar Association or Ontario Bar Association Executives for the 2020/2021 term.

Nicola Simmons, Chair, OBA Civil Liberties,
Constitutional and Human Rights Law Section
Chris Wirth, Past Chair, CBA Administrative Law Section
Patricia Harper, Member at Large, CBA Administrative Law Section
Kimberley Ishmael, Member at Large, OBA Education Law Section
Alex Smith, Member at Large, OBA Education Law Section

More information about all of the lawyers at Keel Cottrelle can be found on our firm's website - www.keelcottrelle.com. During this unprecedented pandemic period, rest assured that Keel Cottrelle LLP remains open and available to meet your legal needs.

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Keel Cottrelle LLP disclaims all responsibility for all consequences of any person acting on or refraining from acting in reliance on information contained herein.

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