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Widdifield

Executors and Trustees, 6th Edition

This seminal work of Canadian legal literature is reviewed and updated by a team of authors drawn from the front ranks of the profession from across Canada. In keeping with the original, the sixth edition of Widdifield on Executors and Trustees offers a comprehensive exposition of the law relating to the exercise of the duties and prerogatives of executors and trustees in Canadian estates and trusts law.

What's New in this Update:

This release contains amendments and updates to the commentary in Chapter 2 (Assets), Chapter 4 (Expenses and Legal Costs), Chapter 5 (Bequests and Beneficiaries), Chapter 7 (Capital and Income), Chapter 10 (Breach of Trust and Its Consequences), Chapter 12 (Application to Court for Advice), and Chapter 18 (Words and Phrases). Highlights of this release, include:

Highlights

Intestacy — No Lawful Heirs — Escheat and Bona Vacantia — Procedure — In this case, the court considered the situation where the deceased apparently died intestate and without lawful heirs. The Public Trustee sought directions respecting the appropriate procedure to follow regarding the disposition of funds in her estate. The court stated that the *Escheats and Forfeitures Act* was the proper statute under which the Public Trustee established the legal right to the estate of a deceased pursuant to an escheat order. This included both real and personal property.

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Requiring the Public Trustee to proceed pursuant to historical common law doctrine of *bona vacantia* would be unnecessarily cumbersome and contrary to plain directions set out in the Act. The Public Trustee must commence an application pursuant to R. 16.04 of Rules of Court to seek direction and/or an order to establish the Crown's entitlement to the personal property. The appropriate standard of proof to establish the Crown's entitlement was the balance of probabilities: *Szlavik Estate v. New Brunswick*, 2018 NBBR 52, 2018 NBQB 52, 2018 CarswellNB 149, 2018 CarswellNB 150, 291 A.C.W.S. (3d) 449, 37 E.T.R. (4th) 225.

Common-law Spouses — Presumption Advancement — Resulting Trust — Rebuttal of Presumption of Resulting Trust — In its decision the Court stated "that for now, the system of separate property continues to apply in most provinces to determine the property rights of common-law partners [and that] [e]xtending the presumption of advancement that applies to property of married persons *in intact relationships* to the property of common-law partners in *intact relationships*, would represent a significant change to the common law which should await clear direction from the Supreme Court of Canada." Nevertheless, the court found in this case the evidence supported rebuttal of a resulting trust and supported the conclusion that the deceased had a deliberate intention to gift certain bank accounts to his common law spouse of 39 years: *Nicholas v. Edgecombe Estate*, 2018 NLSC 176, 2018 CarswellNfld 326, 295 A.C.W.S. (3d) 900, 39 E.T.R. (4th) 232.

Gifts — Acceptance — Resulting Trust — A mother, 16 years after purchasing her house, added her son to the title as a joint tenant. She did so, on the basis of estate planning advice, to avoid inheritance tax on her death. At the same time she executed a will that stated the following intention: "I declare that I contemplate naming my son and others as joint owners of some of my assets, or designated beneficiary of my RRSP, insurance and other investments, *it being my intention that upon my death, such to belong to the named beneficiary, at law and in equity, and that such are not to be shared or allocated to other persons* [emphasis added]." She did not advise the son that he had been added as a joint tenant to the property. Moreover, he had not contributed to the purchase or upkeep of the property. Two years later, the son and his software company consented to a judgment in favour of a creditor in the amount of $800,000. At the time, the son was still unaware that he was on title to property. The creditor registered certificate of judgment upon the son's undivided half interest in property. The mother brought an application for a declaration, *inter alia*, that son held his interest in property on resulting trust in her favour. Dismissing the application, the court found that the mother's intention, described in the will, was to give son an interest in property when joint tenancy was registered and as such the son did not hold property on resulting trust in her favour. The registration of son's interest on title placed son in possession of the gift. The mother could not unilaterally affect the interest of the son after this. The court stated at para. 13: "Where a gift has been delivered into the possession of a donee, acceptance is generally assumed. A donee has the right to unilaterally repudiate the gift upon learning of it: *Leclair v. R.*, 2011 TCC 323 (T.C.C. [General Procedure])".

However, the son's failure to respond to the mother's application did not amount to repudiation: *Gully v. Gully* 2018 BCSC 1590, 2018 CarswellBC 2485, 296 A.C.W.S. (3d) 426, 40 E.T.R. (4th) 297.

Trusts — Resulting trust — Unjust Enrichment — Gifts — The plaintiff was a successful businessman looking for companionship while the defendant was an enterprising exotic dancer seeking financial security. Over the course of an eight-and-half-year relationship, the plaintiff paid the defendant to be his companion and intimate partner but developed strong feelings for her and her children. He showered her with gifts and lavish vacations, paid for a property in Trinidad registered in her name, and contributed to purchase and extensive renovations of her home in British Columbia (BC). The plaintiff alleged that the relationship became a traditional spousal relationship centred on the family, but the defendant claimed that she considered nature of relationship to be highly transactional. The plaintiff ultimately terminated the relationship due to defendant's continuing relationship with the biological father of her children. His action for repayment on the basis, *inter alia*, on resulting trust, conversion, and unjust enrichment was allowed in part. The plaintiff was awarded $1.3 million for renovations to the BC home and the property in Trinidad on the basis of unjust enrichment and resulting trust. All other monies or benefits bestowed upon woman were payments for services or gifts: *Norkum v. Fletcher*, 2018 BCSC 904, 2018 CarswellBC 1394, 293 A.C.W.S. (3d) 208, 38 E.T.R. (4th) 63.

Henson Trust — Beneficial Interest — Timing of Gift Over — This case reinforced the principle that the beneficiary of a Henson trust (often described as a "pure discretionary trust") holds no beneficial interest in the trust. It also restated that the intention of a Henson trust is that any remainder does not gift over until the death of the beneficiary: *Borges v. Santos*, 2017 CarswellOnt 15176 (Ont. C.J.).