

Publisher's Note

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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 1 (Funeral), Chapter 2 (Assets), Chapter 3 (Claims Against the Estate for Debts), Chapter 4 (Expenses and Legal Costs), Chapter 5 (Bequests and Beneficiaries), Chapter 9 (Delegation to Agents), Chapter 11 (Executor's Compensation), Chapter 14 (Passing Accounts), and Chapter 18 (Words and Phrases). Highlights of this release, include:

Highlights

Resulting Trust — Presumption of Advancement — Adequacy of Evidence to Displace Presumption — A couple made mirror wills leaving their estate to the other and leaving the estate of the survivor, to their children equally. After the wife died the husband transferred the real property owned by the couple to the son A. His sister, L, brought an action for a declaration that she had a beneficial interest in the property on the basis of express or resulting trust. The court found that the

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transfers of the real property were gratuitous and as a result the presumption of resulting trust applied. This was not displaced by the evidence, as it was just as likely that the deceased had transferred the property into joint tenancy with A in order to save probate taxes, as it was that he intended A to hold them outright and to exclude his sister on his death: *Pavlovich v. Danilovic*, 2019 BCSC 153, 2019 CarswellBC 258, 302 A.C.W.S. (3d) 893.

Resulting Trust — Presumption of Advancement — Evidence of Common Intention to Create Trust — The plaintiff entered into an agreement to purchase a property but he was having financial difficulties so he entered into a verbal agreement with the defendant, his brother, where the defendant agreed to obtain a mortgage in his name and hold title to the property. The plaintiff was responsible for all mortgage payments, insurance, property taxes, and other expenses associated with the property. The arrangement was intended to be temporary but had been in place for many years. The defendant had renewed the mortgage twice and title to the property was still registered in his name. The plaintiff had lived at the property for a number of years. The plaintiff subsequently defaulted in paying property taxes, stopped paying insurance premiums and making mortgage payments. The plaintiff brought an action claiming the beneficial ownership of the property by virtue of resulting trust, and claiming that the defendant had breached the trust and his fiduciary duties. The defendant counter-claimed for damages based on the plaintiff's breaches of the agreement. The court found for the plaintiff in part. The defendant had made no financial contribution to the purchase of the property, and he acquired title through a direction executed by the plaintiff for which he had given no consideration. The presumption of resulting trust arose when the plaintiff gratuitously directed that the title deed be made out in the defendant's name. The evidence established that the plaintiff always acted as the purchaser and owner of the property. The manner in which the plaintiff treated the property was consistent with ownership and was inconsistent with an intention to give it to the defendant. The defendant had not rebutted the presumption of resulting trust. Instead, the evidence established that it was the parties' mutual intention that the defendant would hold title in trust for the plaintiff's benefit and that he would transfer title to the plaintiff once the latter had sorted out his credit problems and could assume the mortgage. While the agreement that the parties had entered into was intended to be temporary, the defendant effectively acquiesced to its indefinite extension: *Syrnyk v. Syrnyk*, 2019 ONSC 225, 2019 CarswellOnt 246, 300 A.C.W.S. (3d) 524, 43 E.T.R. (4th) 288.

Removal of Trustee — Dissension with Beneficiaries — A trustee expressed a significant level of hostility toward the beneficiaries of a trust when they took what they considered to be necessary steps to protect their interests. In removing the trustee because of a conflict of interest and the hostility displayed by the trustee, the court stated: "Dissension between a trustee and beneficiaries is not necessarily a reason to remove the trustee. . . .The question is whether it would become difficult for the trustee to act with impartiality or whether the friction is of a nature or degree that it prevents, or is likely to prevent, the proper administration of the trust

. . .I appreciate that the comments made by [the trustee] . . .may have been in the heat of anger at the time, but I find they are likely to have damaged the relationship between the trustee and the beneficiaries beyond repair and thereby interfere with proper administration of the Trust”: *Sheppe v. Harlington*, 2018 BCSC 1460, 2018 CarswellBC 2283, 296 A.C.W.S. (3d) 222, 40 E.T.R. (4th) 108 (B.C. S.C.).

The Corpse — Executor’s Right of Possession — An executor who allowed the ashes of the deceased to be taken to the home of her sister and had not challenged that custody in 13.5 years, was found to have effectively determined their disposition and final resting place: *Kelly Estate, Re*, 2019 NSPB 1, 2019 CarswellNS 118.

Constructive Trust — Unjust Enrichment — A home was purchased in 2009 in the joint names of a mother and a daughter. A declaration was granted that the daughter held her half interest in trust for her mother, however, the daughter was awarded a 10% interest in the home on the basis of constructive trust. The court found that the daughter had co-signed a mortgage and pledged her credit, and in doing so, had exposed herself to risk. Moreover, the daughter’s participation as a co-covenantor had assisted her mother in both entering the market and also remaining in the market during the time when real estate prices improved considerably. The mother had, therefore, been unjustly enriched by the assistance provided by the daughter with respect to the purchase of the home: *Jafar-Gholizadeh v. Larijani*, 2018 BCSC 279, 2018 CarswellBC 414, 291 A.C.W.S. (3d) 218.

Assets — Realization — Sale of Land — This case dealt with the trustee’s sale of lands and the role of the court in the approval process. Various offers were received on the properties owned by the deceased, including one from the sister of the realtor. The latter was one of the offers accepted by the trustee. The intervenors opposed the approval of the sales, claiming collusion by the realtor and the purchasers. In addition, while they acknowledge the competing offers may initially have been higher than their own, they submitted an increased offer while the court approval process was ongoing and sought an order directing the acceptance of their revised offer. The trustees’ motion for approval of the sale to the original purchasers was granted. The court stated that while the process may have appeared rushed and unsatisfactory, the evidence did not establish that the process was fixed. If the process followed by the intervenors was to be adopted the implications would be concerning. Where a sale required court approval presumably an interested party could skip the hurly-burly of the real estate process and simply wait to see what the court filings revealed to be the offer they had to beat. They would then appear on the eve of court and edge out those who had gone through the real estate exercise. This would be an untenable situation: *Cushman Estate v. MacEwen*, 2018 NSSC 320, 2018 CarswellNS 974, 300 A.C.W.S. (3d) 449.

