BENCHERS' DIGEST

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Beware the Disappointed Beneficiary

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Every lawyer drafting wills should consider a practice review following the recent decision by Mr. Justice Zarzeczny in Hickson et al v. Wilhelm et al (unreported).

The abridged facts of this case are as follows:

1. The Testator, Thornton, was a successful farmer who employed a solicitor, Osborn, to incorporate his farm in 1976. Land was sold to the corporation by an agreement for sale.

2. Osborn acted as the corporate solicitor from 1976 to 1984 when he was appointed to the Bench.

3. Wilhelm, the then senior partner of the former Osborn firm, undertook responsibility for the Maidstone branch office and many of Osborn's files, including the Thornton Farms Ltd. corporate file. As corporate solicitor, he supervised the preparation of at least two annual returns for the company.

4. In October 1986, Thornton attended at the Maidstone office without an appointment and met Wilhelm for the first time. He provided Wilhelm with instructions for the preparation of a will.

5 Thornton made specific bequests of land to his two sisters and their husbands, his niece and her husband, and his hired man and his wife. The rest and residue of his estate was left to his two sisters.

6. Thornton died suddenly on August 2, 1988 and upon probating the will, it was realized that Thornton did not own the land which he had devised. Instead, he owned shares in a corporation which owned the land.

7. The Executor applied for instructions and by a Judgment reported as Re Thornton Estate (1990) 85 Sask. R. 34, Dielschneider J. held that the gifts had adeemed and therefore the specific bequests of land to the beneficiaries failed. The corporate shares and therefore the land passed to the residuary legatees.

8. The disappointed beneficiaries brought an action against Wilhelm alleging that he was negligent in taking instructions and drafting the will.

The case is important in two respects.

First, the Court held that a solicitor has a duty of care not only to the testator who is the client, but also to the beneficiaries of the will.

Secondly, the Court found that Wilhelm failed to meet the standard of care in taking instructions and therefore held him 75% liable for the failure of the gifts.

In concluding that the firm was negligent, the Court relied on two factors. First, the law firm had a prior association with Norman Thornton in that it had been the corporate solicitor for Thornton Farms Ltd. Although Wilhelm had never met Thornton, the Court held that:

"The evidence satisfies me that Wilhelm met Thornton for the first time in 1986 when he took instructions from him to prepare the will in question. Nevertheless, Thornton was 'known' to him in the sense that he was a shareholder, director and an officer of Thornton Farms Ltd. for whom Wilhelm had acted as corporate solicitor for at least two years. Wilhelm was therefore responsible to know the existence of Thornton Farms and Thornton as its principal."

Given that Mr. Wilhelm had assumed in excess of two hundred corporate files from Osborn, it is not surprising that he did not make the connection between Norman Thorn-ton and Thornton Farms Ltd. Today, this error would be less likely to occur because

of the use of conflict checks when a file is opened.

Secondly, the Court holds that Wilhelm failed to make a sufficient inquiry into the testator's assets.

Although the Court acknowledged that the nature and extent of the inquiry will depend on the circumstances of each case, a solicitor must make sufficient inquiry to ensure that the intentions of the testator are fulfilled. Specifically, because the estate was substantial in this case, (in excess of $1,000,000) and would create considerable tax consequences, the Court held that an inquiry should have been made of the testator's accountant.

More generally, the Court holds that:

"To suggest that it is a sufficient discharge of a solicitor's duty to a testator in circumstances such as these to simply inquire of him what he wishes and then to record and thereafter prepare the will without anything further is to relegate a solicitor and his obligations comparable to that of a parts counterman or order-taker. The public is entitled to expect more from the legal profession.

In this case there is no evidence that any of the expected inquiries were made that would have resulted in further investigation and discussions with Thornton, his accountant, AIm, and perhaps others to effectively deal with the very considerable challenges in giving expression to Thornton's intentions. Careful drafting of the provisions of the will were required to deal with the corporate and tax issues that apply.

In this case the requirements for due diligence were not met with the result that the role and involvement of the corporation in the ownership of the farm assets was not identified and the bequests of land to the plaintiff as expressed in the will were ineffectual and failed"

The case is now authority for the proposition that a lawyer drafting a will cannot simply take instructions from a client. The lawyer must take care in assisting the client to identify all assets.

The troubling question is to what extent can and should a lawyer rely on information provided by a testator. For example, the next time a testator instructs you make a specific devise of

his house, are you required to confirm ownership with a Land Titles search before you prepare a will?

Although this issue remains to be determined in subsequent cases, I would argue that a lawyer is ultimately entitled to rely on a testator's instructions. However, the lawyer must spend sufficient time, ask sufficient questions and, if necessary, make sufficient inquiries to be satisfied that the will fulfills the testator's intentions. In most cases, routine inquiries will lead to all of the problem issues. However, the only way to guarantee thoroughness is through use of a checklist which brings all of the potential issues both to the testator's and lawyer's mind at the time of the interview

We do not expect that this case will open the floodgate of litigation. The fact is that most testators do know the nature and extent of their property and most lawyers are adept at discovering potential problem. However, it should cause some reexamination on our own practice and remind us to be more diligent when taking instructions for wills.

Wills and Estates Seminar

On Friday, January 30,1998, the 1998 Mid-Winter Meeting of the Canadian Bar Association (Saskatchewan Branch) will feature a seminar on Wills & Estates. As Saskatchewan is facing an unprecedented intergenerational transfer of wealth, this presents opportunities (expanding and remunerative) as well as challenges (calling on lawyers to explore non-traditional roles) for the legal profession. This seminar is a must attend for any lawyer who has clients who are likely to die in the next 20 years (and who doesn't).

Highlights of the Meeting of the Benchers held October 23 & 24, 1997

1998 *Budget*

As members will now be aware, the Benchers approved the 1998 budget which sets the 1998 annual fees at $1,010, the seventh consecutive year the fees have been set at that level. The budget includes grant to SKLESI for CLE and the Bar Admission Course. This year, the budget anticipates a $74,000 increase in the Law Society's expenditures for Libraries. After several years of cost cutting, computer and other equipment has become out-of-date. With technology becoming increasingly important in the delivery of library services, the increased expenditures are crucial. It is anticipated that this is an extraordinary expenditure. The

majority of Libraries revenue comes as a grant from the Law Foundation of Saskatchewan. The Benchers and the staff extend their sincere appreciation to the Foundation which approved a grant in the amount of $593,775 for 1998 library operations. The budget anticipates expenditures for the No-Fault Insurance Committee, the Gender Equity Committee, the Tariff of Costs Committee, the Lawyer Referral Service, and Lawyers Concerned for Lawyers as well as the general administration. Despite some increased expenditures in some areas, cost cutting measures and continued efficiencies in the administration department have assisted to keep the proposed deficit at under $10,000.

Rule Amendments

Rules 170 & 171

The Interjurisdictional Practice Protocol signed by the majority of the Law Societies in Canada in 1994 require that as a part of allowing interjurisdictional mobility, Law Societies must remove the articling requirement for members of other Canadian Law Societies with less than three year's membership who seek full admission in another jurisdiction. Amendments to Rule 170 and 171 were approved to remove that articling requirement for such transfer applicants. Before the Benchers were in a position to pass these amendments, it was necessary to have a new transfer examination developed. The examination developed by Gisele Dumonceaux of SKLESI, with assistance from Patrick MacDonald, was approved at the last Convocation making it possible to pass the amendments at this Convocation.

***Rule* 605A**

Rule 605A required members to attend a loss prevention seminar at least once every three years in order to avoid a $200 insurance surcharge. The Insurance Committee recommended an amendment which sets up a credit system. Members must earn three credits in three years to avoid the $200 assessment. However, credits may be earned by attending other SKLESI seminars which have received accreditation by the Insurance Committee. Attendance at a loss prevention seminar will result in three credits. Other SKLESI seminars may be approved by the Insurance Committee and may result in one or two credits. It is hoped that this system will he of assistance to members by providing a choice of seminars to attend.

Rules 964 and 965

The amendments to these Rules deal with the preparation of reconciliations of members' general accounts. Pursuant to Rule 964, non-trust transactions must be recorded promptly and not later than the month end. Rule 965 requires that the balancing of the general account must be completed by the same day as trust accounts; i.e. not more than 20 days after month end.

Insurance

(i) Claims Experience

The Insurance Committee was pleased to note that for the period of July 1, 1997 to September 30,1997, only 22 claims had been made with total reserves of $156,500. However, since SLIA began on September 1, 1955, the total incurred liability which includes both payments made and outstanding reserves amounts to almost $19,000,000.

(ii) Claims Manager Software

Several of the Law Societies in Canada which participate in Canadian Lawyers Insurance Association (CLIA) have been discussing software needs. One major impetus for the review is the year 2000 problem. However, it is hoped that upgrades will help to better manage the information on claims and provide easier communication with CLIA. Unfortunately, the program is custom-made and the fees for the upgrades will he in the neighbourhood of $40,000.

(iii) New Areas of Loss

For many years, civil litigation claims, particularly automobile accident claims resulting from missed limitations, were the primary cause of large claims against our liability insurance fund.

More recently, immigrant investor claims have taken over as the primary cause of large claims. The Insurance Committee foresees that the next potential area of large loss claims is likely to he native land claims. The Committee believes that members should be made aware of what the limits of our coverage are and how lawyers become involved in situations giving rise to these claims. As a result of conversations with some of our members, the Committee is of the view that information sessions would be beneficial. The proposal is to have supper meetings in Regina, Saskatoon and Prince Albert to which firms involved in native land claims would be invited. There would be a discussion as to what could go wrong and how we could help the members.

The Committee will again try to ask CLIA to include an exclusion in our policy on investment brokering. We had previously attempted this. CLIA had resisted and would not put it in the national coverage, however, there is a possibility they would consider it for Saskatchewan only.

Deputy Minister of Justice

The Executive Committee met with the Deputy Minister of Justice, John Whyte, prior to Convocation. He also attended a portion of the meeting of the Benchers. He indicated that the job is extremely stimulating but very demanding in that there are so many constituencies in the justice system which require co-ordination. He advised that it is necessary for the Department to try to maintain good relations with the Law Society, the three courts, judges, the police, victims, etc. The Benchers welcomed the opportunity to meet with Mr. Whyte and look forward to working with him.

Lawyers Concerned For Lawyers

Representatives from Lawyers Concerned for Lawyers, Mr. Justice Vancise, Leanne Bellegarde and John Comrie, appeared before the Benchers along with Scott Henders of PAR Consultants to report on LCL's activities. Since its creation in 1986, LCL's focus has been broader than only dealing with problems caused by alcoholism. The Benchers were advised that studies have indicated that lawyers are at higher risk than most professions, except for dentists. Initially, most people seeking assistance from LCL were the members themselves. However, LCL is taking initiatives to advise spouses and managing partners of law firms of the services that can be provided. In 1996, of 55 new clients, 25 of those seeking assistance were family members and 35 were lawyers. LCL is also working on a canned presentation which law firms may use on retreats. They are co-sponsoring with SKLESI a presentation on healthy life styles at the CBA Mid-Winter Meeting.

As stated earlier, LCL provides assistance in a wide variety of areas. In 1996, the 55 new clients sought assistance in the following areas: alcohol (2), other drugs (6), relationships (7), psychological problems (16), miscellaneous (2), work-related stress (7), parent and child problems (14) and financial problems (1). While LCL has agreed that these statistics can be reproduced, one thing that is most stressed by LCL is their commitment to confidentiality. Because of the stigma lawyers feel in seeking assistance from LCL, the group is most concerned that confidentiality be stressed. The LCL Board is never told who the clients are and any discussions about problems for which members seek assistance, only file numbers are used. LCL does not provide information to the Law Society except for such statistics as indicated above.

Professional Conduct Ruling
(A. Kirsten Logan)

The mandate of the Ethics Commit-tee is to make rulings on questions of professional ethics for the guidance of the profession. The rulings given by the Ethics Committee relate to the ethics of particular situations and are not determinations of the legal issues which arise from those situations.

Imposing *Trust Conditions on*

Trust Conditions* (Chapter *XVI)

Facts:

Lawyer X acted for the wife in a divorce. Lawyer Y acted for the husband. Lawyer Y wrote to Lawyer X indicating that the parties had come to an agreement with regard to matrimonial property. He included a cheque for a preliminary payment on several trust conditions including that: "the parties understand all the property currently in the control of [the husband] which includes farm land, farm machinery, his personal trucking operation, bank accounts, RRSP's, personal property, vehicles including the 1984 Cadillac automobile, farm buildings, grain on hand will remain the property of [the husband]." Part of the settlement included the transfer of the matrimonial home to the husband. Lawyer X sent the signed transfer and the separation agreement to Lawyer Y on the trust condition that it not be used until the remainder of the settlement funds were sent to the wife. He also indicated that the 1984 Cadillac would be returned to the husband upon receipt of the funds. The separation agreement stated in part that "all property presently in the p05-session and control of the husband including .... the 1984 Cadillac automobile shall constitute the sole and exclusive property of the husband Finally, when Lawyer Y sent the final funds to Lawyer X, he imposed another trust condition that the car be returned in a reasonable operating condition". The car had a damaged fender, the radar detector was missing, and the alternator was shot. Lawyer Y alleged breach of trust conditions.

Ruling:

The Committee was of the opinion that this matter came before them as a result of sloppy practice by both lawyers. The

Committee noted that the separation agreement is silent regarding the condition of the Cadillac. The Committee pointed out a long-standing ruling that it is inappropriate to use trust conditions to change the agreement between the parties.

The Committee indicated that it is not appropriate to impose trust conditions on top of trust conditions. The appropriate course when imposing trust conditions where further details must be worked out is to set out along with the trust conditions what return undertaking the maker of the trust condition is prepared to abide by. Those incorrectly imposed trust conditions should not have been accepted. Because of what the Committee members believe was sloppy practice on the part of both members, they were not prepared to recommend that further action by the Law Society be taken.

Will Referrals (Chapter III & Chapter XIV)

Facts:

A financial institution had approached a member indicating that it wished to encourage its customers to have wills prepared. The financial institution was prepared to have its employees take the instructions from the customers and send them over to the lawyer for drafting and execution. Alternately, the financial institution was prepared to make direct referrals of its customers to the member.

Ruling:

The Ethics Committee was of the opinion that it would not be appropriate for the member to receive a client's instructions for the preparation of the will from a third party and referred to an earlier ruling from July of 1989. The Committee was of the opinion that it would not be inappropriate for the financial institution to refer clients to the member for the preparation of wills. With regard to will preparation, the Committee referred to the decision of Hickson et al v. Wilhelm et al.

Opinions of Expert Witnesses (Chapter IX)

Facts:

A member had prepared a draft letter of opinion for a doctor which was to be the expert evidence adduced at a personal injury trial. The draft letter was forwarded to the doctor with the request that the doctor sign it and return it to the lawyer.

Ruling:

The Ethics Committee is of the opinion that it is not proper for lawyers to draft opinions for expert witnesses and asked them simply to sign them. While it is usual to advise the expert as to the issues to be discussed, the Ethics Committee is of the opinion that the preparation of a checklist of issues is preferable. The Ethics Committee believe that drafting the opinion letter could expose the lawyer to insurance claims should some matters be improperly omitted from or included in the letter.

PROFESSIONAL CONDUCT RULINGS HANDBOOK UPDATE,

which will consolidate the rulings given by the Ethics Committee (formerly the Professional Conduct Committee), will be available to the membership at year-end. As there is a considerable saving in providing the rulings on disc versus hardcopy, we are requesting members to advise the administration office by telephone, fax or letter prior to December 15, 1997 as to preference. We appreciate your assistance in keeping publication costs as low as possible.

Election of Benchers

The election of Benchers was held November 17,1997. Election were held for the North West, Prince Albert City, Regina City and Saskatoon City electoral divisions. The candidates in the remaining divisions won their elections by acclamation.

North West Electoral Division:

R.Dennis Maher, Q.C. is the founder and senior partner of Maher Lindgren Blais & Frank and was admitted to the Law Society of Saskatchewan in 1967.

Prince Albert Electoral Division:

Martel D. Popescul, Q.C. is a partner in the firm Balicki, Popescul and Forsyth and was admitted to the Law Society of Saskatchewan in 1980.

Regina City Electoral Division:

Douglas R. Andrews. Re-elected. Mr. Andrews is the senior partner of the firm Andrews. Butler & Talbot and was admitted to the Law Society of Saskatchewan in 1976.

Randall J. Baker. Re-elected. Mr. Baker is a partner of the firm Kanuka Thuringer. He was admitted to the Law Society of Saskatchewan in 1973.

Maurice 0. Laprairie, Q.C. Re-elected. Mr. Laprairie is a partner of the firm MacPherson Leslie & Tyerman and was admitted to the Law Society of Saskatchewan in 1977.

Michael W. Milani is a partner of the firm McDougall Ready and was admitted to the Law Society of Saskatchewan in 1981.

Mary Ellen Wellsch. Re-elected. Ms. Wellsch is Project Manager - Program, Policy & Law, LAND Project, Department of Justice, and was admitted to the Law Society of Saskatchewan in 1980.

Saskatoon City Electoral Division:

Robert J. Gibbings is a partner of the firm Goldstein Jackson Scharfstein Gibbings and was admitted to the Law Society of Saskatchewan in 1981.

Brent Klause, is a Prosecutor, with Public Prosecutions, Department of Justice and was admitted to the Law Society of Saskatchewan in 1980.

Daniel B. Konkin is a partner of the firm McKercher McKercher Whitmore and was admitted to the Law Society of Saskatchewan in 1982.

Jane L. Lancaster, Q.C. Re-elected. Ms. Lancaster is Chair of the Saskatchewan Legal Aid Commission and was admitted to the Law Society of Saskatchewan in 1976.

Barry G. Morgan is a partner of the firm Morgan Theberge and was admitted to the Law Society of Saskatchewan in 1986.

Central Electoral Division:

Mervin William Nidesh, Q.C. Elected by acclamation. Mr. Nidesh is in private practice in Moose Jaw and was admitted to the Law Society of Saskatchewan in 1969.

East Central Electoral Division:

John L. Stamatinos, Q.C. Elected by acclamation. Mr. Stamatinos is a partner of the Stamatinos Leland Koskie firm and was admitted to the Law Society of Saskatchewan in 1976.

North East Electoral Division:

Stuart J. Eisner. Elected by acclamation. Mr. Eisner is a partner in the firm Eisner Mahon Burningham in Melfort and was admitted to the Law Society of Saskatchewan in 1979.

South East Electoral Division:

Lynn B. MacDonald. Elected by acclamation. Ms. MacDonald is a partner in the firm MacDonald & Company and was admitted to the Law Society of Saskatchewan in 1975.

South West Electoral Division:

John H. B. McIntosh. Elected by acclamation. Mr. McIntosh practices law with the firm McIntosh & Hale and was admitted to the Law Society of Saskatchewan in 1974.

Dean of the College of Law, University of Saskatchewan:

R. Peter MacKinnon, Q.C., by virtue of his position as Dean of the College of Law.

Revenue Canada V. Lawyers' Undertakings

The Ethics Committee would like to make members aware that a recent case from the British Columbia Court of Appeal, Re The Bankruptcy of San Diego Catering Ltd.; The Attorney-General of Canada v. Campbell Sanders Ltd. [1996] B.C.J. No.2070 (B.C.C.A.) held that a requirement to pay from Revenue Canada supersedes a lawyer's undertaking to pay funds in trust to a third party. The lawyer for the bankrupt San Diego Catering had been holding funds on the trust condition that he pay them out in a certain priority, the first being wages and vacation pay, etc. The GST owing by the company was fourth on the list. Revenue Canada issued the requirement to pay on the lawyer who paid the funds into court. The Court of Appeal held that the lawyer was a particular person within the meaning of Section 317(3) of The Excise Tax Act and pursuant to that subsection, the Minister of National Revenue had priority.

Members should keep in mind this potential for conflicting obligations, i.e. the demands of Revenue Canada v. the provisions of Chapter XVI, Commentary 10, of The Code of Professional Conduct. Should similar situations arise, members should be careful to make their undertakings or acceptance of trust conditions subject to possible demands by Revenue Canada. Otherwise, the members might possibly find themselves subject to an insurance claim by the third parties for breach of trust.

Articling Experience

The rules provide that members in private practice with five years experience are permitted to take articling students. The Benchers have approved some legal departments of government and public institutions. The Benchers recognize that not every firm has a general practice and that some legal departments have a relatively restricted scope of legal services. However, the Benchers expect principals to meet their responsibility to articling students in providing as wide a range of experience as is possible in each situation. SKLESI circulates a joint articling report as a checklist which it is hoped will assist principals in establishing and designing an effective work program so as to maximize the educational value of articles to students. In addition, the development of farm-out policies by legal departments and firms in an effort to expand the articling student experience is encouraged by the Benchers. On occasion, students will have difficulty in the principal/student relationship. The Benchers have agreed that the Admissions and Education Committee should function in the role of ombudsperson for articling students and principals. Any articling student or principal encountering difficulty in the relationship should contact a member of the Admissions and Education Committee who will consult with both parties and attempt to rectify any concern. In addition, students should be aware that the Law Society has Safe Counsel who are available on a confidential basis to discuss options and provide information regarding the filing of sexual harassment complaints. Those members who have been so appointed are listed on the back of the this Digest.

In extreme cases, in the event that a principal does not fulfill his or her obligation correctly, the Society will consider restricting that principal from taking on articling students in the future.

Judicial Appointments

Congratulations are extended to Gene Anne Smith and Mona Lynn Dovell on their appointment as a judge of the Court of Queen's Bench of Saskatchewan.

Gene Anne Smith of Saskatoon is appointed a judge of the Court of Queen's Bench of Saskatchewan in Saskatoon. She replaces Mr. Justice D. H. Wright, who has chosen to become a supernumerary judge.

Madam Justice Smith graduated in law ft 0 m the University of Saskatchewan in 1974, and was called to the Bar of Saskatchewan in 1975.

From 1975 to 1978, Madam Justice Smith practised law with the firm of McKercher, McKercher, Stack, Korchin and Laing in Saskatoon. Since 1979, she has been an associate professor at the College of Law at the University of Saskatchewan. From 1987 to 1990, Madam Justice Smith also acted as Designate of the Director of Labour Standards under *The Labour Standards Act* to adjudicate matters under the Act. Since 1980, she has also been involved in labour arbitration as an arbitrator. Madam Justice Smith has been a Commissioner of the Saskatchewan Law Reform Commission.

Mona Lynn Dovell of Saskatoon is appointed a judge of the Court of Queen's Bench of Saskatchewan in Saskatoon. She replaces Madam Justice M.A. Wedge, who resigned.

Madam Justice Dovell graduated in law from the University of Saskatchewan in 1983, and was called to the Bar of Saskatchewan in 1984. She has mainly been practicing civil litigation with the firm of Halyk, Dovell Morrison since 1984. Madam Justice Dovell is also a past President of the Saskatchewan Trial Lawyers Association.

Futures Conference

(Allan T. Snell, Q.C.)

The Future of the Legal Profession Conference to be held March 28 and 29, 1998, in Saskatoon, will deal with issues which are of immediate and lasting importance to lawyers, clients, government, and the public at large. It will examine matters such as the role of lawyers, public perception of lawyers, how legal services will he delivered and expected in the future, the accessibility of legal services, the role of professional organizations, and quality of life issues. Over 25 members of the profession, judges, members of the public, and other professionals have agreed to present papers or be involved in panel discussions.

The conference is sponsored by the Department of Justice, the Law Society of Saskatchewan, the College of Law, and the Canadian Bar Association. More information, including the agenda and registration information, will be coming in the beginning of 1998.
