Wills & Estates
Winter Term 2018

Lecture Notes – No. 2

INTESTATE SUCCESSION

Key Words and Concepts

Estate

Testate Succession

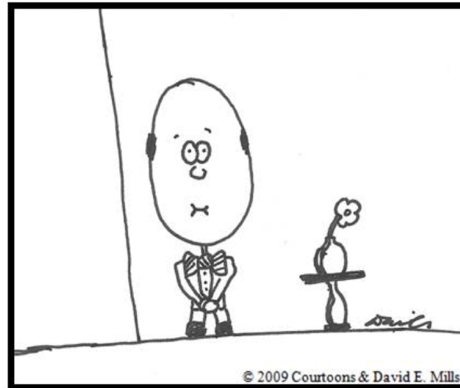
Intestate Succession

Partial Intestacy

Distribution

Preferential Share

Release



A wills and trusts attorney who just got kicked intestates.

A person who dies leaving a Will is said to have died *testate*. Traditionally, we refer to the deceased in such circumstances as the *testator* or *testatrix*. The Will is the principal type of *testamentary instrument*.

A person who leaves no Will dies *intestate*. A person who leaves a Will that that does not provide for complete distribution of his or her estate (e.g there is no clause disposing of the residue of the Estate or that clause is invalid) dies *partially intestate*. In both cases, Part II of the Succession Law Reform Act provides a scheme ('the intestacy rules') for the distribution of the deceased's property.

The intestacy rules themselves owe their genesis to the complexity of medieval English property law. After the Norman conquest of England in 1066 and the evolution of the feudal system, land was passed by the principle of primogeniture. Real property then was *inherited* without reference to the intention of the deceased; it passed according to the type of common law right in the property. Personal property was not the subject of inheritance rules. It passed to a married man's widow and children according to local custom and later by statute. The *Statute of Distribution* was enacted in 1670 and started the evolution of modern succession law including more uniform intestacy rules. This dichotomy between land and personalty was present in English law (in theory at any rate) until the wholesale reforms of the Law of Property Act 1925. It has not featured in Canadian law in any real sense since the mid-19th century.

Distribution on Intestacy

Please refer to the Succession Law Reform Act, s. 1 ('spouse') at cb., p.75.

Operation of the rules:

1. If the deceased is survived by only his or her married spouse, the spouse takes the whole of the Estate.

2. If the deceased is survived by married spouse and issue ('issue includes a descendant conceived before and born alive after the person's death'):

   a. The spouse takes the first $200,000 of the Estate (his or her **'preferential share'** as currently valued by Regulation to the SLRA);

   b. The spouse and children split the remainder of the Estate – equally (if there is only one child) or in shares (1/3 to the spouse, and, 2/3 split equally amongst the deceased's children). If the child dies before a parent, and leaves issue, then his or her children inherit the share of their deceased parent equally;

   c. If the deceased is survived his or her children (and no spouse), then the children split the remainder of the Estate equally. If the child dies before a parent and leaves issue, then his or her children inherit the share of their deceased parent equally.

3. If the deceased is not survived by married spouse or issue, the Estate is distributed as follows (in order of priority):

   a. Surviving parent(s) in equal shares;

   b. Surviving brothers or sisters. If the sibling dies before the deceased, and leaves issue, then his or her children inherit the share of their deceased parent equally;

   c. Surviving nephews and nieces equally;

   d. 'Where a person dies intestate in respect of property and there is no surviving spouse, issue, parent, brother, sister, nephew or niece, the property shall be distributed among the next of kin of equal degree of consanguinity to the intestate equally without representation;' s.47(6) **[Refer to chart of consanguinity / kinship at the end of these notes];**

   e. Escheat to the Crown (the ownership interest in the property is extinguished in principle and is considered as 'bona vacantia' and thus reverts to the Crown).

Preferential Share and ‘Net Value’

Re Crane Estate
2016 ONSC 291 (Ont. S.C.J.)

D.A. Broad J.:

Issue

10 The facts are not in dispute. **The sole issue for determination is a legal one, namely, whether the payment and discharge of the mortgage on the house from the proceeds of the mortgage insurance policy is to be taken into account in determining the "net value" of the estate for the purpose of determining whether it exceeds the preferential share of the respondent as the deceased's surviving spouse.** If the payment under the mortgage insurance policy is to be taken into account, the net value of the estate would, subject to the payment of taxes, funeral expenses and estate administration expenses, exceed the preferential share of the respondent by some $94,500, which residue would be shared equally by the responding party and each of the two sons by virtue of sections 46 and 47 of the SLRA. If the mortgage insurance policy is not to be taken into account the net value of the estate would be less than the preferential share in the responding party as the surviving spouse who would be entitled to the estate property absolutely pursuant to s. 45(1) of the SLRA.

…

14 In my view the object of s. 45 of the SLRA is to confer limited protection on surviving spouses of persons dying intestate by providing them with entitlement to a preferential share in the assets of the intestate estate after satisfaction of the debts and obligations of the estate. The scheme of the section is to strike a balance between affording protection to surviving spouses on the one hand and recognizing the legitimate interests of the surviving issue of the deceased in the estate on the other. This is done by placing a maximum limit on the preferential share to be given to surviving spouses.

15 For the purpose of determining whether the property of the estate in respect of which there is an intestacy exceeds the preferential share of the surviving spouse, and if so, to what extent, the section introduces the concept of "net value" which backs out of the calculation of the value of the estate property "charges thereon", "debts", "funeral expenses" and "expenses of administration." Subsection 45(4) states that the "net value" is the value of the property "after payment" of these items. The subsection does not explicitly specify how and by whom these items are to be paid to arrive at the "net value".

16 In my view, the purpose of the introduction of the concept of "net value" is to ensure that the true value of the estate, after taking into account the legitimate claims of third parties against the estate assets, is what is considered in determining whether the preferential share of the surviving spouse has been exceeded, and if so, to what extent.

17 Payment of a "charge", a "debt", "funeral expenses" or "expenses of administration" on a voluntary basis by another person should not be taken into account because it would have nothing to do with determining the true value of the property in the intestacy. However **where a third party such as the mortgage insurer in this case is contractually bound to the estate to pay off a charge or debt of the estate on the death of the deceased such payment should, in my view, be taken into account in determining the true value of the estate in intestacy. On the date of the deceased's death the estate became entitled to enforce the obligation of the mortgage insurer to pay off the mortgage and accordingly there is no functional difference between the estate paying the mortgage debt from other resources and the estate submitting a claim to the insurer to pay the mortgage debt, as was done in this case.**

…

Disposition
23 For the reasons set forth above I make the following declarations:

(a) the net value of the estate for the purposes of s. 45 of the SLRA shall be determined without reduction by the amount owing under the Charge/Mortgage of Land registered against the title to the house in favour of the Toronto-Dominion Bank on June 22, 2010 as instrument number WR547614, by virtue of the payment of the outstanding balance of that mortgage by TD Life Insurance Company pursuant to the mortgage insurance policy issued by it to the deceased;

Contractual Surrender of Rights in an Intestacy

Caron v Rowe
2013 ONSC 863 (Ont. S.C.J.); cb., p.99

A common issue that arises is whether a domestic agreement containing a provision waiving inheritance rights is enforceable. In this case, husband and wife-executed a pre-marital agreement which provided that the husband's house would remain part of his estate. He died two years later. The issue was whether there was a waiver in the separation agreement.

Miller J.:

[16] There is no dispute that the parties were entitled, as recognized by the Supreme Court of Canada in *Stern v. Stern Estate* [1968] S.C.J. No. 64, to contract themselves out of the benefits of otherwise governing legislation as long as they are clearly aware of their respective rights. In particular, Ms Caron was entitled to contract herself out of the benefits that would otherwise fall to her pursuant to s.44 of the Succession Law Reform Act as long as she was clearly aware of the rights she was relinquishing.

[17] It is the Respondents' position that she did just that by entering into the Pre-Marital Agreement September 2, 2009.

[18] The Pre-Marital Agreement provides at paragraph 4:

> (a) The Home shall forever remain in Paul's personal estate, including, but not limited to, all interest, rents, profits and proceeds of disposition which may accrue from the Home; and,
>
> (b) Paul shall have, at all times, the full right and authority, in all respects the same as he would have if not married, to use, enjoy, manage, gift, sell, assign and otherwise convey the Home without interference, approval or other consent from Andrea and the Home shall remain forever free of claim by Andrea with the exception that she shall have the right to live in the Home for a reasonable length of time following the legal separation of Paul and Andrea, if ever, such occupation not to exceed a term of six(6) months.

[19] 'The Home' is specifically excepted from the description of and rights in respect of "Separate Property" under the Pre-Marital Agreement at paragraphs 2 and 3.

[20] Paragraph 9, under the subtitle "Separation or Divorce – Separate Property", provides that "notwithstanding the provisions of the Family Law Act (Ontario), Andrea shall not be entitled to make a claim against Paul in respect of the division of the value of the Home".

[21] The only provision in the Pre-Marital Agreement that specifically provides for "the death of Paul" is paragraph 11 dealing with child support for Ms Caron's children.

[22] It is the Respondents' position that by agreeing, in paragraph 4 of the Pre-Marital Agreement, that "the Home shall forever remain in Paul's personal estate" and that "the Home shall remain forever free of claim by Andrea", Ms Caron contracted out of her right to the Home as part of Paul Rowe's estate under the Succession Law Reform Act.

[23] Ms Caron's position is that she did not specifically waive her rights under the Succession Law Reform Act and therefore is entitled to the whole of the estate including the Home.

[24] Ms Caron's position is supported by the decision of Krever, J. (as he then was) in *Re Saylor* [1983] O.J. No. 3252 (Ont. H.C.J.). In that case the deceased and his wife were separated at the time of death and had entered into a separation agreement "in satisfaction of all claims". Krever, J. found in respect of the wife's claim of entitlement to the estate pursuant to the Succession Law Reform Act, at paragraph 10: "Before it is concluded that a right as substantial as that has been surrendered one must find "direct and cogent" words to that effect." He did not.

…

[27] **In this case I do not find that there are direct and cogent words in the Pre-Marital Agreement to the effect that Ms Caron was relinquishing her rights** as a spouse under the Succession Law Reform Act. I find that the Pre-Marital Agreement provided for events of separation and dissolution of the marriage but, except as specifically provided in paragraph 11, dealing with child support, did not specifically address Ms Caron's rights as a surviving spouse.

[28] I note that Paul Rowe had more than two years following the marriage to specifically provide for the disposition of the Home on his death and did not do so.

[29] I have considered that Ms Caron agreed in the Pre-Marital Agreement, that "the Home shall forever remain in Paul's personal estate" and that "the Home shall remain forever free of claim by Andrea", but it is not clear that it was agreed between the parties that Ms Caron should have no claim to the Home in the event of Paul Rowe's death.

[30] It is not clear that Ms Caron, notwithstanding that she had independent legal advice before signing the Pre-Marital Agreement, even contemplated that the Agreement had any bearing on any claim to Paul Rowe's estate except in respect of child support for her children.

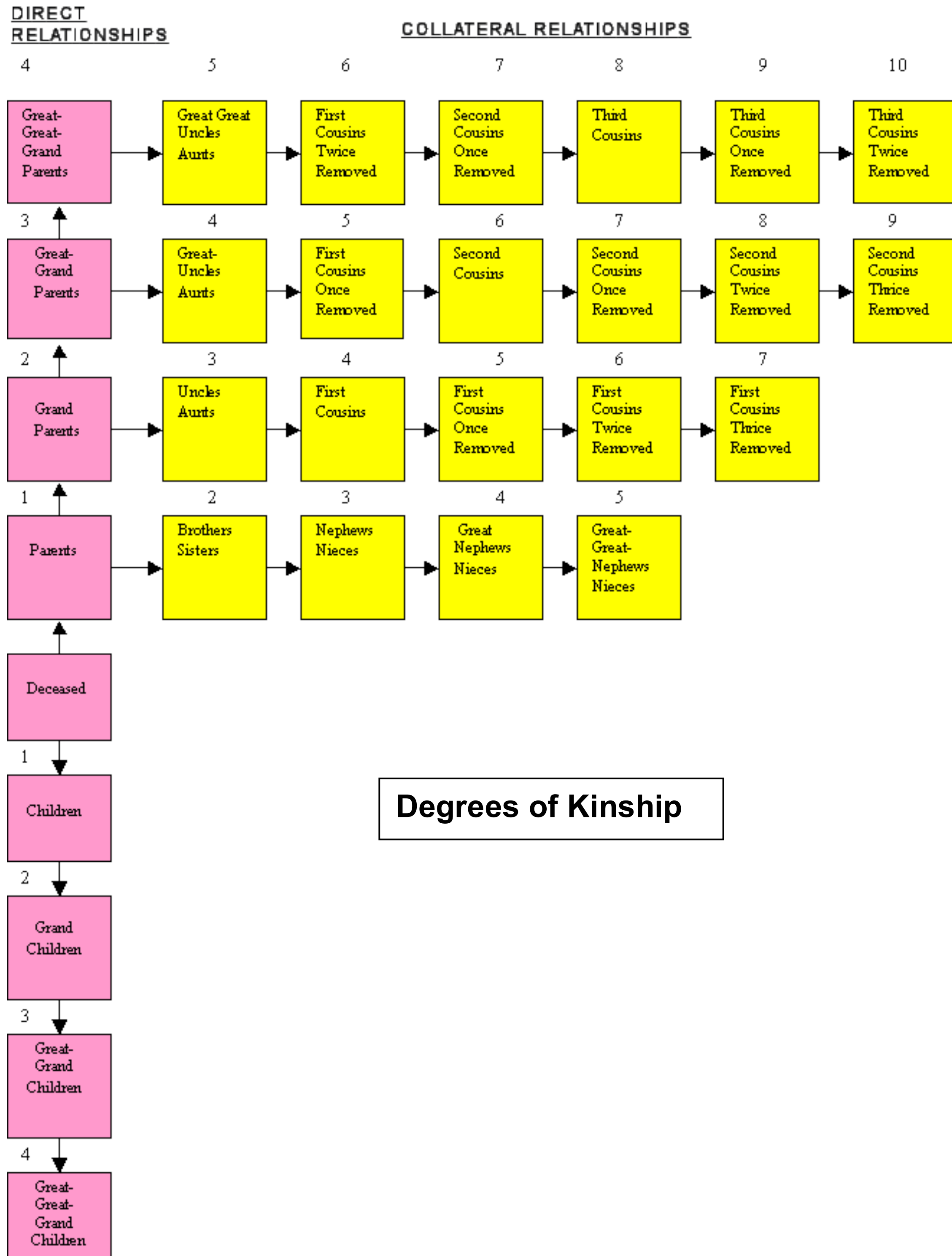
[31] While I accept that Ms Caron had a right to contract out of her entitlement under the Succession Law Reform Act, I am not satisfied that she did so.

[32] Given these findings, it was not necessary that I consider the evidence in respect of Paul Rowe's intentions at the time he signed the will in May 2009 or at the time he entered into the Pre-Marital Agreement. Paul Rowe's intentions at those times are irrelevant unless they were communicated to Andrea Caron and agreed to by her with full knowledge that she would be relinquishing her rights pursuant to the Succession Law Reform Act. There is no evidence of that.

See also **Brant v. Brant (1997), 16 E.T.R. (2d) 134 (Ont. Gen. Div.),** per Lofchik J at para. 10:

The decision in *Saylor* has been subsequently applied by the courts in such cases as *Re: Cairns Estate: Cairns vs. Cairns* (1990), 25 R.F.L. (3d) 373, H.C. and *Frye vs. Frye* (1992), 41 R.F.L. (3d) 145 (Gen. Div). In the case of *Re; Dyer vs. Dyer* (1984), 18 E.T.R., 44, (Ont. Surr. Ct.), a case dealing with the right of a wife to claim against a deceased husband's estate for support in spite of having entered into a separation agreement, reference is made to the *Saylor* case by Scott, J., holding that section 44 (now section 45) of The *Succession Law Reform Act* is a mandatory section, thereby reinforcing the argument that there must be clear and cogent language by which a wife

releases her statutory entitlement to the preferential share in her husband's estate before she will be held to have done so.



THE NATURE OF A WILL

Succession Law Reform Act:

Definitions

1. (1) In this Act,

"will" includes,
(a) a testament,
(b) a codicil,
an appointment by will or by writing in the nature of a will in exercise of a power, and any other testamentary disposition.

Power to dispose of property by will

2. A person may by will devise, bequeath or dispose of all property (whether acquired before or after making his or her will) to which at the time of his or her death he or she is entitled either at law or in equity, including,

(a) estates for another's life, whether there is or is not a special occupant and whether they are corporeal or incorporeal hereditaments;
(b) contingent, executory or other future interests in property, whether the testator is or is not ascertained as the person or one of the persons in whom those interests may respectively become vested, and whether he or she is entitled to them under the instrument by which they were respectively created or under a disposition of them by deed or will; and
(c) rights of entry, whether for conditions broken or otherwise.

- A Will is a formal declaration that is created by the testator or testatrix during his or her lifetime. The Will represents the intention of the testator or testatrix to dispose of property upon death.

- A Will is by its nature both ***revocable*** and ***ambulatory*** - that is the testator or testatrix can change his or her mind and revoke the Will in whole or in part, and, the Will can speak to property that has yet to be acquired by the testator or testatrix or a presently-held asset whose value fluctuates.

- The Will can do much more than just pass on property. It can also represent a devolution of certain other powers or rights that were enjoyed by the deceased during his or her lifetime, such as a *power of appointment* (that is, the right to give away another's property to a third party).

As a fundamental proposition, only a Will that represents *the deliberate or fixed and final expression of intention of the deceased* to dispose of his or her property is valid. It must be in a form that complies with the statute. There is no 'substantial compliance' allowance.

Bennett v Gray
[1958] SCR 392 (S.C.C.); cb, p.304

Here the testatrix had a Will naming her husband as the beneficiary of a life tenancy in her Estate and a gift-over of the Estate in set shares to her children. The husband died before the testatrix. She became unhappy with the Will and wrote a letter to her solicitor. In the letter she wrote (in part):

> Dear Mr. Dysart
>
> When I was in your offis about a month ago I Promised to let you know how I would like my will to be made out. I have no Ida at all about such matters so Ill leave all that to you, but I do know its Important to have such matters settled before its to late. I will try to outline the way I would like to leave the little I have. the two boys are provided for and do not expect any thing from me. to Dixie her real name is Margaret Dorothea Beautrick Gray Bennett Wife of Charls Paul Bennett the sum of thirty thousand dollars. (30,000) my house if I own a house at the time of my death Also all my furniture and my Car Also my Clothing and fur Coats.--to my daughter Jacquline Dinnia Gray wife of Victor Fregeau the sum of ten thousand dollars (10,000). and to my Grand daughter, Joyce Gray, I leave five thousand dollars. and I also want to leave to my dearly Beloved Grand daughter Judith Ann Bennett fifteen thousand dollars and my summer home on Coney Island in Kenora Ont and also the furniture in the cottage my watch or any Jewelery and my diamond rings--To the Reverend A.X. MacAulay one thousand dollars to have holey Masses offered to God for the repose of my soul.
>
> Dear Mr. Dysard I will be in Winnipeg in a few days I will call you. Thanks for your trouble and for all your kindness to us.

The testatrix did go to see her lawyer some weeks later but could not decide who to appoint as her executor. Still later they met and there were some additional instructions given about one gift. She died three years later, still not having made a new Will.

Per Fauteux J:

> Whether the letter of September 27, 1952, contains *per se* **a deliberate or fixed and final expression of intention** must be determined by the phrases immediately preceding and following the intermediate part of the letter where the wishes of Mrs. Gray are expressed; for, read as a whole, the letter has one single subject-matter, indicated as follows by Mrs. Gray: "I Promised to let you know how I would like my will to be made out."
>
> In the opening and closing phrases of the letter, Mrs. Gray conveys to Mr. Dysart sentiments of unreserved trust, reliance and dependence. Born, as admittedly shown by extrinsic evidence, out of an intimate relationship of many years between Mr. Dysart, on the one hand, and Mr. and Mrs. Gray and their children, on the other, these sentiments were those accompanying the mind of Mrs. Gray when, after expressing them, she wrote: "I will try to outline the way I would like to leave the little I have." And having done so,

she closed the letter by informing Mr. Dysart that she would be in Winnipeg in a few days and that she would call him.

I am unable to dismiss the view I formed that, read as a whole and according to its ordinary and natural sense, this letter amounts to nothing more than what is a preliminary to a will. While Mrs. Gray indicated to Mr. Dysart the legacies she then contemplated her will to contain, it is clear, in my view, that she did not want that letter to operate as a will. Indeed, by her letter, she is committing to future consultation with Mr. Dysart both the finality of her decisions, if not of her deliberations, and that of the form in which they should eventually be expressed in a regular will, the preparation of which is entrusted to Mr. Dysart himself. If this interpretation properly attends the document, the letter has not per se, and cannot acquire without more, a testamentary nature, and the proposition stated in *Godman v. Godman…* "that a document which is in terms an instruction for a more formal document may be admitted to probate if it is clear that it contains a record of the deliberate and final expression of the testator's wishes with regard to his property", as well as the proposition stated in *Milnes v. Foden* [(1890), 15 P.D. 105 at 107.], that "It is not necessary that the testator should intend to perform or be aware that he has performed a testamentary act", are of no application in the present case.

What took place from the date of the letter, September 27, 1952, to the day of the death of Mrs. Gray, April 5, 1956, affords no evidence either that her letter contained a deliberate or fixed and final expression of intention or that it acquired such a testamentary character by subsequent and sufficient manifestation of intention on her part. Indeed the evidence shows that Mrs. Gray failed to pursue what she indicated in her letter she contemplated doing subject to consultation with Mr. Dysart, though there were, during this lengthy period of time, the fullest opportunities and facilities to do so, and that the most reasonable explanation for this failure is the abandonment of her original intention. No decision was ever reached as to the choice of an executor; nor was even the disposal of the residue of the estate ever considered; nor did she, at any time, decide to instruct Mr. Dysart to proceed with the preparation of the will, notwithstanding that both were perfectly aware that the formal will, executed by Mrs. Gary at the same time as that of her husband on January 6, 1949, was still in existence.

[Please note that the *dicta* in this case does not stand for the proposition that a note to a solicitor cannot be a valid Will – the test ultimately is whether the instrument sets out the final and fixed intention of the testator which is intended to have effect at death; e.g. Re Kavanagh's Will, 1998 CanLII 18096 (NLCA).]

<u>"WILL-SUBSTITUTES"</u>

Advantages of a Will-substitute rather than a Will?

- Estate administration taxes arising on death may be avoided;
- The asset can be shielded from creditors as it passes 'outside the Estate' – but perhaps not if dependants are inadequately provided for (in which case it may be brought back into the Estate through a judicial order);
- no need for probate and legal fees associated with probate;
- fewer transactions costs;
- minimize opportunities for litigation by disappointed beneficiaries.

Advantages of a Will?

- Income and other taxes arising on death may be minimized through appropriate planning with greater certainty;
- Allows for highly creative plans that suit a person's needs;
- Allows for a comprehensive plan in one document;
- Covers issues beyond transmission of wealth.

One should note that the tax regime has changed with respect to the rigor that the provincial government approaches the collection of Estate Administration Tax.

In the past, there was no real audit in respect of the value of personal property. The **Better Tomorrow for Ontario Act (Budget Measures), 2011** amended the legislation to enhance the compliance regime. The Ontario Minister of Revenue is provided with significant audit and verification functions as a result of this change, as well as assessment, objection and appeal mechanisms, similar to those contained in Canada's Income Tax Act. As a result, it is anticipated that there will be much more pressure to verify the value of the assets disclosed in the application for a Certificate. This will likely result in a higher tax payable unless one has engaged in planning to minimize this tax.

The enhanced audit and verification functions will include (among other things) the right to assess and reassess an estate in respect of its tax liability within four years of the tax being payable, a requirement that the Estate Trustee provide all reasonable assistance and answer all questions in respect of an audit being conducted, provide any 'prescribed' information as is requested and a requirement that third parties give the Minister access to their premises and/or permit the Minister to examine their assets and records. The Minister may also assess or reassess an estate in respect of its Estate Administration Tax liability outside the four-year limitation period if any person made a misrepresentation attributable to neglect,

carelessness or wilful default, or committed fraud in supplying (or omitting to disclose) information regarding an estate to the Minister.

> **Estate Administration Tax rate:**
>
> $5 for each $1,000, or part thereof, of the first $50,000 of the value of the Estate, and $15 for each $1,000, or part thereof, of the value of the estate exceeding $50,000.

1. Gifts

Where large *inter vivos* gifts are made, three sorts of concerns arise: capacity to make a gift; compliance with common law doctrine to allow the transfer to be regarded as valid as a matter of law; and, whether the donor was "unduly influenced" by the donee or another. The last point is particularly significant where the donee provides care to the donor.

Jansen v. Niels Estate
2017 ONCA 312 (Ont. C.A.)

This appeal concerned an *inter vivos* conveyance by the testator of her home into joint tenancy with her son, daughter-in-law, and herself. The conveyance was challenged after the testator's death by one child on various bases. The judgment on appeal considered whether the joint tenancy had been severed and whether the conveyance was a proper gift. The former ground was dismissed at trial and appeal for want of evidence. The latter ground was dismissed on the basis that there was a good gift notwithstanding that words of gift were not used. In a *per curiam* judgment, the Court held on the latter point:

> [40] The application judge applied the proper test for a gift, as set out in McNamee and summarized in *Foley* [*Foley v. McIntyre*, 2015 ONCA 382 (Ont. C.A.)] at para. 25: **"To establish a gift, one must show intention to donate, sufficient delivery of the gift, and acceptance of the gift".**
>
> **[41] As the application judge noted, it was not necessary for Theadora to state that she was gifting the property. Her intention to gift the property was evident from her instructions to her solicitor and his assistant and the executed documents, all of which supported this finding.** This included:
>
> - her advice to her solicitor that she would take title alone and add Richard to the deed later;
> - the codicil to her will, making it clear that the home would not form part of her estate;
> - her request that the joint tenancy between herself and Richard be created on his return to Canada;
> - the absence of any request to revert the title to tenancy in common; and
> - her call to Carol Harding seeking assurance that her home would pass to Richard and Ingrid on her death.

[42] Furthermore, the application judge found that Theadora received legal advice from a lawyer who knew her well; that she understood the consequences of joint tenancy as opposed to tenancy in common; and that she was mentally engaged and cognitive until her death.

[43] The application judge did not wrongly rely on evidence of notes documenting Theadora's visit to her lawyer's office in September 2004 and a phone call made to the office in November, 2004, in determining her intention concerning the gift. The application judge's reasons, and in particular para. 148, do not reflect acceptance of the notes on Theadora's visit as evidence of intention. Rather, the notes were part of the narrative explaining the steps that led to title being in the names of Theadora and Richard and the contents of the codicil. This would also help explain why the appellant took no objection at trial to the admission of the notes.

…

Was Theadora Subject to Undue Influence?

[45] Marjolein submits that the application judge erred by, in effect, requiring her to establish undue influence rather than simply demonstrate that the relationship of the parties gave rise to a potential for undue influence.

[46] There is no merit to this submission.

[47] The application judge applied the law as set out in *Foley*, in which this court noted, at para. 28, that the presumption of undue influence applies "[w]here the potential for domination inheres in the relationship between the transferor and transferee", citing *Goodman Estate v. Geffen*, 1991 CanLII 69 (SCC), [1991] 2 S.C.R. 353, at p. 378. Where the presumption applies, the transferee must establish that a gift was the result of the full, free, and informed thought of the transferor. Evidence that the transferor received qualified and independent advice can be used to rebut the presumption, although it is not required in every case. But corroborating evidence is required in order to rebut the presumption, whether direct or circumstantial in nature.

[48] The application judge applied the presumption that undue influence was exerted, but based on his factual findings concluded, at para. 184, that "the potential for domination and therefore undue influence is completely rebutted." The application judge emphasized the independence of Theadora. He found that her advanced age was not a trigger for domination. This was not a case in which a totally new estate plan had been entered by a person facing a terminal illness. Theadora was pursuing an intention to gift the property that she developed in 2004 and never wavered from. She was cognitively engaged and unfettered by persuasion.

> [49] Although the application judge said that Marjolein provided no evidence of undue influence, when his decision is read as a whole, it is clear that he did not reverse the burden of proof and require Marjolein to prove undue influence. On the contrary, the application judge acknowledged the operability of the presumption but found that it was rebutted. As the application judge put it, at para. 179: "Nothing in the evidence causes me any concern that the direction and eventual registration of the tri joint tenancy deed, was done with anything less than the full acquiescence, acceptance and complete concurrence of Mrs. Niels."

While no new ground is broken, the judgment provides comfort that intention to gift remains a question of fact that can be inferred from the evidence and that a caregiver is not precluded from receiving a gift from a frail and vulnerable older adult. The possibility of exploitation may itself raise a presumption of undue influence which was rebutted on the evidence.

Morreale v. Romanino
2017 ONCA 359 (Ont. C.A.)

Here the presumption of undue influence respecting a gift from an elderly parent to a child was also at issue. The asset was the proceeds of sale of the deceased's home which were then used to purchase another home with title being taken by the deceased's daughter and son-in-law. The deceased was ill with cancer and the daughter and her husband lived with the deceased and provide care services. The deceased did not receive independent legal advice. Gillese J.A. helpfully reviewed the law on point:

> **1. The Presumption of Undue Influence Did not Arise**
>
> [19] At para. 73 of her reasons, the trial judge stated:
>
>> I find that in these circumstances, and despite the "special" relationship that existed, it is not possible to find any specific act of coercion or domination that would lead to a presumption of undue influence.
>
> [20] The appellant points to this sentence and submits that it demonstrates an error in law on the part of the trial judge because there is no need for a finding of a "specific act of coercion or domination" in order for the presumption to arise.
>
> [21] I agree. **In this regard it is important to distinguish between the presumption of undue influence and actual undue influence. In this case, the trial judge was addressing the question of whether the presumption of undue influence arose, not whether there had been undue influence exerted by the respondent over her parents. There is no need for a finding of a specific act of coercion or dominion in order for the presumption to arise. Whether a person's free will was overborne by an act of coercion or fraud is a question of actual**

undue influence: *Keljanovic Estate v. Sanseverino* (2000), 2000 CanLII 5711 (ON CA), 186 D.L.R. (4th) 481 (Ont. C.A.), at para. 61.

[22] In the case of voluntary gifts, whether the presumption of undue influence arises begins with an examination of the relationship between the parties and the first question to be addressed, in all cases, "is whether the potential for domination inheres in the nature of the relationship itself": Geffen, at p. 378. This test embraces those relationships that equity has already recognized as giving rise to the presumption, including parent and child: Geffen, at p. 378.

[23] However, while the test embraces relationships that have been recognized as giving rise to the presumption, it is not enough to simply show that such a relationship exists. Even for such relationships, the presumption does not arise unless it has been established that there is the potential for one person to dominate the will of another. The test requires the trial judge to consider the whole of the relationship between the parties to see if there is the potential for domination, rather than looking for a specific act of coercion or domination.

[24] Despite the impugned statement, in light of the trial judge's findings, I would not interfere with the trial judge's determination that the presumption did not arise in this case. Far from the respondent having the potential to dominate the will of her parents, the trial judge saw Mr. Ruccia as the dominant party in the financial transactions between the Ruccias and the respondent.

[25] The trial judge was very aware of the family dynamic. She recognized that the respondent lived with her parents all of her life and that, as the Ruccias aged, they became more and more dependent on the respondent and, eventually, her husband as well. However, the trial judge found that Mr. Ruccia told the appellant that she would receive less from their estate than would her sister and that he wanted to ensure that her husband would get no money from his estate. And, importantly, the trial judge found that Mr. Ruccia was a strong-willed individual who made all the financial decisions as between him and his wife and that he was so meticulous in respect of his personal financial affairs that he required the respondent to provide him with receipts for all bank transactions that she performed on his behalf.

[26] Given that Mr. Ruccia's mental capacity was not in issue and in light of the trial judge's findings as to the strength of his will in all things, including those financial, the trial judge made no error in concluding that the presumption of undue influence did not arise in this case.

[Emphasis added.]

Thus while a relationship between an adult child providing care to an elderly parent may in some cases give rise to a presumption of undue influence, there is no categorical necessity to presume undue influence where the evidence is to the

contrary. Here the evidence would have rebutted the presumption if it did operate but the refusal to regard it applying categorically operates as a break on frivolous litigation.