TAB 5

Priorities in Estates Distributions

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PRIORITIES IN ESTATE DISTRIBUTIONS

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PRIORITIES IN ESTATE DISTRIBUTIONS

Introduction

Historically, insolvent estates have been dealt with in the context of the provisions of the *Bankruptcy Act.*[1]

Widdifield on Executors Accounts[2] notes:

> As between executors and creditors, the executors are entitled to their full costs, charges and expenses out of the estate in priority to the payment of debts, although the estate is insolvent, unless they improperly deny assets. The Courts have considered this provision and noted[3] if the Court were to find this principle as not applicable to the estate of a deceased bankrupt, there would be great difficulty in getting executors and solicitors to assume the obligations of an estate if there were any questions about its solvency.

The question of priority was then considered under the new *Bankruptcy and Insolvency Act*[4] in the *Re: Ladner Estate*[5] decision.

In *Re: Ladner Estate,* there was a petition filed in respect of an estate under the *Bankruptcy and Insolvency Act* and delivered to counsel representing the estate. The petition was not heard or otherwise disposed of. Ultimately, an application was brought by the estate for payment of its solicitor's account and asking for monies payable from trust to be paid for such fees. The court considered the priority of solicitor's accounts for work performed as solicitor for the estate and held that they constituted a testamentary expense of the estate within the meaning of section 44(2) of the *Bankruptcy and Insolvency Act.* In coming to its conclusion the court (at paragraph 7) reviewed much of the historical law relating to the question of priority with respect to estates. It noted that it was not in dispute that the preparation of financial statements and income tax

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[1] Section 107.
[2] Frederick D. Baker, 5th ed. (Toronto: Carswell, 1967) at 103.
[3] See *Re Bertram*, [1972] 3 O.R. 903, at 66-67 Houlden J.
[4] R.S., 1985, c.B-3.
[5] (2001) B.C.S.C. 943, 39 E.T.R. (2nd) 253, Scarth J.

returns for the estate and, in this case, the three named companies to which the deceased had an interest, constitute proper "testamentary expenses". The court went on to state:[6]

> The cases and texts to which I have referred to indicate:
>
> (1) that executorship expenses, testamentary expenses and administration expenses are in essence synonymous terms which relate to the proper performance of the duties of the executor of the estate;
>
> (2) such expenses include the costs incurred in obtaining the advice of solicitors or counsel with respect to ascertaining the debts and liabilities due from the estate, the payments of such debts and liabilities, and the legal and proper distribution of the estate among the persons entitled.

It should also be noted that a creditor has the right to call upon an administrator to call for an inventory and to account even where the administration has expired.[7]

Moreover, there seems to be no reason why one of two or more executors might not submit his own dealings with the estate for court approval, independently of the other or others, per MacLennan J. A. in *Cunnington v. Cunnington* (1901), 2 O.L.R. 511 (Ont. C.A.) at 516.

Devastavit

Disaffected beneficiaries may wish to consider proceedings against their trustees to seek restitution to the trust fund or equitable compensation on the basis that the trustees have acted in violation of their duties toward the beneficiaries.

Devastavit is the breach by an executor or administrator of his duty to administer the estate and has been generally described as mismanagement of the estate, squandering or misapplying of the assets contrary to the duties imposed on the fiduciary. *Devastavit* can either be deliberate or reckless and, of course, can include negligence. The liability is personal, as with all breaches of fiduciary duty.

The delay to discharge debts may well give rise to a claim for *devastavit*. For example, non-payment of a debt which is regarded as a remote contingent liability, or, if a personal

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[6] At paragraph 9.
[7] *Taylor v. Newton* (1752) 1 Lee 15 (Prerogative Court).

representative pays a debt that is statute barred. Personal representatives will be liable if they discharge debts in an insolvent estate out of order, such as by paying ordinary debts before funeral, testamentary and administration expenses.

After accomplishing the task of determining what the assets and liabilities of the estate are, one of the primary obligations of an executor is the payment of the debts and liabilities. The proper performance of these duties by an executor is often overlooked in a standard administration, where there are sufficient assets to pay relatively simple liabilities.

For the most part, many clients and most executors do not understand that an executor has a fiduciary obligation and duty to protect the creditors of the estate.[8]

Plene Administravit

Another important doctrine to consider is that of p*lene administravit*, which was set out in the Ontario Court of Appeal decision of *Commander Leasing Corp. v. Aiyede.*[9] The Court of Appeal noted (at page 358) that it has long been established that if an executor or administrator has no assets to satisfy the debt upon which an action is brought, in the absence of a plea of no assets or *plene administravit*, he will be taken to have conclusively admitted that he has assets to satisfy the judgment and will be personally liable for the debt and costs if they cannot be levied on the assets of the deceased. Furthermore, in *Edwards v. Law Society of Upper Canada*,[10] the Ontario Court of Appeal also noted that if the executor has some, but insufficient, assets to satisfy the judgment and costs, a plea of *plene administravit praeter* will render him liable only to the amount of assets proved to be in his hands as executor.

The Duty to Pay Debts and Compromise Claims

Most wills include a clause that states that an executor is to pay all the debts of the estate. Section 48 of the Ontario *Trustee Act* specifically provides authority to a personal representative to pay or allow any debtor claim on any evidence that a representative thinks is sufficient.

Unfortunately, section 48 of the *Trustee Act* does not provide much guidance with respect to the nature and extent of that duty.

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[8] *Ontario (Attorney General) v. Ballard Estate* (1995), 6 E.T.R. (2nd) 311 (Ont. Gen. Div.); *MacCulloch Estate v. MacCullock* (1986), 22 E.T.R. 34 (N.S.C.A.), leave to appeal refused (1986), 70 N.R. 81 (S.C.C.).
[9] (1983), 44 O.R. (2nd) 356 (Ont.C.A.).
[10] (2000), 48 O.R. (3rd) 321, 36 E.T.R. (2nd) 192 (C.A.).

The leading case is the Ontario Court of Appeal decision in *Commander Leasing Corp. v. Aiyede Estate.*[11] In this case, the executrix and the deceased's spouse paid part of the money owed by the estate pursuant to two outstanding lease agreements and then distributed the remainder of the assets of the estate without paying the balance of the money owing to the creditor. The creditor commenced an action against the executrix, both personally and in her representative capacity. The Court of Appeal held that, in distributing the entire estate to the benefit of the surviving spouse, the executrix acted in clear disregard of the creditor's outstanding claim and was in breach of her duty as executrix of the estate.[12]

It should be noted that a compromise, on the part of an executor, can only be on things doubtful and contestable. Its object must be the ending or preventing of litigation.[13] In *Vanek v. O'Hara*,[14] the court held that it should not easily override the discretion of executors in making compromises in relatively minor matters.

A creditor of an estate cannot be prejudicially affected by the terms of the will. His or her rights are fixed and determined by the law and not in any manner controlled by the will of his debtor.[15] Furthermore, although it is the duty of the executor to pay the just claims against the testator's estate, it is clearly his duty not to waste an estate that he is administering for the benefit of others, in satisfying demands which are equally untenable in law or in equity.[16] An executor who distributes the estate knowing of an outstanding claim is liable personally to the creditor.[17]

Estates Act[18]

The *Estates Act* provides for an expeditious means by which to deal with money claims or demands made against an estate. These summary procedures allow the personal representative to resolve any doubtful debts against the estate. If a party wishes to make a claim against an estate pursuant to the *Estates Act*, reference should be made to Rule 75.08 of the *Rules of Civil Procedure*, which prescribes the Form (75.14) to be utilized when making a

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[11] (1984), 44 O.R. (2nd) 356, 16 E.T.R. 183 (C.A.).
[12] Ibid, at p. 187 (A.T.R.).
[13] Carmen S. Theriault, *Widdifield on Executors and Trustees*, 6th ed. Carswell at 3-50.
[14] (1995), 7 E.T.R. (2nd) 187 (Ont. Gen. Div.) at p. 193
[15] Carmen S. Theriault, *Widdifield on Executors and Trustees*, 6th ed. Carswell at 3-1.
[16] Ibid.
[17] Ibid, at 3-2.
[18] R.S.O. 1990, c. E.21.

claim. This form sets out the amount of the claim together with the grounds in support of the claim.

(a) Notice of Contestation

If the estate trustee of a deceased person knows of a claim against the estate before distributing the assets, the estate trustee should follow the steps set out in the *Estates Act.* For a liquidated debt, section 44 applies, and for unliquidated debts, section 45 applies.

Under section 44 of the *Estates Act*, the personal representative may serve the claimant with written notice contesting the claim in whole or in part where the claim has been made against the estate, or where the personal representative has notice of a claim or debt, including one that is not presently payable. A prescribed form for such notice is the Notice of Contestation (Form 75.13). The form should include a brief statement of the grounds for contesting the claim and should refer to the section of the *Act* under which the notice is being sent.

Service of the Notice on the claimant should be personal, although a judge may order substitutional service or service by mail where appropriate.

(b) Application for Order allowing claim

The claimant has thirty days after receipt of the Notice of Contestation to apply for an Order allowing the claim if it is a liquidated amount. Failure to file the application within this time limit bars the claim forever. However, the judge may grant permission to file a late application where the claimant applies for the extension within three months after being served with the Notice of Contestation.

The application must be accompanied by a Statement of Claim with proof of prior service on the estate trustee and a copy of the Notice of Contestation. An affidavit verifying the Statement of Claim and showing the names and addresses, where possible, of all beneficiaries of the estate, including residual beneficiaries and indicating which are infants, must also be included.

When the Statement of Claim and Notice of Contestation are filed, the court Registrar shall fix a date for the hearing.

Notice of the application must be served not less than seven clear days before the date scheduled to hear the application on all those persons interested in the estate as the court directs, as well as on the personal representative.

If the claim is a liquidated amount under $800.00, the judge may hear the claim on the return of the application. Where it is $800.00 or more, with the consent of the parties, the judge may hear the matter under the *Estates Act* provisions. Alternatively, the judge may direct the claimant to bring an action for the recovery of his or her claim and set a date for the hearing. If so, the Notice of Appointment must be served on those interested persons specified by the judge.

In cases where an unliquidated claim is made, the application involves applying for an Order for directions. The judge may hear the application for directions and make an Order he or she considers just, or he or she may direct the applicant to bring an action for recovery of the claim.

If the claim is not presently recoverable, the judge may prescribe the time after which the claimant may proceed. The Order of the judge is not enforceable by execution until the claim becomes payable.

No proceedings may be taken to enforce payment of a claim without the permission of the judge where the claim is established under the provisions of the *Estates Act*.

Priority of Claims and the Insolvent Estate

There are certain expenses which are treated in priority in respect of payment from the assets of an estate.

The first is, of course, the costs of the burial and those expenses are first charged upon the assets of the estate.

As noted above, insolvent estates may be administered according to provisions set out in the *Bankruptcy and Insolvency Act*, or in accordance with the legislative provisions concerning such estates, including the procedures set out in the *Trustee Act*. There are other procedures available: for example, an estate trustee may bring an application pursuant to Rule 65 of the *Rules of Civil Procedure* to administer the estate of the deceased and obtain judgment for administration. Furthermore, the trustee has the option of bringing an application for the opinion, advice and direction of the court in respect of any question relating to the management or administration of the trust pursuant to section 60 of the *Trustee Act* and Rule 14 of the *Rules of Civil Procedure*.

Bankruptcy

Section 136(1) of the *Bankruptcy and Insolvency Act* provides that, in the case of a deceased bankrupt, subject to the rights of secured creditors, reasonable funeral and testamentary expenses incurred by the legal personal representative of the estate are paid in priority.

(a) *Trustee Act*

Section 50(1) of the *Trustee Act* sets out a scheme whereby an estate trustee can take tentative steps to bankruptcy proceedings. This particular provision includes the right of a trustee to pay debts proportionately without preference or priority.

Secured creditor protection is dealt with in sections 57 and 58 of the *Trustee Act*.

Section 57(2) provides that a personal representative can compel the secured creditor to prove his or her claim and provide particulars, and section 58 allows the personal representative to apply to the court for an Order requiring the creditor to value his or her security within a specific timeline.

Abatement

In the event that there are insufficient assets in an estate, then some or all of the gifts will "abate" or be reduced.

The courts have established rules for abatement. All bequests do not necessarily abate equally, and the order of abatement will depend upon the terms of the will and the nature of the legacy or devise.

The order for abatement is as follows:[19]

1. Residuary personalty;
2. Residuary real property;
3. General legacies, including pecuniary bequests from the residue;

[19] Carmen S. Theriault, *Widdifield on Executors and Trustees*, 6th ed. Carswell at 5-36

4. Demonstrative legacies (bequests from the proceeds of a specific asset or fund not forming part of the residue);

5. Specific bequests of personalty; and

6. Specific devises of real property.

A general legacy does not specify the thing bequeathed. It is usually a pecuniary legacy, or sum of money. A specific legacy is a gift of a particular article of property (although, to complicate matters, not all gifts of a specific thing are interpreted as being a specific legacy - however, a discussion of that is not relevant here). A demonstrative legacy is a legacy to be paid out of a specific fund.

A fund to be set aside out of residue has been held to be not truly residuary.[20] As set out above, general legacies include bequests from residue.

Gifts of equal status (*i.e.* general legacies) will abate equally unless those claiming priority can establish that the intention of the testator, as set out in the will, was that the bequests should not abate equally. Terms in a will suggesting that certain bequests were to be paid "in the first place", and others to be paid "in the next place", have been held to not establish a priority of payment. Rather, the terms were said to be merely introductory.[21]

However, language that certain legacies were to be paid "in full" and the absence of that language for other legacies has been held to indicate an intention that the legacies to be paid "in full" should not abate.[22]

Difficulties can arise due to the differing meanings that can be attributed to the word "residue". For example, the "residue" can be defined as the estate that remains after payment of the debts, funeral and testamentary expenses, and the costs of the administration. "Residuary estate" is defined in *Black's Law Dictionary*, 7th edition, as "The part of a decedent's estate remaining after all debts, expenses, taxes, and specific bequests and devises have been satisfied."[23] In

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[20] Terence Sheard, Rodney Hull & Michael M.K. Fitzpatrick, *Canadian Forms of Wills*, 4th ed. (Toronto: Carswell, 1982) at 181.
[21] Carmen S. Theriault, *Widdifield on Executors and Trustees*, 6th ed. Carswell at 5-38.1; J.B. Clark & J.G. Ross Martyn, *Theobald on Wills*, 15th ed. (London: Sweet & Maxwell, 1993) at 814.
[22] *Marsh v. Evans* (1720), 1 P. Wms. 668, cited in Carmen S. Theriault, *Widdifield Executors and Trustees* 6th ed. Carswell at 5-38.1
[23] Carmen S. Theriault, *Widdifield on Executors and Trustees*, 6th ed. Carswell at 5-45.

Feeney's Canadian Law of Wills, 4th edition, it is stated that "a general legacy is a gift out of the residuary estate after the payment of debts and specific legacies".[24]

However, general legatees are generally distinguished from a residual legatee, who can "take nothing until all the other legacies are paid in full, for till then there is no residue".[25]

The more widely used definition of "residue" is the estate remaining after the payment of all estate expenses and legacies. "Until the claims against the testator's estate for debts, legacies, testamentary expenses, etc. have been satisfied, the residue does not come into actual existence (*Lord Sudeley v. Attorney-General*, [1897] A.C. 11; *Barnardo's Homes v. Special Income Tax Comm'rs.*, [1921] 2 A. C. 1 at 11)."[26]

As stated in *Osterhoff on Wills and Succession*, 6th edition, p. 523, "A gift of residue is a gift of that part of the testator's estate which he or she has not specifically disposed of. Hence, it includes all his or her property after pecuniary, general, demonstrative and specific gifts are satisfied."

Additional guidance can be taken from the rule in *Allhusen v. Whittell* (1867), L.R. 4 Eq. 295. That rule provides that a gift of income from the residue of an estate is to be income on the "true residue" of the estate only: that is, debts, legacies and succession duties payable out of the general assets of the estate must be paid out of income as well as capital. (This is subject to a contrary intention appearing in the will.)

Ademption

A specific gift fails by ademption if its subject matter has ceased to exist as part of the testator's property at his death. Thus, a specific gift is adeemed if at the testator's death the subject matter of the gift has been destroyed or converted into something else by the act of the testator or by duly constituted authority.[27] The law of ademption is carefully examined in *Re Wilson Estate* (1989), 34 E.T.R. 121(B.C.S.C.). At pp. 123 and 124, Murphy L.J.S.C. examines the law and states:

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[24] at 8.23.3
[25] *Robertson v. Broadbent* (1883), 8 App. Cas, 812 (U.K. H.L.), cited in Carmen S. Theriault, *Widdifield on Executors and Trustees*, 6th ed. Carswell at 5-45.
[26] Terence Sheard, Rodney Hull & Michael M.K. Fitzpatrick, *Canadian Forms of Wills*, 4th ed. (Toronto: Carswell, 1982) at 178
[27] John R. Martyn, Stuart Bridge & Mika Oldham, *Theobald on Wills*, 16th ed. (London: Sweet & Maxwell, 2001) at 275.

> [I]f, at the testator's death, a particular item of property is not found among his assets, a gift of it fails. The technical term for a failure of a gift in these circumstances is ademption. The gift is said to adeem. The rule is based on two assumptions. First, it is assumed that a testator who makes a gift of a particular item of property does not intend to confer general economic benefit on the beneficiary. Second, it is assumed that when property cannot be found in the testator's estate after his death, he intended to revoke the gift of it in his will.

Therefore, whenever a testator makes a bequest of a specific piece of property that is not found at the time of his or her death, the bequest adeems and fails on the basis that "the thing meant to be given is gone." Any proceeds of the disposition of that property fall into the residue of the estate (unless the testator has indicated in the will that the bequest includes any proceeds of disposition of the property).[28]

In administering a will, executors faced with a disposition that has adeemed should look beyond the mere fact of ademption, and consider how the gift adeemed. If the gift adeemed because it was disposed of by a guardian of property under the *Substitute Decisions Act,* the beneficiary of the adeemed gift is entitled to an equivalent amount, without interest, out of the residue. If the residue is not sufficient to pay all gifts that adeemed by reason of the guardian of property's acts, then the beneficiaries of the adeemed gifts take on a *pro rata* basis. As usual, a contrary intention in the will will prevail

Section 36 of the *Substitute Decisions Act* provides:

36. (1) Proceeds of disposition - The doctrine of ademption does not apply to property that is subject to a specific testamentary gift and that a guardian of property disposes of under this Act, and any one who would have acquired a right to the property on the death of the incapable person is entitled to receive from the residue of the estate the equivalent of a corresponding right in the proceeds of the disposition of the property, without interest.

(2) If residue insufficient – If the residue of the incapable person's estate is not sufficient to pay all entitlements under subsection (1) in full, the persons entitled under subsection

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[28] A.H. Oosterhoff, *Oosterhoff on Wills and Successions*, 6th ed. (Scarborough: Carswell, 2001) at 506; Wilson Estate v. Burrowes (1989), 34 E.T.R. 121 (B.C.S.C); Re Scratch, [1922] O.J. No. 518 (S.C.); Re Thornton Estate (1990), 85 Sask. R. 34 (Surr.Ct.); Nakonieczny v. Kaminski, [1980] 2 W.W.R. 738 (Sask.Q.B.) at 743, 746; Barnaby v. Petersen Estate (1996), 15 E.T.R. (2d) 138 (B.C.S.C).

(1) shall share the residue in amounts proportional to the amounts to which they would otherwise have been entitled.

(3) Will prevails - Subsections (1) and (2) are subject to a contrary intention in the incapable person's will. 1996, c. 2, s. 23

Strict Approach – Gift Will Adeem

There are a line of cases that suggest that if a testator owns property corporately, not personally, a gift of it fails. The case of *Re Thornton Estate* (1990), 85 Sask.R. 34 (Surr. Ct.), held that a testamentary gift of land not owned by the testator, but rather by the corporation of which the testator was the sole shareholder, was subject to the rule of ademption. Similarly, in the case of *Re Meier (Estate of)*, 2004 ABQB, the testator devised farmlands in his will to his brother. At the time of his death, however, the farmlands were owned by a corporation of which the deceased was the sole shareholder and director. The court maintained that the corporate assets belonged to the corporation, not the shareholder. It stated that "a sole shareholder has an interest in the corporate assets, but that interest does not operate so as to vest beneficial ownership of those assets in him". Accordingly, these cases are on point and stand for the proposition that "as the testator did not own the [property] at the time of his death, the gift fails".

A similar approach was taken in the case of *Earl v. Wilhelm* (2000), 183 D.L.R. (4^{th}) 45 (Sask. C.A), which dealt with the issue of professional negligence and whether the lawyers who prepared the will could be sued by the intended beneficiaries who failed to receive the benefit which the testator intended. The facts of this case are as follows. The testator had a successful farming operation and was instructed by his accountant to incorporate a company to take over the farming operations (apparently for tax purposes). The assets of the corporation included six sections of farmland owned by the testator, as well as the buildings on them. The consideration was paid in share capital, notably 999 shares going to the testator and 1 share going to his mother. Notwithstanding the sale to the corporation, title to the land was not transferred to the corporation (this was to avoid land titles fees). The same law firm that advised on the incorporation drew up the will for the testator. Thereafter, the land was shown as an asset of the corporation. When the lawyer drafted the will, there were devises of the six separate sections of land to certain individuals (some of whom were also the residuary beneficiaries). The court did not consider the doctrine of ademption in any great detail (in fact, this issue was disposed of at the motion stage), but stated that "the advice was almost unanimous that the specific devises of land were ineffective because the corporation, and not the testator, was the

beneficial owner of the land". This was upheld on appeal. Notably, several of the beneficiaries who took the position that the devises were ineffective were the residual beneficiaries in any event (*i.e.* so they had more to gain if the properties adeemed), one of the beneficiaries represented himself, and one of the beneficiaries was unrepresented. Although this case is often quoted, it does not appear that the issue of ademption was considered in any significant detail. Also, the testator was not the sole shareholder as his mother held one share of the company.

Some Evidence of a More Liberal Approach Being Taken in Ontario Courts – Gift Will Not Adeem

Ontario authority suggests that there may be some softening of the strict construction approach to the doctrine of ademption. U.S. and U.K. authority have also been decided differently. In the U.S. Annotation entitled "Validity, Construction, and Effect of Property Owned by a Corporation in which the Testator has a Majority Interest", [1988] 78 A.L.R 3d 963, they discuss the issue of bequests by a testator of property held by a "one-man" corporation. The issue in these cases is whether courts should ignore the corporate form to give effect to the testator's intention. U.S. courts are not at all reluctant to pierce the corporate veil and give effect to corporate property so long as the creditors of the company are not adversely affected. Also, *Halsbury's Laws of England*, (4th) para. 90, states that it is appropriate to pierce the corporate veil "in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature".

The case of *McDougald Estate v. Gooderham*, [2003] O.J. No. 3106 (Ontario Court of Justice), upheld on appeal 255 D.L.R. (4th) 435, is worth considering, and supports the view that Ontario courts may be taking a more liberal approach to this issue. Although the case primarily focuses on the application of the anti-ademption provisions set out in section 36(1) of the *Substitute Decisions Act*, the court provides some very useful dicta. In *Gooderham*, the testatrix was a wealthy woman who owned a vacation property in Florida (valued at the time at more than $5,000,000.00). The property was subject to a specific bequest in her will to her sister. However, the testatrix did not own the property personally, but rather it was held in a corporation of which she was the sole shareholder. The court also considered the fact that the wording of the will itself provided that if a property was held by a corporation, it was to be treated as if owned by the Testator personally to give effect to the specific bequests. Accordingly, the court

stated that there was "clearly an identity of interest between the Testator and the corporation that held her personally used property".

The anti-ademption provisions of the *Substitute Decisions Act* were at issue because her attorneys for property had elected to sell the property (despite the fact that they were aware of her wishes and had hoped to avoid ademption of the property). The residual beneficiaries argued that her specific bequest of the property adeemed as a result of the sale by the attorneys (*i.e.* and would therefore fall into the residue of the estate). Alternatively, they argued that because the property was held, and sold by, a corporation solely owned by the testatrix, rather than by her personally, section 36 of the Act did not apply.

The court held that since the testatrix owned the corporation and provided for the disposition of its holdings in her will, the fact that the corporation held property (rather than her personally) did not affect the application of section 36.

At the trial level, Wilson J. (upheld on appeal) states:

> Often, individuals [with vacation properties abroad] hold these properties in a corporation to avoid potential tax problems [and residency issues]. An overly technical approach, as suggested by the respondents, would defeat the clear intentions and wishes of Mrs. McDougald. **In my view, it matters not whether it was a corporation solely owned by Mrs. McDougald or it was Mrs. McDougald personally who owned and sold the personal use property**. Section 36 of the Act only says that the doctrine of ademption does not apply to "property", not "personally held property".

Notably, an interesting approach taken by the court (again, at the trial level) was the application of a corporate law principle, *i.e.* "lifting the corporate veil", to avoid an injustice to a third party. The court confirms that the facts and circumstances of this case would warrant piercing the corporate veil to avoid an injustice to a third party. Referring to the case of *Nedco Ltd. v. Clark* (1973), 43 D.L.R. (3d) 714 Sask.C.A.) at page 720, the court suggests that it may be appropriate to pierce the corporate veil if "the corporations are separate in law, [however], one may be under the control of the other to such an extent that together they constitute one common unit". The Ontario Court of Appeal also confirmed in *Meditrust Healthcare Inc. v. Shoppers Drug Mart, a Division of Imasco Retail Inc.*, [2002]O.J. No. 3891 (C.A.) at 794, that a court may pierce a corporate veil for the benefit of innocent third parties.

Another Ontario case worth considering is that of *Doyle v. Doyle Estate*, [1995] O.J. No 3498 (Greer J.), which deals with a situation where the testator left income from shares in a company to certain beneficiaries. As a result of certain tax roll-overs, his shares were owned by a company (and not by him personally). The issue for determination was whether there had been an ademption of the deceased's shares "given the fact that the deceased did not directly own such shares at the date of his death". The fact that the bequest was of "income" from the sale of the shares, and not specifically of the shares, was significant. The court referred to *Re Thornton* (above) and stated that in that case the bequest failed because "it was a bequest relating to land which was no longer owned, or had never been owned, by the testator at his death". The court held that ademption did not take place where there had only been a change in the name or form of the asset.

Conclusion

As one can see, issues involving insolvent estates can be both complex and difficult given the fact that, in most cases, there are not sufficient assets in the estate to pay the gifts that were either expected or, at minimum, hoped for in the administration of the assets of the estate.

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