

TAB 9**Transmission on Death of Private Company
Shares Without Probate**

Michael Disney
Davies Ward Phillips & Vineberg LLP

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Probate – Pros and Cons

Section 47 of the *Trustee Act* (Ontario) is generally regarded as protecting parties dealing with personal representatives acting under a will that has been admitted to probate, even if the probate is later revoked:

"Where a court of competent jurisdiction has admitted a will to probate ..., even though the grant of probate ... may be subsequently revoked as having been erroneously made, all acts done under the authority of the probate ..., including all payments made in good faith to or by the personal representative, are as valid and effectual as if the same had been rightly granted or made, but upon revocation of the probate ..., ... the new personal representative may ... recover from the person who acted under the revoked grant or appointment any part of the estate remaining in the person's hands undistributed and, subject to the *Limitations Act*, 2002, from any person who erroneously received any part of the estate as a devisee, legatee or one of the next of kin, or as a spouse of the decedent ..., the part so received or the value thereof."

For this reason, banks and other financial institutions often have policies that require (or which they interpret as requiring) that evidence of probate be provided in order for the institution to act on instructions of personal representatives in regard to financial assets of the deceased.¹

However, since obtaining probate requires the payment of Ontario's 1.5% estate administration tax, avoiding the necessity for probate is advantageous from the standpoint of an estate. In particular, dual wills have become a common technique in Ontario for avoiding estate administration tax if a significant part of the value of the testator's assets consists of shares of a private corporation. Where dual wills are used, the shares are dealt with in one will, while the testator's other assets are dealt with in the other will. The intent is that only the latter will would

¹ Notwithstanding s.460(1) of the *Bank Act* (Canada), which protects a bank in acting on the basis of either probate or merely a notarial copy of the will plus an affidavit of transmission.

be admitted to probate. In order for this technique to work effectively, it is of course essential that there be no obstacle to the personal representatives being recognized as the owner of the shares without probate.² The provisions of corporate statutes that are relevant to this issue have seldom been considered by the courts. Since private corporations in Ontario are most commonly incorporated under the *Business Corporations Act* (Ontario) (the "OBCA"), this paper will concentrate on the relevant provisions of the OBCA and the related provisions of the *Securities Transfer Act, 2006* (Ontario) (the "STA") to which the OBCA refers.³

Conflict of Laws Issues

As a preliminary matter, it is essential to determine what laws apply to the issues that are being considered. Not surprisingly, subsection 44(2) of the STA provides, in part, that:

"The law, other than the conflict of law rules, of the issuer's jurisdiction governs,

- (a) the rights and duties of the issuer with respect to the registration of transfer; [and]
- (b) the effectiveness of the registration of transfer by the issuer"

Under subsection 44(5), the "issuer's jurisdiction" is the jurisdiction of incorporation of a corporation. Therefore, the OBCA will govern the formalities that personal representatives must comply with in order to obtain transfer of shares of an OBCA corporation held by the deceased into their names, or into the names of the persons entitled to the shares under the will. However, the law governing the transmission of the shares on the death of the deceased would be determined according to a different conflict rule. Therefore, if the deceased were domiciled in a jurisdiction other than Ontario, it would be the law of that jurisdiction that would govern the

² Practical proposals to address this potential problem are discussed in more detail by Barry Corbin, "Death of a Shareholder: Corporate Issues in Probate Planning", Law Society of Upper Canada, *The Six-Minute Estates Lawyer* 2007.

³ Most other Canadian corporate statutes have similar provisions. The parallel provisions of the *Canada Business Corporations Act* (the "CBCA") will be noted.

transmission.⁴ This distinction may have significant consequences, for example, if the law of that other jurisdiction treats the authority of personal representatives as deriving from probate rather than from the will.

Transfer of Shares under the OBCA on Transmission from Deceased

The key provisions of the OBCA dealing with the obligations of an OBCA corporation to register a transfer of shares where a transmission of the shares has occurred on the death of the shareholder are set out in section 67. Subsection 67(2) of the OBCA provides as follows, to the extent relevant:

"A corporation whose articles ... restrict the right to transfer its securities shall, and any other corporation may, treat a person referred to in clause (a) ... as a registered security holder entitled to exercise all the rights of the security holder that the person represents, if that person furnishes evidence as described in section 87 of the [STA] to the corporation that the person is,

- (a) the executor, administrator, estate trustee, heir or legal representative of the heirs, of the estate of a deceased security holder"⁵

As will be set out in more detail below, the "evidence" referred to in subsection 67(2) could consist of merely a copy of the will. Therefore, at any time following the death of the deceased, upon the personal representatives providing a copy of the will to a private corporation, the corporation (since it will have transfer restrictions in its articles) would be required by subsection 67(2) of the OBCA to treat the personal representatives as a registered security holder entitled to exercise all of the rights of the deceased in the shares. These rights would include the right to vote, the right to receive dividends and the right to receive the remaining property of the corporation on a dissolution, together with the statutory rights of shareholders under the OBCA.

⁴ Castel & Walker, *Canadian Conflict of Laws*, 6th ed., 2005 +, §27.2.

⁵ CBCA, s. 51(2).

However, subsection 67(2) does not address the corporation actually registering the personal representatives as the registered holder of the shares in the share register of the corporation.

Subsection 67(7) of the OBCA provides, to the extent relevant, as follows:

"... a person referred to in clause (2)(a) is entitled to become a registered holder or to designate a registered holder, if the person deposits with the corporation or its transfer agent,

- (a) the original grant of probate ..., or a copy thereof certified to be a true copy by,
 - (i) the court that granted the probate ...,
 - (ii) a trust corporation incorporated under the laws of Canada or a province, or
 - (iii) a lawyer or notary acting on behalf of the person; ...

together with,

- (c) an affidavit or declaration of transmission made by the person stating the particulars of the transmission;
- (d) the security certificate that was owned by the deceased holder, ... and
- (e) any assurance the issuer may require under section 87 of the [STA]."⁶

Therefore, a corporation is only **obligated** under subsection 67(7) of the OBCA to record executors or trustees under a will as the registered holder of shares owned by the deceased if the will has received probate. Subsection 67(9) provides that:

"Deposit of the documents required by subsection (7) ... empowers a corporation or its transfer agent to record in a securities register the transmission of a security from the deceased holder to a person referred to in clause (2)(a) or to such person as that person may designate and, thereafter, to treat the person who thus becomes a registered holder as the owner of those securities."⁷

⁶ CBCA, s. 51(7).

⁷ CBCA, s. 51(9).

However, subsection 67(7) does not **prevent** a corporation from registering a transfer to executors or trustees under a will based on evidence other than probate, if other evidence is acceptable to the corporation. A closely-held corporation, which will have transfer restrictions in its articles in order to qualify as a "private issuer" for purposes of securities laws,⁸ is obligated by subsection 67(2) to treat the executors or trustees under the will of a deceased shareholder as entitled to all of the rights of the deceased, based simply upon a copy of the will. It may also choose to treat the will as sufficient evidence to transfer registered ownership to the executors or trustees, based upon the corporation's knowledge of the deceased shareholder and confidence that the executors or trustees have proper authority under the will.⁹

As was noted above, if the testator was domiciled in a jurisdiction other than Ontario, the transmission of the shares of an Ontario corporation will be governed by the laws of such domicile, even though issues relating to the transfer of the shares to the personal representatives will be subject to the OBCA. Subsection 67(8) of the OBCA deals expressly with such circumstances:

"Despite subsection (7), if the laws of the jurisdiction governing the transmission of a security of a deceased holder did not require a grant of probate ... in respect of the transmission, the legal representative of the deceased holder is entitled ... to become a registered holder or to designate a registered holder, if the legal representative deposits with the corporation or its transfer agent,

(a) any security certificate that was owned by the deceased holder; and

⁸ The definition of "private issuer" is set out in s. 2.4 of National Instrument 45-106. Typically, the transfer restrictions in the articles of a closely-held corporation require that the transfer of shares be approved by resolution of the board of directors or of the shareholders. Transfer restrictions of this kind are not permitted in respect of shares that are offered to the public: OBCA, s. 42.

⁹ Typically, however, a widely-held corporation, that has no information regarding most of its shareholders other than what is reflected in the share register, would be concerned about its potential liability for wrongful transfer if it recorded a transfer to executors or trustees under a will based on evidence less than that set out in subsection 67(7), which obligates the corporation to record the transfer and gives it the protection of subsection 67(9). A widely-held corporation is also not obligated to recognize the rights of executors or trustees under a will pursuant to subsection 67(2), although it may choose to do so.

- (b) reasonable proof of the governing laws, the deceased holder's interest in the security and the right of the legal representative or the person the legal representative designates to become the registered holder."

Read literally, this provision could be applied even to the transmission of shares owned by a testator domiciled in Ontario, since as noted above, the laws of Ontario do not require probate in respect of the transmission. Subsection 67(7) could then be interpreted as applying only where the law of a testator's domicile requires probate in respect of the transmission of the shares, although if that was intended by the drafters, it is odd that the provision is not introduced by language mirroring that in subsection 67(8), such as "if the laws of the jurisdiction governing the transmission of a security of a deceased holder require a grant of probate ... in respect of the transmission". In any event, either subsection 67(8) applies to the transmission of shares owned by an Ontario testator, in which case it requires that the transfer of the shares to the personal representatives be registered (whether or not there are transfer restrictions, apparently), if the personal representatives provide the stipulated documents, or subsection 67(7) was intended to apply to a transmission of shares owned by an Ontario testator, in which case, as discussed above, as a practical matter there is nothing that requires the corporation to demand probate, although it would have the ability to do so if it chose.

The Frye Estate Decision

The recent decision of the Ontario Court of Appeal in *Frye v. Frye Estate*¹⁰ contains one of the few judicial considerations of the effect of these provisions of section 67 of the OBCA. It highlights the fact that the mandatory requirement in subsection 67(2) that a corporation whose articles restrict the right to transfer its securities must treat personal representatives as a registered security holder is not conditional upon the securities transfer restriction having been

¹⁰ 2008 ONCA 606 (CanLII), leave to appeal refused Feb. 5, 2009 (S.C.C.).

complied with. In that case, the testator had bequeathed his shares in a family holding corporation to his sister. The corporation had customary transfer restrictions in its constating documents and was subject to a unanimous shareholder agreement, which further restricted the transfer of its shares and required that any shareholder wishing to sell shares first comply with a right of first refusal. At trial, the court held that the provisions of the shareholder agreement precluded the testator from bequeathing his shares to his sister. The Court of Appeal disagreed and held that "contractual obligations do not constrain a person's ability to bequeath property by means of a will"¹¹. The Court of Appeal then made the following comments on the effect of section 67 of the OBCA:

"Pursuant to s. 67(2), Cam's executors are entitled to be treated as the registered holders of the shares he bequeathed to Cheryl.

Nor was s. 67(7) of the [OBCA] brought to the attention of the trial judge. As the parties did not address the import of s. 67(7), I would leave it to them to consider whether it overrides the requirement of the letters patent that a resolution of the board of directors is required to approve the registration of the transfer of shares to the estate trustees.

In any event, there is no basis for finding the specific bequest to be null and void. Legal title to the shares is transmitted by the Will to the estate trustees, who hold them in trust for Cheryl. However, the estate trustees are bound by the shareholders' agreement and cannot distribute the shares out of the estate to Cheryl without complying with the requirements of the shareholders' agreement and the letters patent. The estate trustees' inability to transfer the shares to Cheryl immediately does not, however, render the bequest void.

... During the interim, the estate trustees, as bare trustees for Cheryl, must exercise the rights associated with the shares as she directs."¹²

Although the Court of Appeal did not decide whether subsection 67(7) would override transfer restrictions, it dropped a heavy hint that this would probably be its view. It may be

¹¹ *Ibid.*, para. 19.

¹² *Ibid.*, paras. 20-23.

wondered whether this result was deliberately intended by the drafters of the statutory provisions, given that there are no words in subsection 67(7) expressly overriding transfer restrictions, as compared with the express reference to transfer restrictions in subsection 67(2). However, the result is probably logical and will make little difference, since as *Frye Estate* itself demonstrates, any further transfer of the shares by the personal representatives will be subject to the transfer restriction. Becoming the registered holder provides the personal representatives with no obvious advantage over their position under subsection 67(2), by virtue of which they can exercise all of the rights attaching to the shares without being registered as the holder.

Evidence of Fiduciary Status - STA Provisions

Section 67 does not constitute an exhaustive scheme in regard to transfers of shares of an OBCA corporation to persons acting in a representative capacity, such as executors or trustees under a will. Section 53 of the OBCA provides that:

"Except as otherwise provided in this Act, the transfer or transmission of a security is governed by the [STA]."

Under the relevant provisions of the STA, an issuer has considerable discretion to make judgments as to the sufficiency of the evidence presented to it for purposes of requesting the registration of a transfer, that (among other things) enables an issuer, if it deems it appropriate, to register a transfer to executors or trustees under a will, or to a further transferee as directed by such executors or trustees, based solely on a copy of the will.

Subsection 86(1) of the STA provides, to the extent relevant, as follows:

"If a certificated security in registered form is presented to an issuer with a request to register a transfer of the certificated security ..., the issuer shall register the transfer as requested if,

- (a) under the terms of the security, the proposed transferee is eligible to have the security registered in that person's name;

- (b) the endorsement or instruction is made by the appropriate person or by an agent who has actual authority to act on behalf of the appropriate person;
- (c) reasonable assurance is given that the endorsement or instruction is genuine and authorized;
- (d) any applicable law relating to the collection of taxes has been complied with;
- (e) the transfer does not violate any restriction on transfer imposed by statute or by the issuer ...; [and] ...
- (g) the transfer is rightful or is to a protected purchaser."¹³

In the case of the presentation to the issuer of share certificates endorsed by the executors or trustees under a will, with the request that the issuer register a transfer into the names of the executors or trustees or another person, clauses 86(1)(b) and (c) are of particular relevance. For purposes of clause 86(1)(b) "appropriate person" is defined in subsection 1(1) of the STA to include (in clause (d)), if the person specified by a security certificate is deceased, "that person's personal representative acting for the estate of the deceased person".¹⁴ With respect to clause 86(1)(c), subsection 87(1) of the STA provides, to the extent relevant, as follows:

"An issuer may require the following assurance that each necessary endorsement ... is genuine and authorized: ...

- 3. If the endorsement is made ... by a fiduciary ... referred to in clause (d) ... of the definition of 'appropriate person' in subsection 1(1), appropriate evidence of appointment or incumbency.
- 4. If there is more than one fiduciary ... referred to in clause (d) ... of the definition of 'appropriate person' in subsection 1(1), reasonable assurance that all who are required to sign have done so. ..."¹⁵

¹³ CBCA, s. 76(1).

¹⁴ See CBCA, s. 65(1)(d).

¹⁵ CBCA, s. 77(1)(b), (c).

For purposes of section 87, subsection 87(3) defines "fiduciary" to include "a personal representative acting for the estate of a deceased person" and defines "appropriate evidence of appointment or incumbency", as required by clause 87(1)3, as follows:

- "(a) in the case of a fiduciary appointed or qualified by a court, a document issued by or under the direction or supervision of the court or an officer of the court and dated within 60 days before the date of presentation for transfer,
- (b) in any other case,
 - (i) a copy of a document showing the appointment,
 - (ii) a certificate certifying the appointment issued by or on behalf of a person reasonably believed by the issuer to be a responsible person, or
 - (iii) in the absence of a document or certificate referred to in subclause (i) or (ii), other evidence that the issuer reasonably considers appropriate ..."¹⁶

In referring to "a fiduciary appointed or qualified by a court", clause 87(3)(a) should not be interpreted as referring to the probate of a will in Ontario. Under Ontario law, executors or trustees appointed under a will derive their appointment and their authority from the terms of the will, not from the order of the court granting probate.¹⁷ The term "qualified", which has no particular meaning under Ontario law, reflects that the language of this provision, like most of the rest of the STA, is closely modelled on the wording of Article 8 the *Uniform Commercial Code* and therefore reflects requirements that exist under U.S. law that have no equivalent in

¹⁶ CBCA, s. 77(4).

¹⁷ In Ontario, executors appointed by a will derive their title from the will, and the property of the deceased vests in them on the death of the testator. The grant of probate (which in Ontario is now called a "Certificate of Appointment of Estate Trustee with a Will") is merely the authenticated evidence of the title of the executors, which is required for the purpose of certain proceedings in court. See Williams, Mortimer & Sunnucks, *Executors, Administrators and Probate* (2008) at 97; Macdonell, Sheard and Hull, *Probate Practice*, 4th ed. (1996) at 185; *Carmichael v. Carmichael Estate* (1999), 31 E.T.R. (2d) 33 at 39-40 (Ont. Sup. Ct.); *Silver Estate v. Silver* (2000), 35 E.T.R. (2d) 287 (Ont. Sup. Ct.). The position is apparently different in most states of the United States. See Atkinson, *Law of Wills*, 2nd ed. (1953) at 64; *Scott on Trusts*, 4th ed. (1989) §557.

Ontario. Therefore, with respect to an Ontario will, clause 87(3)(b) is applicable and a copy of the will would constitute "appropriate evidence of appointment or incumbency".

It is important to note that subsection 87(2) of the STA provides that "an issuer may elect to require reasonable assurance beyond that specified in this section." Therefore, there is nothing to preclude an issuer from refusing to register a transfer at the request of executors or trustees under a will unless the will has been admitted to probate, if the issuer considers that precaution to be necessary for its own protection (which of course a private corporation is unlikely to do). Therefore, there is no inconsistency between sections 86 and 87 of the STA, on the one hand, and section 67 of the OBCA, on the other.

One-Person Corporations: Practical Issues

Private corporations the shares of which are bequeathed by a will are often personal holding corporations or other "one-person" corporations where the testator may be the only director, officer and shareholder. As a matter of corporate law, there is nothing problematic in the personal representatives, after the testator's death, proceeding to use their powers as shareholder, to which they are entitled by virtue of subsection 67(2) of the OBCA, to elect new directors and otherwise take control of the operations of the corporation. Attached as an Appendix to this paper is a sample resolution showing the simplicity of this process.

However, banks and other financial institutions that have policies which they interpret as requiring probate as evidence that personal representatives are entitled to deal with the deceased's assets may not appreciate the difference between assets held by the deceased personally and assets held through the deceased's corporation. The sole director and officer of a "one-person" corporation is of course also likely to have been the only person with signing authority to operate the corporation's bank accounts. The personal representatives may encounter difficulties in persuading the bank to accept them as the new signing authorities. A

bank manager is unlikely to understand the effect of subsection 67(2) of the OBCA, as it has been explained in this paper. In many cases, however, particularly if the deceased and the personal representatives are known to the financial institution and there is no apparent dispute over the estate, a letter from the estate's solicitor to the financial institution may be all that is required to persuade the financial institution not to insist on probate.

These difficulties can also be avoided if the deceased is not the sole signing officer for the corporation. If the corporation has one or more other directors, the surviving director or directors can continue to deal with the corporation's bank without interruption, as the bank will already have on file its standard documentation establishing the authority of the surviving directors to operate the corporation's accounts and the bank manager will have no difficulty understanding that the death of one director has not affected the ability of the survivor or survivors to continue to act on behalf of the corporation.

However, it is not always practical or convenient for the sole shareholder of a "one-person" corporation to ask one or more individuals to serve as directors of the corporation. While the shareholder can readily ensure that his or her control of the corporation is not affected, if necessary by restricting the directors' powers through a unanimous shareholder agreement, this introduces the need for more complicated documentation of the affairs of the corporation. Individuals who attempt to do their own corporate housekeeping without professional assistance often make a very poor job of it, or do not prepare the appropriate corporate documentation at all. Therefore, there are dangers in proposing more complex corporate governance to a testator who has a "one-person" corporation, unless the testator can be relied upon to deal with corporate formalities conscientiously, or delegate them to professional advisors.

APPENDIX
RESOLUTION OF THE SHAREHOLDER
OF
MARLEY'S PAYDAY LOANS INC.

WHEREAS Jacob Marley, prior to his death, was the sole shareholder of Marley's Payday Loans Inc. (the "Corporation"), holding one common share (the "Share");

AND WHEREAS pursuant to the Last Will and Testament of Jacob Marley dated December 24, 2008, Ebenezer Scrooge was appointed the Trustee and Executor of the Estate of Jacob Marley (the "Estate");

AND WHEREAS pursuant to subsection 67(2) of the *Business Corporations Act* (Ontario), the Corporation therefore shall treat Ebenezer Scrooge, as Trustee and Executor of the Estate, as a registered security holder entitled to exercise all of the rights of the deceased as the shareholder of the Corporation;

AND WHEREAS it is desirable to elect the director of the Corporation and confirm the transfer of the Share as aforesaid;

ELECTION OF DIRECTOR

IT IS RESOLVED THAT:

1. the number of directors of the Corporation and the number of directors to be elected at the annual meeting of the shareholders of the Corporation is one; and
2. Ebenezer Scrooge is elected the director of the Corporation.

TRANSFER OF SHARE

IT IS RESOLVED THAT:

pursuant to the restrictions on transfer contained in the articles of the Corporation, the transfer by operation of law upon the death of Jacob Marley of the Share from Jacob Marley

to Ebenezer Scrooge, Trustee and Executor of the Estate of Jacob Marley, is approved and it is directed that Ebenezer Scrooge, as Trustee and Executor of the Estate of Jacob Marley, be registered as the holder of the Share.

The undersigned, being the sole shareholder of MARLEY'S PAYDAY LOANS INC., passes the foregoing resolutions pursuant to the *Business Corporations Act* (Ontario).

DATED as of April 6, 2009.

Ebenezer Scrooge,
Trustee and Executor of
the Estate of Jacob Marley