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TRUSTS AND ESTATES: THE ESSENTIAL UPDATE

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TRUSTS AND ESTATES: THE ESSENTIAL UPDATE

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1. Testator's Moral Obligations Under the B.C. *Wills Variation Act*

Wilson v. Lougheed, [2010] B.C.J. No. 2628, 2010 BCSC 1868 (CanLII)

N.L. died in 2007, leaving a 1989 will which left to her husband W.L., in addition to the assets passing outside of the will to him, approximately 98.6% of her estate, and 1.4% to her daughter K. K. had previously received some financial support and *inter vivos* gifts from her mother, as well as a substantial settlement regarding an estate freeze entered into by her mother and W.L., who was K.'s adopted father. It was established, among other relevant facts, that K. had a close and loving relationship with her mother, and had been financially dependent on N. for her entire life. N.'s assets were valued at approximately \$26M at her date of death (\$6.2M of which passed directly to W.L. outside of her estate, and \$420K of which passed to K. by virtue of a beneficiary designation in her favour on N.'s RIF). Under N.'s will, K. was given certain personal property and real estate, some of which had been sold prior to N.'s death. K. applied under the B.C. *Wills Variation Act* for a variation of N.'s will on the basis that N. had not made adequate provision for her.

The court considered whether N. had made adequate provision in her will for the proper maintenance and support of her daughter, and if not, whether the court should vary N.'s will pursuant to the *Wills Variation Act* to make adequate, just and equitable provision for her.

The court readily came to the conclusion that 1.4% of N.'s estate was inadequate provision for K., based upon the relevant factors to be considered in such cases. The factors cited by the court as relevant to a consideration of a parent's moral obligation to a child included the size of the estate, the reasonably-held expectations of the child, the standard of living of the testator and the child, the child's financial need and other personal circumstances, the other beneficiaries of the estate, and the actual and reasonably foreseeable circumstances of the

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child at the parent's date of death. The court noted that these factors overlapped and should not be viewed as independent of each other.

The trial judge characterized the inquiry in these cases as whether the testator had acted as a judicious parent as measured by an objective standard, assessed in the light of current societal legal and moral norms, moral norms being defined as society's reasonable expectations of what a judicious parent would do in the circumstances, by reference to contemporary community standards. She noted that in circumstances where adequate provision for a child had not been made, testamentary autonomy was overridden by the legislative considerations implemented under the *Wills Variation Act*.

The trial judge concluded that although the testator's moral duty owed to her spouse was stronger than her duty to her daughter, nevertheless given the large value of the estate and W.L.'s own considerable assets (approximately \$25M), in conjunction with other factors, it would not be just or equitable to deny K. a larger share of her mother's estate. She varied the will to give K. a \$5.5M legacy, which amounted to approximately 20% of the value of N.'s assets.

This case provides a thorough and reasoned examination of the principles to be considered in the application of the B.C. *Wills Variation Act*, as well as being an example of a substantial award given under this Act. This case is also of relevance to practitioners outside of B.C., as the analysis and relevant factors regarding a parent or spouse's moral obligations could have application to dependant's relief claims, further eroding testamentary freedom in cases where dependents are successful in making such claims.

2. Determination of Domicile of Deceased at Date of Death – Domicile of Choice not Abandoned

Re Foote Estate, 2011 CEAG 31,729 Alberta (C.A.)

The deceased's spouse and children were considering making application for dependant's relief and had applied to the Alberta Court for advice and directions as to (i) interpretation and validity of an "in terrorem" or anti-litigation clause in the deceased's will and (ii) where the deceased was domiciled at date of his death. Prior proceedings (*Re Foote (Estate of)* 2007 ABQB 654) had dealt with whether the Alberta court had jurisdiction and was the appropriate forum to determine the issue of the deceased's domicile, which it determined it was. The deceased left a large estate valued at over \$130 million. He was born and educated in Alberta, and practiced law there until 1967. He then resided in Japan, and then on Norfolk Island, a territory of Australia, before his death in 2004 in Edmonton, Alberta. Norfolk Island has notoriety as the island where the survivors of The Bounty inhabited, and most of the present inhabitants are their descendants.

The bulk of the residue of the estate was left to a British Virgin Islands corporation, which was required to divide its assets between an Australian charity and the Edmonton Community Foundation.

In determining whether the deceased was domiciled in Alberta or Norfolk Island at his date of death, the trial court had found in favour of Norfolk Island, after an extensive review of the facts. On appeal, there was no dispute that the deceased's domicile of origin was Alberta, and that in accordance with the trial judge's findings, that the deceased had acquired a domicile of choice in Norfolk Island. The primary issue concerned whether the deceased abandoned his Norfolk Island domicile when he returned to Canada for cancer treatment, where he died shortly thereafter. He had also acquired a condominium five years prior thereto in Victoria, B.C., and spent the summers there immediately before his death, and there was evidence that he and his spouse planned to retire there in future. The Court of Appeal upheld the trial court's decision that the deceased had not abandoned his domicile of choice in Norfolk Island, emphasizing that in order to make a change of domicile, the choice must be a voluntary one, "not dictated by business, debts or health," and that to lose domicile requires an intention to cease to reside in a place and acts to end one's residence.

3. New Wills and Succession Legislation in Alberta

Alberta has now passed its new Wills and Succession Act (the "Act") and it has received Royal Assent. The Act will come into force on a date set by proclamation, which is being held off on for now to allow for preparation and education, although it is expected in early 2012. The Act will apply to wills made and deaths which occur on or after the day the Act is proclaimed in force.

The Act is a modernization, consolidation and harmonization of Alberta's current succession law and repeals the Dependents Relief, Intestate Succession, Survivorship, and Wills Acts and section 47 of the Trustee Act. It also makes changes to other Alberta legislation. Needless to say, the changes made in the new Act are sweeping, not the least of which is the new (to Alberta) notion of a court having extensive ability to find that a testator had a contrary intention to that in a will, beneficiary designation or other testamentary documents, allowing for more court intervention and "fixing" of wills in Alberta.

Examples of some of the other changes to the wills and succession laws implemented in the new Act include:

1. a court may now rectify a will if it is satisfied that the will does not reflect the testator's intentions because of a mistake or a failure to give effect to the testator's instructions by a person who prepared the will;

2. codification of the types of evidence that a court may look at in determining admissible evidence;
 3. a gift in a will to the testator's ex-spouse will be revoked upon divorce unless a contrary intention is shown;
 4. the definition "child" is harmonized with the *Family Law Act* (Alberta), and includes children in the womb at the time of the testator's death who are later born alive;
 5. abolition of the preferential share for a spouse on an intestacy and a provision that the surviving spouse receives the entire estate if the intestate's other descendants are also descendants of the surviving spouse;
 6. separated spouses will be deemed to have predeceased for the purposes of the new intestate succession regime;
 7. concurrent changes to the *Matrimonial Property Act* to allow spouses to make claims upon death as well as divorce; and,
 8. abolition of certain presumptions of advancement and presumptions regarding gifts to creditors and beneficiaries named in a will.
4. **Conflict of Laws and Administration of Estates - Change of Administration of Trusts From Quebec to Alberta - Restriction of Beneficiaries Rights to an Accounting Based Upon Applicable Law of Administration Being Quebec**

Webster-Tweel v. Royal Trust Corp of Canada (2010), 185 ACWS (3d) 1098, 2010 ABQB 139 (Alta QB)

In this case, the applicant beneficiary was requesting a complete accounting for a lengthy period for three related trusts of which she was a contingent beneficiary. The corporate trustee claimed that the law of Quebec, the original location of the trust's assets and administration, governed such a request for two of the trusts under conflict of law principles, even though the assets and administration of the trust had been deliberately moved to Alberta by the trustee in 1978. The trust deed of the third trust selected Quebec law to govern, and therefore the conflict of law issue only arose regarding the other two trusts. Based upon uncontroverted expert evidence, if Quebec law applied, the beneficiary was not entitled to any more information or further accounting than she had already received.

The court had to consider whether Alberta or Quebec law should apply in relation to the beneficiary's application for a complete accounting for the entire period of the administration of the three trusts.

The court characterized the issue of a beneficiary's right to an accounting as most closely involving the administration of a trust, and that the law of the jurisdiction with the closest connection to a trust should govern the administration of the trust. The court went on to find that this law also applied to determine the question of whether the law governing the administration of the trust had been validly changed during the course of the trust administration.

The court determined (uncontroversially) that at the inception of the trusts, Quebec had been the jurisdiction most closely associated with the trusts. Therefore, Quebec law governed whether the law governing the trusts' administration had been validly changed. Unchallenged expert evidence established that under Quebec law, the law applicable to a trust's administration is immutable unless a court order changing such law is obtained, or, prior to 1994, a private member's bill had been passed by the Quebec legislature changing such law. Since neither exception applied in this case, the court held that Quebec law governed the applicant beneficiary's entitlement regarding an accounting for the trusts, despite the 1978 change of jurisdiction of the trust.

This case is of interest to practitioners as it confirms that in Alberta, and likely in other provinces, the court will respect and apply conflict of law principles in respect of a trust based upon the law of the closest-connected jurisdiction, notwithstanding that this may be extremely detrimental to a beneficiary's rights to obtain an accounting from the trustees, which is looked on in common law jurisdictions as a fundamental right of beneficiaries.

5. Validity of Change of Beneficiary under Insurance Contract by Attorney Under General Power of Attorney

Re Moss (Bankrupt), 2010 MBCA 39 (CanLii)

One of the issues addressed by the Court of Appeal was whether the attorney had the authority to sign change of beneficiary forms acting under a general power of attorney granted to him by the donor. The issue arose in the context of a change of beneficiary from the donor of the attorney, E.M. of her son D.M., to her granddaughter, C.M. D. M. was also her attorney, and a bankrupt. The trustee in bankruptcy and a financial institution appealed the trial judge's decision that held the change of beneficiary forms were validly executed, and sought a declaration that the proceeds of the policies were the property of D.M., and should be paid to his trustee in bankruptcy. The Court of Appeal found D.M. had no authority to change a beneficiary under a general power of attorney which did

not specifically permit the designation or alteration of beneficiaries of an insurance policy and that the power of attorney must be a specific one. The court granted the declaration and relief sought by the applicants.

6. Solicitor's Negligence - Disappointed Beneficiary - Duty of Care - Time Frame for Preparing a Will

McCullough v. Riffert, 2010 ONSC 3891 (Can LII)

R.M. died ten days after giving instructions to a lawyer for his will, which was never executed. R.M.'s niece would have received his entire estate under his new will. Instead, his three estranged children became entitled on an intestacy. Niece, as the "disappointed beneficiary", sued lawyer in negligence for not attending to the preparation and execution of the will before R.M. died. No medical evidence was called at trial because R.M. had refused to seek medical advice, although he appeared very ill for undiagnosed reasons and emaciated.

In its decision, the court reviewed three questions:

- (1) What is the standard of care required of the solicitor in preparation of a will?
- (2) Is the solicitor liable to a disappointed beneficiary?
- (3) In the circumstances of this case, did the solicitor fail to meet the standard of care?

In setting out considerations in evaluation of a solicitor's actions and whether he or she have acted as a reasonably competent solicitor where a testator dies before the will is executed, the court referred to several factors:

- (1) The terms of the lawyer's retainer: for example whether a precise timetable is agreed upon.
- (2) Whether there was any delay caused by the client.
- (3) The importance of the will to the testator.
- (4) The complexity of the job - for example the more complex the job the more time required.
- (5) The circumstances indicating the risk of death or onset of incapacity in the testator; and
- (6) Whether there has been a reasonable ordering of the lawyer's priorities.

In this case, the court concluded the lawyer met the standard of care, and was not negligent, and referenced several factors, including the timing of the appointment for the initial meeting made one week after the niece's call who arranged it, and that the will was sent out in three days, well before the lawyer's note to send a draft out, the deceased attended the meeting, walked with the aid of a cane, was properly dressed, did not express any urgency other than that the will be completed before a planned trip in two months, there was no diagnosis that R.M. had a terminal illness, R.M. did not call back after the meeting nor did the niece to see if the will was ready, and that the niece was shocked when he died ten days later, not expecting it.

The court commented there is a "continuum between a client who presents without any particular concerns regarding health or age and a client who is clearly on his or her death bed. The level of urgency to prepare a will quickly will increase as factors mount". Interestingly, no reference is made in the case, including the expert evidence, that the coroner's report indicated the cause of death was suspected myocardial infarction, not terminal cancer as alleged by the niece.

7. Estate Freeze - Transfer of Common Shares to Son - Whether Shares Excluded Property under Ontario *Family Law Act*

McNamee v. McNamee, 2010 Carswell Ont 7316 (Ont. S.C.)

This case has caused a fair amount of consternation among estate planners as it raises issues with regard to whether shares ostensibly gifted to a child as part of an estate freeze are excluded property as a "gift during marriage". It is helpful in providing guidance with regard to steps to take to ensure the necessary exclusion will be available on termination of a marriage.

Father froze his company and "gifted" new common shares to his son, at which time father executed a declaration of gift to evidence his intention. On son's marriage breakdown, the issue arose of whether the shares were excluded property and therefor not subject to equalization with his spouse. Evidence showed son had an unclear knowledge of the nature of his ownership in the company, and it was only after separation that he learned shares had been transferred to him in conjunction with a declaration of gift. The court considered in detail whether there was a gift of the shares, and set out various conditions that have to be met to ensure a valid gift. The court found there was not a valid gift for several reasons, including the father did not have the necessary donative intent and there had been no acceptance by the son of the shares, relying on the fact that the son was not even aware of the declaration of gift until after his separation.

The case is helpful in underlining the need for the parties to a legal transaction to have a clear understanding of its nature if it is to be given legal effect, and that all necessary steps must be properly completed, including an informed acceptance where a gift of shares is to be made in the context of an estate freeze.

8. Recent Amendments to Ontario's *Estate Administration Tax Act*, 1998

Now in force in Ontario, Royal Assent having been given May 12, 2011, the Ontario government has amended the *Estate Administration Tax Act*, 1998 (the "Act"), with substantial consequences for executors and those professionals advising them. There are three changes of significance to practitioners.

First, the Minister of Revenue, and not the Attorney General, is now responsible for collection of information, assessment of tax under the Act, and enforcement of the Act. This signals a new desire on the part of the provincial government to enforce the provisions of the Act and not simply rely on executors and administrators to report and pay the proper amounts of tax payable under the Act, as is the case under the current regime.

Second, the Minister of Revenue is charged with collecting prescribed information regarding the deceased person when an estate representative makes an application for an estate certificate (i.e. a probate or other similar application). No regulations regarding this prescribed information have been enacted yet, but we expect that such regulations will be enacted in the near future, and will require executors to provide detailed asset information on applications for estate certificates. Currently, only total figures for estate assets (personal property and real property being separated and a total then being provided) are required when making such applications. We expect that this information will be used to initiate audits of estates involving reasonable asset values and completeness of asset reporting to ensure that the proper amount of Estate Administration Tax is paid, however it may be that current practices and assumptions regarding excluded assets and proper valuation of assets will also be challenged in the not-too-distant future.

Finally, the new offence provisions of the Act not only implement new consequences for non-compliance for executors and administrators, but also make it an offence for anyone to assist in making a statement under the Act that is false or misleading in respect of any fact, or that omits to state any fact the omission of which makes the statement false or misleading. This offence provision will likely result in professionals assisting executors in estate certificate applications to need to take extra care than is presently the case with respect to the estate information being provided on court applications in order to ensure that they do not "assist" in making false or misleading statements, as the maximum

fine is twice the amount of the tax payable by the estate or up to two years in prison or both. The new provisions will apply to applications for estate certificates made on or after January 1, 2013.

9. **Costs in Ontario Estate Litigation - "Loser Pays" - Proportionality - Continuation of "Sea Change" in Court Approach to Costs in 2010 Cases - Increasing Uncertainty and Unpredictability in Application of Cost Principles**

Smith v. Rothstein, 2010 ONSC 4487 (CanLII)

Pytka v. Pytka, 2010 ONSC 6406; Carswell Ont 8659

Estate of John Kaptyn, Kaptyn v. Kaptyn, 2011 ONSC 542 (CanLII)

and many others

Under the traditional approach to the award of costs in estate litigation, all costs of the parties were generally paid out of the estate, based on public policy considerations to ensure that only valid wills would be given effect. Older case law establishes that in a situation where the action of the testator was the cause of the ambiguity or where it is necessary to ensure only valid wills are propounded or to ensure the proper support of dependants, costs would be paid from the estate. As a result of the 2005 Ontario Court of Appeal decision in *McDougald Estate v. Gooderham*; 2005 Carswell Ont 2407, 17 E.T.R. (3d) 36 (Ont. C.A.), a dramatically different approach to costs in estate litigation was set out and the court held that the normal costs rules that apply in civil litigation should apply, unless there are important public policy considerations justifying costs be paid from the estate which might apply in two situations: if the litigation is the result of testator's actions or omissions or where the litigation is necessary for the proper administration of the estate. Recent cases have applied the "modern approach" and have given rise to some surprising results, clearly causing consternation in the estates bar as it grapples with the application of the new approach. In *Smith*, the court applied "loser pays" and proportionality principles in ordering costs of over \$700,000 against the unsuccessful objector to the will. In *Kaptyn*, costs of over \$4.4M were substantially reduced to \$1.175M and a large portion were ordered payable personally by the sons of the deceased. Even the Children's Lawyer's costs were reduced. In *Pytka*, "loser pays" was applied, where the deceased's daughter brought a motion to set aside a settlement reached for dependant's relief and was unsuccessful. There have been a score of other recent cases in 2010 now applying the "modern" approach.

This remarkable shift in the approach of the courts to costs raises new challenges in commencing and managing estate litigation, including managing

client expectations and the financial risks involved in such litigation for both litigants, executors and trustees, and their counsel.

10. Proposed Abolition of Rule Against Perpetuities in Nova Scotia

On July 15, 2010, the Law Reform Commission of Nova Scotia (the “Law Reform Commission”) released a Discussion Paper regarding the rule against perpetuities, often the bane of will and trust drafters. The Law Reform Commission has proposed abolishing the rule, and concurrently expanding the court’s power to vary trusts to include the power to maintain, vary or terminate a trust on any terms it sees fit provided the variation is for the benefit of any non-consenting party and the court respects the testator’s intention as closely as possible.

Currently, Nova Scotia law applies the rule against perpetuities without exception and without a “wait and see” approach. To alleviate problems arising from the effects of the application of the rule even in cases of remote hypotheticals, convoluted life-in-being concepts, and distinguishing between vested and contingent interests, and rather than adopting a “wait and see” approach as has been done in other jurisdictions, the Law Reform Commission proposes simply abolishing the rule. The concurrent expansion of the court’s ability to vary trusts is designed to address the original social policy concern, namely the long-term control by testators of the future use of land and its alienation by way of perpetual trusts that the rule against perpetuities seeks to address.

Given the pros and cons of each approach to the problems of perpetual trusts, debate as to the merits of the Law Reform Commission’s recommendations, even if implemented, is expected to continue for some time. Responses were invited until early September, 2010, and the final report of the Law Reform Commission recommending abolition of the rule against perpetuities in Nova Scotia was published in January, 2011. No word yet on whether or when these recommendations will be implemented.

11. Update: Trust Law Reform in Canada

As many of you know, in November 2007, STEP Canada hosted a two-day Symposium on trust law reform in Canada, which was attended by approximately 80 prominent lawyers, academics, trust company representations and government officials from across Canada. During the Symposium, delegates identified various policy issues which should inform the drafting of modern trustee legislation, referencing draft trustee legislation prepared by the British Columbia Law Institute. Subsequent to that, the Symposium acted as a catalyst and was critical to the Uniform Law Conference of Canada (“ULCC”) deciding to take on the project of preparing model trustee legislation for adoption by the

Provinces and Territories. The STEP Canada Report of the proceedings of the Symposium has been lauded by the members of the U.L.C.C. as invaluable in its efforts. The U.L.C.C. struck a working group to develop the model legislation, and a drafting group of which it is a component has prepared part of it for review at their next meeting this summer. STEP Canada's National Steering Group on Trust Law Reform will continue to monitor progress of the model trustee legislation and provide support and input. Its mandate also includes promoting trust law reform and implementation of new trustee legislation.

12. **Resulting Trust and Unjust Enrichment Claims by Common Law Spouses – Proper Legal Approach and Principles Involved**

Kerr v. Baranow and *Vanesse v. Seguin* (indexed as *Kerr v. Baranow*), 2011 SCC 10 (CanLII)

In *Kerr v. Baranow*, a couple in their late sixties separated after 25 years in a common law relationship. Both had worked during their relationship and contributed to their mutual welfare. K claimed support and a share of property in B's name. The trial judge awarded K \$315,000 by way of resulting trust and unjust enrichment, and \$1,739 per month in spousal support starting from the date of her claim. The court of appeal overturned the decision regarding the property claim, finding that K did not make a financial contribution to the acquisition or improvement of B's property, and also finding that spousal support should start from the date of the trial.

In *Vanesse v. Seguin*, it was agreed by the parties that S was unjustly enriched by V during their 12 year relationship. V had stayed home to care for their young children for the middle period of their relationship while S worked and travelled for business. The trial judge awarded V half of the value of the wealth accumulated by S during the period of unjust enrichment, less her interest in the home and RRSPs in her name. The Court of Appeal set aside this award and found that the proper approach to the valuation of an unjust enrichment claim was a *quantum meruit* calculation where the value each party received from the other was assessed and set off.

The Supreme Court of Canada examined five issues: 1. the role of the "common intention" resulting trust in claims by domestic partners, 2. whether or in what circumstances a monetary remedy for a successful unjust enrichment claim should be assessed on a *quantum meruit* basis, 3. when mutual benefit conferral should be taken into account in the context of an unjust enrichment claim, 4. the role of the parties' reasonable expectations in unjust enrichment claims, and 5. the effective date of the commencement of spousal support.

The Court allowed both appeals, restoring the trial judge's decision in *Vanesse v. Seguin*. In *Kerr v. Baranow*, the Court restored the trial judge's decision regarding the spousal support issue, allowed K's appeal regarding her unjust enrichment claim and ordered a new trial on this issue, and dismissed K's appeal regarding the dismissal of her claim in resulting trust (a counterclaim by B regarding unjust enrichment was also sent back for a new trial).

In *Kerr*, the appeal was characterized by the Court as being a question of the role of resulting trust law in common law spousal property disputes and how an unjust enrichment analysis should take account of the mutual conferral of benefits and what role the parties' intentions and expectations play in that analysis, in addition to the question of the proper effective date of spousal support. In the *Vanesse* appeal, the Court stated that the central problem was how to quantify a monetary award for unjust enrichment. To summarize the very lengthy decision of Justice Cromwell on behalf of the Court, the Court found on each of the five issues outlined above as follows.

1. The Court determined that the "common intention" approach to resulting trust has no further role to play in the resolution of property claims by domestic partners on the breakdown of their relationship.
2. Recognizing that some courts have taken the view that if the claimant's contribution cannot be linked to specific property, a money remedy must always be assessed on a fee-for-services basis, and other courts have taken a more flexible approach, the Court held that where both parties have worked together for the common good, with each making extensive, but different, contributions to the welfare of the other and, as a result, have accumulated assets, the money remedy for unjust enrichment should reflect that reality and should not be based on a minute totting up of the give and take of daily domestic life, but rather should treat the claimant as a co-venturer, not as the hired help.
3. In common law relationships where each partner has contributed to the welfare of the other, the Court determined that the defence and remedy stage, with a small exception, was the appropriate point in the unjust enrichment analysis to take account of this mutual conferral of benefits.
4. The parties' reasonable or legitimate expectations should play a limited role in an unjust enrichment analysis, to be considered in relation to whether there is a juristic reason for the enrichment only.
5. The appropriate date for the commencement of spousal support in the circumstances of the *Kerr* appeal was the date of the application.

This case represents a new and more expansive direction by the Court regarding property claims by common law spouses, scrapping the “common intention” resulting trust, limiting in varying degrees the role of the reasonable expectations of the parties and expanding the traditional approach to calculation of *quantum meruit* to monetary claims, and will of course have an impact on how spousal property claims against estates are dealt with in the future.

13. **Court Rectification of Trustee Mistakes - Scope of the Rule in *Re Hastings-Bass* Narrowed**

Pitt v. Holt and *Futter v. Futter*, [2011] EWCA Civ 197, [2011] WLR (D) 84

These British cases were appeals by HMRC (Her Majesty’s Revenue and Customs, formerly Inland Revenue) from two separate Chancery level decisions in which the court in both cases set aside transactions on the basis of breach of fiduciary duty or mistake, based upon the unintended tax consequences arising from the transactions in question. In both cases, the taxpayers had sought and obtained professional advice regarding the tax consequences of the transactions before implementing them.

In both cases, the England and Wales Court of Appeal (“Court of Appeal”) considered the proper scope of the rule in *Re Hastings-Bass*, which allows a transaction by trustees to be set aside or voided where the transaction had an unintended result. Recent caselaw in England had extended the rule to situations where the transactions had not produced the desired result, for example, where unintended capital gains or inheritance tax consequences had resulted from the transaction such that the trustees would not have entered into the transaction if these consequences had been known to them.

The Court of Appeal allowed the appeals of HMRC on the basis that there had been no breach of fiduciary duty (the trustees/settlor not having acted outside of the scope of their powers or not taken into account a relevant matter or taken into account an irrelevant matter) in either case, nor was there any mistake as to the legal effect or a material fact of the transaction, and there was therefore no reason for a court to set aside the transactions. The Court of Appeal held that since the taxpayers had taken professional advice regarding the consequences of the transactions, they could not be said to have breached their fiduciary duty by entering into the transactions. The fact that the professional advice obtained has been incorrect and inadequate, such that unintended tax consequences arose from the transactions, was unfortunate, but did not amount to a breach of fiduciary duty or mistake as to the legal effect of the transaction such that the transactions were void or voidable. Unforeseen tax liabilities were characterized by the Court of Appeal as a consequence of the transactions, not an effect of them. Lord Justice Longmore, approving the judgment of Lord Justice Lloyd,

commented that the application of the rule in *Re Hastings-Bass* had taken a “wrong turn not infrequently acted on over a twenty year period”, but the Court of Appeal was now able “to reverse that error and put the law back on the right course”.

The Court of Appeal has now severely restricted the ability of taxpayers to set aside transactions entered into on the basis of inaccurate tax advice, and in such situations the taxpayer must now bring a claim against the professional advisor in negligence regarding the unintended tax consequences of a transaction entered into without material mistake or breach of trust. This will likely also have a profound impact on tax advisors, who are no longer protected from the consequences of incorrect or inadequate advice by an ability of trustees to set aside transactions in court by application of this doctrine.

14. The European Union Succession Regulation

The increasing mobility of persons and their assets across borders has resulted in more complexity and lack of harmonization of applicable rules governing succession to property on death. The European Union has responded by approving on June 4, 2010 a set of political guidelines for future work on proposed European rules governing succession, including a European Certificate of Succession.

By way of background, an extensive background report was prepared in 2002, followed by a consultation paper in 2005, "European Green Paper on Succession and Wills", which culminated in a proposed regulation submitted by the European Commission in October 2009. Much of the policy and principles underlying the 1988 Hague Convention on Succession have been incorporated into the proposal Regulation.

The guidelines focus on six issues, further to extensive consultation and work by the competent Council Working Party, as follows:

- Creation of a comprehensive instrument to govern succession including jurisdiction, applicable law, recognition and enforcement including a European Certificate of Succession.
- One single authority should govern and deal with succession of the whole estate, wherever the assets are located.
- One law should govern the succession as a whole, wherever the assets are located.
- The connecting factor for jurisdiction should be the habitual residence of the deceased.

- The court of habitual residence of the deceased would have authority to transfer matters to the courts of a member state where the deceased made a choice of law of that member state.
- Within certain limits, a person can choose the law he or she wishes to govern succession to his or her property.

Comment: As the EU moves to greater harmonization, can we say the same within the borders of our own country, comprising ten provinces and three territories? What spillover effect will the Regulation, once enacted, have on the direction non-European Union countries take in the development of conflict of law rules applicable to succession?