Recent Cases of Interest

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When results count.

March 23, 2009 Halifax Estate Planning Council

The Case Law Brief

- Case Name (with citation)
- Facts (relevant to decision)
- Procedural History (how we got here)
- Issue(s):
- Decision(s):
- Reasons:
- Obiter Dicta ("said by the way..") or Pithy Quotes
- Comments on Potential Impact or application of decision

Why do we care about case law?

- Reported cases from various levels of court help us to interpret the current state of the law
- Cases help to interpret the meaning of legislative provisions
- Cases help us to apply the law to a particular set of facts
- Some areas of law consist primarily of a body of law called the "common law", which really means judge-made law such as the law of trusts

Current Cases to be Covered

- Laflamme (2008 DTC 4829)
- Redeemer Foundation (2008 SCC 46)
- Strong v. Marshall Estate (2009 NSCA 25)
- LeVan v. LeVan (2008 ONCA 388)
- Frye v. Frye Estate (2008 ONCA 606)
- Re: Thibault Estate (2009 NSSC 4)
- Lipson (2009 SCC 1)
- Morrell Estate v. Robinson (2008 NSSC 295)
- Parker v. Cox (2008 NSSM 29)
- Canadian Movitel Inc. v. The Queen (Docket #2006-3071)

Why do we care about case law?

- If you want your client to fit within the decision in a particular case, you would say that you are "on all fours" with the facts in the case
- If you want to suggest that your client would have a different result from a reported case, you would attempt to "distinguish" the case
- Hierarchy of cases:
  - Supreme Court of Canada – highest precedential value;
  - Tax Court (Informal) or consent judgments – no precedential value;
  - Cases from other provinces – carefully check the wording of the legislation

Free Websites to find cases

- For Nova Scotia cases – Courts of Nova Scotia website www.courts.ns.ca
- For cases across Canada – Canlii www.canlii.org
- For Tax Court of Canada cases – www.tcc-cii.gc.ca

Laflamme – Common Sense Prevails

- Guy Laflamme ("GL") completed a complex estate freeze in 1996 – resulted in Trust for benefit of 5 children holding Class A growth shares (he was not a beneficiary)
- GL retained voting control Class E shares and Class D shares each convertible to 1,000,000 Class A growth shares
- Trust distributed 1/5th of Class A shares to son Jean via butterfly and were redeemed for $15 million note
- GL assessed $15 million in income under Income Tax Act s.56(2)– conferred benefit on son of $15 million since not worth $15 million due to conversion feature of Class D shares
- Decision: GL successful – Lamarre J. looked at taxpayer's intention in carrying out estate freeze and used context and common sense; concluded that GL would have waived conversion feature on sale to third party therefore no "nuisance" value
- Practice point – Keep it simple

LeVan v. LeVan – The More the Better

- Ontario couple had a marriage contract which was signed two days before getting married in 1996
- Richard LeVan and siblings owned majority interest in public company – father instructed children to have pre-nups
- Trial judge found that Erika LeVan did not get proper financial disclosure as required under Family Law Act (ON) which was confirmed by ON Court of Appeal; SCC refused leave to appeal
- Practice point: Financial disclosure has to be made in a way that is complete; has caused more caution on part of lawyers including valuations and financial statements being provided

Redeemer Foundation - FLP is SOL

- Foundation operated a forgivable loan program ("FLP") - parents made donations with expectation that donations would fund children's education at affiliated college
- CRA began audit of Foundation but changed tactics and served with a requirement under s. 230(3) asking for identity of donors
- CRA reassessed a number of donors disallowing their claims for charitable donation credits
- Foundation sought declaration that CRA request for third-party information was improper
- SCC upheld FCA decision that donor information was requested for a legitimate purpose; having determined that FLP not a valid charitable program, majority (4 to 3) found that it was appropriate for CRA to reassess the donors
- Practice point: Taxpayers have to take such requests seriously

Frye v. Frye Estate – Shares with Sister

- Testator Cam Frye was one of four siblings who held shares in family business
- Siblings entered into shareholders agreement restricting transfer of shares, as did Letters Patent
- Cam's will left his shares to sister Cheryl
- Trial judge found that gift was null and void as bequest was contrary to shareholders agreement
- Court of Appeal agreed that SA applied to testamentary disposition however legal title to shares is transmitted by will to estate trustees who hold them in trust for Cheryl
- Trustees must comply with requirements of SA and attempt to accomplish transfer as advisable; during interim, hold shares as bare trustees for Cheryl must exercise rights as she directs
- Practice point: Executors have to operate with share transfer restrictions including shareholders agreements

Strong v. Marshall Estate – Not An Issue

- Patricia Strong ("PS") was adopted soon after birth; birth mother died intestate
- Issues: (1) Is PS "issue" for purpose of Intestate Succession Act (NS); (2) Does legislation violate s. 15(1) or s. 7 of Charter?
- Administrator applied for directions as to whether PS was an heir; PS applied for order that legislation violated Charter – NSCA affirms SC decisions that not issue and does not violate Charter
- Held that "for all purposes" in CFSA is all-encompassing – specifically disagrees with Hart v. Hart Estate (1993 decision)
- Appeal dismissed but Estate pays costs
- Practice point: Should put issue to bed in context of adopted persons as issue under NS legislation

Joke Break

What do you get when you read an estate case backwards?

You get your parent back and your family stops fighting.

Re Thibault Estate – A New Prospective

- Section 19A of the Wills Act was proclaimed into force August 18, 2008
- Has effect of deeming that ex-spouse has predeceased the deceased testator – on divorce (not separation)
- Mr. Thibault divorced in 2003 and did not change will; died Sept. 8, 2008
- Issue: Is Section 19A retroactive, retrospective or prospectively
- Decision: Section 19A must be read prospectively
- Practice Point: Clients who have divorced prior to August 18, 2008 still need to change their wills

Parker v. Cox – Pay the Visa Bill

- Probate Court removed Defendant Reid Cox as Executor
- Claimant became substitute executor and obtained order from Probate Court reiterating requirement for Cox to provide accounting
- Claimant sued in Small Claims court to recover (1) cheque written for $4,000; (2) credit card interest and (3) income tax penalty re: late filing
- Small Claims Court determined that it had jurisdiction as Probate Court not exclusive
- Claimant awarded amounts plus costs of filing
- Practice point: Small Claims Court may be another option for these types of claims

Lipson – Spousal Twist Too Much

- Earl and Jordana Lipson bought a house through a serious of transactions similar to those in Singleton case to get interest deductibility but with "spousal twist" via spousal attribution rules
- CRA reassessed under GAAR; case went to Supreme Court of Canada – 4 to 3 loss for Lipsons (3 different judgments – 2 dissenting)
- Majority decision: General Anti-Avoidance Rule ("GAAR") limits the scope of avoidance transactions and denied a tax benefit when benefit arises, transaction is an avoidance transaction and transaction results in misuse of abuse; in this case there was an abuse of the spousal attribution rules
- Commentary: Not a well-reasoned decision – TCC Rip C.J. predicted that it will not be the leading GAAR case
- Practice point: When doing tax planning with clear tax avoidance purpose, there will be uncertainty as to whether GAAR or specific anti-avoidance provisions will be applied; well established planning still ok but may be more demand for advance rulings from CRA

Movitel – Assign It

- Movitel was neither the owner nor beneficiary of creditor insurance policy but claimed constructive receipt on repayment of loan and took CDA credit
- CRA assessed penalty tax for excessive CDA election
- CRA long standing policy that a private corp. is not entitled to credit its capital dividend account when debt is repaid out of proceeds from "creditor insurance"
- CRA and Movitel agreed to consent judgment allowing CDA credit but CRA has affirmed position that company must be beneficiary or policyholder under loan collaterally assigned to lender for CDA credit to arise
- Practice point: Private companies should purchase individual policy and assign to lender to get CDA credit rather than rely on consent in Movitel

Morrell Estate v. Robinson – Gift from Ex

- Mr. Morrell did not change his will following his divorce
- Separation agreement included waiver of claims against estate
- Issue: Whether ex-spouse waived her right to receive gift under the will of Mr. Morrell
- Supreme Court held that separation agreement did not mention will and not specific enough to exclude gift
- Decision is consistent with other strange decisions on this point - currently under appeal
- Practice point: Separation agreements need to be more specific to exclude gifts under will, beneficiary designations etc.

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