Recent Trusts Cases

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TWO YEARS HAVE PASSED since the last survey of Recent Trusts Cases in Manitoba but during that time there has not been a great number of really groundbreaking cases in this province. The allied field of fiduciary duties continues to be an ever-expanding one but this is an area which crosses so many boundaries that it is well-nigh impossible to deal with it in any survey of ordinary trust cases. For example, my colleague Professor Osborne in his Recent Review of Tort decisions in this same volume[1] deals with the Manitoba Court of Appeal decision in *Vita Health Co.* v. *Toronto Dominion Bank*[2] and the Supreme Court of Canada decision in *Hodgkinson* v. *Simms*.[3] Both illustrate the willingness of modern courts to find and base their judgments on fiduciary relationships rather than simply on the more traditional ground of negligent misrepresentation.

The two most interesting trust cases I would like to deal with concern first variation of trusts, a burgeoning area in this age of rapidly changing economic conditions, and then the general law of resulting trusts and the doctrine of presumption of advancement.

In the case of *May et al.* v. *May Estate*,[4] the Court of Queen's Bench had to deal with an application for the variation of a testamentary residuary trust pursuant to s. 89 of the *Trustee Act*.[5] Briefly, the facts were that the testatrix had given a life interest in the income from the residue of her estate to her son with a power of encroachment on the capital given to the executor (who was not the son). On the son's death the balance of the residue was to be divided equally among the son's children (namely the testator's grandchildren) who were to receive one half of the funds at the age of 35 years and the balance at the age of 50 years. Subsequent to the son's death the trustee was given power to use income and capital for the

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1 At page 409.

2 (1994) 95 Man. R. (2d) 255 (C.A.).

3 (1995) 22 C.C.L.T. (2d) 1 (S.C.C.).

4 (1994) 96 Man. R. (2d) 268 (Q.B.)

5 R.S.M. 1987 c. T-160.

benefit of each grandchild prior to their reaching the age of 50 years. If a grandchild died before the age of 50 his or her children were to inherit that share with a gift to the siblings of the deceased grandchild if he or she did not have any children.

At the date of the will the son was approximately 38 years old and his children were 11, nine, and seven years old respectively. At the date of the testatrix's death the son was 58 years old and his children 31, 29, and 27 years old. The oldest grandchild had a child three years old, the second grandchild had two children, one 3 years old and the other a newborn, and the third grandchild was unmarried with no children. The residue of the estate had a value of a little over $400,000 which provided an income of approximately $24,000 which had been paid to the son.

The grandchildren with the consent of their father applied to terminate the trust on the following terms. First, that the residue of the estate be divided into two equal shares with one share being paid to the son and the other to the three grandchildren equally. Secondly, in order to protect the children of the testatrix's grandchildren, each grandchild would take out a life insurance on his or her life for $150,000 in favour of the insured's children as irrevocable beneficiaries with a gift over to the insured's siblings. Thirdly, the two siblings with children would own the policy with a stipulation by the Court prohibiting them from selling or otherwise terminating the policy. Fourthly, all the premiums on the insurance would be prepaid from the proceeds of the estate prior to distribution to the grandchildren. The net result of all this was that each of the great grandchildren would be guaranteed a payment on the death of his or her parent instead of having a contingent interest which might never vest. Also the proposed $150,000 insurance proceeds would exceed the maximum benefit under the will of approximately $136,000.

In this case the persons on whose behalf the Court was being asked to consent under s. 59(5) of the *Trustee Act* were the infants (being the great grandchildren of the testatrix) who had a contingent interest in the estate and any unborn great grandchildren who would similarly have a contingent interest.

The test for any variation under the said section is whether the carrying out of any agreement to vary would be for the benefit of each and every person for which the court was being asked to consent. The word "benefit" has been defined by the Court to include anything which "would enhance the financial, social, moral or family well-being of that person."[6] This is a very wide definition and the Court has consistently been prepared to give it a liberal construction as evidenced in the recent Manitoba case of *In the Matter of the Estate of Jean Christine Henderson*[7] which

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6 Section 59(8)(a), *Trustee Act*, R.S.M. c. T-160.

7 (1992) 77 Man. R. (2d) 91 (Q.B.).

was dealt with in the last issue of the Annual Survey of Manitoba Law.[8] The learned judge in this present case concluded that there was clearly a benefit to both the vested and contingent interests over and above the benefits prescribed in the will. This would have been sufficient to grant the application but she also went a step further and considered whether a prudent adult would accept the proposal. This was a test applied in the case of *Re Tweedie Estate*.[9] She concluded that "a prudent adult, motivated by intelligent self interest and sustained consideration of the expectancies and risks in the proposal made, would likely accept the proposal."[10]

This was clearly a reasonable decision and it is encouraging to see our Court continuing the trend to give a liberal interpretation of Section 89 of the *Trustee Act* in granting variation of trusts. One must of course be careful that an overly liberal interpretation should not go against the basic intentions of the testator. In these days of fast changing economic conditions the Courts must endeavour to construe the intentions of the testator so that the beneficiaries have all the benefits intended while at the same time maintaining the basic desires evidenced in the will. As was said in the case of *Re Irving*[11] and quoted by the learned judge in the instant case "the spirit of the Act, as I read it, permits pruning of the trust in order to promote fruitfulness but the root is to be preserved."[12]

Turning now to the field of resulting trusts, the Manitoba Court of Appeal in a careful and well-reasoned judgment by Mr. Justice Huband dealt with this type of trust including the impact thereon of the presumption of advancement.

In *Re Dreger*[13] the testatrix Helena Dreger was married and had two children of the marriage Dwayne Anthony born in 1963 and Stephanie May born in 1966. Then some twenty years later when she was 43 years of age she had a third child Morgan Alysse born as the result of a different relationship.

In 1988, when Morgan was two years old, Helena Dreger learned that she had terminal cancer, of which she died in 1990. As she faced death, Helena's principal concern was to make financial provision for Morgan. Her eldest son Dwayne had a promising career with the Toronto-Dominion Bank and her adult daughter Stephanie was the self-supporting mother of two children. In November 1988, Helena Dreger wrote to her solicitor with instructions to prepare a will and indi-

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8 C.H.C. Edwards, "Recent Trusts Cases" (1993) 22 Man. L.J. 185 at 188.

9 [1976] 3 W.W.R. 1 (B.C. S.C.).

10 *Supra* note 1 at 274.

11 (1975) 66 D.L.R. (3d) 387 (Ont. H.C.).

12 *Ibid.* at 399.

13 (1994) 97 Man. R. (2d) 39 (C.A.).

cated her major concern was for Morgan. She estimated the total value of her estate at about $70,000, including the equity in a house, a car, RRSP annuity contracts and life insurance policies. She wanted Dwayne appointed as executor and, after providing for some legacies for her two adult children and the Cancer Research Foundation, she desired that the residue be held in trust for the maintenance of Morgan with $5,000 to be paid annually to whomever was looking after Morgan. A will along the lines of these instructions was prepared and executed on December 5th, 1988. A codicil made in May 1990 effected some increases in the legacies to her two children and appointed Joyce Gaudry and Roy Olecko as guardians of Morgan during her infancy. She told the latter couple that her estate was sufficient to provide a flow of funds to assist in maintaining Morgan through her infancy.

Unfortunately, things did not work out according to Helena's expectations. It turned out that the RRSPs and life insurance policies to which she had referred as forming part of her estate were in fact payable to Dwayne Dreger as a named beneficiary and totalled in value $33,561.66. Thus Dwayne as the executor did not include these funds from the London Life Insurance Company as part of the assets of the estate. This meant that the estate was about half the size contemplated by Helena and certainly not enough to provide maintenance at the level she intended through Morgan's infancy. Joyce Gaudry, being one of the guardians of Morgan, sued Dwayne Dreger, claiming that he was the trustee of the funds from the London Life Insurance Company for the estate as a whole either under an *inter vivos* trust created by Helena or, alternatively, under a resulting trust.

The learned trial judge expressly found that Helena neither told her son that he was the beneficiary named in the policies nor asked him to hold the monies on behalf of the estate. Apparently, she never advised him of her plan to finance the maintenance of Morgan from these funds. It was this lack of communication which made it difficult for the Court to hold that an *inter vivos* trust of the insurance moneys had been constituted. Clearly her instructions for her will to her lawyer showed that she meant the monies to form part of her estate and that her son was only to receive them as a trustee. However, she never communicated any of this to her son himself. Although the counsel for the plaintiff strenuously argued that some direct communication was not necessary (citing some American authorities) the Court of Appeal pointed out that even in the United States there was such a division of opinion that they should not attempt to chart a new path in Canada.

The Court, however, did go on to find that the plaintiff's alternative argument (based upon a resulting trust) did have more merit. It was acknowledged that a transfer without consideration to a stranger gave rise to a rebuttable presumption of a resulting trust and that if the transfer was from husband to wife or father to child, there was a rebuttable presumption that an advancement was intended. The first question, however, in this case was whether these principles of equity applied to insurance or annuity contracts which become payable not when the designation

of the beneficiary is made, but only upon the death of the insured. Following both an English authority from the case of *In re A Policy No. 6402 of the Scottish Equitable Life Assurance Society*[14] and a Manitoba authority from the case of *Northern Trust Company* v. *Coldwell et al.*,[15] the Court came to the conclusion that the law with respect to resulting trusts did include insurance and annuity contracts, and that the relevant time to determine would normally be when the designation of the beneficiary was made.

The next hurdle which the Court had to clear was that of the presumption of advancement between Helena Dreger and her son Dwayne. It used to be that the presumption did not arise between mother and child as it did between father and child. This was because in the 19th Century, the support of children was solely a father's responsibility. However Mr. Justice Huband referred to a couple of recent Canadian decisions[16] which had held that the same obligation of support rests on both father and mother. This is a view which this writer has held for some time, and has contended that this is the more obvious answer to the problem of gender equity rather than simply abolishing the presumption of advancement as has been done in several Canadian provinces other than Manitoba.

Mr. Justice Huband then went on to point out that the strength of a presumption whether of advancement or a resulting trust will vary from case to case depending on all the circumstances. In this particular case the child in question was an adult who appeared to be embarked on a fairly solid banking career and there was no evident reason why Helena Dreger should order her affairs to provide financial security for the child who needed it least. On the totality of the evidence (including the letter of instructions to the lawyer regarding the will) the Court felt that it was the intention of Helena Dreger that the proceeds of the four London Life Assurance contracts should form part of her estate and Dwayne Dreger therefore held those funds on a resulting trust for the estate.

It may strike the traditional Equity observer that this was a case where the Court was determined to intervene to provide the desired benefit for the apparently needy infant Morgan. The learned trial judge achieved this by finding a trust to be created *inter vivos*. The Court of Appeal however felt they could not quite go so far and chose the alternative route of the resulting trust. Both courts clearly felt that whatever the legal hurdles might be, the testatrix's intentions were clear and, without saying so explicitly, they were following the age old maxim that Equity looks at the intent rather than the form.

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[14] [1902] 1 Ch.D. 282.

[15] (1914) 25 Man. R. 120 (C.A.).

[16] *Cohen* v. *Cohen* (1985), 60 A.R. 234; *Dagle* v. *Dagle* (1990), 255 A.P.R. 245.