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NEWSLETTER

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The Law of Killaloe— Leslie Frost (Premier of Ontario 1949-1961) was fond of telling of the big-city lawyer who, armed with stacks of legal authorities, was cut down in full flight by the small-town judge with, “What you say may be in all them books, all right, but it ain’t the Law of Killaloe.”

In a country well governed, poverty is something of which to be ashamed. In a country badly governed, wealth is something of which to be ashamed.

Confucius

Barney, Bill, Jack and King were Clive Wishart’s beloved horses. Fearing that they might fall into abusive hands after his death, Clive provided in his will “I DIRECT AND DECLARE that my Executors have my horses shot by the Royal Canadian Mounted Police and then buried.”

Upon Clive’s death the RCMP (to their considerable credit) refused to shoot the horses without a specific Court Order, and Clive’s troubled Executors applied to the Court for direction.

As might be imagined, the case drew considerable public attention, including a letter from an elementary school student in Vancouver, “*Dear Judge, Please don’t let anyone kill the horses.... I will be sad if they get killed. From Jennifer.*”

Justice Riordan of the New Brunswick Queen’s Bench, in a carefully reasoned judgment, reminded us that emotion and public sympathy cannot be the bases for judicial decisions. While it is pretty clear in the written decision that Justice Riordan wanted to do his best for Barney, Bill, Jack and King, he couldn’t just pull reasons out of the air, and so turned to the rationale of public policy. “Obviously public policy is a very general term, difficult to define and determination of what is against public policy can of course be subjective. In my opinion, the destruction of four healthy animals for no useful purpose should not be upheld and should not be approved. To destroy the horses would benefit no one and would be a waste of resources and estate assets even if carried out humanely. It is my conclusion that to

destroy Barney, Bill, Jack and King as directed in the Will at this time and in the present circumstances would be contrary to public policy. The direction in the Will is therefore void.”

The full case can be read at <http://canlii.ca/t/1mwnp>

Passing of Accounts— One of the essential duties of any trustee is to keep careful accounts of all trust property entrusted to him or her. These accounts must be accurate, fully transparent and always available to beneficiaries on reasonable notice. Unlike simple book-keeping, these accounts must allocate clearly between capital and income receipts and expenses.

All persons who handle property as a trustee, or in a trustee-like office such as executor, attorney or guardian, can be required to pass the accounts before a judge. The accounts should be prepared in the unique format prescribed by the Rules of Civil Procedure and accompanied by all relevant supporting documents, properly cross-referenced. Any claim for compensation should be made at this time. The court appearance is made on notice to beneficiaries and others who have a financial interest in the trust property, and such persons have the right to make representations.

Passing of accounts is not typically requested for ongoing trusts such as family trusts, but in case called upon, the trustees should nevertheless keep accounts at the same high standard described above.

Who would be an executor? The dead cannot thank you; and the living will not.

Justice Leask, Hansen v. Hansen, 2011 BCSC 1601

How Old Is Too Old? We recently had the pleasure of helping a client with a bit of estate planning. Getting to know him a little better, we discovered that he lives in a retirement home not far from Ottawa and likes to keep himself busy surfing the net and e-mailing friends. But when the front office needs guidance updating their web page or fixing network glitches, they call on his expertise. He’s ninety-nine.

Appointing Executors— There are several rules for appointing executors in a Will. The first one is simple: have bench strength. Make sure you have a backup, and a backup to the backup. But there are more.

Traditionally, we have advised that the key characteristics of good executors are four-fold, as follows:

1. An executor should not be significantly older than the testator. Statistically, you want them to out-live you.
2. They need to know you, your affairs and family well enough to understand the nuances of your estate.
3. They need to have at least basic “street smarts” and be able to deal with banks, insurers, governments and beneficiaries in an efficient and businesslike fashion.
4. They should be geographically proximate. This is a big country to have to criss-cross to administer an estate. Non-Canadian executors may also have to post bonds.

More recently, we have also begun to raise issues of executors having to deal with fractious families, complex business assets and arcane tax issues. Estates just seem to be getting more complicated (and sometimes just more weird) every year, and it is no honour to send an unsuspecting son or daughter into the jaws of hell unready for the onslaught. Be sure to have a thorough discussion with your estate planning lawyer about these issues.

The world is full of people whose notion of a satisfactory future is, in fact, a return to the idealized past.
Robertson Davies

Palm Tree Justice and Fishing Expeditions— Like members of any other profession, lawyers have a colourful vernacular of their own. To suggest that opposite counsel is engaging in a “fishing expedition” is no compliment—you are saying to him that he has no idea where he is going, but hopes that if he asks enough witnesses enough questions about enough topics that sooner or later he will catch something of value.

Similarly, to say that a judge has resorted to “palm tree justice” is to pay no compliment, but rather suggests that the court ignored precedent and statute to dispense rough and ready justice.

“With respect” (or the higher octane version “with the greatest of respect”) is a lawyers’ favourite introductory expression. Generally, nothing of the sort is intended.

Spring Cleaning: the “Ounce of Prevention” Department (updated from Newsletter 35)

As well as attending to the raking and scrubbing at this time of year, there is no better time to review some far more important, but not as interesting, issues. Here are some of the key ones (in no particular order of importance):

1. Important records. Inventory these so you know what you have (and what’s missing), then organize them all in a safe and accessible place. Scan copies and save them off-site (make a semi-annual ritual of swapping thumb-drives with a close friend or relative).

2. Insurance. Life, disability, home, auto, business— do you have enough? Too much? Are named beneficiaries consistent with your wealth and estate plans?

3. Will and powers of attorney. Do they still make sense in your current circumstances? Are the executors and attorneys still the right ones for the job? Do the instruments fully integrate with your wealth and estate plans?

4. Mortgages, credit cards and other debt. Do you know if you’re getting the best rates and the best terms? Do you understand your prepayment privileges? Are you taking maximum advantage of them?

5. Tax planning. Now is a good time to sit down with your most recent tax return and reflect on the deductions that you could have had with some forethought and planning. Investing in a little advice in this department usually pays back in spades.

6. Disaster readiness. Your smoke detectors *do* work, right? Fire extinguisher in an obvious spot on each floor? Every family member understands the escape plan if the alarm goes off in the middle of the night? Are you ready for a three day power outage? Could you survive a month’s unemployment? Do you have a list of emergency contacts in your wallet and on your phone?

7. Your well-being. Eating right? Time to quit smoking? Regular exercise? When’s the last time you had a full physical? Is it time to end some unhealthy relationships? Are you investing well in your good relationships?

You could easily add items of your own to this list, but the trick is in getting started. Why not commit yourself to thirty minutes today to start the process? You’ll thank yourself and so will those who are dear to you.