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BAILIWICK

bail-i-wick (ba'lewik). *n. area of interest, skill, knowledge or expertise*

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MULTIPLE WILLS – BENEFITS, RISKS AND UNCERTAINTIES

BY JORDAN FORSYTH

Commercial Law, Corporate Law, Real Estate Law, Wills, Estates and Trusts

Before the Wills, Estates and Succession Act (British Columbia) ("WESA") came into force in March 2014, any executor applying for a Grant of Probate in BC had to pay probate fees of 1.4% on the value of all assets forming part of the deceased's estate. However, Section 122 of WESA now states that the applicant for a Grant of Probate is only obligated to disclose assets passing to him or her "in his or her capacity" as the deceased's personal representative, rather than all assets passing to any and all personal representatives. Accordingly, in theory if a will-maker appoints one executor to administer a Will governing only assets that will require a Grant of Probate, he or she is only obligated to declare and pay probate fees on the value of those specific assets passing to him or her as personal representative, whereas a second executor administering a Will governing assets that do not require a Grant of Probate (such as certain shares of a privately-held company) can simply deal with such assets without needing to apply for a Grant of Probate and therefore avoid the need to pay probate fees of 1.4% on such assets.

However, even for an estate where the value of assets not requiring a grant of Probate (such as company shares) are very high (and so possible thousands of dollars in Probate fees could be saved), there are significant complexities and potential disadvantages to using a multiple Will structure even where thousands of dollars in probate fees could be saved.

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A CAUTIONARY TALE TO THOSE WHO USE SOCIAL MEDIA TO "VENT"

BY BRIAN VICKERS

Commercial, Civil Litigation

In the recent decision of Pritchard v Van Nes, 2016 BCSC 686, the Court was faced with the issue of defamation over social media. Defamation is the act of publishing a statement that has the effect of lowering or ruining the reputation of an individual in the eyes of a reasonable person. Justice Saunders for the Supreme Court of BC ultimately found the defendant liable for $67,000 for her comments, which she described as "venting", on Facebook. The result is a cautionary tale to those who use social media platforms such as Facebook and Twitter to, as the old idiom goes, "air out their dirty laundry".

In what may be perceived as a safe environment to discuss pressing concerns with friends, one must be ever mindful of how those discussions may effect an innocent third party. In the Pritchard case the defendant, was a real estate agent with over 2000 Facebook "friends" and a profile open to the public. Her and her neighbour, the plaintiff, had an acrimonious relationship that eventually led the defendant to incite a maelstrom of controversy on Facebook.

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A CAUTIONARY TALE TO THOSE WHO USE SOCIAL MEDIA TO "VENT"

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Justice Saunders found that her comments accused the plaintiff of being a "nutter" and a "creep" when she erroneously stated that the plaintiff was "using a system of cameras and mirrors to keep her backyard, and her children, under 24-hour surveillance". Justice Saunders was very quick to state from the outset that the defendant's allegations and attacks on the plaintiff's character "were completely false and unjustified". However, despite her baseless allegations, the defendant's Facebook friends took this as a call to action which only aggravated the situation. Their comments snowballed out of control and, in just over 24 hours, the plaintiff's "stellar reputation" as a respected and admired music teacher had been completely destroyed.

The Courts are certainly concerned with the ease by which the internet can assist someone in so effectively and instantaneously damaging the good reputation of an innocent person. At paragraph 119 of the Pritchard case, Justice Saunders stated as follows:

> ... In my view the potential in the use of internet-based social media platforms for reputations to be ruined in an instant, through publication of defamatory statements to a virtually limitless audience, ought to lead to the common law responding, incrementally, in the direction of extending protection against harm in appropriate cases. ...

In recognition of the Court's increasing duty to respond to this discouraging reality, Justice Saunders found the defendant liable for not only her own defamatory comments, but also for the comments made by her Facebook "friends". The Court set out the following test for liability for another person's comments:

1. Actual knowledge of the defamatory material posted by the third party,
2. A deliberate act that can include inaction in the face of actual knowledge, and
3. Power and control over the defamatory content.

In a nutshell, in most conceivable situations you will have control over your Facebook page. As a result, if you incite comments from others and, after viewing them, fail to delete them within a reasonable time, you could be liable for those comments.

In today's Digital Era, the ease, affordability and anonymity by which someone can access the internet and, more particularly, the volatile sharing capacity of social media outlets such as Facebook and Twitter raises legitimate concerns regarding defamation. While Facebook and other social media sites provide a forum to post your views to the world at large, your ability to use those forums comes with the responsibility to make sure that you do not defame innocent parties. Now, with the recent decision of Pritchard, it also means that you are responsible for making sure others don't post defamatory comments on your pages.

As a result of Pritchard, we can expect an increase in this type of litigation. We can also expect continued developments in the law of internet defamation to protect innocent victims such as Mr. Pritchard as the Court incrementally responds to the ever evolving connectivity power of social media. ■

To learn more about Brian Vickers, his areas of practice and to view other articles written by lawyers at our firm, visit us online at www.bakernewby.com.

MULTIPLE WILLS – BENEFITS, RISKS AND UNCERTAINTIES

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The following is a list of just a few of the potential complications that may be encountered in the course of trying to avoid probate fees through the use of multiple Wills:

1. **Two Executors** - The need to draft two separate Wills with two different personal representatives in order for the multiple Will strategy to work under WESA costs fees due to the complexity of drafting two separate Wills that must work together.

2. **Wills Variation Risk** - Whereas the Will that will be submitted to Court for a Grant of Probate will be protected from a Wills Variation application under WESA by an unhappy spouse or child once 180 days from the Grant of Probate has passed without any variation application being made, the Will governing the assets not subject to probate will never be protected from a challenge no matter how much time passes, since the 180 day limitation period will never start to run without a Grant of Probate.

3. **Uncertainty** - There is also an element of uncertainty regarding how British Columbia courts will interpret the provisions of WESA which allow for multiple Will planning in BC. While the wording of WESA seems to clearly allow for such planning, until the BC Supreme Court actually considers and approves an estate structured to avoid probate fees by using multiple Wills and executors, an element of uncertainty will remain.

4. **Graduated Rate Estate Rules** - On January 1, 2016, the Income Tax Act (Canada) was amended to provide that a deceased's estate is able to access graduated tax rates only in accordance with a series of new "Graduated Rate Estate" restrictions. However, questions have arisen regarding whether having two separate Wills with two separate personal representatives will force the two personal representatives to choose only the assets governed by one Will to be eligible for the tax benefits of being a Graduated Rate Estate. Even if Canada Revenue Agency were to take the official position that only one estate arises out of a person's death even if there is more than one Will, it would still be necessary for the personal representatives to work together very closely to ensure that the 36 months of graduated tax rates are not lost and that all necessary joint elections are made.

While multiple Wills planning under WESA may lead to significant probate fee savings, especially for estates that have valuable privately-held company shares, the potential pitfalls and complexities outlined above will need to be carefully considered in consultation with accountants and estate planning lawyers before proceeding. ■

To learn more about Jordan Forsyth, his areas of practice and to view other articles written by lawyers at our firm, visit us online at www.bakernewby.com.

NEW BRITISH COLUMBIA SOCIETIES ACT

BY JULIET SADR
Real Estate Law, Wills, Estates and Trusts

In the spring of 2015, the new Societies Act (British Columbia) (the "New Act") was passed which will replace the current Society Act (British Columbia) (the "Current Act"). The New Act will come into force on November 28, 2016, at which time societies will have two years to transition from the Current Act to the New Act by filing a transition application containing a Constitution and Bylaws.

Despite this transition period, many provisions of the New Act will become immediately applicable on November 28, 2016 and any Bylaw provisions that are inconsistent with the New Act will not be enforceable. Therefore, societies will need to review their Constitution and Bylaws prior to November 28, 2016 to determine whether changes need to be made immediately upon the New Act coming into force. The following are some of the significant changes that will come into effect:

Constitution
The Constitution of a society will only be able to contain the name of the society and its purpose. If a society has any other provisions in its constitution, these will need to be moved into the Bylaws to ensure compliance with the New Act.

Increased Disclosure for Charities and Publically Funded Societies
The New Act contains increased disclosure obligations for publically funded societies - societies that obtain funding from the government or public in excess of an external funding threshold set by the regulations to the New Act – and charities. Members of charities and publically funded societies will have access to all corporate records, but the Bylaws may restrict access to director's meeting records and accounting records. Further, charities and publically funded societies must disclose the remuneration paid to the directors and the ten highest paid employees or contractors receiving at least $75,000 in wages per annum. This disclosure can pool salaries being disclosed together and list positions rather than personal names.

Directors
The New Act will make significant changes pertaining to directors. A director must be at least 18 years old (subject only to the exceptions set out in the regulations). If the society is a charity or publically funded society, the majority of a society's directors must not be employees or contractors of the society. In addition, societies will be prohibited from remunerating directors unless authorized to do so by the Bylaws.

New Corporate and Governance Procedures
The New Act will include corporate and governance procedures substantially similar to those in the Business Corporations Act (British Columbia) and other corporate legislation for companies. For instance, the threshold to pass a special resolution will be reduced from 3/4 of votes cast by voting members to 2/3, unless the society's Bylaws create a higher threshold; voting by proxy will be allowed if it is written into the society's Bylaws; and the existing requirement that non-voting members outnumber the voting members will be removed.

Senior Managers
The concept of non-director "senior managers" – individuals who oversee the activities of the whole or a principal unit of the society or perform a policy-making function - is introduced in the New Act. Senior managers can either be appointed by the society or deemed to be such by operation of the legislation. Senior managers are deemed to have fiduciary duties and other liabilities similar to directors, despite not actually sitting on the Board of the society.

Electronic Filing System
Concurrently with the coming into force of the New Act, the Registrar of Companies will implemet a mandatory electronic filing system for incorporation, Bylaw changes and other filings at the corporate registry. This electronic filing system will allow the corporate registry to maintain a single database of societies and society Bylaws. Additionally, when existing societies transition from the Current Act to the New Act, they will be required to input their constitutions and Bylaws into an electronic database.

The above changes are designed to allow for flexibility and greater ease in how societies operate. Upon the coming into force of the New Act on November 28, 2016, Societies must begin making the necessary transitions and attention must be given to the foregoing changes. It is important to start considering how the New Act will impact the structure and organization of your society. ■

To learn more about Juliet M. Sadr, her areas of practice and to view other articles written by lawyers at our firm, visit us online at www.bakernewby.com

RECENT EVENTS

ON MAY 29, 2016 LAWYERS AT BAKER NEWBY LLP PARTICIPATED IN THE ANNUAL RUN FOR WATER IN ABBOTSFORD, BC.

The goal of this event is to raise awareness and funds for people in the developing world who are lacking one of life's basic necessities – clean water. All of the funds raised go towards helping build clean water projects in some of the most remote and desolate areas of southern Ethiopia. The run hosts thousands of runners who participate in either a half marathon, a 10km run or a 5km fun run. The lawyers at Baker Newby were privileged to participate in this ever-growing event. ■

ON JUNE 12, 2016 BAKER NEWBY PARTICIPATED IN THE ANNUAL FRASER VALLEY DRAGON BOAT CLUB "BATTLE OF THE PADDLES".

This fun and competitive dragon boat regatta occurs at Harrison Lake and this year six teams participated. Through the exceptional effort of everyone on the Baker Newby team, we were successful in taking home the gold and dethroning the City of Chilliwack who had won the event for the past three years. Everyone had a great time and we are looking forward to participating next year! ■

KUDOS

Todd Harvey was recently presented with an Honorary Paul Harris Fellow award by the Rotary Club of Chilliwack for meritorious service both to the Rotary Club and to the community.

In the community, Mr. Harvey is the Chair of the Chilliwack Foundation, Vice President of the Chilliwack Hospital and Health Care Foundation and served on the Board of the Rotary Club of Chilliwack from 2012 to 2014. Mr. Harvey will be the President of the Rotary Club of Chilliwack in 2017 - 2018. Mr. Harvey is Past President of the Chilliwack Chamber of Commerce and has served on the Boards of the Canadian Home Builders Association and Big Brothers Big Sisters.

Mr. Harvey's legal practice includes general corporate commercial work including the purchase and sale of businesses, including farms, business contracts and commercial lending. He also practices in the areas of commercial real estate transactions, corporate reorganizations, tax-motivated transactions, wills, estates, incapacity planning and estate planning, including trusts. ■

INTRODUCING

WE WOULD LIKE TO TAKE A MOMENT TO INTRODUCE YOU TO SOME OF OUR NEW ASSOCIATES AT BAKER NEWBY LLP

BRITTANY CORWIN

Brittany Corwin was born in New Westminster and grew up in Maple Ridge, BC. Upon completion of high school, Brittany attended Simon Fraser University and obtained her Bachelor of Arts degree in 2012, majoring in Psychology.

Brittany subsequently attended law school at Thompson Rivers University where she received her Juris Doctor in 2015. Upon graduation, she began her articles with Baker Newby LLP and joined the firm as an associate upon her call in 2016.

Brittany now works out of Baker Newby's Chilliwack office. Her main practice areas include personal injury, commercial and civil litigation and construction law. In her spare time, Brittany enjoys playing soccer, golf, snowboarding, hiking and travelling. ■

ALVIN BAJWA

Alvin Bajwa was born in Vancouver, BC and grew up in Maple Ridge, BC. He completed his Bachelor of Arts degree at Simon Fraser University and his Juris Doctor at the University of Manitoba.

Alvin practices in Construction Law, Commercial Litigation, and Personal Injury Law. He completed his articles with Baker Newby and was called to the bar in 2015. He is based in the firm's Abbotsford office. ■

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IF YOU WOULD LIKE TO SUGGEST AN ARTICLE IDEA THAT IS OF INTEREST TO YOU, PLEASE CONTACT:

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