ANDREW P. ZACHARIAS

CRIMINAL, CIVIL AND COMMERCIAL LITIGATION

WELCOME TO ONE OF OUR NEW ASSOCIATES

Mr. Zacharias grew up in Chilliwack. He graduated with a Bachelor of Arts in Philosophy from Simon Fraser University in 2004, and received his Bachelor of Laws from University of Alberta in 2008. While attending law school, Mr. Zacharias won the inter-school Client Counselling Competition. He was then part of the University of Alberta team in the American Bar Association Client Counselling Competition where he placed third in the regional competition. He was also the recipient of the Maritime Law Book Award in recognition of first place standing in Professional Responsibility.

Mr. Zacharias is currently a Director of the Chilliwack Huskers Junior Football club, and President of the Chilliwack Bar Association.

In his spare time, Mr. Zacharias enjoys spending time with his family, playing hockey, traveling, and weight lifting.

KUDOS

CRISTEN GLEESON

Cristen Gleeson joined Baker Newby LLP as an Associate in February 2006 and in January 2010 joined the Partnership. Active in the legal community, Ms. Gleeson is presently co-chair of the Fraser Valley Family Law Section of the Canadian Bar Association. In addition to a wide ranging practice which includes personal injury, employment, aboriginal, and sexual abuse claims, Ms. Gleeson's practice is strongly focused on matrimonial and family law.

DAVID RENWICK Q.C.

David Renwick Q.C. has been re-elected as a Bencher for the Law Society of British Columbia. Bencher's govern the work of the Law Society and set standards of professional responsibility for lawyers.

ADNAN HABIB

Recently Adnan Habib has presented seminars for both the Canadian Homebuilders Association of the Fraser Valley and the Greater Vancouver Homebuilders Association on the topics of construction contracts, first time home buyers, and lien claimants' priority over Canada Revenue Agency. Also, in April 2010 Mr. Habib was appointed to the Board of Directors of the United Way of the Fraser Valley.

WE WANT TO HEAR FROM YOU!

WE ALWAYS TRY TO PROVIDE ARTICLES THAT ARE TIMELY, INFORMATIVE AND USEFUL TO OUR READERS. IF YOU WOULD LIKE TO SUGGEST AN ARTICLE IDEA THAT IS OF INTEREST TO YOU, PLEASE CONTACT:

TIM WURTZ AT 604-792-1376 OR TWURTZ@BAKERNEWBY.COM

Chilliwack Office
P.O. Box 390, 9259 Main Street,
Chilliwack, BC V2P 6K2
Phone: 604-792-1376
Fax: 604-792-8711
e-mail: info@bakernewby.com

Abbotsford Office
200 – 2955 Gladwin Road,
Abbotsford, BC V2T 5T4
Phone: 604-852-3646
Fax: 604-852-5194
e-mail: info@bakernewby.com

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BAILIWICK

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

SPRING 2010

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Baker Newby LLP is committed to being the leading Fraser Valley law firm, providing a full range of quality, practical and effective legal services. Our team of lawyers and staff will continuously strive to serve with excellence, earning the respect, loyalty and trust of our clients, our community and our peers.

ROBERT F. DELAMAR
civil and commercial litigation

KNOWING WHEN TO FOLD 'EM

A working knowledge of basic economics is critical to achieving an optimal result when a party is considering litigation.

All sophisticated businesspersons understand the cost/benefit analysis that is the first step in making a decision whether or not to sue.

Typical questions include: Will I recover enough from the other party to justify the cost of engaging counsel? Can I afford to lose not only the case, but also the costs owed to the other party if I am unsuccessful? Am I litigating to protect a bedrock principle no matter the cost?

Economic analysis does not end once the decision to pursue litigation is made. It can be of critical assistance as the matter develops. Very often, midstream, when the outcome remains in doubt, a client will call his lawyer and ask him to advise as to whether or not he should continue.

The issue was described simply and profoundly by Kenny Rogers in his famous song "The Gambler" as follows: "You got to know when to hold 'em, know when to fold 'em/know when to walk away and know when to run."

Knowing when to fold 'em was first comprehensively analyzed by the famous psychologists Amos Tversky and Daniel Kahneman as part of a broader inquiry into what drives decision making when human beings are confronted with unknown outcomes (risk). While I am specifically concerned with a subset of their research known as "loss aversion" and its application

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TRUSTS AS FAMILY ASSETS UNDER THE *FAMILY RELATIONS ACT*

BY JOHN C. LEE, Q.C. & BREE R. HANKINS
civil litigation, insurance law, family law

Your child, Isabelle, married Eli five years ago. Unfortunately, the marriage was unsuccessful and Eli and Isabelle are presently going through the process of separation and divorce. Eli is advancing a claim under matrimonial law against a trust, which you had set up for the benefit of Isabelle. You are very concerned because your family had designed this trust solely for Isabelle and did not intend for Eli to receive any benefit from the trust. How could this situation have been avoided?

When married spouses separate, the *Family Relations Act* (the "*Act*") is the legislation in British Columbia which governs property division. The *Act* provides that assets used for a family purpose are subject to an equal division between the spouses. Section 58(3) of the *Act* provides that an interest in a trust can be a family asset if it is used for a family purpose, and thus, subject to division under the *Act*.

How a Court will determine if an asset was used for a family purpose will vary depending on the circumstances. Consider the following examples:

During the marriage, Isabelle and Eli decided not to contribute to an RRSP because they discussed the fact that the trust was going to provide for them upon their retirement. This could constitute "use" of the trust for a family purpose.

During the marriage, Eli engaged in risky investing behavior which was condoned by Isabelle because both spouses believed that their finances were secure because of the trust. This could constitute "use" of the trust for a family purpose.

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KNOWING WHEN TO FOLD 'EM

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to the litigation context, their comprehensive "prospect theory", of which it forms part, has been widely adopted and applied by economists in fields as diverse as finance and politics.

Loss aversion is aptly summarized as follows: Would you rather have a police officer, after pulling you over for speeding, give you a "warning", as opposed to a ticket for $100; or have your insurer refund you $100 for having accrued no speeding tickets when you next renew your insurance?

Tversky and Kahneman demonstrated empirically that most people, if given a choice, would choose the "warning" rather than the rebate, because losses weigh larger than gains. Their research shows that individuals generally garner roughly twice the personal satisfaction from avoiding a loss, than gaining a windfall of the same value.

Let us consider a hypothetical situation where a business is owed $400. The cost of litigating the matter to a successful conclusion is estimated by counsel to be $200. Cost/benefit analysis was completed by the client and the decision made to sue.

Well into the litigation, a document is produced by the other side that muddies the water (making recovery at best 50/50). Does it remain worthwhile to continue to pursue the matter in light of the new evidence (despite the fact it may require further expenditure of fees)?

Many litigants will answer: "Well I've already spent $100 on legal fees, despite the new evidence there is still a chance I could win and recover $400. If the cost of pursuing the matter requires me to expend another $100, it is worth the risk."

Applying loss aversion theory to this hypothetical might result in the litigant pursuing a different course of action. The concern is the expenditure of fees. These are a sunk cost with no chance of recovery until the outcome of the litigation is known.

Loss aversion theory suggests that the critical question to ask at this juncture is not, "how much has been expended thus far?" But rather, "what further risk will the litigant be exposed to if he continues to pursue the case?"

Now add the following facts to the hypothetical. The other side is willing to settle the matter for $200. What do you do?

Some simple math can help resolve the dilemma.

The risk of further loss (losing the case) is 50%. There is 0% risk of further loss in settling the file, but the total loss crystallizes at $300 (the $400 debt plus $100 in legal fees expended thus far less $200 in settlement funds). You have 100% certainty that you will sustain a 75% loss. Hold 'em or fold 'em?

By going to trial with a 50% chance of losing, the litigant exposes herself to both the loss of her legal fees expended but also the entire amount of the debt. You may have "saved" the money expended on legal fees thus far by not settling, but by expending further fees you have doubled the amount at risk (from $300 to $600 if you lose). The corresponding upside is only $200 (the most you can recover from the original debt after subtracting legal fees). You have a 25% possibility of recovering 50% of the debt owed. You also have a 25% possibility of doubling your loss.

This simple scenario shows that risk aversion can lead to risk taking behaviour (seeking to save legal fees expended in order to reach a conclusion whose outcome is uncertain) – precisely the opposite (and irrational) outcome the litigant is seeking to avoid. Knowing when to fold 'em is critical.

Some might question why a lawyer would advise a client to consider economic theories such as loss aversion when making a decision whether or not to continue to pursue a matter. Getting great results for clients requires engaging in unconventional thinking. There may be a perception that lawyers are generally incentivized to take matters to trial rather than settle (as trials command further fees). The commercial litigation group at Baker Newby LLP strives first and foremost to apply the law in order to assist clients to achieve optimal business outcomes. A meaningful analysis of the full economic risk presented by litigation, including the risk of throwing good money after bad in the form of legal fees, is critical to achieving this objective. ■

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

DEATH IS NOT THE END PART 3

JASON R. FILEK
estate litigation

In my two previous articles, I discussed two main areas where litigation over an estate can arise, namely a wills variation action, and a joint tenancy dispute. In this article, I will discuss an intestate deceased, which is another main area where litigation over an estate can arise.

When an individual dies without a will, we call that person an intestate deceased, or we say that they died intestate. When an individual dies without a will, the assets of their estate will be distributed according to the *Estate Administration Act* of British Columbia. The wishes or intentions of the deceased are not taken into account, and the estate is distributed according to a formula as set out in the *Estate Administration Act.*

For example, if the deceased leaves behind a spouse and no children, the spouse will receive the entirety of the estate. If there are children, the spouse will receive the first $65,000.00, household furnishings and a life estate in the matrimonial home. If there is one child, whatever is left over is divided equally between the spouse and the child. If there is more than one child, the spouse receives one-third of the remaining amount, and the children split the remaining two-thirds.

As discussed in Death is not the End – Part 1, if there is a will, a spouse or child may apply to the Court to vary the terms of the will. However, the *Wills Variation Act* is not applicable in the situation of an intestate deceased, and the estate will be distributed as set out in the *Estate Administration Act.*

Under the *Estate Administration Act,* a spouse is defined as including a common-law spouse. A common-law spouse is defined as meaning either:

a) a person who is united to another person by a marriage that, although not a legal marriage, is valid by common-law; or
b) a person who has lived or cohabitated with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, for a period of at least two years immediately prior to the other person's death.

Whether or not an individual is a common-law spouse of the deceased is one area where litigation can arise. If an individual claims to be the common-law spouse of a deceased, that assertion may be challenged by the children of the deceased. For example, a deceased may, in their later years, have been cohabitating with an individual, and this individual may not have been well known by the deceased's children. This situation could easily arise where the children have become estranged from the deceased, or in situations where the children lived some distance from the deceased and did not visit. The question for the court to decide in these circumstances is whether or not the deceased and the alleged common-law spouse were living together in a marriage-like relationship. It should be pointed out

> *"WHETHER OR NOT AN INDIVIDUAL IS A COMMON-LAW SPOUSE OF THE DECEASED IS ONE AREA WHERE LITIGATION CAN ARISE."*

that simply living together is not necessarily enough to constitute a common-law marriage. The couple must be living together in a marriage-like relationship.

The decision of the British Columbia Court of Appeal in *Gostlin v. Kergin,* is often cited as authority when the issue of whether a couple is living in a marriage-like relationship arises. In that case, the court stated the following:

> *"…I would ask whether the unmarried couple's relationship was like the relationship of the married couple and that the unmarried couple have shown that they have voluntarily embraced the permanent support obligations of Section 57 [of the Family Relations Act]. If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been "Yes", then they are living together as husband and wife. If the answer would have been "No", then they may be living together, but not as husband and wife."*

In addition, the Court went on to consider that in the particular circumstances of some cases, the answer to the above question may be elusive. If so, then other indicators may be considered. For example, the court can consider whether or not the couple referred to themselves as husband and wife or as spouses, whether or not they shared the legal rights to their living accommodations, whether or not they shared their finances and bank accounts, and whether or not they shared their vacations. Basically, the court will consider whether or not the couple shared their lives. Of course, each case may have its own unique circumstances which may tend to prove or disprove whether or not the couple was living in a marriage-like relationship.

In conclusion, it is likely that the courts will be asked to deal with more and more of these disputes, as it appears to be more common for individuals to cohabitate as opposed to getting married. The courts will look at each case on its own facts, and will weigh the evidence to decide whether or not the couple was cohabitating in a marriage-like relationship. In other words, in these cases the courts are asked to determine whether or not the couple was sharing their lives as husband and wife.

Of course, the simplest way to avoid this potential area of litigation is to ensure that you have a current and valid will in place!

In the next edition of the Bailiwick, I will discuss challenges to the validity of a will, which is the fourth main area where litigation over an estate can arise. ■

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

TRUSTS AS FAMILY ASSETS UNDER *THE FAMILY RELATIONS ACT*

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During the marriage, Isabelle borrowed money from the trust in order to purchase the family home. This could constitute "use" of the trust for a family purpose.

During the marriage, Isabelle received $2,000 per month from the trust and placed this into her joint bank account with Eli. The funds were then used to pay the mortgage and the monthly bills. This could also constitute "use" of the trust for a family purpose.

All of these examples can result in a determination that Eli is entitled to a share in Isabelle's interest in the trust.

There are various types of trusts that can be created. A trust typically has individuals assigned to be "trustees." A trustee is an individual in charge of making decisions regarding the trust such as disbursement of funds or where to invest the trust's assets. The type of trust could have an impact on a Court's determination of whether the trust will be a family asset. The following types of trusts have been found to be family assets:

1. A fixed interest trust. This type of trust is where the beneficiary spouse is going to receive a specified amount or portion of the trust property. An example of this type of trust would be where Isabelle is to receive, lets say, $50,000 from the trust.
2. A discretionary interest trust. This type of trust is where the beneficiary spouse only receives something upon the exercise of discretion from the trustee. An example of this type of trust would be when Isabelle requires the trustee's permission to receive $50,000 from the trust.
3. A contingent interest trust. This type of trust is where the beneficiary spouse will receive property after a specific event occurs. An example of this type of trust would be when Isabelle receives $50,000 upon graduation from University.
4. A fixed, subject to divestment trust. This type of trust gives the beneficiary spouse a share when an individual passes away. An example of this type of trust is when Isabelle is entitled to $50,000 upon the death of her parents.
5. A discretionary and contingent trust. This type of trust gives the beneficiary spouse a share upon the happening of an event and subject to the consent of the trustee. An example of this type of trust is where Isabelle is eligible to receive an amount determined by the trustee after 10 years have elapsed.

> *"THE BEST PRACTICE IS TO CONSULT A LAWYER WHO IS KNOWLEDGEABLE IN THE CREATION OF TRUSTS TO ENSURE THAT THE TRUST HAS BEEN PROPERLY CONSTRUCTED."*

There are steps that can be taken to minimize the risk that the trust will be found to be a family asset. The foundation starts with the trust itself. The best practice is to consult a lawyer who is knowledgeable in the creation of trusts to ensure that the trust has been properly constructed. This makes it more difficult for the Court to attribute a value to the interest, and limits the Court's ability to award an interest because payment is reliant on the trustee granting permission.

There are several also steps that can be taken which may assist the beneficiary in defending a claim that the trust is a family asset. To ensure that you are adequately protected, you should consult one of our experienced family law lawyers at Baker Newby LLP who can assist you in minimizing your risk. ■

To learn more about John Lee and Bree Hankins, their areas of practice and view other articles written by lawyers at our firm, visit us online at www.bakernewby.com