



Winter 2013

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Probate planning

PROBATE IS THE PROCESS BY which an individual's Will is certified by a provincial court, if necessary. Where an individual holds certain assets in his or her own name, a probated Will is ordinarily required in order for the estate trustees to deal with a variety of those assets (such as bank/investment accounts and Canadian real estate). For its services, the court charges a probate fee based on a percentage of the fair market value of the individual's assets under the probated Will (~1.5% in

Ontario – or roughly \$15,000 for every \$1 million of assets). To make matters worse, assets may be subject to probate fees on multiple occasions (i.e., both spouses may be subject to probate fees on the same assets).

Intuitively, it seems unfair to pay probate fees on assets that do not otherwise require a probated Will to effect their transfer (such as shares of privately-held family corporations or personal property). Thankfully, there are a number of probate planning opportunities to help reduce these fees.

Probate planning *(continued)*

One of the most common forms of probate planning is holding assets jointly with another person. The impact of holding assets jointly is that probate fees are not paid until the death of the last to die of the joint holders. While this is an effective means of avoiding probate fees on multiple occasions, this form of probate planning does not have the effect of eliminating probate fees in their entirety.

Another common, and more effective, form of probate planning is the use of “multiple Wills” – one Will that deals with those assets for which a probated Will is required (often called a “public Will”) and another Will that deals with those assets for which a probated Will is not required (often called a “private Will”). When multiple Wills are used, only the fair market value of those assets that form part of the public Will are subject to probate fees. Probate fees can accordingly be avoided to the extent of the fair market value of those assets forming part of the private Will.

A more advanced type of probate planning combines multiple Wills with the transfer to a “bare trustee corporation” of legal title to (but not beneficial ownership in) certain assets that might otherwise require a probated Will upon death (such as bank/investment accounts and Canadian real estate). Where properly implemented, the transferred assets will form part of the private Will (and not the public Will which it would have otherwise formed part of) and probate fees that may have otherwise been owing upon death will be avoided.

A number of changes to the way in which probate fees are collected were introduced at the start of 2013. It does not currently appear that these changes have impacted the use of multiple Wills or bare trustee corporation planning, but it is possible that changes may be made to these practices in the future.



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Occupy Queen Street:

Musselman v. 875667 Ontario Inc. and the Impact of the Ontario Occupier's Liability Act on Landlords and Tenants

THE CONTROL AND OPERATION of a building or commercial centre is one of the key issues that landlords and tenants will consider at the outset of any lease negotiation. The obligations to repair, replace and maintain the building or commercial centre carry significant financial implications and, more importantly, may impose onerous liability and legal consequences. These responsibilities and obligations will be governed by the type of lease the parties enter into and the negotiated provisions contained therein.

Occupiers' Liability

Regarding liability and legal responsibility, legislation has been enacted in order to provide protection to any visitors, invitees or trespassers to a building or property. In Ontario, the Occupiers' Liability Act, RSO 1990 (the "Act") was instituted in order to replace the old common statutory duty of care, which was viewed as complex, arcane and inadequate in dealing with the liability of occupiers of property where trespassers, licensees and invitees were concerned. The common law rules of negligence imposed certain liability upon landlords and tenants of properties and differentiated between invitees and trespassers, where the Act is intended to expand the liability of owners and landlords in appropriate ways depending on the circumstances. Under common law, a landlord could lease a defective or unsafe property without incurring liability to the tenant or a third party. With the expanded liability found in the Act, a landlord may be found liable when deemed an "occupier" under the Act.

Under Section 1 of the Act, an "occupier" includes a person in physical possession of the premises, or a person who has responsibility for and control over the condition of the premises and the activities carried out therein. Pursuant to Section 3(1) of the Act, "an occupier owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons, are reasonably safe while on the premises." In addition, Section 8(1) of the Act provides that where a landlord is responsible for repair and maintenance of the property, it shall be deemed an occupier.

Musselman v. 875667 Ontario Inc.

The case of *Musselman v. 875667 Ontario Inc.*, 2012 ONCA 41, [2012] O.J. No. 649 (Ont. C.A.)

("Musselman") provides a relevant case example of what circumstances will be considered by the judiciary in determining whether a landlord will be considered an "occupier" under the Act.

On February 10, 2004, the plaintiff, Ms. Gloria Musselman (the "Plaintiff"), was dining at a restaurant called "Cities Bistro" located at 859 Queen Street West, Toronto, Ontario, with her husband and two children. Following the meal, the Plaintiff visited the ladies room in the basement of the restaurant. The construction of the staircase leading to the basement was such that it required the Plaintiff to descend down eight risers, turn ninety degrees and descend two further risers to reach the basement floor. At the time, there were no guards, no wall and no handrail on the west side of the staircase. As the Plaintiff ascended the staircase to return to the restaurant she lost her balance and fell backwards down the stairs.

As a result of the fall, the Plaintiff was rendered quadriplegic. The Plaintiff spent several months in hospital, followed by a lengthy recovery at a rehabilitation facility. It was determined that the Plaintiff would require constant professional health care for the remainder of her life. The Plaintiff sued the restaurant, its proprietor and the landlord, as well as the City of Toronto for negligence in ensuring that the stairs were constructed in a manner that would provide for safe use.

The "Cities Bistro" restaurant had been operated by Brian Heasman through a shell company (the "Tenant") since 1990. Fred Dominelli (the "Landlord") owned the property where "Cities Bistro" was being operated. On December 30, 1999 the Landlord and the Tenant entered into a lease (the "Lease"), which governed the tenancy at the time of the Plaintiff's accident. The Lease was a "completely care-free net lease" and the Tenant was responsible for all expenses and charges related to utilities, property tax, etc. In particular, Section

6 of the Lease provided that the Tenant would be responsible for all maintenance. The Landlord was entitled to enter the premises to check the state of repair and take any necessary steps required to maintain the premises in a state of good repair.

Decision of the Trial Judge

As a result of her injuries and medical expenses, the Plaintiff was awarded \$3,243,349.48 in damages. The trial judge found the proprietor and the city jointly and severally liable for the Plaintiff's damages, but found that the landlord was not an "occupier" for the purposes of the Act. In coming to this conclusion, the trial judge specifically noted that the operative provisions of the Lease allocated complete responsibility for maintenance and repair of the premises to the Tenant. In addition to the relevant lease provisions, the court examined the conduct and the relationship of the parties and other relevant circumstances to determine if the Landlord was an "occupier" within the meaning of the Act. The court found that the Landlord had limited knowledge of and no input or control over the construction and renovation conducted on the basement stairway and the Tenant had undertaken all the work and construction processes related to the basement stairway under its own initiative.

The trial judge concluded that the Landlord had no responsibility for or control over the activities that occurred on the premises or the persons that were allowed to enter the premises. Therefore,

the Landlord owed no duty to the Plaintiff or its invitees under the Act as it could not be classified as an "occupier".

Court of Appeal

The Plaintiff appealed the ruling, which was dismissed by the Ontario Court of Appeal. The interpretation of the operative terms of the Lease at trial were deemed accurate, and it was determined that the trial judge correctly allocated responsibility for repair and maintenance of the premises to the Tenant, and that the Landlord was appropriately determined not to be an "occupier" within the meaning of the Act.

Conclusion

Despite the intended purpose of the Act, it is only in rare and exceptional cases that liability will be found against an owner or a landlord who is not an "occupier". In determining whether an owner or a landlord is an "occupier" within the meaning of the Act, the court will examine the totality of the circumstances involved in each individual case, including the operating provisions of the lease, the conduct and relationship of the parties and other relevant circumstances. The lesson to be learned from Musselman is that both landlords and tenants should endeavor to conduct themselves in strict compliance with the lease and avoid actions which may be in conflict with their expansive obligations and responsibilities.

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CAVEAT EMPTOR



RECENTLY THERE HAS BEEN A spate of publicity about homebuyers complaining of the conduct of the real estate agents who assisted them in the purchase of a home and against the vendors who sold them the home.

In the most recent complaint to make the news, the purchaser complains that the real estate agent did not warn her that a baby had accidentally drowned on the property. In another case approximately two weeks prior, the homeowner complained that the real estate agent failed to disclose that a double murder had been committed in the house approximately ten years before the homeowner purchased it.

The sobering news for these complainants is that, to date, there is no precedent in Ontario for awarding damages on the basis of these or

similar complaints. The basic law is simply “buyer beware” (caveat emptor). The general rule is that it is for the purchaser to make whatever inquiries about a property may be material and to satisfy himself or herself that the property is suitable. There are some limited exceptions. A vendor, and by extension a vendor’s agent, is generally obligated to disclose defects in a property that are not obvious on an ordinary inspection. Furthermore, a vendor is not entitled to cover up a defect, for example by doing a cosmetic repair does not really solve the problem but merely masks it.

Until now, the law in Ontario has been that a vendor, and by extension the vendor’s agent, must disclose a defect in the property that makes the property unsafe for habitation, again provided that the defect would not be obvious

on an ordinary inspection. In one recent case handled by our firm, the Court affirmed that a purchaser who complained that the vendors and the vendors' agent failed to disclose that a person convicted of possession of child pornography lived across the street had a complaint that was legally tenable. This is, however, only a minimal finding. The case settled before it could go to trial. We do not know what a trial judge, having heard all of the evidence, would have decided. In the case just mentioned, the presence of the bad neighbour was more than of theoretical interest to the purchasers, because they had two young children and would not have been in a position to give the children constant supervision so as to ensure that the children did not come into contact with the neighbour.

The law of Ontario had already developed to the point that a purchaser could, in theory, complain about a defect not only in the property itself but in the neighbourhood. This stems from a number of decisions years ago in Ontario relating to the presence of radioactive material in the soil elsewhere in the neighbourhood but not on the property itself. The Court found the vendors liable for not disclosing to the purchaser the presence of radioactive soil in the neighbourhood. So it is not a bar to a complaint

that the defect relate to something in the neighbourhood rather than to the property itself.

The result is that the purchaser who wishes to make a complaint based on some unattractive feature of the neighbourhood, such as the presence of a "bad" neighbour or an unfortunate past event on the property itself does not yet have a favourable precedent on which to base his or her case even if the purchaser may suffer some psychological alarm.

Another sobering thought is that the insurer for the real estate agents in Ontario usually defends these cases to the hilt. There will be no easy victory for the purchaser.

One notable feature of the case handled by our office is that a number of newspaper articles made the point that it hardly does a careful and conscientious purchaser any good that there is a registry of sex offenders when the registry is not accessible to the public. It may be well and good to say that the onus is on the purchaser to make inquiry but the relevant avenue of inquiry in this case was closed. The newspaper articles called for the registry to be open to the public.

It will be interesting, to say the least, to see how the law develops in Ontario. But, for the time being, to those who know little law and even less Latin: buyer beware.

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Firm News & Professional Notes

Howard S. Black was interviewed on The Pattie Lovett Reid Showtopic on How to Resolve Legal Issues Without Heading to the Courtroom, Feb 2013

David Ullmann was quoted in the Globe and Mail article Top court deals blow to pensioners in insolvency case, Feb 2013

Stephen Messinger was quoted in the Lexpert® article Prime Time for Real Property, Feb 2013

Stephen Posen to accept the Lifetime Achievement Award on behalf of the Glenn Gould Estate from the U.S. Recording Academy during the 2013 Grammy Awards, Feb 2013

Stephen Posen, Stephen Messinger, Michael Horowitz, and **Adam Perzow** of the Commercial Leasing team participated at the 2013 ICSC Whistler Conference, Jan 2013

Howard S. Black was listed in the 2013 Canadian Legal Lexpert® Directory, Leading Practioner, for Estate Litigation, Jan 2013

Stephen Posen was listed in the 2013 Canadian Legal Lexpert® Directory, Leading Practioner, Property Leasing, Jan 2013

Stephen Messinger was listed in the 2013 Canadian Legal Lexpert® Directory, Leading Practioner, Property Leasing, Jan 2013

Christina Kobi was listed in the 2013 Canadian Legal Lexpert® Directory, Leading Practioner, Property Leasing, Jan 2013

Adam Perzow was listed in the 2013 Canadian Legal Lexpert® Directory, Leading Practioner, Property Leasing, Jan 2013

Matt Maurer was interviewed for the article Information statements good for buyers, dangerous for sellers that was published recently in the Law Times, Jan 2013

Samantha Prasad published Tax Gifts on The Fund Library, Dec 2012

Samantha Prasad was quoted in the CBA National Magazine Article, Blazing Trails, Nov 2012

Samantha Prasad presented Shedding Light On Family Business Succession Planning, Nov 2012

Catherine Francis, Timothy Dunn, & Rachel Moses presented on Canadian Banking and Insolvency Law to the State Bank of India (Canada), Nov 2012

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