Rural Property Issues – Selected Estate and Tax Planning Matters Involving Transactions of Farm Properties

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Rural Property Issues

Presented by:

Jason Stephan

CA Tax Law

Red Deer, Alberta

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SELECTED ESTATE AND TAX PLANNING MATTERS INVOLVING TRANSACTIONS OF FARM PROPERTIES

This paper this divided into two parts. The first part considers selected estate planning considerations for blended farm families. The second part considers unique tax considerations and planning opportunities when dealing with farm properties.

I. ESTATE PLANNING FOR BLENDED FARM FAMILIES

Challenging estate planning issues can arise in complex family situations such as second or third marriages, marriage partners with children from prior relationships, common law relationships and so forth.

This paper focuses on will variation issues which can arise in "blended" family situations, as well as strategies available to the estate practitioner to mitigate the risk of a surviving spouse or common law partner frustrating the testamentary intentions of a testator spouse client.

A. Key Issue: Potential Application to Vary the Will of the Testator Spouse

In most cases, a testator wants to ensure that his or her spouse or adult interdependent partner ("**AIP**")[1] is properly provided for in the event the testator is the first to die. However, in many blended family situations, the testator will want also to limit the ability of the surviving spouse or AIP from accessing all of the testator's property and potentially making dispositions to the testator's step sons or daughters (or other persons) to the detriment of the testator's sons or daughters (or other intended beneficiaries of the testator).

The key estate planning issue in many blended families situations is that a surviving spouse, AIP, or other "family member"[2] of the testator may make an application ("**Application**") for "proper maintenance and support" varying the will of the testator under section 88 of the WSA. Section 103 of the WSA confirms that this right of a family member to make an Application cannot be contracted out of or waived by agreement. Accordingly, while the risk of a successful Application can be mitigated, as discussed below, it cannot be eliminated from the estate plan.

If a surviving spouse makes an Application, it is established that a Court will apply the principles articulated by the Supreme Court of Canada in *Tataryn* v. *Tataryn Estate*, [1994] 2 S.C.R. 807 in considering the merits of the Application. The Court in *Tataryn* held that a deceased individual has both a legal and a moral obligation to his or her dependents.

In respect of a legal obligation to a surviving spouse, that obligation is generally measured by the obligation that would result if the surviving spouse had divorced the testator spouse immediately prior to death. That obligation in turn would be determined under the *Matrimonial Property Act* (Alberta) ("**MPA**").

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1 The definition of an AIP generally relates to a longer term common law relationship and is discussed in F. below.

2 The definition of "family member" is defined in paragraph 72(b) of the *Wills and Succession Act* (Alberta) ("**WSA**"). In addition to a spouse and an AIP, dependent children or grandchildren, and certain full-time student children of the testator are also family members.

Because there is no actual divorce, the Court is applying the MPA "indirectly" as the measuring stick in considering the merits of an Application. In this respect, it is important to be aware that Courts have held that a pre-nuptial (or post-nuptial) agreement ("**Agreement**") described in section 37 of the MPA can significantly limit a testator's legal obligation under an Application (discussed in E. below).[3]

The MPA does not apply to AIP relationships. However, a Court can make equitable divisions of property on a cessation of the AIP relationship. AIPs can enter into cohabitation agreements, similar in effect to Agreements, limiting the testator's legal obligation (discussed in F. below).

Independent of any "legal" obligation, including those limited by an Agreement, the testator spouse also has a moral obligation to a surviving spouse or AIP. At a minimum, there is a general moral obligation of the estate to prevent a surviving spouse or AIP from becoming a ward of the state.[4]

Section 93 of the WSA lists factors a Court will consider in determining what, if any, variation is warranted in the event of an Application. For example, the size, nature and distribution of testator's estate to the surviving spouse, such as outright gifts to the surviving spouse under the will or entitlements under a spouse trust would be relevant considerations among others.

In addition to those factors enumerated in section 93, the post-amble of that section indicates that a Court may also consider any other factor it considers relevant. For example, there is authority for the proposition that an application under dependents relief legislation is not supposed to be used to amass an estate for the beneficiaries of the surviving spouse.[5] In my view, this is an important principle for a Court to be mindful of in blended family situations, and this principle facilitates the use of testamentary spouse trusts (discussed in G. below) at least partially in the place of outright gifts to the spouse or AIP to prevent such amassing from occurring.

B. Potential Future Issue: Standing to Make an Application under the MPA

The WSA is new legislation in force only since February 1, 2012. Proposed section 117 of the WSA was going to permit a surviving spouse to make an application for a matrimonial property order under the MPA *without* a corresponding reduction to his or her entitlements under the estate of the deceased spouse, resulting in a potential "double dip" result for the surviving spouse to the detriment of the estate's other beneficiaries. Such a result would often frustrate the estate planning intentions of testators in many blended family situations.

Section 117 was going to apply to wills executed not only after proclamation of the WSA, *but also before proclamation* if the death of the testator occurred subsequent to proclamation. This was alarming to many estate practitioners with practices over several years drafting wills on the assumption that no such right under the MPA applied to those wills.

Fortunately, due in part to concerns expressed by estate practitioners, section 117 of the WSA was not enacted on February 1, 2012. However, this section may be proclaimed on a later date, eliminated altogether, or modified perhaps to provide a surviving spouse with the right to seek a

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3 See *inter alia Skwordoda* v. *Skwordoda Estate*, 2008 ABQB 240 and *Roberts* v. *Salvador*, 2006 ABQB 400. However, the recent Ontario court decision of *McCain* v. *McCain*, 2012 ONSC 7344 (CanLII), is an example of a court overriding the contractual terms of an Agreement. Agreements need to be reasonable and fair to reduce the risk of a court overriding the Agreement.

4 *Skwordoda*, paragraph 55.

5 *Ibid*, paragraph 56.