



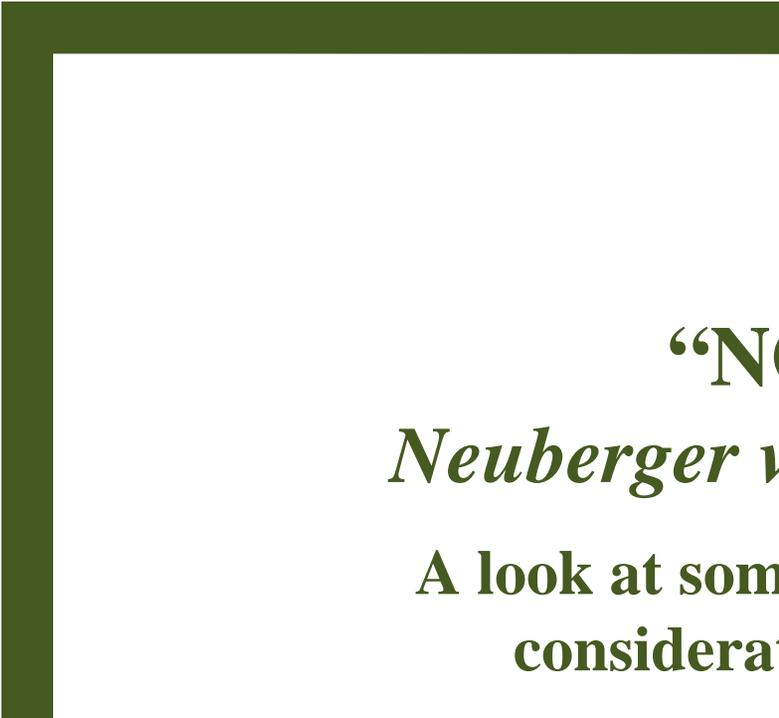
**Gardiner Roberts LLP**

**Toolbox Seminar**

**May 26, 2016**



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**“NOT SO FAST”**  
***Neuberger v. York*, 2016 ONCA 191**

**A look at some of the unique elements and  
considerations in probate litigation**

**Toolbox Seminar**  
**May 26, 2016**

**Presented by:**  
**Tim Duncan**



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## Judicial History

- On appeal from the Superior Court of Justice (Madame Justice Greer, as she then was)
- Application by Edie (estate trustee and beneficiary) to challenge will validity (“*Huh?*”)
- Motion to dismiss Application by Myra (co-trustee)
- Motion granted by Justice Greer in November 2014
- On appeal, decision of Justice Greer overturned by Justice of Appeals Gillese

## The Family

- Testator = Chaim Neuberger
- The Estate = \$100 Million +
- Family
  - Wife: Sarah (predeceases Chaim)
  - Daughters: Edie (Neuberger) and Myra (York)
  - Date of Death: September 25, 2012
  - Age at Death: 86

## The Wills

- Primary and Secondary Wills in 2004
- Primary and Secondary Wills in 2010
- Similarities:
  - Myra and Edie = joint executors and trustees
  - Primary estate divides equally
  - Second Will creates voting control of separate company structures (one for Myra, one for Edie)

## The Wills

- Change from 2004 to 2010 = Estate Freeze in 2010
  - Common shares of companies placed into trusts
  - Chaim retains preference shares (control)
  - Edie and children are beneficiaries of Trust A
  - Myra and children are beneficiaries of Trust B
- The Effect (according to Edie):
  - Capital stock organized differently:
  - Company B allegedly worth \$13 million more than Company A

## Estate Administration and Will Challenge

- Prior to challenge, Edie acts as trustee under 2010 Wills, but some notable actions also not taken by Edie
- However:
  - Edie had taken prior litigation steps under 2010 Will
  - This caught the Court's attention
- Edie challenges 2010 Wills in December 2013
- Myra moves to dismiss application in Feb 2014

## Motion Grounds

- Equitable doctrine of estoppel by representation
- Equitable doctrine of estoppel by convention
- In English:
  - Edie's conduct consistent with 2010 Wills precludes her from challenging validity of 2010 Wills
  - "Too late to change your mind"
- Justice Greer: Delay in bringing challenge + taking steps as trustee estopped Edie
  - Adam (Edie's son) called a "straw man"

## Again, *Not So Fast*

- Justice Greer’s decision overturned on appeal
- Estoppel by Representation or Convention in Probate is unprecedented and unwise
- Policy Reasons:
  - Probate Court has a “duty to the public”
  - Probate Court has a duty to testator
  - Estate trustees must be given a reasonable timeframe to contemplate challenging a Will

### “Straw Man Adam”

- No evidence upon which to base this finding
- If a motion judge rejects otherwise unchallenged evidence, that is a challenge to credibility
- Judge must give an explanation for rejecting evidence
- Being a “straw man” is not in itself grounds for disentitlement in any event

### **Obiter: No Automatic Right to Proof in Solemn Form**

- SCJ and ONCA agree
- Adam argued that Rule 75.01 provides an automatic right to proof in solemn form
- Wrong.
  - Automatic right to request the Will be “proved in such manner as the court directs.”
  - The Court retains discretion as to mode of proof under Rule 75.06.

### Conclusion

- Plenty of good reasons why Will challenge application is likely to ultimately fail.
- BUT, practicality has its limits
- Dismissal of application prior to trial requires real certainty as to merits.



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# **Rectification- A Useful but not Universal Tool to Remedy Mistakes**

**Toolbox Seminar**

**May 26, 2016**

**Presented by:  
Lorne Saltman**



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## Topics to Discuss

- What is Rectification ?
- Leading Tax Cases
- Objections by the Canada Revenue Agency
- Leading Contract/Trust/Estate Cases
- Others

## What is Rectification?

- Rectification is one of the equitable remedies available to a superior court of a province to relieve against that which is unfair, unconscionable, or unjust
- Rectification has traditionally been considered an equitable remedy that is available to correct a written agreement when the parties were in agreement on the terms of their contract but, by mistake, wrote them down incorrectly
- It is a remedy, however, that may be used in appropriate circumstances to avoid an adverse tax consequence from a completed transaction



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## **The elements that must be proven to obtain a rectification order are as follows:**

- The parties had a common intention before making the written instrument alleged to be deficient;
- This common intention continued unchanged at the time the written instrument was executed;
- The written instrument mistakenly did not conform to the prior common intention; and
- The party seeking relief can show the precise form in which the written instrument can be made to express the prior common intention.

## *Juliar v. Canada (Attorney General)*

- The leading judicial authority on the remedy of rectification in income tax matters
- The taxpayer/applicants for relief received promissory notes as consideration for shares of their holding company by mistake, and the court substituted shares as the consideration by way of rectification of the transfer documentation

## *Juliar v. Canada (Attorney General)*

...cont'd

- The Juliar family owned a holding company ("867"), which held the shares of a convenience store business. The family sought to divide the business between family members.
- The application judge found as a fact that the Juliars had a common and continuing intention that the transaction occur on a basis which would not attract immediate income tax liability.

## *Juliar v. Canada (Attorney General)*

...cont'd

- The Juliars transferred their shares in 867 to a newly-incorporated holding company. Due to a mistaken assumption as to the adjusted cost base of the shares, their accountant had advised them to transfer their shares in exchange for promissory notes.
- They assumed that the adjusted cost base of the shares was sufficient so not as to give rise to taxable deemed dividends under the ITA. However, the adjusted cost base of the 867 shares was in fact less than assumed and the Juliars were deemed under the ITA to have received dividends on the excess, resulting in significant tax liabilities.

## *Juliar v. Canada (Attorney General)*

...cont'd

- In contrast, had the Juliars received shares of the new holding company as consideration for the shares of 867 instead of the notes, the transfer would have qualified for a rollover, deferring the tax liability.
- Given the Juliars' common and continuing intention to avoid immediate tax liability, the Court rectified the corporate documents to substitute shares of the new holding company for the promissory notes as consideration.

## *Juliar v. Canada (Attorney General)*

...cont'd

- In doing so, the Court commented as follows:
  - "Denial of the application would place on the Juliars a heavy burden which they were entitled to avoid and which they sought to avoid from the inception of the transaction.
  - It would yield to Revenue Canada a premature gain solely because of an error in understanding or communication between [Mr. Juliar] and [the Juliars' accountant]."

## *Juliar v. Canada (Attorney General)*

...cont'd

- The decision was upheld by the Ontario Court of Appeal, which concluded that the true agreement between the parties was that the transfer of shares in 867 to the new holding company would occur in a manner that would not attract immediate liability for income tax.
- It was not necessary to prove a specific intent to issue shares instead of debt.

## Post-*Juliar* Decisions

- Recently, the CRA has objected to certain applications for rectification orders, asserting that the courts have extended the scope of relief too far after *Juliar*:
  - Instead, there should be present a specific intent to use a determinable instrument or structure; and
  - Rectification has gone so far as to permit retroactive tax planning.

## Post-*Juliar* Decisions ...cont'd

- A number of court decisions outside of Ontario have accepted the CRA's position
- In *Groupe Jean Coutu (PJC) Inc. v. Attorney General for Canada*, the Québec Court of Appeal held that a plan for a Canadian parent company to reduce exposure to currency risk in respect of its investment in a US subsidiary unexpectedly resulted in *FAPI* to the Canadian parent

- The Canadian parent sought to substitute for the faulty plan an alternative that would not have given rise to *FAPI*
- The CRA objected on the basis that the Canadian parent sought to “rewrite tax history” because of unintended tax consequences from the original plan:
  - what the parties intended (to insulate the parent against FX risks) was achieved, and the documentation was consistent with that intent;
  - to substitute the alternative plan would be tantamount to retroactive tax planning; and they argued that rectification required a specific intent to be shown, not just a general intent to have a tax-neutral transaction

## *Jean Coutu* ...cont'd

- The judge in the first instance agreed with the parent but the Court of Appeal disagreed and found in favour of the CRA:
  - Tax liability, the Court said, is based on what happened and not on what a party in retrospect would have rather done
  - Rectification is granted to restore a transaction to its original purpose and not to avoid an unintended effect;
- The Supreme Court of Canada is scheduled to hear appeals from this *Jean Coutu* case where rectification was denied and another Ontario case, *Fairmont Hotels v. Attorney General for Canada*, where it was granted in another failed Canada/US FX structure

## Foreign Rectification Order

- Will a Canadian court recognize a rectification order granted by a foreign court to correct a mistake in a transaction affecting the foreign jurisdiction and Canada?
- That question recently arose in the case of *Canadian Forest Navigation Co. Ltd. v. The Queen*
- A Canadian parent company with subsidiaries in Cyprus and Barbados received distributions which became taxable as dividends, and wished to have them rectified by the respective courts and treated as non-taxable loans

## *Canadian Forest Navigation Co. Ltd. v. The Queen ...cont'd*

- When the CRA assessed the Canadian parent on the basis that it had received taxable dividends, it applied to the Cyprus and Barbados courts for rectifying orders that the distributions be treated as loans, but without any notice to, or input from, the CRA
- After the assessment and objection process, the parent moved in the Tax Court to require the CRA to recognize the foreign orders and treat the receipts as loans not as dividends
- The Tax Court of Canada refused to make the requested order

## *Canadian Forest Navigation Co. Ltd. v. The Queen ...cont'd*

- The Court ruled that the domestic Canadian court (whether a Québec civil court if the foreign affiliate were to seek enforcement of the debt against the Canadian parent, or the Tax Court if the Canadian parent sought to have the CRA's assessment overturned) would have to consider certain relevant factors in deciding whether to enforce the foreign orders

## *Canadian Forest Navigation Co. Ltd. v. The Queen ...cont'd*

- The Court should consider the following factors:
  - Will the foreign judgment disturb the structure and integrity of the Canadian legal system ?
  - Does the foreign judgment conflict with domestic law?
  - Will enforcing the foreign judgment result in judicial assistance being given by a Canadian court that would be used in a manner that would not have been available in a strictly domestic litigation?
- In any subsequent Tax Court trial, the Canadian parent would be able to introduce the foreign judgment as evidence, the CRA could object, and the presiding judge would decide what weight to give to the foreign orders

## Non-Tax Cases for Rectification

- The Supreme Court of Canada in cases relating to rectification of contracts that produced unintended (non-tax) results have held that the court's task is corrective, not speculative.
- “It is to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other.”

## Rectification and Trusts

- When a tax-related error is made in relation to a trust, it may be possible to apply for an order from the civil courts to rectify the relevant documents to be consistent with the original intention of using the trust, and thus avoid the adverse tax consequences

### *Canada (Attorney General) v. Brogan Family Trust*

- The CRA and the Department of Justice have expressed dissatisfaction and concern with the result in this case
- The Ontario Superior Court of Justice held that CRA need not be served with notice of a rectification application to add minor beneficiaries inadvertently omitted from a family trust deed. Subsequently, tax on the capital gain on the sale of trust property was allocated to the added minor beneficiaries:
  - “ the CRA is only required to be given notice of a proposed rectification proceeding when the CRA’s legal interests might be directly affected by the outcome of the rectification proceeding, such as where the CRA is a creditor and the rectification would affect its rights



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# **Succession Planning for Preserving Assets**

**Toolbox Seminar**

**May 26, 2016**

**Presented by:  
Lindsay Histrop**



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# Obstacles to Wealth Preservation

- Taxes
- Creditors
- Litigation
- “Wrong” executors or attorneys
- Beneficiary Error

## Common Will Myths

- My spouse gets it all anyway
- My spouse owns half of everything anyway
- There are no longer succession duties
- Testamentary trusts no longer “work”

## Common Myths

- A trust can only continue for 21 years
- Insurance and RSP beneficiary designations in Wills are subject to probate
- The \$25 will kit is lawyer approved

## Planning Tools

- Multiple wills
- Testamentary trusts
- Spousal trusts
- Carefully considered powers of attorney for property
- Alter ego trusts for those over 65
- Principal residence trusts

# Taxation on Death

- Estate administration tax (“EAT”)
- Federal tax on capital gain
- U.S. estate tax
- Land transfer tax
- Other foreign tax

## Will Planning

- Multiple Wills to avoid 1.5% EAT on certain assets and the risk of a provincial tax audit on private company shares and loans, personal articles
- Utilize spousal rollovers to qualifying spousal trusts
- Avoid rights to purchase real estate by beneficiaries, structuring instead as a share of residue

- Choose sensible executors
- Name more than one executor
- Consider majority rule
- Provide a mechanism for replacing executors/trustees
- Consider special executors for business and other specialized assets

## Trust Wills

- Assets gifted outright to a surviving spouse may never find their way to the children
- Trusts can prevent the survivor from giving everything to a second spouse
- Trusts for insurance proceeds, either under the will or separate insurance trusts protect the beneficiary and preserve the capital

- Trusts continue to be an essential will planning aid
- Income splitting advantages continue to apply if beneficiaries have little or no other income
- Trusts can assist in protecting assets from the beneficiary's spouse on marriage breakdown

- Protect against the surviving spouse remarrying and leaving the assets to the second spouse
- Ensure children from prior marriages are not cut out by the step parent
- Protect the young or spendthrift beneficiary
- Protect beneficiaries from spousal claims

- Think ahead to the number of years the trust will continue
- Consider Successor trustees
- Anticipate the 21 year deemed realization of capital property
- Include
  - Power to effect a post mortem estate freeze
  - Power to move trusts offshore

## Principal Residence Trust Wills

- Principal Residence Trust for surviving spouse
- Preserves capital interest for residual beneficiaries (typically children)
- Consider how expenses will be paid
- Consider effect of remarriage

# Principal Residence Trust Wills

...cont'd

- Principal Residence trusts for minor children, or until a specified age
- Allows for continuity of stable home environment if both parents die
- Consider how expenses will be paid
- Consider who will have the right to reside in the home

## Power of Attorney

- Take care in who is named
- Preferably name at least 2 attorneys
- Name special attorneys for business interests
- Instructions on management issues
- Power to effect tax minimizing estate planning measures, such as an estate freeze

## Alter Ego Trusts

- Settlor must be 65 and over
- All the income must be paid to the settlor and no one other than the settlor can receive capital
- More comprehensive document than a power of attorney

## Alter Ego Trusts ...cont'd

- After death of settlor, all income is taxed in the trust at top marginal rates
- Since the demise of the testamentary income splitting trust, alter ego trusts are much more attractive planning vehicles

## Alter Ego Trusts ...cont'd

- Not subject to probate
- Saves estate administration tax
- Privacy – not a public document
- Can protect the settlor from predatory caregivers and others
- Trusts already existing at death are harder to contest

# Beyond Wills and Powers of Attorney

- Estate Freeze in favour of a Trust:
- Defer tax on future gain
- Limit tax liability on death to current gain
- Multiplying the \$800,000 capital gains exemption on qualifying small business corporation shares and other income splitting opportunities
- Maintain control through family trust and voting shares

- Hold “Family” assets in name of non-active spouse
- Separate real estate from Opco
- Designate beneficiaries of Life Insurance and RRSP’s
- Joint property ownership
- Principal residence trusts

- Alter Ego and Joint Partner Trusts
- Hold assets in offshore jurisdictions
- Offshore creditor protection trusts
- Multiple trusts for different family factions to avoid tying up the estate administration in litigation

## Asset Protection – Family Law Claims

- Domestic Contracts
- Life Insurance to discourage *Family Law Act* elections on death
- Segregating inherited assets
- Structuring ownership of business assets to qualify as “excluded property”

## Gifts to Married Children

- Gifts after marriage are not excluded if used to invest in a matrimonial home or commingled in a joint account with the spouse
- Always have a deed of gift to document it
- Consider loans instead
- Take back security where possible
- Consider a principal residence trust

## *In Terrorem* Will Clauses

- *In terrorem* clauses typically threaten to disinherit the beneficiary who brings a claim to contest the will
- Must be a gift over to others, not just failure of the gift if a claim is brought
- Consider making the signing a full release, a condition precedent to the gift

## *Inter Vivos Trusts*

- Will challenges are easily made under the *Rules of Civil Procedure*
- *Inter vivos* trust challenges are more difficult
- Trusts are not public record like probated wills
- Off shore trusts in creditor protected jurisdictions may be recommended

## Asset Protection Trusts

- Where the family might fight – for example blended families
- Consider multiple *inter vivos* trusts for different family factions
- Separate the children from first marriage and step parent
- Taxpayers under 65 may trigger tax on capital gain

## Educate the Beneficiaries

- Net family property under the Family Law Act excludes gifted or inherited property received after the date of marriage, and property traced to the gift or inheritance
- Declaration by donor/testator can also exclude any income or increase in value

## Educate the Beneficiaries

...cont'd

- Protection lost if beneficiary puts assets in joint account with spouse or in name of spouse
- Inherited or gifted property put into a matrimonial home will lose its excluded status

# Foreign Real Estate

- Immoveable property generally subject to domestic law of the jurisdiction
- Consider whether forced heirship applies, or whether there are domestic taxes payable on death

## Foreign Real Estate ...cont'd

- Advisable to have a separate Will prepared by counsel in the foreign jurisdiction in the foreign language
- Advisable to name an Executor who is resident in the jurisdiction to avoid probate problems where there are foreign executors

## U.S. Real Estate

- Ownership by Canadians of U.S. real estate continues to be a problem in planning to avoid U.S. estate tax
- Holding through a Canadian resident corporation no longer tax neutral
- Non-spousal Canadian resident trusts are subject to the 21 year deemed realization of capital property

## U.S. Real Estate ...cont'd

- Non U.S. citizens resident outside the U.S. subject to U.S. estate tax on U.S. *situs* assets
- U.S. *situs* assets include real property in the U.S.
- 60,000 exemption for non-citizens
- Protocol provides additional relief

## U.S. Estate Tax-Treaty Protocol

- Protocol provides for exemption proportionate to value of U.S. assets over value of worldwide estate
- Formula:

$$\frac{\$ \text{ U.S. } 5.45 \text{ m. } \times \text{ value of U.S. } \textit{situs} \text{ assets}}{\text{value of worldwide assets}}$$

# U.S. Estate Tax-Treaty Protocol

...cont'd

- No tax if worldwide estate value is less than U.S. \$5.4 m. (for 2016)
- Marital credit enables the pro-rated exemption for Canadian resident non-U.S. citizens to be doubled for transfers to spouse or spouse trust

# U.S. Estate Tax-Treaty Protocol

...cont'd

- Modified tax credit relief for U.S. estate tax paid by Canadian residents in respect of assets subject to Canadian tax on capital gain in same year
- Tax credit relief for cross-border charitable donations

## U.S. Estate Tax

- Transfers to qualified domestic trust (QDOT) enable deferral of tax to death of second spouse
- QDOT may be established under testator's will or by surviving spouse
- Rules for QDOT must be strictly followed

# Holding Title to U.S. Real Estate

- Joint tenancy results in the entire value being considered part of the U.S. estate of the first to die
- Tenants in common preferable
- Each spouse can leave their interest in a testamentary spousal trust
- Where the threshold may be exceeded, recommended structure is to hold U.S. real estate in a Canadian trust

## Holding Title to U.S. Real Estate ...cont'd

- Consider having the spouse with the smaller worldwide estate own the U.S. *situs* property; hold the U.S. *situs* property in a spousal trust under the title holder's will
- Consider non-recourse mortgage: some U.S. commercial lenders will lend up to 65% of the value

## Holding Title to U.S. Real Estate ...cont'd

- If one spouse is a U.S. citizen, preferable to have the U.S. citizen spouse hold the U.S. real estate as the combined exemption is \$4m.
- Have the U.S. citizen spouse leave the U.S. real estate in a testamentary spousal trust on death

- Trusts are a critical tool to address:
  - Creditor claims & beneficiary spousal claims
  - Issues of a spendthrift beneficiary
  - Control over assets passing to a surviving spouse who may remarry
  - Second spouse excluding children of the first marriage
  - Avoiding 1.5% EAT by an *inter vivos* trust

## Tools for Preserving Asset Succession:

- Multiple Wills
- Careful choice of executors
- Protective Trusts in Wills
- *Inter Vivos* Principal Residence Trusts
- *Inter Vivos* Trusts to hold U.S. real estate
- *Inter Vivos* Alter Ego Trusts
- Off shore creditor protection trusts
- Educating beneficiaries



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