



## Estate Litigation

As demographics continue to shift, and as our population continues to age, in-house counsel will be increasingly faced with estate litigation issues, and they will need to keep up with rapidly evolving case law in this area. WeirFoulds LLP partners Clare Burns, whose practice focuses on trusts, estates, and capacity litigation, and Lori Duffy, who focuses on wills, trusts, and estate planning, test your knowledge on estate litigation.

**1** A claim by an estate against a corporation or other party can be brought by:

- (a) the estate trustees or executors;
- (b) in the name of the Estate;
- (c) in the name of the Estate with leave of the court

Is the correct answer:

- (a) and (b);
- (a) and (c); or
- (b) and (c).

**2** Your corporation's shareholders' agreement has a restraint on alienation clause that limits the persons to whom shares can be transferred to other existing shareholders. One shareholder dies. Her will leaves her shares to a person who is not an existing shareholder. The existing shareholders start a claim to have the bequest of the shares in the will declared to be void *ab initio*. They will succeed in their claim.

True or False?

**3** You are in-house counsel at a corporation. An employee has just died and your benefits group has received calls from two women both claiming the right to the deceased's pension survivor benefits for spouses. Your discussion with the deceased's last supervisor reveals that the deceased had both a wife to whom he was legally married and a person the supervisor describes as the deceased's mistress. Both women may have a claim to the survivor benefits under the pension.

True or False?

**4** Your founding shareholder retains control of the corporation through ownership of 51 per cent of its common shares. The founding shareholder dies suddenly leaving her shares equally to her spouse and four children. The three eldest children are adult. The youngest is 16 years old. The family wishes to sell their shares to other existing shareholders. No court application is required.

True or False?

## QUIZ ANSWERS

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### **A** 1. (A) AND (C)

Only estate trustees and executors named in a deceased's last will and testament have the authority to conduct litigation on behalf of a deceased person, absent leave of the court. An estate is not a person at law other than for purposes of the Income Tax Act. Actions are therefore properly brought in the name of the executors/estate trustees. If a corporation is served with a claim commenced in the name of an estate that does not name the executors/estate trustees, in-house counsel should consider demanding evidence from the serving solicitor that s/he has the authority of the executors/estate trustees named in the deceased's last will and testament to commence the litigation. In Ontario such a demand is made under rule 15 of the Rules of Civil Procedure.

### **A** 2. FALSE.

In the recent Ontario Court of Appeal decision in *Frye v. Frye*, the court concluded that contractual obligations do not constrain a person's ability to bequeath property by means of a will. In the result, pursuant to a provision in the Ontario Business Corporation's Act, shares bequeathed contrary to a restraint on alienation clause passed to the deceased shareholder's estate trustees. The court held that those estate trustees held those shares as bare trustees for the person to whom the deceased left the shares. The court concluded that the estate trustees were bound by the shareholders' agreement but had discretion as to when to seek the consents necessary to effect the transfer to the person named in the will. The estate trustees were at liberty, in the court's view, to await a change in circumstances or to wait to try to effect a change in the consent procedure. In the interim, the estate trustees were in the court's opinion bound to exercise the rights associated with the shares as the person named in the will directed.

The decision gives rise to some serious issues. In particular, it suggests that restraint on alienation clauses in shareholders' agreements on their own, are ineffective to prevent a testator leaving shares to someone in breach of such clauses. Moreover, it suggests that the intended recipient of shares pursuant to such a bequest can effectively operate as a shareholder by simply requiring the estate trustees of the deceased shareholder's estate to do their bidding, thus, never engaging the restraint on alienation clause.

Prudent in-house counsel should consider reviewing their

clients' shareholders' agreements with them in order to determine what amendments or other external arrangements might be made to decrease the risk of such an unpalatable result.

### **A** 3. TRUE.

A person may die with more than one spouse for the purposes of estates and pension litigation, either pursuant to statute (where, for instance, a person may be legally married to A but be the common law spouse of B), or pursuant to the terms of pension or other benefit plans (where, for example, survivor benefits may be payable to a deceased's spouse which term is defined to include both legally married and common-law spouses). Faced with disputes of this kind, consideration should be given to paying the funds in dispute into court so that the disputing parties may litigate their right to the funds without the corporation incurring any further legal costs.

### **A** 4. FALSE.

The shares owned by the 16 year old cannot be sold without someone first being appointed by the court as guardian of that child's property pursuant to s. 47 of the Children's Law Reform Act. A parent is not, as a matter of right, the guardian of a child's property and, therefore, the surviving spouse does not have the authority to authorize the sale of the sixteen-year-old's shares.

## YOUR RANKING?

- **One or fewer correct:** *Might be time to brush up*
- **Two or three correct:** *Not bad, but could do better.*
- **Four correct:** *Impressive.*

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