Evans & Co. Legal Brief Program Love 97 FM- July 18, 2006

Dispositions of Property Upon a Person's Death

The following by no means exhausts all of the issues that may arise in relation to dispositions and property distribution upon the death of a person. It merely seeks to address the issues raised in an email from a listener of the Evans & Co. Legal Brief program.

1. The property rights of a wife have in her Husband's estate.

If the intestate dies leaving a husband or wife and no children, the surviving spouse takes the whole of the residuary estate. (Section 4(1)(a)- Inheritance Act)

<u>The Matrimonial Home</u>
The surviving spouse of a person who died after February 1, 2002, may acquire the matrimonial home in which the surviving spouse is residing and the household chattels. (Section 6 Inheritance Act) The fact the matrimonial home is described as the place where the surviving spouse is residing may suggest that if the surviving spouse was not residing in the matrimonial home at the time of the death of the deceased spouse, the section is inapplicable.

This right arises from the fact the surviving spouse already has some interest in the matrimonial home. The surviving spouse may then acquire the home on the payment of money to the personal representative to enable the appropriation.

If the surviving spouse is to exercise this right, it must be done within six months from receipt of the notice from the personal representative of the deceased.

However, this right of appropriation may not be exercised where the matrimonial home consists of a dwelling house which has been specifically devised to a child of the deceased.

Until the time period for the exercise of this right expires the personal representative of the deceased cannot sell or otherwise dispose of the interest in the matrimonial home or household chattels without the surviving spouse's written consent, except where there are no other assets available to administer the estate.

Section 24 of the Inheritance Act also gives the surviving spouse of a deceased person, who has no interest in the matrimonial home but was residing therein at the time of the death of their spouse, a right to continue to reside in the matrimonial home and not be evicted or excluded from the house. This however subject to exceptions, provided in that section.

<u>Other Property</u>
It may be possible for a person to argue that a presumed resulting trust arises in his favour relation to all or a particular asset of the deceased, by virtue of some contribution which the person made to the deceased which enabled the deceased to acquire the asset/property.

2. To whom may a testator will his property

Generally, a testator may dispose of his property and assets in any manner he sees fit and to whomever he wishes, even to a mistress.

Statute law may now also affect testamentary dispositions. By virtue of section 12 the Inheritance Act, the surviving spouse and other dependants of a deceased person who died after February 1, 2002, with a will, may also make an application to the court for an order to make financial provision for them on the ground that the disposition of the deceased's estate under will does not make reasonable financial provision for the surviving, in this case.

Reasonable financial provision is defined as financial provision for the maintenance of the dependant which it is reasonable in all the circumstances of the case for the dependant to receive.

However, the court has a discretion **not** to make an order for financial provision for a surviving spouse where they had been living apart from the deceased for 12 months or more, if it considers that in all the circumstances of the case, it is just and reasonable to refuse to make the order.

Some of the circumstances will take into account in relation to a surviving spouse are:

(a) the financial resources available to the dependant and the financial needs he or she is likely to have in the foreseeable future
(b) the size and nature of the net estate of the deceased
(c) their age and the duration of the marriage
(d) the provision which the spouse may have received if the marriage had been terminated by a decree of divorce instead of death **PROVIDED** that at the date of the death of the deceased a decree of judicial separation was not in force or the husband and wife had not been living part for a period of 12 months of more and the separation was continuing

Also as mentioned above a presumed resulting trust may have been created.

3. Can a testator leave property for someone in his will without the other beneficiaries in the will being aware of it?

For years the creation of secret trusts has been employed as a mechanism disposing of property to a secret beneficiary, such as an illegitimate child or mistress. Usually, the testator will during his lifetime either arrange with someone he trusts, Y, that he will leave property in his will to Y but that property is to be held in trust by Y for a secret beneficiary whose name is disclosed to Y or he may create a trust naming Y as trustee. In the latter instance, even though the other beneficiaries under the will may be aware of the trust they will not know who are the beneficiaries.

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