

October 2009

WILLS

Sometimes, the only asset that a creditor can seize from a debtor is a bequest to the debtor under the will of someone who has died. The creditor must move swiftly because once the estate trustee pays the money, the debtor may not be forthcoming as to where it went. The goal is to intercept the payment. An attempted interception was the subject of Ker Estate v. DeRose, a 2009 decision of the Ontario Court of Appeal.

Sisterly Love

Two sisters engaged in what we assume was bitter litigation relating to their father's estate. At the end, the court ordered sister Andrea to pay sister Kirsten costs of \$145,000, which Andrea failed to pay. Their mother had died in 2006. Her will stated that half of her estate was to be used to purchase a non-commutable annuity (i.e. once purchased, it could not be cashed in) payable to Andrea during her lifetime. The trustees could purchase this annuity in their discretion. Any money left over was to be used to purchase an annuity to be paid to Andrea's son on Andrea's death.

Before the estate trustees took the money from the estate to purchase the annuity, Kirsten garnished the estate trustees for the money Andrea owed her. It seems that Andrea did not care,

but her son did. If his aunt scooped the money that otherwise could have been used for his mother and him, he would not get it.

Vest

The first question that the court had to ask was whether the money had vested in Andrea (i.e. could Andrea call on the trustees to pay the money to her or was payment contingent on the happening of some other event). The court held that the gift had vested in Andrea. The fact that the estate trustees had not yet purchased the annuity did not mean that Andrea could not enforce the terms of the will and ultimately call for payment.

Arguments

Once the court made that decision, the grandson's remaining arguments fell one by one. His arguments and the court's responses follow:

1. The decision failed to respect the wishes of the mother in her will. - Too bad. If you will your money to a debtor, a creditor can claim it.
2. The estate had already purchased the annuity. - It had not. The trustees had made the annuity application, but it had not been completed.
3. There is a difference between a beneficiary being

able to call for payment under an estate and a creditor being able to call for payment. - No, there is not.

4. The decision adversely affects the grandson. - Too bad. His interest was always contingent. Nothing in the will forced the trustees to provide for the grandson.

Result

The court held that the garnishment was effective. That garnishment, we gather, depleted almost the entire amount of the monies that were to be used to purchase Andrea's annuity.

INTENTION

Debtors who have fraudulently conveyed their property, usually to their spouses, often claim that they had always intended to transfer the property and, in doing so, they were not trying to defeat their creditors; they were simply trying to give effect to pre-made plans. The latest case in which this defence was used is Royal Bank of Canada v. Clarke, a 2009 decision of the British Columbia Supreme Court.

Story

Husband and wife purchase their property in 2003 and build a house on it. They take

title in their joint names. The bank is the first mortgagee. In December 2004, husband takes out business loans with the bank. In 2006, after placing a second mortgage for additional financing for husband's business, the couple lists the property for sale. The real estate agent opines to them that it is unusual for the property to be held jointly, given that husband has a business. Husband tells the agent that husband had always intended to put the property in wife's name alone, but the bank, in its capacity as first mortgagee, said that wife did not have sufficient income to carry the mortgage alone and therefore the property had to be in joint names. As an aside, we rather doubt that the bank said this, but let us assume that it is true.

It seems that the couple do not sell the property. In March 2008, they consolidate their debts and take out a new first mortgage with CIBC, who does not object to the property being in wife's name alone. Therefore, in March 2008, husband transfers his interest to wife for a dollar. At the time of the transfer, husband owes the bank \$147,000 and, after the transfer, makes no further payments on the loan.

Separation

We have not heard of the-real-estate-agent-made-me-do-it defence before, but it is a variation on a theme. Somebody else always suggests that they do it; it is never the debtors' idea.

The B.C. Fraudulent Conveyance Act differs from

Ontario's, but they both have the same message: a transfer made to delay, hinder, or defraud creditors is void. Husband and wife transferred the property to wife alone to insulate it from husband's business creditors. The fact that the couple had previously contemplated doing so - if that were true - is irrelevant. What they did was exactly the mischief that the statute was enacted to counteract.

The judge therefore declared that the transfer was void and that the bank was entitled to pursue its remedies as a creditor of husband as if he were a joint owner.

ANNOUNCEMENT

Jeffrey Tighe has joined our litigation department.

Jeff has a B.Sc. from Queen's University, an MBA from Wilfrid Laurier University, and a law degree from University of Manitoba. He was called to the Bar in Ontario in 1999. Since then, he has practised in commercial litigation and construction law.

In his spare time, of which there may be little, he is currently researching and writing a book in the field of military history.

You will find this and prior newsletters posted on our website.

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