

# **Pot Pourri of Topics**

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## **A. The “Potential” Adult Interdependent Partner**

So the housekeeper may be more than a housekeeper...

The introduction of the Adult Interdependent Relationships Act now creates a obligation to ensure that all potential Adult Interdependent Partners are served with notice of their potential rights.

*Motto #1: If in doubt ...Serve.*

You will never be in trouble if you serve someone. Executors are often reluctant to serve a potential Adult Interdependent Partner (“AIP”) because they fear that serving them will create a claim where none exists. That fear must be alleviated by lawyers explaining to the personal representative that there is nothing to fear. Either the person will have a claim or not. If they have a claim then it is better to deal with it up front rather than find out after distribution that the AIP had a good claim.

## **When is the Housekeeper more than a Housekeeper**

Basically, a housekeeper becomes someone who needs to be served if they have lived with the person for three years or more ( or had a child together) and they function as an economic and domestic unit.

The relevant sections of the Adult Interdependent Relationships Act are as follows:

### **Interpretation**

**1(1)** In this Act,

- a. “adult interdependent partner” means an adult interdependent partner within the meaning of section 3, but does not include a former adult interdependent partner;
- b. “adult interdependent partner agreement” means an agreement referred to in section 7;
- f. relationship of interdependence” means a relationship outside marriage in which any 2 persons
  - i. share one another’s lives
  - ii. are emotionally committed to one another, and
  - iii. function as an economic and domestic unit;

**(2)** In determining whether 2 persons function as an economic and domestic unit for the purposes of subsection (1)(f)(iii), all the circumstances of the relationship must be taken into account, including such of the following matters as may be relevant:

- a. whether or not the persons have a conjugal relationship;
- b. the degree of exclusivity of the relationship;
- c. the conduct and habits of the persons in respect of household activities and living arrangements;

- d. the degree to which the persons hold themselves out to others as an economic and domestic unit;
- e. the degree to which the persons formalize their legal obligations, intentions and responsibilities toward one another;
- f. the extent to which direct and indirect contributions have been made by either person to the other or to their mutual well-being;
- g. the degree of financial dependence or interdependence and any arrangements for financial support between the persons;
- h. the care and support of children;
- i. the ownership, use and acquisition of property.

**Adult Interdependent partner**

- 3(1)** Subject to subsection (2), a person is the adult interdependent partner of another person if
- a. the person has lived with the other person in a relationship of interdependence
    - i. for a continuous period of not less than 3 years, or
    - ii. of some permanence, if there is a child of the relationship by birth or adoption,
  - b. the person has entered into an adult interdependent partner agreement with the other person under section 7.
- (2)** Persons who are related to each other by blood or adoption may only become adult interdependent partners of each other by entering into an adult interdependent partner agreement under section 7.

It is fairly easy to establish that any two people living together are likely to be economically interdependent when they live together. The most difficult part of this definition is the time period of three years. The difficulty is trying to determine when the relationship started. If you

are acting for the estate, your best witness on this point is dead and you are having to rely on witnesses who have hearsay evidence at best. You may have to cross examine your clients to determine if the relationship exists. Often clients do not wish the relationship to exist and will be reluctant to give you all the information. If you suspect there is a relationship...**repeat Motto #1. If in doubt . . . serve.**

You cannot assume that the date for determining the commencement of the three years is the day that the parties actually combined all of their belongings into one household. The relationship of “living together” may have commenced long before that date.

You must serve the AIP with the NC 23 Notice which is attached at Tab A.**B. Asking for Advice and Direction**

The area of estates is unique in that you may go to court to request advice and direction from the court for any matter to which you seem to run into an impasse. You may have uncooperative or missing beneficiaries or evasive executors. You may have unique assets that are not easy to sell or donate. It may be unclear how to interpret a clause in the will. All of these scenarios and many more are suitable for an application for advice and direction.

The relevant sections of the Surrogate rules are Rules 55-70 (attached as Tab B) and *Administration of Estates Act* s.60 (attached at Tab B).

An example of an application is attached at Tab C. Use forms C1, C2 and C13 from the Surrogate Forms.

## **Service**

Basically the rule will be that you will serve anyone that has an interest. In estates the list is usually longer than you would normally have. Generally, the executor will always be served. If the issue involves something that might ultimately impact on the value of the residue of the estate then you must serve all of the residual beneficiaries. If there are infants or dependent adults involved, you may also have to serve the Public Trustee’s Office. If the issue could affect

a trust, then you have to serve the beneficiaries of the trust and the contingent beneficiaries of the trust. It is better to serve everyone than to be delayed by a court directing that you must serve additional individuals.

### **Remedies**

You must determine what you want and put that into your Notice of Motion. You do not actually ask for advice. You are really advising the court of the dilemma you face and provide suggestions for dealing with it and asking the court to direct the remedy that you seek.

## Drafting the pleadings

In the Notice of Motion you set out what is being sought and in the Affidavit you need simply to tell the story.

## Conflict

The estate must normally maintain a neutral position in respect of the outcome. If the executor is also a beneficiary, it may be necessary to have the executor and beneficiary receive independent advice and representation.

### **C. No Trustee is named**

In some wills there is no Trustee named for trusts in the will or a trustee dies or becomes unable or unwilling to act. A new Trustee may be named by the existing Trustees pursuant to the *Trustee Act* s.14 (see Tab D). Alternatively an application may be made under section 16 of the *Trustee Act* (see Tab D). The application can be made using an Originating Notice and Affidavit. Alternatively a C1 and C2 from the Surrogate Forms may be used.

The evidence required is as follows:

- a. Qualifications of the Trustee recommended. Consider proposing two people (consider Public Trustee for minor children)
- b. Alternate Trustee recommended
- c. Deal with concerns for conflicts with Trustee and Beneficiaries of the Trust
- d. Deal with any deficiencies in the trust

## Service

- a. Public Trustee will need to be involved for all dependent children (under 18) and for all Dependent Adults.
- b. All Beneficiaries of the Trust including contingent beneficiaries
- c. All guardians of minors or dependent adults

- d. The Personal Representative (if not the applicant)

#### **D. Powers of Administration in the Will**

There are many powers that a Personal Representative does not have automatically. Most people assume that powers such as running a business or continuing to run a farm are powers a personal representative has automatically. This is not true. In order to run a business or a farm specific direction must be given (see the Canadian Law of Wills, third edition, Thomas Feeny, p. 248-9). I would also recommend seeking direction in respect of commencing or defending litigation where the costs may be substantial.

If the power is not given to the Executor in the will you will have to seek direction from the court to obtain the necessary powers.

This lesson is more about proper drafting. Be sure to give powers to the Trustee to deal with a business, if the Testator has a business and deal with these powers in the will.

If you must apply to obtain the powers you will do so under Rule 55-70 and s.60 of the *Administration of Estate Act* (Tab B) of the Surrogate Rules.

#### **Documents to Draft**

Use a C1 and C2 to make the application. Be careful to include all powers you may need so you do not have to go back to court.

For example with a business you will need at least some of the following powers:

- a. Continue the daily operations including collecting revenue and paying expenses in the ordinary course of business
- b. Sale of merchandise in the ordinary course of business
- c. Liquidation or sale of assets of the business or sale of shares of the corporation
- d. Continue to compensate employees
- e. Invest capital in the business from the residue of the estate

**Liability**

The liability for the personal representative could be substantial if there are losses for the corporation. If there could be losses it is best to seek the residual beneficiaries consent or court approval.

There may also be liability to the lawyer advising the Personal Representative if a business is carried on unapproved, and losses result.

Personal Representatives do not expect to be sued and if they are, it is quite possible that a lawyer will also be sued or reported to the Law Society for the advice given.

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