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## Law Reform Notes

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*Law Reform Notes* is produced twice yearly in the Legislative Services Branch of the Office of the Attorney General, and is distributed to the legal profession in New Brunswick and the law reform community elsewhere. Its purpose is to provide brief information on some of the law reform projects currently under way in the Office of the Attorney General, and to ask for responses to or information about items that are still in their formative stages.

The Department is grateful to all of those who have commented on items in earlier issues of *Law Reform Notes*; we encourage others to do the same. We also repeat our suggestion that, if any of our readers are involved either professionally or socially with groups who might be interested in items discussed in *Law Reform Notes*, they should let those groups know what the Department is considering and suggest that they give us their comments. We are unable to distribute *Law Reform Notes* to everybody who might have an interest in its contents, for its contents are too wide-ranging. Nonetheless we would be pleased to receive comments from any source.

### A. UPDATE ON ITEMS IN LAW REFORM NOTES #2

#### Mechanics' Lien Act

Still under review; nothing to report at present.

#### Property Act s. 45(1): notice of mortgage sale

We have decided to delay action on this for the time being, in the hope that it may be possible to take a broader look at mortgagee's remedies in 1995. We would welcome comments on deficiencies in the present law of mortgagee's

remedies, whether from the mortgagee's or the mortgagor's point of view.

#### The Civil Jury

In *Law Reform Notes #2*, we asked for comment on two options. These were:

- (1) abolish the civil jury; or
- (2) repeal the list of special cases in which a jury trial is a matter of right; the result would be that jury trials would be

available in all cases, but only if the judge determines that "the questions in issue . . . are more fit for trial by a jury than by a judge."

Responses to this have persuaded us that the second of those options is not worth pursuing, though it did have some support. The stronger argument, we believe (which was made by both supporters and opponents of the civil jury) was that it is not realistic to expect litigants to persuade judges that the questions in issue are "more fit" for trial by a jury than by the judge, and that a law that depends on this precondition serves no practical purpose.

Excluding that option, though, also undermines the status quo, under which the availability of the civil jury in most cases does depend on the discretion of the judge. We are faced then with three alternatives: the first is to abolish the civil jury; the second is to retain the list of special cases in which a jury trial is a right but remove the discretionary provision in other cases; the third is to amend the current law in a way that, given its present limited scope, would almost certainly expand the availability of the civil jury. We reject the second because, despite some comments made in correspondence, we still cannot see that there is anything truly special about the existing list of special cases which justifies treating them differently from other cases. We are not inclined to recommend the third because we see no advantages and several disadvantages coming from an expanded availability of civil jury trials. We have therefore decided to recommend that the civil jury be abolished.

#### Bulk Sales Act

All the responses we received favoured repealing the Act. We are pursuing discussions on this within government.

#### Wills Act

(a) Land/Movables in Non-New Brunswick Wills. We received no criticism of our suggestion

that the Wills Act should be amended so as to recognize, in relation to land, the same forms of non-New Brunswick wills that s.40 now recognizes in relation to movables. We will be recommending the necessary amendments.

(b) Substantial Compliance. We received both support for and opposition to the suggestion of bringing the doctrine of 'substantial compliance' into the Wills Act. Having reconsidered the matter, we still believe that on balance the doctrine would be a desirable addition to the Act. We will be making the necessary recommendation.

(c) Other issues. We would be interested to know of any other particular problem areas in the Wills Act that should be dealt with. We do not expect to be able to give the Act a comprehensive review in the near future, but if there are specific problems that could easily be fixed, we would consider dealing with them.

#### Intestacy

1. The spouse's share, the separated spouse, the common law spouse. We received various comments on our suggestions that the Devolution of Estates Act should be amended so that

- (a) a surviving spouse became entitled to the entire estate of a deceased intestate spouse, even when there were issue;
- (b) a surviving spouse who had been separated from a deceased intestate for five years should receive a reduced share of the estate; and
- (c) a common law spouse who had cohabited with the intestate for five years and was doing so when the intestate died should be entitled to share in the estate.

The criticism of item (a) was essentially that it was wrong in principle; the critics argued that the issue should continue to receive a share. Criticism of items (b) and (c) included comments on the practical uncertainties they might generate, as well as comment on the general principle that was being proposed.

Having considered all of the comments made in the correspondence, we still believe that the changes outlined above would represent an improvement in the existing law. We have therefore decided to put them forward for further discussion within the government, recognizing, of course, that the questions at issue are to a large extent matters of social judgment.

(2) Stepchildren, etc. One respondent commented that we were wrong to look at step-relationships as being equivalent to kinship for the purposes of intestacy law, and that it was only when a child was adopted that one should consider replacing its original lines of kinship with new ones. On reflection, we agree. We are therefore not recommending that step-relationships should be recognized for purposes of intestacy law.

(3) Remote next of kin. We were surprised that nobody wrote to say that distributing intestate estates among remote next of kin caused practical problems. Without this, we are not inclined to proceed with our suggestion that the list of kin who could inherit on intestacy should be cut off at around the first cousin level, with estates being distributed by the Public Administrator if no closer relatives were found. The present law does at least provide a relatively clear way of deciding who gets what when a person dies intestate without close relatives, and unless people tell us that in its practical operation, the current law is more trouble than it is worth, we are not at present inclined to change it. We would, though, ask one more time for people to tell us if they consider the present law unduly inconvenient.

### Administration of Estates

Our suggestions were (a) to reduce the need for bonding of administrators, (b) to reduce the need for formal appointment of administrators, and (c) to expand s.19 of the Devolution of Estates Act. Responses indicated that these would be steps in the right direction, but also highlighted the need to look closely at the details of whatever was eventually decided upon.

We will be proceeding with this, but before taking these three items too far we thought we would ask if there were other aspects of the law of estate administration that we should look at at the same time. We do not expect to be able to conduct a thorough review of the law at present, but if there are other large problems that could easily be fixed by small amendments, we would consider taking them on board.

### Provision for Dependants Act

We were surprised that we did not get more response to the suggestion that the Act should be made less open-ended; we had expected that the suggestion would be welcomed. However, there was no opposition to the idea, and we have decided to proceed with a recommendation.

Looking back at the three possible preconditions mentioned in *Law Reform Notes #2* for bringing an application under the Act (absence of adequate resources; special services rendered; other exceptional circumstances); we are now leaning towards adopting absence of adequate resources as the only precondition for an application under the Act. Though it is hard to assert that there can never be 'other exceptional circumstances' in which an application might seem appropriate, we cannot at present see what the 'exceptional circumstances' might be in which it would be right for a dependant, if he/she did have adequate resources, to upset either the equal shares on intestacy or the specific provisions made by a testator in a will.

### Marital Property Act

Seven topics were mentioned in *Law Reform Notes #2*. Three of them were narrow in scope (vesting of the marital home; how many marital homes; professional qualifications). The other four ('marital property' *versus* 'net family assets'; business assets; likely economic impact; common law spouses) raised broader issues relating to the scope and framework of the legislation.

As to the three narrow issues, responses have confirmed our view that only the second needs legislative attention. As to the four broader issues, no-one tried to persuade us that New Brunswick should change its approach from one that divides 'marital property' to one that equalizes 'net family assets', nor did anyone suggest that common law spouses should be included in the property division provisions of the Act. We do not propose to give those ideas any further study at this time. We do, however, think that further study is called for in relation to the sharing of business assets and to the possibility that divisions of property under the Act might take into account, where this arises on the facts of the case, the likely differential economic impact of the marriage breakdown on the two partners.

We are at present leaning towards recommending an amendment on differential economic impacts, and away from recommending amendments relating to business assets. The reason for the latter, which is a change from the opinion expressed in *Law Reform Notes #2*, is that we are concerned that a specific legislative amendment might do more harm than good. As noted in issue #2, the case-law on business assets is developing, and our present view is that the best approach may well be to allow that development to occur, rather than to intervene by legislation.

### Fatal Accidents Act

The suggestion was that the Act should be extended to allow common law spouses to bring claims. Most responses agreed with this. We have recommended accordingly.

Enforcement of Money Judgments. Professor Williamson's report was distributed in July. We asked for comments by October 15, but we would still be happy to receive them. The report recommends the adoption of a comprehensive statutory code which includes both pre-judgment and post-judgment remedies. It sets out annotated draft legislation as a basis for discussion.

Among the major objectives of the proposal are:

- to ensure that all valuable rights of a judgment debtor are available to satisfy a judgment;
- to provide procedures by which all of those rights can be realised upon;
- to provide sensible rules on exemptions from exigibility;
- to simplify the process for enforcing judgments, reducing the need for court involvement as much as possible;
- to use the personal property register under the Personal Property Security Act to give notice of unsatisfied judgments, as well as to provide security for judgment creditors;
- to replace the Creditors Relief Act with a system under which, if there is more than one judgment registered against a judgment creditor, the judgments would be enforced collectively.

### B. NEW ITEMS

Deregulation. All government departments have been asked to review their legislation, policies and programs to remove unnecessary regulation. In this context, we invite our readers to identify statutory or common law rules that needlessly complicate the commercial or personal lives of their clients. Of the items discussed in this issue, we consider that repeal of the Bulk Sales Act and our proposals for simplifying estate administration both qualify as deregulation - a term which includes the removal of unnecessary legal requirements of any kind. We would welcome other suggestions.

### Advancements/Partial Intestacy.

Having dealt with the other main aspects of intestate distribution above, we thought we should also consider the law on advancements and partial intestacy.

As to advancements, the present law obviously has its origins in the social and legal expectations of bygone years. This produces (a) anomalies such as the fact that gifts to children may be "advancements by way of portion" while gifts to grandchildren, brothers and sisters, or others cannot, and (b) uncertainties as to what is an "advancement by way of portion" as opposed to a simple gift.

In some places the rule that "advancements" must be brought into account on intestacy has simply been repealed. In other places it has been replaced by a rule that substantial gifts made within a particular period before the intestate's death must be taken into account (these not being limited to gifts to children).

At first sight, there is clearly some attraction in the idea that if an intestate gives a large gift to one of his/her prospective beneficiaries, some sort of equalization should take place when the intestate dies. On the other hand, any attempt to require equalization by law, whether under our present "advancements" rule or under a broader rule covering gifts in the period before death, obviously runs the risk of imposing an equalization that was neither intended nor desired, as well as of creating problems in determining which kinds of gifts needs to be equalized.

Our feeling at present is that a rule requiring equalization is not manifestly preferable to the absence of any such rule. We therefore suggest that s.31 of the Devolution of Estates Act be repealed without replacement.

As for partial intestacy, the questions are, in a way, the other side of the same coin. The present law is that if part of an estate passes under a will and the remainder passes on intestacy, the people who are taking on intestacy

do not have to bring into account anything that they receive under the will. That rule, if our suggestion above on advancements is accepted, would not appear to require re-examination. If, though, the existing rule on advancement were retained, or some comparable provision were introduced for equalizing inter vivos gifts with subsequent intestate shares, it would seem odd to leave to s.32 unamended. If an inter vivos gift has to be set off against an intestate share it would seem strange that a gift in a will, which is no less explicit than the inter vivos gift, did not have to be. If, though, the existing law on advancements is repealed without replacement, as we believe it should be, there would be no anomaly in retaining s.32 in its present form.

### Access to Neighbouring Land

Several common law jurisdictions have recently enacted, or have considered enacting, legislation under which property owners can obtain authorization to go onto neighbouring land when it is necessary for them to do so in order to maintain their own property, but the neighbouring owner will not consent. Procedurally, what would probably be involved would be an application for a court order. The applicant would have to show that access to the neighbour's land was reasonably required, and would have to undertake to make good any damage caused. Should legislation of this sort be considered for New Brunswick?

*Responses to any of the above should be addressed to Tim Rattenbury, Office of the Attorney General, Room 115, Centennial Building, P. O. Box 6000, Fredericton, New Brunswick, E3B 5H1. We would like to receive replies no later than January 15, 1995 if possible.*