New Nouveau Brunswick

#2 : March 1994

LAW REFORM NOTES

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*Issue #2 of **Law Reform Notes** is appearing much later than we had planned. Last year, for budgetary reasons, the Office of the Attorney General reluctantly decided that the Legal Research Section of the Law Reform Branch had to close. The remainder of the Branch was subsequently renamed the Legislative Drafting Branch, drafting being its major continuing function.*

*In the period since then, the Office of the Attorney General has been considering what part the government should play in law reform work. Discussions have been held with the Law Schools and the Bar, and are continuing. Clearly, though, the Department must retain at least some involvement in the field, and it has decided to continue to produce **Law Reform Notes** as a vehicle for communication with the Bar and others.*

Issue #2 has therefore finally been prepared. In large measure, it represents work that was in progress as the Legal Research Section was gradually closed and which was brought to a stage at which comment would be helpful. In the light of those comments we will decide whether to recommend legislative action. We emphasize that none of the suggestions made or opinions expressed represent either departmental or government policy. They are merely intended to provide a basis for reaction.

*Anybody receiving **Law Reform Notes** should feel free to bring its contents to the attention of others. Though **Law Reform Notes** is initially addressed to the legal community, our goal is to serve a broader public, and we would welcome the help of our readers in bringing our proposals to the attention of the people who may eventually be affected by them.*

UPDATE ON ITEMS IN LAW REFORM NOTES #1

We would like to thank everybody who responded to items in Issue #1. We gained a great deal from these comments. The current position on the items that were mentioned there but are not yet concluded is as follows:

- Mechanics' Lien Act: Consultations on this continue. Our original suggestion for repeal of the Act had more opponents than supporters. Since then we have produced a second document which asks for comment on two further possibilities. These are:

  (a) repealing the Act but altering the law of privity of contract so that people in a chain of contracts have remedies against those they are not dealing with directly;

  (b) reworking the Act; the main elements would be

  - a lien which was not subject to time limits, but was discharged once the owner had paid in full;

  - a payment notice process, under which lienholders could, if they wished, require owners to make progress payments in a form which prevented intervening lienholders from diverting the money to their own use;

- no holdback or trust provisions (and therefore no need for time limits revolving around substantial completion dates); the payment notice, we suggested, would make these superfluous.

We sent this second document to everybody who responded to the first one. Copies can be provided on request.

- Law Reform Act: This was enacted in December 1993, with some amendments prompted by comments we received on the Bill. The Act makes several amendments to tort law (*per quod* actions; occupier's liability) and contract law (privity of contract; exemplary damages; rescission after performance). It was recently proclaimed, and will come into force on June 1, 1994.

- Property Act, s.45(1): notice of mortgage sale: Replies to Issue #1 suggested that press advertisements of mortgage sales should continue to be required in all cases. Some commented that the requirement to post the notice of sale at the court house, the registry office and one other public place was unnecessary. In response

(a) we will probably be recommending repeal of the requirement for posting;

(b) we are considering whether changes to the nature of the press advertisement might satisfy some of the concerns (e.g. cost, unnecessary embarrassment to mortgagor) originally mentioned to us. Would it be adequate if, in a case where the mortgagor has been served, the press advertisement merely gave the civic address of the property, stated the time and place of sale, stated that it was a mortgage sale, and gave an address from which further details could be obtained? If the mortgagor had not been served, naming him/her would also be necessary. The result would be to clarify the effect of s.45(3), a provision that people are apparently reluctant to rely on.

- Memorials and Executions Act, s.6: renewals of memorials of judgment: Replies to Issue #1 confirmed our belief that s.6 did not need amending.

- Court-directed Wills for Infirm Persons: On balance, the comments we received on this tended to support the idea rather than oppose it, but with some concern that the power should not be too open-ended. On re-consideration, we have confirmed the tentative recommendation we made in Issue #1. We hope that legislation will be prepared shortly.

NEW ITEMS

Our comments on these new items are very much shorter than we would have liked. In some cases the Legal Research Section had been preparing separate discussion papers, but that is no longer a realistic option. What follows, therefore, are brief summaries of, or questions about, the recommendations that we think should be made on a number of items we have had under review.

1. The Civil Jury. The Rules Committee suggested some time ago that we should consider the circumstances in which civil jury trials are available. At present R46.01 says that civil jury trials are available:

(a) as of right, in actions for libel, slander, breach of promise of marriage, malicious arrest, malicious prosecution, or false imprisonment; and

(b) in other actions, if the judge so orders.

It is hard to see any logic in this list of special cases. We have considered whether some other consistent rationale can be found for differentiating cases in which there should be a right to a jury trial from those in which there is merely a possibility; we have not found any. We doubt, anyway, that there is much point in retaining the jury trial as part of the civil process. The arguments we have read for abolishing it (it's a historical remnant; it causes confusion on the rare occasions it's used; it enables litigants to try to tilt the playing field in their favour) seem more persuasive than the arguments against (its democratic and perhaps practical value; you never know when you may need it).

We therefore invite comments on two options:

1) abolish the civil jury;

2) repeal Rule 46.01(2); the result would be that the existing R.46.01(1) would govern all cases: jury trials would be available if the judge determines that "the questions in issue ... are more fit for trial by a jury than by a judge."

2. The Bulk Sales Act. Should this Act be repealed? We believe that the Act is generally regarded as one that causes complications and dangers far greater than any benefits it brings. Alberta and British Columbia have recently repealed their Bulk Sales Acts. Unless people with experience of the workings of the Act advise us otherwise, we would be inclined to recommend that New Brunswick follow suit.

3. Wills Act

(a) Land/movables in Non-New Brunswick wills. Is there any reason for retaining the land/movables distinction in ss.36 to 40 of the Act? The effect of the provisions is that, as to land in New Brunswick, a non-Brunswick will has to be in New Brunswick form, but as to movables, alternative forms are recognized. We suggest that the same alternative forms should be acceptable for land as for movables. If the Wills Act is amended in this way, the distinction in s.73 of the Probate Court Act between land and movables for purposes of resealing wills probated elsewhere should also be removed.

(b) Substantial compliance. Should New Brunswick adopt the substantial compliance doctrine in relation to the formal requirements of wills? Under this approach (precedents exist in Manitoba and Saskatchewan) a document which does not satisfy all the formal requirements of the Wills Act can be admitted to probate if the court is satisfied that the document represents the deceased's testamentary intent. We have mixed feelings as to whether this is a good idea. The advantage is that substantial compliance gives effect to the wishes of those who intended and attempted to die testate, but did not get the form of the paperwork quite right. The disadvantage lies in the loss of certainty as to whether a document is or is not a will, and thus a possible increase in litigation.

We think that the advantages probably outweigh the disadvantages. We would be interested to know what experience practitioners have had of dealing with documents that are testamentary in nature but were not formally executed in accordance with the Act, and whether the 'substantial compliance' doctrine would be, on balance, beneficial.

4. Intestacy. There are several changes that we are considering.

(a) The spouse's share. Is there any reason why the Act should not simply say "everything to the spouse"? This would be simpler than the existing law and is the natural culmination of centuries of legal evolution in favour of the spouse. We also believe it would reflect the expectations of married couples well (though the current law is also acceptable from this point of view). We are told that when people prepare wills, it is common to leave virtually everything to one's spouse if he/she survives, but to the children if he/she does not. The result of adopting this approach in the intestacy context would be that where the deceased is survived by issue as well as a spouse the issue would be excluded. Note, though, that:

(i) in many cases their share is already modest,

(ii) in many Canadian and common law jurisdictions, "everything to the spouse" is already the law for small (and sometimes not so small) estates,

(iii) unless there has been a remarriage the surviving spouse has the same obligations to the issue as the deceased spouse had, and

(iv) in extremis, the issue can proceed under the Provision for Dependants Act to have provision made for them out of the deceased's estate.

The main difficulty with the "everything to the spouse" approach comes where there has been a re-marriage, and issue of the first marriage are still alive when the intestate dies. Is it right that they should get nothing while the second partner takes everything? We believe that though this result may seem harsh, rules such as 'split the property evenly between the first family and the second family' (proposed by Manitoba LRC,

rejected by British Columbia LRC) are just as capable of producing harsh results when looked at from the viewpoint of the second spouse. We think the better approach is to start with "everything to the spouse" as the basic intestacy rule, and then leave it to the issue to challenge this under the Provision for Dependants Act if they choose. The result is not perfect, but intestacy law is inevitably a blunt instrument. Those who wish to avoid its effects can easily do so by making a will.

(b) The separated spouse. At present, separation, for however long, does not affect the spouse's right to share in the estate. We think this should change, especially if the spouse's right is to become an entitlement to the entire estate. More difficult, though, is to decide what legal effect separation should have. Options tried elsewhere include (a) cutting the separated spouse out completely; and (b) replacing his/her fixed share under the Devolution of Estates Act with a right to apply under the local equivalent of the Provision for Dependants Act.

We are considering a third approach: altering the spouse's share so that after five years, say, of separation, he/she shares equally with whoever would take the estate if there were no spouse. Who that is may vary with the circumstances; the spouse's share would become a floating share that might, in different cases, be shared with children, with parents or with brothers and sisters, etc.

We are reluctant to propose anything that removes the separated spouse completely because (a) for whatever reason, the spouses have not in fact divorced, and (b) despite the separation, the spouse may still have just as valid a claim to the estate as whoever becomes next in line if the spouse is excluded: a deceased may have had as little to do with his or her children, for example, as with the separated spouse, or may never have even known the next-of-kin. We see no reason why the fact of separation must necessarily mean that the spouse gets nothing, especially given that it is impossible to predict who will take the estate once the spouse is excluded.

(c) The common law spouse. We consider that the common law spouse (again, say, five years co-habitation) should be given a share of the intestate's estate, but not necessarily the same share that a marital partner would take. For whatever reason, the parties have not in fact married, and there may well be children or other relatives whose claim should not necessarily yield to that of the unmarried co-habitant.

Here, too, we think the floating share described for the separated spouse may be a suitable mechanism. We would welcome comments on this and suggestions of other shares that people might think more appropriate.

Note that the five-year period that we are provisionally suggesting as the co-habitation requirement is longer than the period required to bring a support application under, say, the Family Services Act. This is because we think inheritance rights are different from a right to apply for relief against need. We think it is reasonable that the inheritance rights should take longer to establish.

(d) Stepchildren, etc. We are inclined to include stepchildren as "children" under the Devolution of Estates Act (and the step-parents as parents) if (a) the parent and step-parent married while the child was a minor; (b) they all lived together as a family; and (c) the step-parent, if the child is an adult when the step-parent dies, continued to treat the child as his/her own even after the child attained the age of majority. We think a comparable test should apply to stepbrothers and stepsisters.

Is there a better definition of the stepchildren etc. who ought to be eligible for intestate succession? Somewhere, we feel, a line has to be drawn so that e.g. by marrying a divorcee with grown-up children one is not automatically considered to give inheritance rights to the divorcee's entire first family.

(e) Remote next-of-kin. What experience do people have of tracing remote next-of-kin? Would it make more sense if the Act cut off tracing at a specific point in the degrees of consanguinity, and vested the estate in a trustee (perhaps the Public Administrator?) to distribute in a way he/she thinks the deceased would be likely to have considered satisfactory? Other common law jurisdictions have adopted similar measures. What this would create would be a kind of semi-discretionary trust to wrap up cases in which there are no close kin. It would be a recognition that the further one goes down the line of next-of-kin, the more likely it is that the deceased would

have preferred friends or favoured organizations, rather than blood relatives, to take the benefit of the estate.

If there were to be a cut-off, where should it be? As a matter of first impression (confirmed by legislation elsewhere), uncles/aunts or first cousins seem the likely cut-off. More distant relatives, though, might still benefit if the trustee agreed that there was some reason beyond the mere fact of their being the closest surviving kin.

5. Administration of Estates

(a) Bonding. Is there any reason why, in cases of intestacy, the law should require bonding of administrators as a matter of course? We would be inclined to suggest that bonding should become a matter to be decided upon by the court in its discretion.

(b) Need for formal appointment of administrators. Is there any reason why the administrator of an intestate estate should need formal court appointment any more than an executor does? What would the implications be if the law simply permitted the person or persons entitled to apply for administration to act to the same extent as executors appointed by a will can act? (We note in passing that we believe that, technically, executors without letters probate may have fewer powers to act than people believe, but that is a different matter.)

(c) S.19, Devolution of Estates Act. This provision provides a neat way of tying up the loose ends of an informally administered estate after two years, but with some exclusions as to the property to which it applies. Is there any reason why this should not apply to all the property in the estate?

6. Provision for Dependants Act

Several people have suggested to us that the Act is too open-ended; that it makes it hard for testators to know what they may safely leave to whom, and hard both for estates and for dependants to know whether an application is worth bringing or defending. The argument in response, of course, is that the open-endedness of the Act is inevitable if the Act is to be capable of doing justice in situations where the facts may vary widely. We would be interested to know what the experience of practitioners has been in dealing with the Act and whether it would be preferable if the Act were more explicit as to the situations in which it is to apply.

If the Act were to be made more explicit, we would see three situations in which the Act would apply:

(1) Almost certainly, where the dependant does not have adequate resources unless assisted by the estate. We are not sure quite how to express this economic test, but surely if the Act is to exist at all, it must at least deal with cases of economic hardship;

(2) Probably, where the applicant has performed special services for the deceased, and it would be unjust if these were not recognized. The kind of case we have in mind here is the person who sacrifices his/her entire life to looking after an ailing family member, but then is left only a pittance in the will.

(3) Possibly where there are other exceptional circumstances rendering it unconscionable for the deceased not to have made greater provision for the applicant. This, obviously, is a catch-all provision designed to deal with unforeseen situations. If a catch-all is needed, how restrictive should its terms be? Should it use words such as "exceptional" or "unconscionable," or should it be more generous to potential applicants?

Our inclination would be to go with all three of these, but we would be interested to hear comments on them and on other possible additions or alternatives.

7. Marital Property Act

We have received a number of suggestions for changes to this Act. It is unfortunate that we cannot express the reasons for our responses at greater length.

(a) Should New Brunswick follow some other provinces in equalizing net family assets rather than dividing marital property? We think not. Both models have their advantages and their drawbacks, and we are not persuaded that the equalization approach is so clearly preferable, either in practice or in principle, as to justify the change. If there were to be a substantial move from our present legislation, we would be more

inclined to consider saying (as the Australian Law Reform Commission did) that all property was divisible, with a presumption of equal sharing for most of it, but we are not yet in a position to recommend that either.

(b) Should business assets be divisible? Yes and no is our present answer to this. We believe that the Act should be amended to make business assets more readily divisible on the basis of contribution -- to some extent the courts have managed this already despite the words of the statute -- but we do not think that business assets should be shared on exactly the same basis as marital property.

We do suggest, though, that a further element discussed by the Australian Law Reform Commission should be built into the Act, namely, an award to reflect the likely differential economic impact of the marriage breakdown of the two partners. Where one has an earning capacity far greater than the other we are inclined to think that an "equitable" award dividing marital property should take into account the fact that one of the partners will be much more able than the other to replace the property that he/she is deprived of.

(c) Should common-law couples come under the division of property provisions of the Act? We think not. The circumstances under which, and the expectations with which, couples may co-habit are too varied, we believe, to justify the law in imposing a 50/50 split on the property they jointly used or acquired during co-habitation.

(d) When one spouse dies, should the marital home automatically vest in the surviving spouse? We are not sure, but we think probably no change is called for here. In cases of intestacy the marital home does now vest in the surviving spouse, as it does if there is a joint tenancy or if the will so provides. Where there is a will which does not leave the surviving spouse the marital home, s.4 of the Act entitles the spouse to obtain the home by applying to the court. So the purpose of the amendment is essentially to remove the need for a court application when a marital home is not in joint tenancy and a will leaves the marital home to somebody other than the spouse. We see some attraction in this, but think that, given the general structure of the Marital Property Act it is probably better to leave things as they are.

(e) How many marital homes? As the Act now stands, more than one property can fit the description of the marital home. The suggestion to us was that the Act should be limited so that only one property fits this description. On *inter vivos* divisions, we are not sure why this would be necessary. We can see the argument for it, though, in applications after death, given the surviving spouse's entitlement to take the marital home and household goods. Subject to correction by any of our readers, we are inclined to recommend an amendment to s.4 of the Act.

(f) Valuing and dividing professional qualifications. Some people have suggested that as professional qualifications should be considered property to be valued and divided, and that the Act should be amended if necessary to permit this. We think this is an impossible exercise. Rather than try to squeeze such things into the definition of property in order to make them divisible, we think it is better to deal with it under the heading of the earning capacity of the various parties, as outlined in (b) above.

8. Fatal Accidents Act

It has been suggested to us that the Act should be expanded to permit claims by common-law spouses. We are inclined to agree, and consider that a claim under the Fatal Accidents Act should be available to those common-law spouses who have a right to support under the Family Services Act. We welcome comment.

9. Enforcement of Money Judgments

Professor John Williamson has been working on a detailed legislative proposal based on his 1985 report and a subsequent report of the Alberta Law Reform Institute. We expect to receive this report shortly and to be distributing it for comment in the spring. Anyone who would like to receive a copy should contact this office.

Responses

Responses to any or all of the above should be directed to Tim Rattenbury at the address given above. We would like to receive them, if possible, by May 1st, 1994.