SURVIVING SPOUSE WHO ELECTS UNDER <u>FLA</u> CANNOT BE EXECUTOR

In a recent decision of the Divisional Court in *Reid v. Reid Martin*[1]. The Ontario Divisional Court held that where a surviving spouse who is named as an executor in the Will of a deceased spouse, elects to take his or her share under the *Family Law Act* rather than under the Will, the surviving spouse cannot be the executor of the estate.

In *Reid v. Reid Martin,* the Divisional Court held that the surviving spouse Antoinette Reid cannot be an executor of the estate of her late husband and allowed the appeal of the lower court's decision to maintain her position as executor of the estate.

In *Reid v. Reid Martin* the Divisional Court reviewed the competing authorities in this area.

The Court looked at s. 6(8) of the *Family Law Act* and held that the interpretation that the surviving spouse cannot be executor was the correct view.

Section 6(8) of the *Family Law Act* provides as follows:

> **(8) Effect of election to receive entitlement under section 5** - When a surviving spouse elects to receive the entitlement under section 5, the gifts made to him or her in the deceased spouse's will are revoked and the will shall be interpreted as if the surviving spouse had died before the other, unless the will expressly provides that the gifts are in addition to the entitlement under section 5.

---

[1] Unreported, March 22, 1999 No. 49343/98 (Ont.Div.Ct.) Southey, J., Matlow, J., Swinton, J. (The author was counsel for the Appellant)

Brend Hovius and Timothy G. Youdan in their text The Law of Family Property[2] took the view that while this question was undecided by the courts, it appears that the appointment of a surviving spouse as executor should not prevail if the surviving spouse has elected under the *Family Law Act.*

In the Law of Family Property, the authors compared the provisions of the *Family Law Act* to the equivalent provision in the *Succession Law Reform Act* and argued that unlike the equivalent provision in the *Succession Law Reform Act* dealing with the effect of a decree of divorce or judgment or nullity on the Will of a testator, s. 6(8) of the *Family Law Act* does not deal explicitly with the appointment of the surviving spouse as executor or trustee.[3]

The authors go on to point out that an argument may be made that s. 6(8) deals only with gifts of property; however, the better view is that the Will is generally to be interpreted as if the surviving spouse had predeceased the testator.[4]

The contrary view in respect of this issue was dealt with by David Simmonds in his article "Wills Drafting and The Family Law Act (1986)".[5]

In contrast to David Simmonds' argument, the authors of The Law of Family Property indicate that a strong argument in favour of the removal of a surviving spouse as executor is consistent with the wording of s. 6(8) and consistent with the decision in *Stewart v. Stewart Estate*[6] they go on to say that the interpretation produces the usually appropriate result that the appointment of a surviving spouse as executor or trustee is rendered ineffective by virtue of his or her election to receive the entitlement under s. 5 of the *Family Law Act*

[2] at pp. 542-543, Carswell, (Toronto)1991.
[3] IBID at. p. 543.
[4] IBID at p. 543.
[5] (1987), C.F.L.Q. 209 at 211.
[6] (1989), 19 R.F.L. (3d) 364, (Ont. H.C.).

The decision of the Divisional Court in *Reid v. Reid Martin* has helped clear up a previously unresolved issue and will be of some great assistance to practitioners in the area of estate, trust and fiduciary litigation.