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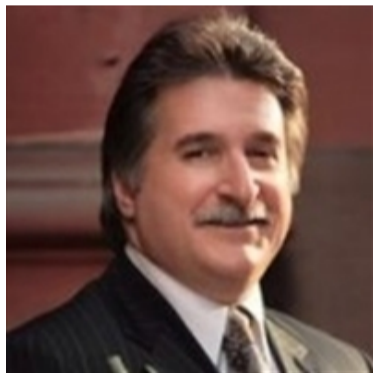
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Estates & Wills & Trusts

OCA split decision underscores difficulty in drafting for contingencies

By Kirsten McMahon, Associate Editor



Disputes involving the division of a family farm or cottage are common and it's challenging to foresee what issues might arise after a will has been drafted, Toronto-area estates litigator and mediator [Charles B. Ticker](#) tells *The Lawyer's Daily*.

Ticker, who practises estates litigation and mediation at [Charles B. Ticker Law Office](#), suggests lawyers advise their clients to sit down with their families to discuss what should happen after they die.

"In that discussion, you could come to a resolution at that time. Or give the parent a little more insight, so when they draft their will they can give instructions. They'll have a better idea of what's going on and of what's in their children's minds," he tells the legal publication.

He makes his comments in connection with an Ontario Court of Appeal [decision](#) that dismissed the appeal of a brother against trustees of a parent's estate in a clash over the family farm. The appellant and the trustees are brothers and their dispute involved directions their mother left in her will on how the family farm should be sold.

"According to court documents, [the respondents] brought an application for advice on the construction of the will in relation to the farm. The will directs that the trustees should have the farm appraised for its fair market value as of the date of their mother's death," the article states.

The will provided that if any of the children or a combination of them wished to purchase the farm they could do so at 75 per cent of appraised fair market value provided they entered into an Agreement of Purchase and Sale with the trustees within one year of the mother's death.

The will went on to say that it was the testator's wish that the farm be kept in the family and also noted that proceeds of the sale were to be distributed to her children.

By the first anniversary of her death, the trustees had four competing offers for the farm which led to each of the four children submitting individual offers. The court noted that the appellant is "the only one of the children who farms full time for a living."

"Since the trustees were uncertain about which offer should be accepted, they did not complete an Agreement of Purchase and Sale with any of the children within one year of their mother's death," the article notes. "Instead, they brought an application for advice regarding 'the sale of the farm and for an order for vacant possession of the portion of the farm previously leased to the appellant.'"

The application judge determined that the mother's intention on what should happen if there were competing offers from her children "could not be ascertained," the article states, and the trustees were ordered to sell the farm "to whomever they choose and at a price they determine, in their sole and unfettered discretion."

At appeal, the panel was split over the appellant's three arguments but ruled 2-1 to dismiss the appeal and ordered that the trustees are entitled to costs.



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“The fact that this was a split decision, there was a very strong dissent, underscores the difficulty in drafting for these contingencies,” Ticker tells the legal publication.

“You couldn’t even get three Court of Appeal judges to agree on how to deal with this,” he adds.

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