

***Webster v. Webster*¹ – Limitation Periods and Equalization Payments: When is it too Late?**

Limitation provisions generally aim to strike the appropriate balance between an aggrieved party's right to seek redress and a potential defendant's right not to remain under the cloud of litigation indefinitely or to answer for a wrong where it has become difficult, if not impossible, to marshal the evidence.

The case of *Webster v. Webster Estate*, a recent decision of the Ontario Superior Court of Justice, attracted notoriety in the media, as the Webster family is well known in Montreal and the world of philanthropy. The case considers limitation periods in the estate context.

By way of background, Mr. & Mrs Webster were married for 29 years. It was a second marriage for both parties. Mrs. Webster was a devoted wife. Mr. & Mrs. Webster gave generously to their community. They lived happily ever after until Mr. Webster's death on October 11, 2003. Mr. Webster was 87 years old when he died. Mrs. Webster was then 81 years old.

Mr. Webster's estate was valued at around \$24 million. Mrs. Webster was provided for under the terms of the Will, but the bulk of the Estate was left to the Eric T. Webster Foundation. Unfortunately, since the death of her husband, Mrs. Webster developed Alzheimer's disease, which had progressed to the point where she was unable to testify as a witness in the proceeding.

The Will appointed four Estate Trustees of the Estate including Mrs. Webster and her son by her first marriage, who was also Mrs. Webster's legal representative and the step-son of Mr. Webster.

In Ontario, when a spouse dies with a Will, the surviving spouse may elect to take the benefits bestowed under the Will, or seek the equalization of net family property from the estate as calculated under the provisions of the *Family Law Act*.

An application for an equalization payment must be brought within six months of the first spouse's death, otherwise the surviving spouse is deemed to have chosen to take under the Will.

Mrs. Webster did not file an election within the prescribed six months. This meant that she could no longer elect to equalize their net family property. However, Mrs. Webster and her son both alleged that they were unaware of any right to elect to receive an equalization payment under the *Family Law Act* in the six months following Mr. Webster's death. Mrs. Webster therefore sought an order extending the time within which she could file an election to make an equalization claim from the Estate of her deceased husband.

Unfortunately for Mrs. Webster, and her son who ultimately spearheaded the proceeding, they did not receive a sympathetic hearing from the court.

According to the court, while there was evidence to suggest that Mrs. Webster was not content with her benefits under the Will during the life of Mr. Webster, the court nevertheless recognized

¹ *Webster v. Webster Estate* (2006), 25 E.T.R. (3d) 141 (Ont. S.C.J.), decided July 6, 2006; (supplementary reasons released February 1, 2007: (2007), 30 E.T.R. (3d) 165 (Ont. S.C.J.)

that she was completely free to change her mind and seek an equalization payment within the prescribed time.

Section 2(8) of the *Family Law Act* provides that the court may, on a motion, extend the prescribed time if it is satisfied that: (1) there are apparent grounds for relief; (2) relief is unavailable because of delay that has been incurred in good faith; and (3) no person will suffer substantial prejudice by reason of the delay.

While courts have generally been liberal in extending the time limit, especially where there is any sign of ongoing negotiation prior to the limitation period lapsing, the court stated that was not the situation here.

For its part, the Estate submitted that a prenuptial agreement disentitled Mrs. Webster to request an equalization payment or alternatively, she and her son failed to safeguard her interest in a timely manner. Mr. & Mrs. Webster had signed a prenuptial agreement in Quebec in 1974. The agreement provided that Mrs. Webster and her husband would be separate as to property upon dissolution of the marriage by death. According to the court, the marriage contract did not bar the wife from an equalization claim because it did not expressly address election issues upon the death of one of the spouses.

Mrs. Webster and her son alleged that they were initially unaware of any right to make an election for equalization of the net family property. Six months after the expiration of the limitation period, the son learned otherwise, consulted a lawyer, and an application was brought a further six months later. No explanation was offered for the delay incurred after Mrs. Webster's son became aware of the right to make an election for equalization. While the court recognized that Mrs. Webster might have been in a state of emotional upset and had much difficulty in dealing with Mr. Webster's death, it noted that the majority of surviving spouses would be in a similar state of grief. Moreover, the court held that there was an opportunity for Mrs. Webster and her son to obtain legal advice upon the death of Mr. Webster, which they did not do.

Given the above, Mrs. Webster did not meet the criteria for an extension of the prescribed time because the delay in filing an election was not incurred in good faith. The failure by Mrs. Webster and her son to make inquiries amounted to wilful blindness. There was no justifiable reason for not making such inquiries.

The court also held that Mrs. Webster's declining health during the delay substantially prejudiced the ability of the Estate to defend the motion. The court also held that this was not a case that warranted an exercise of judicial discretion in Mrs. Webster's favour, due to the clear expression of Mr. Webster's intention to redistribute his wealth to charity.

Finally, the courts held that the *Family Law Act* should not be used as a scheme to rewrite a Will and redistribute wealth contrary to the testator's intention. The sad reality was that Mrs. Webster, in her failing health, was now a custodian of wealth to be redistributed to a subsequent generation. Mrs. Webster's Will provided that her three sons were the sole beneficiaries of her estate. Accordingly, it would seem as though it would be Mrs. Webster's sons, as opposed to Mrs. Webster, who would benefit from an order granting the extension of time, while Mr. Webster's children would be excluded altogether.

The court held that it was unjust and contrary to the objectives of the *Family Law Act* to use the extension provision to secure this result. Accordingly, the court declined to exercise its discretion and dismissed the motion.

