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MAGCO LEGAL LESSONS NO. 34

LEGAL TOPIC:

PAYMENT OF DEBTS OF DECEASED PERSONS

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A. Introduction

After a Legal Personal Representative (hereinafter referred to as “LPR”) of a deceased’s estate has obtained a Grant of Representation, that being either a Grant of Probate to an Executor, a Grant of Letters of Administration with Will Annexed or a Grant of Letters of Administration to an Administrator, the next step in the Administration process would be the payment of the deceased’s debts. This process requires that the LPR first identify all the assets and liabilities of the deceased’s estate, otherwise known as “calling in the estate”. The LPR must then determine the whether the estate is solvent or insolvent, and then proceed with the payment of debts in accordance with the common law.

The assets used for paying the deceased’s debts and liabilities include, inter alia, real and personal estate over which the deceased exercised a general power of testamentary disposition and real and personal estate in which the deceased has a share and/or interest. Gifts of real and/or personal property made subject to Donatio Mortis Causa, or gifts made in contemplation of death can only be used for the payment of debts only after all other assets have been exhausted.

B. Ascertaining the Assets and Liabilities

The general rule is that before the assets of the deceased’s estate are distributed to the beneficiaries entitled to benefit under the estate, the LPR of the deceased’s estate, with the assistance of his Attorney-at-Law must then do their due

diligence to ascertain, identify and quantify all of the assets of the deceased's estate. Upon the identification and quantification of the deceased's assets, the LPR of the deceased's estate must then ascertain, identify and quantify all the debts and liabilities of the deceased's estate. In this instance the LPR may run advertisements for Creditors in the local newspapers. A deceased's estate debts may include funeral and testamentary expenses, secured debts, preferred debts, ordinary and unsecured debts, and deferred debt.

C. Solvency or Insolvency of the Estate

Once the assets and the liabilities of the deceased's estate have been determined and quantified, it must then be determined whether the deceased's estate is solvent or insolvent. Whether an estate is solvent or insolvent would determine the method in which the estate would be administered and distributed.

i. Insolvent Estates

An estate is deemed insolvent where the deceased's total liabilities are greater than the total assets and as such the deceased's estate does not have sufficient assets to pay the funeral and testamentary expenses, administrative expenses, debts and liabilities in their entirety. What this means is that once an estate is insolvent, the beneficiaries entitled to benefit under the deceased's estate would not receive anything as the LPR must now use the assets of the deceased's estate to repay the Creditors.

As such the law has set out three (3) ways in which a Creditor can be paid and these are outlined as follows:

a. Agreement between the LPR and Creditors

The LPR may, without the intervention of the Court negotiate and enter into an agreement with Creditors as to which category of Creditors should be paid first.

b. Administration under Direction of the Court

Either the LPR, the Beneficiaries or the Creditors may make an application under **Part 71** of the **Civil Proceedings Rules** for the Court's direction on the order in which Creditors should be paid, the amount that the Creditors should be paid, as well as to obtain the Court's assistance in identifying debts which may be doubtful. This procedure is commenced by the filing and serving of a Fixed Date Claim Form with a supporting affidavit of the of the LPR making the Claim.

c. Administration Under the Bankruptcy and Insolvency Act Ch 9:70

Where a Creditor can satisfy the Court that the debt is sufficient to support a Bankruptcy petition against the estate of a debtor, the Creditor may present a petition to the Court for an Order for the Administration of the deceased's estate according to the **Bankruptcy and Insolvency Act Ch 9:70. Section 115** of the Act states that:

Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

(2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

(3) The proof of claim may be made by the creditor himself or by a person authorised by him on behalf of the creditor, and, if made by a person so authorised, it shall state his authority and means of knowledge.

4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counterclaim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.

(5) The proof of claim shall state whether the creditor is or is not a secured or preferred creditor.

(6) Where any rent or other payment for certain periods falls due at stated times the person entitled to the rent or payment may prove for a proportionate part of the rent or other payment to the date of bankruptcy as if the rent or payment grew due from day-to-day.

The Court, on being satisfied that there is no reasonable probability that the deceased's assets would be sufficient to pay the debt, and also satisfied that a Grant of Probate or Letters of Administration was issued to a LPR, will make an Order for the administration of the deceased's estate under the Trinidad and Tobago Bankruptcy Law.

D. Order of Payment of Debts

1. Funeral, Testamentary and Administration Expenses

Although the LPR, the Creditors and the Beneficiaries together are free to negotiate and agree on the on the priority of Creditors to be paid, as a general rule, funeral testamentary and administration expenses are the first to be charged on the deceased's estate.

2. Secured Creditor/Secured Debt

Secured Creditors or Secured Debt such as Mortgages, Registered Judgments are given priority based on the date of the registration of the charges. Registered Judgements and Mortgages operate as a charge against land thus allowing Judgment Creditors to seize upon land owned by the deceased in order to discharge the outstanding debt.

3. Preferred Debt

Preferred Debt includes, inter alia, outstanding taxes, statutory charges such as NIS payments, wages owed to employees where the Deceased was a private employer. Once secured creditors have been repaid and the funeral and testamentary and administration expenses have been paid, only then would the preferred debts be paid. Preferential debts rank equally among each other and where the assets permit they must be paid in full. If they

cannot be paid in full because the assets are insufficient, then the debts will abate in equal proportion amongst themselves.

4. Ordinary Debt

This includes loans where there is no security given in exchange for the loan such as unsecured loans, personal loans, student loans. If the deceased's assets are not sufficient to pay all ordinary debts in full, then the debts would be abated in equal proportion amongst themselves.

5. Deferred Debt

The final limb in the hierarchy of payment of debts is that of deferred debt and refers to loans between family members, friends and associates. Therefore, where the deceased loans his wife a sum of \$120,000.00 in his lifetime, this debt would not be payable to the deceased's wife until all foregoing creditors are paid in full.

ii. Solvent Estates- Intestacy

On the other hand, according to the case of Re Leng (1895 1 Ch 652) the deceased's estate is deemed solvent where the total liabilities are less than the total assets and therefore persons so entitled would be able benefit from the estate in accordance with the rules of intestacy. There are different rules for the payment of debts of a solvent estate on intestacy and testacy.

Where the estate of an intestate is solvent, it would then be the LPR's responsibility to pay all debts and liabilities in full. The residue of the estate would then be distributed to persons entitled to benefit from the deceased's estate in accordance with the **Administration of Estates Act Chap 9:01**.

iii. Solvent Estates- Testate

Where a person dies testate, that is leaving a valid Will, and their estate is solvent, the first issue to be determined is whether the deceased appropriated and/or charged any assets for the payment of debts and liabilities and whether those assets charged for the payment of debts and liabilities are sufficient to liquidate them. A charged asset is that which the deceased leaves to a beneficiary on the condition that his liabilities and debts are paid or that a particular debt or liability is paid. On the other hand, an appropriated asset is that which the testator unequivocally states that a particular asset is to be used for the payment debts and liabilities. **Section 64** of the **Wills and Probate Act Chap 9:03** is particularly instructive in this regard. **Section 64** states the following:

64. (1) Where a person dies possessed of, or entitled to, or, under a general power of appointment by his Will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of mortgage equitable charge or otherwise (including a lien for unpaid purchase money), and the deceased has not by Will, Deed or other document signified a contrary or other intention, the interest

so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value shall bear a proportionate part of the charge on the whole thereof. (2) Such contrary or other intention shall not be deemed to be signified— (a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate, or (b) by a charge of debts upon any such estate, unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

Where it is determined that the charged and/or appropriated assets are sufficient to liquidate all debt and liabilities then the LPR can comply with the deceased's directions and clear all debts and liabilities, then distribute the rest of the deceased's estate in accordance with the terms of the deceased's Will.

Things can get a bit more complicated where the deceased's assets either have not been charged and/or appropriated by the Testator in his Will or the assets charged and/or appropriated are insufficient in value. Where this occurs the LPR would categorise all the assets of the estate into seven (7) funds where, once the assets are placed into a fund, the LPR would be required to liquidate the assets of each fund in turn and pay off the debts in full.

The seven (7) funds are set up as follows:

1. Undisposed of Personal Property

This fund consists of general personalty and residuary personalty not specifically disposed of, including personalty passing under a residuary gift. Therefore, any failed or lapsed gift not specifically bequeathed and which forms part of the testator's personal estate will also fall into this fund. However, a sum for the general pecuniary legacies must be set aside for the payment of the sum to the beneficiaries thereof. General pecuniary legacies are monetary gifts where the testator leaves no source from where the funds should be paid from. For example, a testator may devise in his Will that the sum of \$10,000.00 to be paid to his daughter Jasmine, without indicating which account or from which liquidated asset the \$10,000.00 should be paid from.

Where a particular asset has been used in its entirety, it is said to have "abated" fully. Where only part of the value of the assets has been used and there is partial abatement of the asset, the beneficiary may still be entitled, on a pro-rated basis, to part of the value of the asset. Where no part of a fund has been used, the Beneficiaries of the deceased's estate would receive their full entitlement.

2. Assets Appropriated for Payment of Debts and Liabilities

The second fund consists of assets appropriated specifically and solely for the payment of debts and liabilities as the testator would have envisaged that the assets would be required for the purpose of paying his/her debts and liabilities.

3. Undisposed of Real Property

The third fund consists of undisposed Real Property. Unlike the first fund, a failed or lapsed share of Real Property is not included in this fund and remains under its original category.

4. Property Charged by the Testator

The fourth fund consists of property charged with the payment of debts. As stated before, this is property which was devised to a beneficiary subject to the payment of all debts and liabilities.

5. General Pecuniary Legacies

The fifth fund consists of the monies taken out of the first fund to satisfy the general pecuniary legacies. A general pecuniary legacy must not be confused with a specific pecuniary legacy which is where the testator gifts a sum of money to a beneficiary and specifically identifies a source of payment. An example of a specific pecuniary legacy is where the testator bequeaths to his son, Jason, the sum of \$20,000.00 from his Republic Bank Account.

6. Specific Devises in the Will

The sixth fund consists of specific legacies and specific residuary devises. This fund would also include:

- a) Any type of real property which is not devised, is undisposed of and has not been charged or appointed;
- b) Specific pecuniary legacies;
- c) Devised general or specific property or residuary; and
- d) Lapsed gifts of Real Property.

7. Real and Personal Estate over which the Testator had Power of Appointment

The seventh and final fund includes any general power of appointment that the Testator had over any real and personal estate and which he appointed by Will. The fund only applies to appointments by Will and not by Deed. Thus, a power of appointment would arise where the Testator appoints in his Will that his daughter Jasmine may dispose of his 1980 Chevrolet Corvette as she wishes. Although at common law, the real and personal property subject to a power of appointment may be used by the LPR to pay the testator's debts where the other funds were

not sufficient to fully satisfy the testator's debts and liabilities. However, the real and person property subject to a power of appointment does not devolve upon the LPR.

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