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STEP Inside

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STEP Inside

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Considering the Family in Family Trusts

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The discretionary family trust is a central component of many estate plans. Among other things, it can offer its beneficiaries privacy, income splitting, and some creditor protection. Discretionary family trusts can be created either during one's lifetime or on the death of an individual, typically through a will. Assets transferred during one's lifetime into the trust are removed from the transferor's name, and therefore are not subject to provincial probate fees when the transferor dies. This is an especially attractive feature in provinces like Ontario, where the estate administration tax is roughly 1.5 percent of the gross value of assets owned at death. While there are many good reasons to recommend a family trust as part of a client's estate plan, family law issues must be considered before a trust is settled.

Timing Is Everything

There is a common misconception that if a married individual is a beneficiary of a trust, the value of the trust's assets is protected on the breakdown of the individual's marriage. In Ontario, this is only sometimes true. It is well-established law that an interest in a trust is considered "property" pursuant to section 4 of the Ontario *Family Law Act*. This is true whether the trust is entirely discretionary in nature or not.

When spouses separate in Ontario, they are entitled to an "equalization" of their net family properties pursuant to part I of the *Family Law Act*, which essentially provides for the division of the value of assets and debts accumulated over the course of the marriage. Gifts and inheritances received during a marriage are excluded from equalization on separation so long as those interests have not been shared with a spouse, or consumed. In the trust context, this means that if a family trust was settled before a beneficiary's marriage, the beneficiary's interest is considered property to be valued on marriage breakdown. If the family trust was settled after the beneficiary's marriage, the trust interest is generally treated as excluded property.

Determining the Value of the Trust Interest

Once it has been established that a separated spouse has an interest in a trust that existed at the date of marriage, the value of that interest must be determined. Unlike other property (such as a matrimonial home or a bank account), there is no simple way to determine the value of a spouse's interest in a family trust for equalization purposes. Conflicting methods of doing so have been put forth by the courts.

The original approach, proposed in 1997 by the Ontario Superior Court of Justice in *Sagl v. Sagl*,[1] valued the husband's interest in the family trust by treating the trust assets as though there was a deemed realization among all beneficiaries on the date of separation. The court then took that value and divided it by the number of beneficiaries of the trust.[2] This approach ignores the very nature of a discretionary trust because each beneficiary does not have a vested interest in the trust assets, but merely the right to be considered in a distribution.

The *Sagl* method of trust valuation was adopted in 2004 by the Ontario Superior Court of Justice in *Kushnir v. Lowry*, when the court ascribed 50 percent of the value of the trust assets on the date of separation to the wife, because she was one of two beneficiaries of the trust on the date of separation.[3]

Later decisions of the Ontario court have rejected the method in *Sagl* and *Kushnir*, and have moved toward a more holistic approach when valuing a spouse's discretionary interest in a trust for equalization purposes.

In the 2016 decision of the Ontario Superior Court of Justice in *Tremblay v. Tremblay*, the court focused on the ability of the beneficiary of a trust to "control" distributions.[4] The court

1 *Sagl v. Sagl*, [1997] OJ No. 2837; 1997 CarswellOnt 2144 (CJ).
2 Ibid., at paragraph 37.
3 *Kushnir v. Lowry*, [2004] OJ No. 375; 2004 CarswellOnt 530 (Sup. Ct. J), at paragraph 21.
4 *Tremblay v. Tremblay*, 2016 ONSC 588; 2016 CarswellOnt 922, at paragraph 31.

looked at the following enumerated factors to determine the amount of control exercised by the beneficiary of the trust:

1. any evidence with respect to the founding intent of the trust, such as whether the trust was designed to effectively allow control by the beneficiary;
2. the compensation of the trustees, including whether the beneficiary is a trustee;
3. any requirement, including veto powers, that the beneficiary be a part of any trustee decisions;
4. any history of past trustee actions that demonstrate direct or indirect control by the beneficiary;
5. powers of the beneficiary to remove trustees; and
6. whether any of the trustees are at arm's length with the beneficiaries.[5]

In *Tremblay*, the court found that the husband, as trustee and beneficiary, was able to force distributions from the trust when it would benefit him to do so. Accordingly, in determining the value of the beneficiary's trust interest, the court found that the purpose of the trust was to provide the beneficiary with a "reserve fund" to use when he needed to support himself and his family. The court found that the trust was analogous to a defined contribution pension plan or a tax-free-savings account, because the money in the trust came from the beneficiary's share of the profits of certain investments, which profits were the result of the beneficiary's contributions.

Given the nature of the trust, the court held that the appropriate way to value the beneficiary's interest in the trust was to use the adjusted net book value of the assets held in the trust, which amounted to $891,200 at the date of separation.[6]

Along with the element of control, the courts are alive to the complex dynamics that exist between separating spouses when one spouse is a trustee and the other is a beneficiary of a trust.

In *Mudronja v. Mudronja*, the husband's father created a family trust, which named the wife as a beneficiary and granted the husband a power of appointment. In determining the value of the wife's interest in the trust for equalization purposes, the court held that the value should be nominal, because the wife had no ability to force distributions from the trust, which held the husband's significant business assets.[7] The court's reasoning is summed up succinctly as follows:

> To allocate otherwise would have the effect of artificially increasing her NFP [net family property], thereby unfairly and inequitably diluting her equalization entitlement arising from the applicant's significant business interests.[8]

As can be gleaned from the courts' gradual shift from a purely mathematical calculation to a holistic consideration of the degree of control exercised by a beneficiary, the method of valuing a trust is constantly evolving. Unfortunately for advisers, the lack of consistency makes it hard to advise their clients.

Advisers who draft family trusts should consider the powers, if any, that are given to a beneficiary in a trust deed. If a beneficiary is a sole trustee, he or she certainly has the power to control distributions, which will likely result in a higher value being given to that trust interest upon separation. If a beneficiary is one of two trustees, he or she effectively has veto power in all decisions and, therefore, may also have the power to control distributions. If a beneficiary is one of three trustees with a majority provision, that beneficiary cannot control the distributions. However, if the other trustees are appointed merely as "figureheads" and simply take direction from one trustee, a court may find that that trustee controls distributions.

Some trust agreements include a "trustee appointer" or a "person entitled to appoint trustees." As suggested by the analysis above, if this person is a beneficiary and can remove and appoint trustees, a court could find that the beneficiary has control because he or she can simply appoint "friendly" trustees. This may result in a higher value being assigned to that beneficiary's trust interest upon separation.

Imputing Income

While trusts are typically discussed in matrimonial litigation in the context of equalization, they also serve as a function by which a beneficiary may derive income to fulfill his or her child and spousal support obligations.

Section 19(1)(i) of the *Child Support Guidelines* authorizes the court to impute income to a spouse when the spouse is a beneficiary of a trust who

5 Ibid., at paragraph 32.
6 Ibid., at paragraphs 37 and 39.
7 *Mudronja v. Mudronja*, 2014 ONSC 6217; 2014 CarswellOnt 15112, at paragraph 99.
8 Ibid., at paragraph 100.

is or will be in receipt of income from the trust. The process by which a court "imputes" income to a spouse (that is, adds additional income to the income already declared by the spouse on his or her income tax returns) is a factual and evidence-driven exercise.

While the *Child Support Guidelines* do not apply to spousal support, the Ontario Superior Court of Justice in *Howe v. Howe* used the enumerated factors at section 19(1)(i) of the *Child Support Guidelines* in its analysis of whether income should be imputed to the husband, on the basis that the factors "are analogous to some important considerations that are relevant to spousal support."[9]

In the 2011 decision of *Laurain v. Clarke*, the Ontario Superior Court of Justice listed the following factors that the court should consider in its analysis when imputing income to a beneficiary of a trust:

1. Is the amount included in the beneficiary's income for the purposes of income tax?
2. Is the amount capital that generates income?
3. Is the amount, if capital, compensation for loss of income?
4. Has the amount, if capital, been equalized, or is it exempt?
5. Is the payment of the amount gratuitous?
6. Is the amount of the payment recurrent?
7. Were the funds typically used to finance a significant proportion of the beneficiary's living expenses?[10]

In *F.B.M. v. B.F.*, the court confirmed its ability to impute income to a beneficiary of a trust when the payments derived from the trust are recurrent and used to support a "significant" part of the beneficiary's living expenses.[11] It is important to note while that capital amounts received from a trust are not usually regarded as income for the purposes of support, the income generated by the capital amounts can be imputed as income to a beneficiary.[12]

A factor emphasized by the jurisprudence is whether a beneficiary uses payments from the trust to fund his or her lifestyle. As noted above, the beneficiary's degree of control is also a relevant factor.

In *F.B.M.*, the trial judge held that there was no evidence that the husband could compel the trustee of the trust (his father) to make distributions of income from the trust. This was one of the key factors in the court's decision to reject the wife's claim that income should be imputed to the husband.[13]

For the concerned beneficiary, it is important to remember that the court will consider all of the enumerated factors listed in *Laurain*, and that no single factor will have more weight than others. It is also important to note that although a trust interest that came into existence after the date of marriage will be excluded for the purposes of equalization, the timing does not matter for the purposes of imputing income to a support payer.

Hindsight is 20/20. While a marriage contract is still the gold standard in protecting a beneficiary's interest in a discretionary family trust, it is not always an option, for various reasons. In the absence of a marriage contract for a beneficiary that excludes his or her trust interest in the net family property calculation and that disallows the imputation of income for support purposes, advisers should turn their minds to family law principles when considering the features of a discretionary family trust.

9 *Howe v Howe*, 2014 ONSC 2649; 2014 CarswellOnt 5492, at paragraph 18.
10 *Laurain v. Clarke*, 2011 ONSC 7195; 2011 CarswellOnt 13729, at paragraph 35.
11 *F.B.M. v. B.F.*, 2019 ONSC 708; 2019 CarswellOnt 4002, at paragraph 58.
12 *Clapp v. Clapp*, 2014 ONSC 4591; 2014 CarswellOnt 10739, at paragraph 27.
13 *F.B.M.*, supra note 11, at paragraph 62.

Domestic Contracts and Testamentary Freedom

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Pre- and post-relationship domestic contracts are frequently used to protect the current and future assets of one or both parties from division in the event of a relationship breakdown. Domestic contracts are increasingly popular among couples entering relationships later in life, when their respective assets have been acquired without the assistance of their new spouse, and they wish to preserve their assets for their own children. Increasingly, scions of wealthy families may be compelled by their parents to enter into a domestic contract with their significant other, failing which they risk being disinherited.

Not surprisingly, there is a distinct absence of romance associated with these domestic contracts. As a result, some parties are reluctant to press the issue, engage in full financial disclosure, or obtain sound legal advice prior to signing. To the layperson, the myriad terms and extensive legalese contained in the contracts can be confusing and off-putting.

Testamentary plans are usually based on the assumption that a domestic contract is effective, leaving the testator free to dispose of any portion of their estate that is not otherwise encumbered by the terms of an agreement. Judicial consideration of domestic contracts is framed by legislative provisions and public policy concerns that may have an impact on the terms of the agreements. In cases where domestic contracts are attacked, one can expect equity to be argued, and one should assume it will be followed by the courts.

As a starting point, legislation concerning the division of family property either preserves inheritances and gifts from third parties received during the relationship from being shared with the non-inheriting spouse on a relationship breakdown, or requires that those gifts and inheritances be considered on a non-equal but equitable division of family property. This assumes that the original gift or inheritance has been preserved in a form that can be identified or traced. Exempt property that has been dissipated or consumed loses its exempt status.[1]

Further, most legislative regimes allow eligible family members to assert a claim for maintenance or support against the estate of a testator who made insufficient provision for them. Claims can be allowed even in the face of a contractual agreement waiving such claims, and notwithstanding the important consideration of testator intention, although the legislation may differ slightly from one jurisdiction to the next. In *McKenna Estate (Re)*,[2] the deceased's surviving wife signed a prenuptial agreement waiving any claim against his estate. Bensler J considered this issue and found that nothing turned on the agreement and that it did not preclude a redistribution of the deceased's assets.[3] Clearly, testator intention is trumped by the public policy goal of ensuring adequate provision for eligible family members.

What about domestic contracts that require current or future spouses of a testator's children to waive a claim to their inheritance? This is a different and less common species of waiver. Do such contracts withstand judicial consideration? It is useful to review two fundamental safeguards that should accompany any such agreement.

First, full and comprehensive financial disclosure should be exchanged. A deliberate failure to disclose all relevant financial information may result in judicial intervention if the contract is not consistent with the objectives of the legislation. In *Leskun v. Leskun*, the court referred to Fraser J's comment in *Cunha v. Cunha*: "[n]on-disclosure of assets is the cancer of matrimonial property litigation."[4] In *Dubin v. Dubin*, Mesbur J confirmed that "[a] party needs to know what asset base might potentially grow, in order to determine what he or she is being asked to give up in the agreement."[5] In *Rick*

1 *Lovich v. Lovich*, 2006 ABQB 736, at paragraph 38.
2 *McKenna Estate (Re)*, 2015 ABKB 37.
3 Ibid., at paragraph 37.
4 *Leskun v. Leskun*, 2006 SCC 25, at paragraph 34, quoting *Cunha v. Cunha*, 1994 CanLII 3195 (BCSC), at paragraph 9.
5 *Dubin v. Dubin*, 2002 CanLII 2103 (ONSC), at paragraph 32.

v. Brandsema,[6] the Supreme Court reiterated the two-stage test stated in *Miglin v. Miglin*,[7] in the context of addressing the validity of a separation agreement. The court found the agreement to be unconscionable owing to the wife's vulnerable psychological state, and confirmed the duty to make full and honest disclosure. These cases give strong indications of the courts' approach to domestic contracts signed without adequate financial disclosure.

In *Smith v. Smith*, the court stated with regard to financial disclosure: "[F]ull and frank financial disclosure is fundamental to the court's exercise of the jurisdiction granted in those statutes. ... Parties who fail to disclose, thereby misleading their spouses and the court, do so at their peril."[8] Admittedly, it will often be difficult to accurately know or disclose the actual or potential inheritance—that is, one not yet received—that is being waived in a claim. Also, given the overriding claim to family maintenance and support, a waiver may be easily disregarded for the somewhat limited claim against the testator's estate.

Second, all parties to a domestic contract should obtain robust independent legal advice. In *Lemoine v. Griffith*,[9] one of the parties had not reviewed the matrimonial property agreement before attending a meeting where the agreement was to be signed. During the course of the meeting, she met with a lawyer who had been presented by her spouse's lawyer, with whom she spent no longer than 10 or 15 minutes and whose fee was paid by her spouse. Hunt McDonald J found as a matter of fact that no independent legal advice was given.

Some parties may be tempted to minimize financial disclosure or the level of independent legal advice. As a practical matter, absence of full financial disclosure and robust independent legal advice may well lead to a rejection of the proposed contract. It is fair to say that there is a growing reluctance by some counsel to provide independent legal advice given their potential exposure to liability. The legal fees for independent legal advice, if provided appropriately, may create a barrier to the party seeking advice. However, the risks of relying on a flawed contract that is vulnerable to being set aside or varied in the future outweigh the greater certainty and range of choices presented to parties with the knowledge that the division of property will be governed exclusively by legislation and case law. If appropriate and prudent steps are taken when executing a domestic contract, the parties' confidence and certainty in their testamentary plans will increase accordingly.

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It is worth considering two cases that provide additional insight as to how the courts may approach claims of this nature.

In *Milavsky v. Milavsky*,[10] the testator made significant transfers of what was alleged to be family property, or property against which a claim for constructive trust could be made, into trusts outside the family property regime. The wife brought a claim for constructive trust and division of matrimonial property during the testator's life and continued against his estate. The estate was initially successful in having a significant portion of the wife's claim dismissed on application for summary judgment. The chambers judge's decision was appealed successfully. The Alberta Court of Appeal also confirmed that the wife had a potential claim under the *Statute of Elizabeth* on the basis that fraudulent concealment was at issue.[11] Referring to *Guerin v. The Queen*,[12] the court noted that deceit or common-law fraud was not necessary to bring a claim for fraudulent concealment. After numerous interim applications and decisions over several years, the matter in *Milavsky* was finally settled; however, the claim under the *Statute of Elizabeth*—prohibiting fraudulent conveyances—remains a

6 *Rick v. Brandsema*, 2009 SCC 10, at paragraph 5.
7 *Miglin v. Miglin*, 2003 SCC 24.
8 *Smith v. Smith*, 2016 ABCA 376, at paragraph 18.
9 *Lemoine v. Griffith*, 2012 ABQB 685, at paragraph 145; aff'd 2014 ABCA 46.
10 *Milavsky v. Milavsky*, 2011 ABCA 231.
11 Ibid., at paragraph 36.
12 *Guerin v. The Queen*, [1984] 2 SCR 335, at 390.

potential tool in opposing a domestic contract where financial disclosure is meagre or non-existent, even in the absence of mala fides.

The case of *McCain v. McCain*[13] is also informative, even though the substantive claim to set aside the property waiver did not proceed to trial. At the behest of the husband, the parties entered into a post-nuptial contract protecting any assets inherited by the husband from his father from claims by the wife. The husband was advised by his father that in the absence of such an agreement, he would be disinherited. The contract set out the property to be received by the wife in the event of a marriage breakdown. It also contained a waiver of spousal support and a waiver of claim against the parties' estates.

It is noteworthy that the wife had independent legal advice and negotiated better terms than those initially proposed. However, when challenging the contract, the wife also stated that she had little information about her husband's financial and business affairs at the relevant time. She claimed that the contract was unconscionable, that financial disclosure was not sufficient, and that her husband (and by extension his father) took advantage of her vulnerability such that the contract was entered into under duress.

Greer J set aside the waiver of spousal support and ordered significant support in favour of the wife on an interim basis, leaving the issue of whether the contract could be set aside entirely to be determined at a later date. Arguably, the factors that led the court to set aside the spousal support waiver element of the contract could be extended to set aside the terms of the contract dealing with property.

Both *Milavsky* and *McCain* were settled prior to trial. Given the apparent direction of the courts in the pre-trial applications, one can reasonably infer that the settlements were motivated by risk—in the case of *Milavsky*, the risk that matrimonial/family property would be clawed back into the family property regime, and in the case of *McCain*, the risk that the contract would be set aside entirely. In both cases, the clear message from the courts appears to be that any shortfall in financial disclosure and/or independent legal advice prior to entry into a domestic contract will create grounds for challenge after the fact, although both decisions also turned on the presence of "unconscionable behaviour."

A common strategy of estate planning is to name one's spouse or dependent child as a beneficiary of a life insurance policy. Designating a beneficiary is often included as a requirement in a separation agreement as a means of securing the testator's support obligations to a former spouse or children. The difficulty with such a term is that a bad actor who revokes the beneficiary designation in breach of the agreement, and who leaves a nominal or insolvent estate, may also leave the former spouse with no viable options for recovery.[14] In *Moore v. Sweet*,[15] the deceased breached a separation agreement by naming his current spouse as a beneficiary of his life insurance policy. In this case, the court found that the former spouse had a valid claim in constructive trust against the life insurance in the hands of the current spouse on the basis that the former spouse had paid the premiums.

With regard to the initial question of the enforceability of domestic contracts and their impact on testamentary freedom, as with most legal issues, there is no certainty that these contracts will be upheld. However, compliance with the fundamental requirements of financial disclosure and independent legal advice will assist in preserving the function and intent of these contracts. It is unlikely that domestic contracts, no matter how waivers of claim against a testator's estate are crafted, will prevent a court from revising the distribution from an estate to a qualified family member in appropriate circumstances.

Regardless of the party for whom one acts, domestic contracts and testator freedom are best preserved through:

1. full and transparent financial disclosure;
2. robust independent legal advice;
3. acknowledgment of risk of court intervention; and
4. acknowledgment of risk to a claim for family maintenance and support regardless of any contracted waiver.

Putting one's best foot forward through these prophylactic steps will be more likely to preserve the integrity of domestic contracts and minimize the necessity of taking remedial steps—the effectiveness of which is uncertain—or litigating their validity after the fact.

13 *McCain v. McCain*, 2012 ONSC 7344.
14 *Scheelar v. Scheelar*, [2015] AJ No. 209 (Court of Queen's Bench, as it then was)
15 *Moore v. Sweet*, 2017 ONCA 182.

Trust Reporting Rules

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Who and What to Report? That Is the Question

We have been dealing with the proposed trust reporting rules since they were first contemplated in the 2018 federal budget. And now we will have even longer to do so, given the additional one-year delay included in Bill C-32, which was given first reading on November 4, 2022 and received royal assent on December 15.

The rules themselves appear deceptively simple: certain information (name, address, date of birth, place of residency, and taxpayer identification number) must be reported about the settlor, trustee(s), beneficiaries, and protector(s) of a trust (other than a trust that is excluded, per new paragraphs 150(1.2)(a) to (o) of the *Income Tax Act*[1]).

The purpose of this article is not to go through the new rules in detail. Rather, it is to point out a number of issues that have been identified so far and the many (perhaps unexpected) situations that will be subject to these rules.

Definitional Issues

Settlor

The term "settlor" captures more than the "legal" settlor as set out on the first page of a trust deed. The definition set out in subsection 17(15) is to be used, which includes any person or partnership who, at any time, has made a loan or transferred property (directly or indirectly) to or for the benefit of the trust. There is an exception for arm's-length loans bearing a reasonable rate of interest and arm's-length transfers for fair market value (FMV) consideration. This means that all trust transactions since the creation of the trust will have to be examined to ensure compliance with the trust reporting rules.

This definition of a settlor for the purposes of the rules is very broad, and there are a number of uncertainties that have been identified about who is and is not included. For example, does the definition include a freezor in an estate freeze in which the trust acquires nominal-value equity common shares (where the freezor has transferred old shares to the corporation in return for freeze preferred shares)? Does it include a publicly traded corporation that pays dividends on shares owned by the trust (where the trust did not pay FMV for the dividends)? Note that the definition refers to loans rather than indebtedness, so it may not include transactions in which the trust merely owes funds to another person (such as where a corporation pays for trust expenses that are subsequently repaid, or where income distributions are paid by promissory note) without a formal "loan" agreement in place. Also note that it does not matter if the loan has been repaid: any past non-arm's-length loan (including loans that were made to allow the trust to acquire shares) must be considered.

Once a person is a settlor, they are always a settlor. Notably, there is no exception for a settlor who has died. It is unclear why this is not the case. How is it possible to report residency and address information for a deceased settlor? Also, it may be impossible to obtain information such as date of birth or social insurance number if it is not otherwise available.

Beneficiary and Beneficially Interested

The term "beneficiary" is problematic because it is not defined for the purposes of subsection 248(1). The definition of "beneficiary" in subsection 108(1) refers to a person being "beneficially interested," which is defined in subsection 248(25), but that definition applies only for the purposes of subdivision K and not the entire Act. Consider a family trust that has a common disaster clause according to which an individual's estate is to receive the trust capital. The individual's estate would be considered a "beneficiary" of the family trust, whereas the persons in the individual's will would be considered "beneficially interested" in the trust.

The 2009 Federal Court of Appeal decision in *Propep*[2] used the broader definition of "beneficially interested" for the purposes of determining

1 *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), as amended. All statutory references in this article are to the Income Tax Act unless otherwise stated.
2 *Canada v. Propep Inc.*, 2009 FCA 274.

associated status. The Canada Revenue Agency (CRA), in CRA document no. 2014-0538021C6 (October 10, 2014), referred to *Propep* in support of using the broader definition for the purposes of subparagraph 55(5)(e)(ii). However, the words "is or may ... be entitled" in that provision already support the use of a broader definition, regardless of *Propep*. As the trust reporting rules are written (that is, without the words "is or may"), it is not clear that the use of the broader definition of "beneficially interested" is technically correct.

Determining whether someone is a beneficiary commences with a review of the trust deed. Where an individual or corporation is specifically named, this should be a relatively straightforward exercise. But what about situations where the trust terms exclude an individual while they are a "designated person" or a non-resident of Canada? If the condition for exclusion is met in the particular year, the individual should not be considered a beneficiary in that year, although they may be considered beneficially interested, because they could become a beneficiary in the future once they are no longer a designated person or non-resident. Where the trust deed includes a reference to a class of persons (such as grandchildren or a corporation owned by a beneficiary), it will be more difficult to determine whether all of the potential beneficiaries have been included. Indeed, depending on the definition of "corporate beneficiaries," it may include every corporation in a complex corporate group.

Information on a person who becomes or ceases to be a beneficiary in the year must be reported. Information must also be reported on a person who becomes or ceases to be a trustee or protector. Thereafter, no further reporting is required.

Bare Trusts

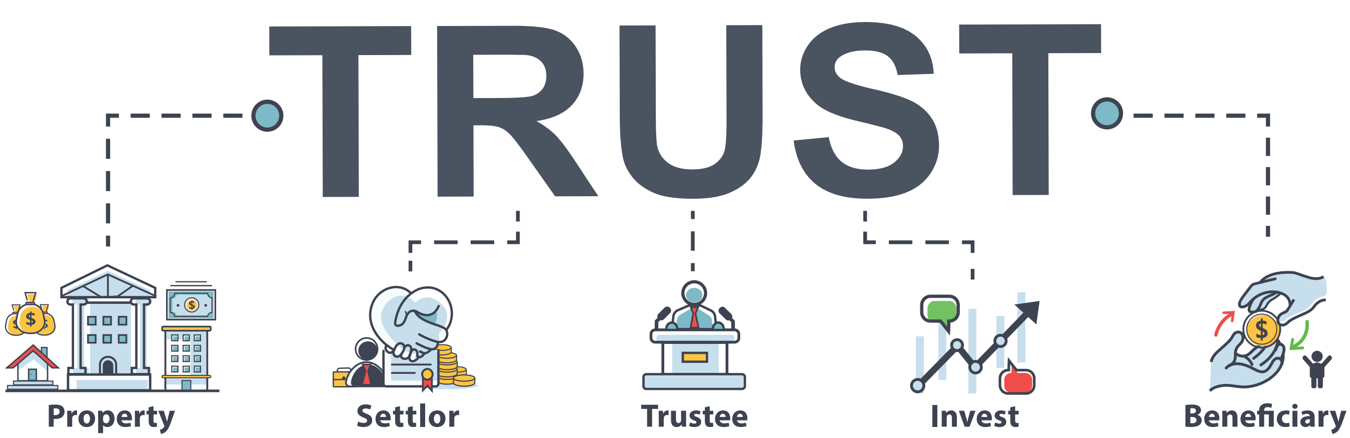
Practitioners were surprised in February 2022 by the addition of subsection 150(1.3), which subjects "bare trusts" to these rules. This provision will now capture the following situations:

- individuals who are added as a co-owner of a bank or investment account or on title to real property for administrative ease during an owner's lifetime or for estate administration;
- corporations that hold title to real property on behalf of a beneficial owner (which is a common arrangement in the real estate and forestry sectors);
- real property managers who have a bank account into which they deposit revenues and from which they pay expenses on behalf of the beneficial owner; and
- charitable and non-profit organizations that hold and distribute "funds on behalf of" third parties.

Amending the rules to include bare trusts is a significant expansion of the rules and will likely result in the filing of hundreds of thousands (or more) additional trust returns each year. With this change come a number of questions.

The settlor (and beneficiary) of a bare trust should be the beneficial owner, but what about situations where the bare trustee holds title to more than one account or property on behalf of the same settlor or beneficiary? It appears that each account will be treated as a separate "trust" that requires disclosure. Will administrative relief be granted to allow some form of "consolidated" reporting in such situations?

What about a bare trust arrangement in situations involving an alter ego or joint partner trust? If the settlor holds title to property that is beneficially owned by an alter ego trust, will there be two required filings? And if a settlor and the settlor's spouse hold title to property that is beneficially



owned by a joint partner trust, will there be three required filings?

What happens when there is a change to the bare trust relationship during the year? Consider the situation of XYZ Corp acting as bare trustee for real property owned by Mr. A, where beneficial ownership of the property is sold to Ms. B so that XYZ Corp is now acting as bare trustee for Ms. B. It appears that there should be two required trust filings in the year: one between XYZ Corp and Mr. A, which is wound up during the year, and one between XYZ Corp and Ms. B, which commenced during the year.

A trust account number must be obtained for bare trust arrangements where the bare trustee is an individual or corporation. Usually, a copy of the trust deed or will must be given to the CRA when the first T3 return is filed. However, since a formal "trust deed" does not exist for these arrangements, it is not clear what supporting information (if any) the CRA will require. This will also require a separate trust filing (generally due March 31) that is outside the individual's or corporation's regular tax-filing deadline (April 30 or June 15 for individuals, or six months after the corporate year-end for corporations). It is not clear how a bare trust is to complete a T3 return. Will only the trust reporting schedule need to be completed? If so, would it not be administratively easier to instead add a supplemental schedule to the personal or corporate tax return to gather the desired information? Alternatively, could the CRA design a separate schedule similar to Quebec's form TP-1079.PN-V, "Disclosure of a Nominee Agreement," which discloses the relevant information but without requiring a trust account number or an annual T3 return?

Other Issues

Although charities and paragraph 149(1)(l) non-profit organizations are themselves exempt from the new rules, any bare trust arrangements in which they are involved are not. There are many such arrangements in the charitable and non-profit sector, and requiring reporting for such organizations will place an additional administrative burden on a sector that is still recovering from COVID-19 and is now dealing with decreasing revenues and increased demand for services as a result of the current economic climate.

Another surprise was the requirement making lawyers who hold funds in trust for a particular client or group of clients (that is, anything other than a pooled account) subject to the trust reporting rules unless the account is in existence for less than three months during the year. The purpose of such reporting is not clear, but it will increase the administrative burden on lawyers who are already dealing with a variety of corporate and land ownership transparency rules.

> Amending the rules to include bare trusts is a significant expansion of the rules and will likely result in the filing of hundreds of thousands (or more) additional trust returns each year. With this change come a number of questions.

New regulation 204.2(1) requires that "*every person* ... in a fiduciary capacity ... shall provide information in respect of a trust." This implies that every trustee must make a separate filing in respect of the trust disclosure rules. It is assumed (and should be clarified) that a single filing on behalf of a trust will satisfy the obligation for each trustee.

Finally, the new penalty provisions also give rise to a number of concerns. First, it is not clear who is subject to the penalty—the provision refers to "a person or partnership," not the trustee(s). Could the penalty be applied to a beneficiary who does not provide information requested by a trustee? What about a tax preparer or adviser who is advising on the rules? Nor is it clear that multiple penalties cannot be assessed in respect of the same trust. Clarity on the application of penalties and examples of what the CRA considers to be a "reasonable effort" to fit within the relief in regulation 204.2(2) are necessary.

Conclusion

No doubt other issues and questions will emerge as practitioners continue to consider the variety of trust arrangements that their clients have in place. It is hoped that the CRA will release guidance on these rules early in 2023 (before the release of the 2023 T3 guide) so that the necessary steps can be taken to identify affected trusts and gather the applicable information well before the filing deadline.

IN THE HEADLINES

CASE COMMENT: WEAVER ESTATE V. WEAVER

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Two persons cease being spouses of each other for the purposes of British Columbia's *Wills, Estates and Succession Act*, SBC 2009, c. 13 (WESA) if, in the case of a marriage, an event occurs that causes an interest in family property, as defined in part 5 of the *Family Law Act*, SBC 2011, c. 2 (FLA), to arise. Does this mean that if spouses have separated from each other, but neither has commenced a claim for division of property before one of them dies, then the estate of the deceased spouse cannot commence the claim on their behalf?

To answer this question, the BC Court of Appeal in *Weaver Estate v. Weaver*, 2022 BCCA 79, considered the interplay between British Columbia's family law regime and estate law regime.

Mr. Weaver and Mrs. Weaver married in 1993 and separated in 2005. They did not commence court processes to divide family property and family debt or to obtain a divorce in the 15 years between their separation and Mrs. Weaver's death in 2020. Four months after Mrs. Weaver's death, the administrator of her estate filed a notice of civil claim seeking a division of family property and family debt against Mr. Weaver.

However, Mr. Weaver took the position that the administrator did not have standing to bring the claim because the administrator was not a "spouse" and the court therefore lacked jurisdiction to hear the claim. The chambers judge dismissed Mr. Weaver's application to have the claim struck, and Mr. Weaver appealed the decision.

The BC Court of Appeal applied the modern principle of statutory interpretation and noted both the important role that context must play when a court construes the words of a statute and the remedial nature of the FLA and WESA.

The BC Court of Appeal found that the chambers judge correctly interpreted the province's family law and estate law regimes as allowing the administrator standing to commence a claim, assuming that the time limits imposed by the FLA had not expired. The court noted that the modern principle of interpretation may support an interpretation that the administrator of an estate has two years from the date of death of the deceased spouse to commence a claim for division of family property and family debt. However, that was not at issue in this appeal.

In concluding that the administrator had standing to bring the claim, the BC Court of Appeal cited WESA section 150 and the policy rationale behind it—namely, that valid claims should not be barred by the death of the deceased. The court further noted that the FLA does not prohibit estate administrators from commencing claims for division of family property and family debt, whereas the legislation in certain other provinces and territories specifically prohibits them from doing so. The court confirmed that standing to bring this type of claim crystallizes on separation. Separation is the triggering event, and a court application to enforce section 81 of the FLA is not a precondition to its crystallization. It is the intention of the legislature that the two statutes work harmoniously, and the BC Court of Appeal agreed with the logic of the administrator respondent that Mr. Weaver's interpretation would result in a gap that carries the realistic potential for substantial injustice. The court stated that "a separated and surviving spouse could seek the division of family property and equal responsibility for family debt against the estate of a deceased spouse ... ; however, the estate of a separated and deceased spouse ... could not avail itself of the same relief, even in cases where the death was unanticipated, sudden, occurred shortly after separation, and there was little if any time to realistically commence a family law claim" (at paragraph 74).

Weaver is a reminder to advisers of the important intersection between estate law and family law and the need to interpret legislation from each of these areas of law in their broad context, including the scheme of the statute, the object of the statute, and the intention of Parliament. It is imperative to consider not only claims that may arise against an estate after the death of the deceased, but also claims that might be advanced by the administrator on behalf of the deceased.

THE TESTATOR'S RIGHT TO PRIVACY: DUHN ESTATE

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It is a scene that has played out countless times in the boardrooms and over the phone lines of estate litigators: a disappointed beneficiary, convinced of some wrongdoing, calls for a full investigation into their late loved one's financial affairs. As often as not, these comments are grounded in suspicion or mistrust rather than evidence.

In the recent case of *Duhn Estate*, 2022 ABCA 360, the Alberta Court of Appeal, upholding the decision of the Court of Queen's Bench of Alberta (as it then was), confirmed that, absent sufficient evidence of abuse, undue influence, or incapacity, incursions into the private, pre-death financial matters of a testator will not be permitted.

Alice Duhn, the deceased, and her husband, Robert Larsen Duhn, raised several children and lived on a successful family farm. In 2009, the farm was sold, and the sale proceeds were transferred to the deceased, her husband, and two children who had interests in the farm. When the deceased's husband died in 2014, he left the entirety of his estate to the deceased. Over the course of the next four years, the deceased spent several million dollars on her children and grandchildren, ultimately leaving an estate worth approximately $4.5 million at her death on March 27, 2018.

Following the deceased's death, two of her children brought an application before the Alberta Court of Queen's Bench seeking full financial disclosure in relation to the transfers of money and property made by the deceased during the last four years of her life. In support of the application, the applicants claimed that the deceased may have been unduly influenced or lacked capacity at the time the transactions were completed, and that some of the transactions were made without the deceased's knowledge.

The personal representatives of the deceased's estate—two of the deceased's grandchildren—opposed the request, asserting that they had investigated and reported about the deceased's assets as they were at the date of the deceased's death. In the view of the personal representatives, there was no legitimate reason or duty to engage in any review of the deceased's pre-death financial life. In any event, the deceased had never instructed or authorized the personal representatives to investigate these transactions, nor was there consensus among the beneficiaries about the need to conduct a further review.

In her memorandum of judgment (2021 ABQB 35), the chambers judge confirmed the duty of personal representatives to account for the administration of the estate, set out in Alberta's *Estate Administration Act* and the *Surrogate Rules*, and noted that, in certain circumstances, the proper administration of an estate may require an accounting for pre-death financial transactions. However, the chambers judge cautioned, "Rarely, if ever, will the court order an investigation into a *competent* testator's private pre-death financial affairs without an evidentiary threshold that raises a 'significant concern' that there has been some potential abuse that needs to be investigated further, and then, only after considering a testator's privacy rights" (at paragraph 20; emphasis in original).

The evidence before the chambers judge showed that the deceased had been competent throughout her life and, despite physical limitations that caused her to rely on her children for support, lived independently and remained in charge and aware of her personal and financial affairs. Further, the deceased had declared her intention to gift a significant portion of her estate before her death, and went to great lengths to protect her wishes in relation to those gifts by consulting lawyers and her doctors regularly. Because the applicants had not met the minimum evidentiary threshold required to displace the deceased's right to privacy in her financial life, the chambers judge declined to order the production of financial information for the four years before the deceased's death.

The Alberta Court of Appeal dismissed the appeal and, citing the decision in *Johnson v. Johnson*, 2022 ONCA 682, commented that "a claimant should not be able to put an estate to the needless expense of steps, such as documentary discovery, unless he or she meets the minimal evidential threshold" (at paragraph 4).

The decision in *Duhn Estate* represents a firm restatement of the principle that competent testators are entitled to keep their financial decisions private and confidential if they so desire, and sends a clear signal to litigants that investigations into the pre-death financial lives of a testator are an extraordinary measure, not a tool to alleviate suspicion or mistrust.

DIVISION OF FAMILY TRUST ASSETS: WHAT CONSTITUTES FAMILY PROPERTY IN SASKATCHEWAN?

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Canadian practitioners have long been advising clients on the merits of establishing inter vivos discretionary family trusts as a tax- and estate-planning tool. In 2015, the Saskatchewan Court of Appeal set out some parameters to determine what will happen to an interest in a trust on a marital breakdown in Saskatchewan. The court recently had an opportunity to revisit those parameters and to consider the impact of an inheritance on the division of family trust property.

Grosse v. Grosse—Setting the Foundation in 2015

The Saskatchewan Court of Appeal considered this issue in a comprehensive way in the 2015 decision of *Grosse v. Grosse*, 2015 SKCA 68.[1] Melville and Theresa Grosse had been married for 28 years prior to their separation, and during their marriage had amassed a significant amount of property, including assets held within a family trust. Melville was the sole trustee of the discretionary family trust and was also named as a beneficiary (along with their two adult sons and future grandchildren). Theresa was not named as a beneficiary. Melville was given broad discretionary powers to manage the trust and to determine distributions of income or capital.

The court was asked to consider whether Melville's interest in the trust constituted "family property" within the meaning of that term in the *Family Property Act* (Saskatchewan), and if so, how that interest should be valued and divided. The court determined that Melville's interest in the trust was family property and ordered that the entirety of the trust (or the fair market value of its assets as of the date of adjudication, less costs of distribution and income tax liability) should be divided equally between Theresa and Melville, for the following reasons:

1. Melville was the sole trustee and a contingent beneficiary.
2. As trustee, Melville had a power of appointment over the trust's income and capital, which was exercisable in his favour.
3. The trust owned common shares in a corporation. Melville caused the shares to be issued to the trust. He was also the sole director of the corporation.

The court held that when determining what property constitutes "family property" for the purposes of the provincial legislation, one must "pierce the veil" of whatever legal entity or device is used to hold the property in order to see what degree of control the person actually exercises over the property.

S.B. v. T.B.—The 2022 Revisit

In 2022, the Saskatchewan Court of Appeal had an opportunity to revisit the *Grosse* principles in the case of *S.B. v. T.B.*, 2022 SKCA 65. The parties had amassed assets during their marriage, including a grain and cattle operation, and had a family trust, which had been set up by S.B.'s father (L.B.). Both S.B. and T.B. were beneficiaries of the

1 For a more comprehensive case review, see Amanda S.A. Doucette, "Grosse—Division of Family Trust Assets—The New Battleground for Family Property Disputes" (2015) 35:1 *Estates, Trusts and Pensions Journal* 39-45.

trust. There were other beneficiaries, including grandchildren and S.B.'s sister and her family. S.B. had been added as a trustee of the trust at a later point in time. The trust was a partner in a partnership with L.B., who had contributed personally held mineral interests to the partnership.

L.B. died 10 days after S.B. and T.B. separated. S.B. inherited a quarter section of land from his father's estate, as well as a portion of the residue. The court was asked to consider the division of the trust, as well as the inheritance, and specifically to determine whether there should be an unequal division of S.B.'s interest in the trust by reason of his inheritance from L.B.

The court concluded that the trial judge had failed to appreciate the "complex structure of interests that was in place" (at paragraph 97). S.B. had received an inheritance and had an interest in the trust. In addition, T.B. (unlike the spouse in *Grosse*) was actually a beneficiary of the trust. The trial judge had inappropriately lumped all of the assets together in determining what constituted "family property" and what value should be attributed to the same. As a result, the court sent the matter back to the trial judge for a determination of the value of S.B.'s interest in the trust, and whether (and how much) of that interest constituted family property for the purposes of the Saskatchewan legislation.

Practical Takeaways for Saskatchewan Practitioners

1. "Control" continues to be a relevant factor in the determination of what constitutes family property. Questions to be answered include: Is the spouse a sole trustee? Is the trust a discretionary trust? What role (if any) does the other spouse play in the maintenance or control of the trust?
2. Past distributions are also a relevant factor. What distributions (if any) have been made? Even if the trust is truly a discretionary trust with no mandated distributions, if there are regular distributions on an annual basis to particular beneficiaries, that fact will play a role in the determination.
3. Both an inheritance and an interest in a family trust can be characterized as family property in Saskatchewan. However, each asset needs to be reviewed and valued separately.

THE MORE IN COMMON, THE MORE COMMON LAW

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The question of whether a couple attained the legal status of "common-law partners" often comes down to a determination of whether the couple was "cohabiting in a conjugal relationship." A recent Manitoba decision, *Carasquero et al. v. Holder et al.*, 2021 MBQB 258, sought to determine the period of cohabitation between the parties. Unfortunately, both members of the alleged couple had lost capacity, so their respective attorneys, appointed under powers of attorney, litigated the matter on their behalf.

Reynold and Rachael were in their late 40s when they met in 1979. At the time, Rachael was married to another man, from whom she separated in 1981. From 1982 to 1985, Reynold and Rachael lived together in Reynold's home in Winnipeg. As a result of conversations they had on the topic of marriage, it became apparent to Rachael that Reynold did not want to get married. In approximately 1986, having achieved clarity regarding Reynold's intentions and with her divorce granted, Rachael moved out of Reynold's home and into her former marital home on Menno Bay.

At issue was whether Reynold and Rachael were in a conjugal relationship between 1986 and 2019. Presumably, both had capacity during most if not all of that period, but later, when the matter came to a head, both were unable to testify or argue on their own behalf.

Rachael's attorney took the position that there was no common-law relationship during that period, and characterized the relationship between the parties as a combination of friendship and landlord-tenant. This was on the basis that during their co-residence, Reynold occupied the basement suite in the house on Menno Bay and paid rent to Rachael.

Reynold's attorney argued that the parties were cohabitants from 1986 until the fall of 2019. This contention was based on an income tax declaration signed in 2001 by Reynold confirming his residence at Menno Bay since 1986.

Pursuant to *Steffen v. Bryer et al.*, 2004 MBCA 83, cohabitation requires a majority of the following characteristics: economic interdependence, including an intention to support; an express or implied commitment to the relationship for at least an extended period of time; the sharing of a common principal residence; a common desire to make a home together and to share responsibilities in and toward that home; where applicable, shared responsibilities of child rearing; and a sexual relationship. In addition to those factors must be a general recognition by family, friends, and the larger community that the two are a couple or family unit.

The court concluded that Reynold and Rachael were cohabiting in a conjugal relationship. They had lived in the same home for 30 years. Cards to family members had been signed from "Rach and Ray." An affectionate Christmas card in which Rachael expressed her love for many years for Reynold was further evidence of their romantic relationship. There were numerous photographs of the couple together, including many with Reynold's arm around Rachael. Evidence was provided by Reynold's brother (who was also Reynold's attorney representing his interests in the proceedings) and another acquaintance that Rachael and Reynold were viewed as a married couple in the community and that they attended social events and gatherings together.

The court did not rely on evidence of the rent paid by Reynold to Rachael as a sign of a landlord-tenant arrangement; instead, it recognized that paying rent may have been Reynold's way of contributing to the household. Reynold worked long hours at a restaurant, which meant he did less around the home. There was other, conflicting evidence of their relationship, including submissions that Reynold and Rachael had other romantic involvements over the years and that they slept in different rooms during their cohabitation. Under her will, Rachael referred to Reynold as her "friend" and gifted him a life interest in Menno Bay. The residue of Rachael's estate was left to other family members. Rachael also made a gift during her lifetime of $50,000 to Reynold, which the court took as a further sign of a relationship, although Rachael's attorney suggested that this was compensation for Reynold's assistance with Rachael's care when her health was deteriorating.

In determining when their cohabitation began, the court relied on Reynold's report of a different address on a bill of sale in 1988 as evidence that he did not reside with Rachael in that year, contrary to his income tax declaration in 2001. The court fixed July 1, 1989 as the date that cohabitation commenced. The parties ceased cohabitation on October 30, 2019, when Rachael was moved out of the home by her attorney.

In Manitoba, dates of cohabitation may be relevant for a determination of family property division upon separation or death. In this case, rather than a brief period of cohabitation in the 1980s, there was a period of more than 30 years of cohabitation, which consequently opened the door to family property claims between common-law partners.

The determination of whether two individuals are common-law partners will always be made on a case-by-case basis and will depend on the unique factors of each case. Individuals who reside together and who do not intend to gain the legal rights of common-law partners would be wise to make that clear in a cohabitation agreement.

In this case, the inability of the parties to give evidence as to whether a common-law relationship existed between them complicated the matter. However, the court was able to make a determination on the basis of their conduct.

CASE COMMENT: LABATTE V. LABATTE

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In *Labatte v. Labatte*, 2022 ONSC 4787, the Ontario Superior Court of Justice considered whether contributions to a registered education savings plan (RESP) by its joint subscribers—two divorced spouses—were the property of the subscribers or were held in trust for the beneficiaries of the RESP. The court ruled that the contributions were held in trust, but its analysis raised numerous further questions.

The parties married in 2003 and had two children together, D.L. and B.L. The parties separated in 2010 and entered into a partial separation agreement (PSA) in 2011. The PSA provided that the parties would continue to make equal annual contributions to the RESP they had established during their marriage, and that they would use the RESP for their children's post-secondary education.

When D.L. was accepted into an undergraduate program, she notified her father and sought funding from the RESP. The father refused to disburse funds unless D.L. and her mother provided significant financial disclosure. The mother brought a motion for an order that she be made the sole subscriber of the RESP or given sole authority over distributions. The father asked that the RESP be split into two RESPs in proportion to their respective contributions.

The court dismissed the father's claim and focused its analysis on the relief sought by the mother, who argued that the RESP is not the property of the subscribers but, rather, is held in trust by them for their children.

The court noted that, while not entirely consistent, the case law in both bankruptcy and family law proceedings often finds that RESPs are the property of the subscribers. The court considered the statutory framework of the *Income Tax Act* (Canada) (ITA), the revocable nature of the RESP, and the ability of a subscriber to change beneficiaries. On the basis of this evidence, the court found that establishing an RESP does *not* create a trust for the benefit of its beneficiaries "unless the circumstances dictate otherwise" (at paragraph 51).

What are those circumstances? The court held that an RESP will "not be the property of the subscriber if the actions of the subscribers lead to the conclusion that the RESP is being held in trust for the beneficiary" (at paragraph 52). The court also held that, in the absence of a written trust agreement, it can consider the surrounding circumstances and evidence as to what the parties intended, what was agreed to, and how they conducted themselves.

Focusing on the PSA provision in which the parties agreed that the "RESPs maintained by the parties shall be used for the children's post-secondary education" (at paragraph 13), the court concluded that the PSA language was sufficient to create an express trust for the children, there being certainty of intention, objects, and subject matter. However, the court then found that it could not make a finding as to whether the parents were fiduciaries vis-à-vis their children with respect to the RESP, since this point had not been argued. With respect, given the court's ruling that there was an express trust, what else could the parents be but fiduciaries? In the result, the court used its inherent jurisdiction over trusts to grant the mother sole authority to disburse funds from the RESP.

> ...considered whether contributions to a registered education savings plan by its joint subscribers—two divorced spouses—were the property of the subscribers or were held in trust for the beneficiaries of the RESP. The court ruled that the contributions were held in trust...

The reasoning in this case raises a number of questions.

What does it mean for the court to find that there is an *express trust* separate from the RESP contract (which was not produced)? Specifically, the express trust does not appear to be a bare trust. Is it not then a taxpayer with annual tax filings and tax obligations? How does that coexist with the statutory scheme of the ITA for RESPs and the RESP contract?

If there is an express trust here, surely it is a reversionary trust under subsection 75(2) of the ITA. What does that mean for the accumulating income in the RESP?

Are the terms of this express trust the same as or different from the contractual terms of the RESP? The court's reasoning suggests that they are different, since it implies that the trust supersedes the father's contractual right to take back his contributions.

If the terms of the trust are unclear, is there really certainty of intention? Is an agreement by two individuals to use their property for a particular purpose sufficient, in itself, to establish certainty of intention?

This decision raises fundamental trust and tax issues that merit being taken up again, but with a more robust trust analysis.

THE SHIFTING FAMILY PARADIGM IN QUEBEC

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The civil law of succession evolved from Roman law and French customary law. Remnants of these roots can be found in Quebec's law of succession, notably as regards intestacy and alimentary support. The family paradigm has been, and still is, the bedrock of the law of succession. In our modern era, the increase in divorce and cohabitation has put to the test, and even shifted, the family paradigm.

In a recent decision, *Succession de Charpentier*, 2022 QCCA 660, the Quebec Court of Appeal reaffirmed the family paradigm by setting strict parameters on the interpretation of a testatrix's will and article 764 of the *Civil Code of Québec* (CCQ). In adopting such an approach, the Court of Appeal actually enhanced testamentary intent and freedom.

The facts in the case can be simply stated. Madeleine Charpentier died

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in July 2018, leaving a will, executed in 1974, in which she bequeathed all of her property to her husband, Paul Marotte, or, in the event of his predecease, to her brother-in-law, Raymond Marotte, and his de facto spouse, Huguette Gagné. Madeleine and Paul divorced in 1991. Paul predeceased Madeleine, in March 2018.

The decision of the Superior Court of Quebec (2020 QCCS 3790) had held that the subsidiary legacies to Raymond and Huguette had lapsed by virtue of the revocation, by operation of law, of the universal legacy to Paul, pursuant to article 764 CCQ:

> 764. A legacy made to the spouse before a divorce or the dissolution of a civil union is revoked unless the testator manifested, by means of testamentary dispositions, the intention of benefitting the spouse despite that possibility.
>
> Revocation of the legacy entails revocation of the designation of the spouse as liquidator of the succession.

The Superior Court judge had held that the revocation of the legacy to Paul rendered the subsidiary legacies to Raymond and Huguette devoid of their object and hence they lapsed, provoking an intestacy. The judge had reasoned that marriage was the source of the presumed affection between Madeleine and Paul and his family, and thus motivated the decedent's donative intent.

The Court of Appeal rejected the lower court's conclusions and reasoning and declined to extend the reach of article 764 CCQ to the revocation of the subsidiary legacies to the former spouse's family members. The court also disagreed with the Superior Court judge's characterization of the subsidiary legacies as having "lapsed" because they lacked an object. The court found that they did indeed have an object, the transmission of property, which was not at all dependent on the revocation of Paul's legacy. Furthermore, there was no justification for the conclusion that the intended purpose of the legacies to Raymond and Huguette was to maintain family relationships.

These legacies were not impacted by the divorce but were subject only to the suspensive condition of Paul's predecease, which triggered the entitlement of Raymond and Huguette.

The lower court's error was in interposing the change of circumstances affecting the relationship among the parties because of the divorce as a reason for revoking the legacy to Paul as well as the legacies to Raymond and Huguette.

The *Charpentier* decision demonstrates the shift from a fossilized family paradigm to one that is multifaceted, with each facet enjoying an autonomous or independent status that could benefit from the decedent's generosity, driven by intention. The interpretive yardstick is actual testamentary intent, not presumed intent. The latter, regrettably, was applied by the Superior Court to stigmatize Paul's family.

While Quebec has the highest number of cohabiting spouses in Canada, it accords the fewest marital-like entitlements upon them. Yet benefits are available to de facto spouses, notably under tax and pension legislation. The general criterion in determining entitlements is proof of a conjugal relationship with reference to permanency, intimacy, and commitment, within a stipulated period, from one to three years, or with reference to parenthood. Conduct such as sharing a common residence, pooling resources, and public appearance as a couple influences the courts in favouring a broad and liberal interpretation. In a sense, the courts' approach in assessing the status and entitlements of de facto spouses has endorsed the shift and modification of the family paradigm to accommodate societal realities.

CONFLICTING INTERESTS IN FAMILY LAW AND ESTATE ADMINISTRATION: CHIPPETT ESTATE (RE)

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The case of *Chippett Estate (Re)*, 2019 NLSC 51, is interesting in terms of both family law and estate planning and administration.

The facts are straightforward. Mae Pittman-Chippett was the administratrix of the estate of her late husband, Ralph Glendore Chippett. The beneficiaries of the estate were Mr. Chippett's daughter, Lisa Martel, and Mae herself. Mae launched an action against the estate in her personal capacity for a division of matrimonial property, which was followed by an application seeking to have the public trustee appointed as the estate's legal representative for the limited purpose of defending the matrimonial property division claim.

The issue to be addressed by Justice Murphy of the Supreme Court of Newfoundland and Labrador, General

Division was whether or not section 71(2) of the province's *Family Law Act*, RSNL 1990, c. F-2 (FLA) permitted the public trustee to step into the role of an estate administrator for the limited purpose of defending a matrimonial property claim made by the estate administrator, while the estate administrator continued to carry out all of the other aspects of the estate administration.

Mae's counsel argued that section 71(2) of the FLA provided for the requested relief:

Death of spouse

> 71(1) An executor or administrator of a deceased spouse may enter into an agreement with the surviving spouse as to the ownership or division of property under this Act.
>
> (2) Where an executor or administrator of a deceased spouse is the surviving spouse, the public trustee may act in the place of the executor or administrator under subsection (1).

Justice Murphy confirmed that neither he nor counsel could locate any case law interpreting this section of the FLA, nor could they locate an equivalent provision appearing in a statute elsewhere in Canada (at paragraph 10). In considering the application of this section of the FLA, Justice Murphy emphasized the distinction between an administrator of an estate entering into an agreement and an administrator entering into litigation involving the estate (at paragraphs 12-15):

> I see a significant distinction between the entering into of an agreement as to the ownership of or division of property and litigation over the ownership of or division of property. The entering into of an agreement generally means that there is no dispute or conflict over the ownership or division of property or that any dispute or conflict has been resolved by the agreement. However, the existence of litigation over the ownership of or division of property generally means there is some dispute or conflict between the parties to that litigation, namely the estate and the surviving spouse. ...
>
> [I]t is my view that section 71(2) does not extend beyond circumstances where an agreement exists.
>
> I realize that my interpretation of section 71(2) means that it would apply only in limited circumstances where the surviving spouse as executor or administrator of an estate reaches an agreement with the estate on the ownership or division of property. The logical question one might ask is when or how could such an agreement be reached given the inherent conflict between the personal interest of the surviving spouse on a matrimonial property claim and her duty as legal personal representative of the estate. Notwithstanding such conflict, there can certainly be cases where there is no dispute or disagreement between the beneficiaries of the estate and the surviving spouse as to the ownership or division of property. In such cases, an agreement on ownership or division of property could be made between the surviving spouse and the estate with the consent of the beneficiaries and assuming there are no creditors of the estate or none who would be prejudiced.

Justice Murphy further noted that this interpretation was supported by the common-law rule that a trustee (including an estate administrator) can be removed in cases where a disqualifying conflict arises between the personal interests of the trustee and the trustee's duties (at paragraph 16).

Ultimately, Justice Murphy refused to grant the order sought by Mae (at paragraph 19):

> I cannot imagine a greater conflict than that which exists in this case where Ms. Pittman-Chippett's claim has put her directly in opposition to her duty as Administratrix to the daughter of Mr. Chippett.

Interestingly, Justice Murphy also stated that Mae should be removed from her position as administratrix of the estate owing to the obvious conflict of interest, but he did not make an order as such because it was outside the scope of the application (at paragraph 21).

In light of this decision, surviving spouses who intend to bring a claim against a deceased spouse's estate for a division of matrimonial property should not apply to be appointed as an administrator of the estate, because in most cases this will result in a disqualifying conflict.

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CHAIR'S MESSAGE

CHRIS IRELAND

Wishing you and your family health, happiness, and prosperity in 2023!

The new year brings STEP Canada's 25th anniversary, and I hope you can join us in some way to celebrate this significant achievement when we meet once again in person at our national conference on June 19-20 in Toronto. The preliminary program, registration, and sponsorship campaign will open in mid-January 2023. As with each milestone anniversary, we are planning a special evening to celebrate the growth of STEP Canada and the guidance that STEP has demonstrated through thought leadership, education, networking, and public policy for the trust and estate industry in Canada over the last 25 years. The sponsorship levels and corresponding benefits will be reflective of this special occasion.

In November 2022, the STEP Canada board met in person in Toronto for a strategy retreat and quarterly meeting. Excellent insight was collected from board members about how their organizations have shifted practices in response to the global COVID-19 pandemic. As a result, STEP Canada is committed to ensuring that our operations, education, and networking events are meeting the needs of our members and maintaining the excellent value proposition that membership brings.

As I mentioned in my report in the November 2022 issue of *STEP Inside*, eight Canadian organizations were put forward as finalists in seven different categories of the STEP 2022 Private Client Awards. These prestigious awards recognize and celebrate excellence in the trust and estate industry on a global scale. The special event took place on December 13 in London, England. Congratulations to the following finalists:

Accountancy Team of the Year (large firm)
TD Wealth Private Trust, Tax Services

Digital Assets Practice of the Year
Digital Undertaker

Employer of the Year
Nika Law LLP
RBC Wealth Management

Multi-Family Office Team of the Year
KPMG Family Office

Family Business Advisory Practice of the Year
KPMG Private Enterprise International

Vulnerable Client Advisory Practice of the Year
Whaley Estate Litigation (WEL) Partners

Young Practitioner of the Year
Lesley Donsky, TEP, RBC Royal Trust

Our traditional full-day course is back with a twist. It has evolved into a two-day course, delivered online with interactive and pre-recorded content from our subject-matter experts. The five cohort options for the course, "Canada/US Cross-Border Estate Planning" (offered weekly from January 10 through February 8), have been tailored to reasonably accommodate all time zones. Some cohorts have already reached their capacity of 80 delegates—participation has been capped to ensure that everyone has the chance to interact with the esteemed speakers. I encourage anyone interested to register as soon as possible for this excellent and valuable opportunity.

Thank you to all delegates who have registered for the 2022-23 branch and chapter bundles, and to the many organizations who have generously sponsored the bundle packages. We will be starting off on January 19 with the national seminar, "Planning for Family Members with Disabilities." The remaining seminars in the bundle packages will be delivered both in person and on demand online during the spring.

Congratulations to Nancy Golding, who has officially concluded her term as chair of STEP Worldwide in January 2023, and to STEP Worldwide council member Bill Fowlis. Our gratitude is also due to Nancy and Bill for their dedication and contributions at so many levels of STEP, domestic and international, and for having been wonderful ambassadors for STEP. Replacing Bill as a Canadian representative on the worldwide council, for a three-year term, is Kimberly Whaley of WEL Partners.

In closing, I wish to acknowledge all of the committees and individuals who continue to work tirelessly on so many important initiatives for STEP Canada and its members, from the chapters and branches to the national committees, to those serving on STEP Worldwide committees. Your efforts are proving to make our organization so valuable to its members and their practices, and the trust and estate industry.

Thank you all on behalf of the members of the executive committee—Rachel Blumenfeld, Richard Niedermayer, Brian Cohen, Aileen Battye, and Pam Cross—and senior staff Janis Armstrong and Michael Dodick.