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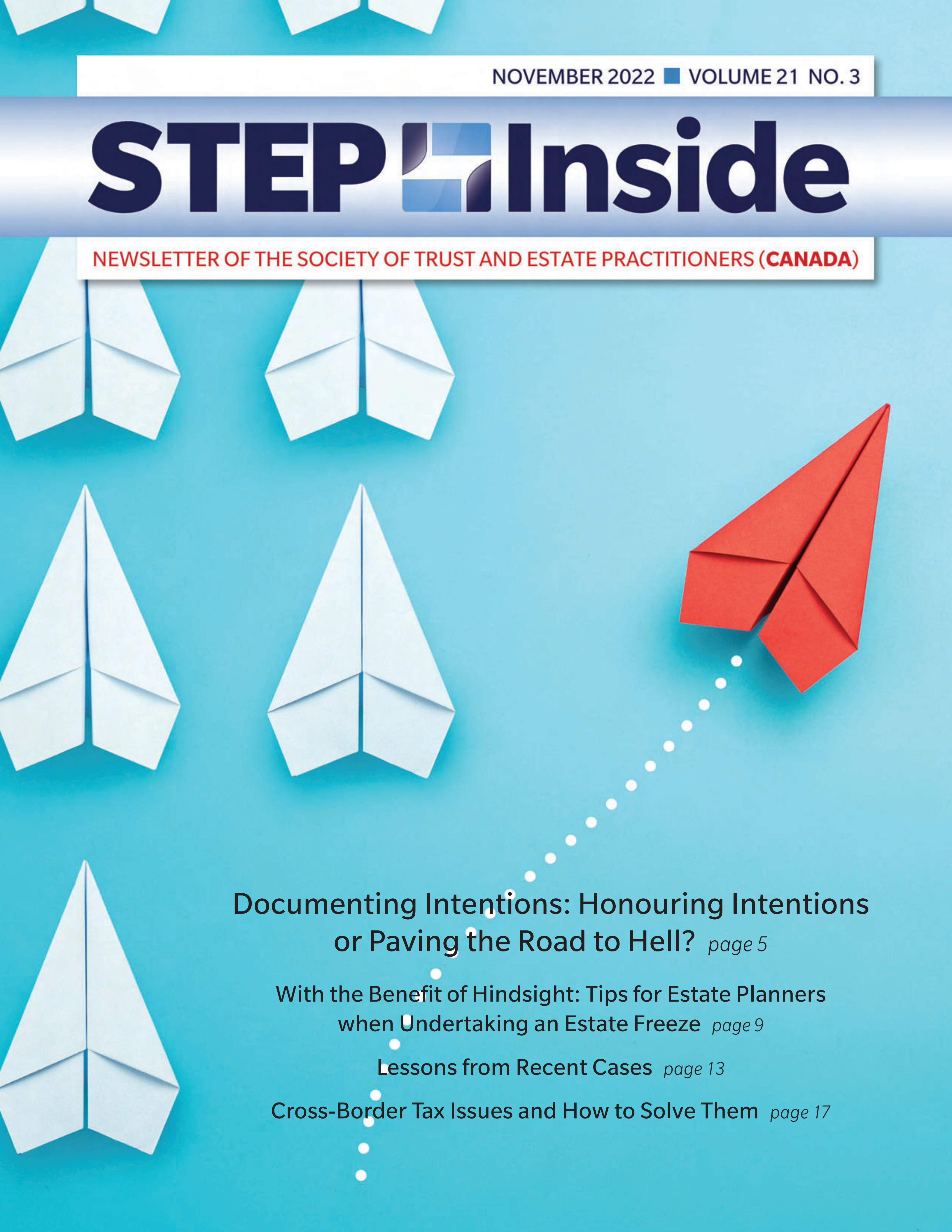

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Editorial Review

It seems like only yesterday that we participated in STEP Canada's 24th Annual National Conference. Many of us were, at long last, able to once again meet with our colleagues and listen to more than two days of excellent presentations. In this issue of *STEP Inside*, we are excited to present a number of papers based on presentations by the authors at the 2022 National Conference, and we hope that this dive into some of the most popular presentations will be of interest to all readers.

In "Documenting Intentions: Honouring Intentions or Paving the Road to Hell?" Amy Mortimore, TEP, Troy McEachren, TEP, and Rhonda Johnson, TEP undertake a common-law and civil-law analysis of the fine line that practitioners have to walk between documenting a client's wishes and intentions and ensuring that the fiduciary has the flexibility and discretion to respond to a myriad of unpredictable future events. The authors summarize the current state of legislation in various provinces, with particular emphasis on British Columbia and Quebec, regarding the formalities of creating a testamentary document. They then consider the evidence that courts may weigh in giving effect to a testator's wishes, along with recently enacted curative powers. Finally, they review the pros and cons that practitioners should consider when documenting testamentary intentions.

In "With the Benefit of Hindsight: Tips for Estate Planners when Undertaking an Estate Freeze," John Oakey, TEP, Amanda Stacey, TEP, and Melanie Yach, TEP provide an interesting case study of estate planning and the various ways it can go wrong, and offer potential solutions for dealing with unplanned life events. Beginning with a simple plan for an estate freeze, the authors discuss what can happen when the freezors' original goals are disrupted by life changes, whether anticipated or not: when a child gets divorced; when the freezors need more money than expected; when a child wants funds distributed from assets that have been held for growth; when a trustee retires; and when an unrelated beneficiary is entitled to share in the trust assets. The authors reflect on each scenario with comments about what could have been included in the original trust deed, or what could have simply been discussed in greater detail during the planning stages, to determine what safeguards may help to prevent, or at least to manage, such difficult situations.

In "Lessons from Recent Cases," Janet Michelin, TEP and Alison Oxtoby, TEP summarize some notable recent cases and outline the lessons to be drawn from them. The topics covered include the interpretation of wills in Quebec; how pour-over clauses to trusts in a will should be applied, and whether the fact that an amendable trust has not been amended is a valid consideration when the courts are reviewing such clauses; what information needs to be disclosed to beneficiaries by trustees in various situations, and when information can actually be sealed, even in an estate situation; whether beneficiary designations are testamentary or inter vivos in nature, and the effect that their characterization may have on resulting trust determinations; the changing nature of the definition of family; and, finally, the validity of holograph wills and will variation. Each of these summaries contains nuggets of information that will be of interest to all.

Whether or not one has a cross-border practice, the US implications of trust and estate planning is something that must be considered consistently. In "Cross-Border Tax Issues and How to Solve Them," Rhonda Rudick, TEP and Brent Nelson, TEP analyze some of the more common issues that trust and estate practitioners may face, and offer some potential solutions and considerations. Included in their discussion is an analysis of controlled foreign corporation (CFC) and passive foreign investment company (PFIC) issues arising on a cross-border estate freeze; the interplay of US rules with respect to foreign grantor trusts and the Canadian reversionary trust rule contained in subsection 75(2) of the *Income Tax Act*; and a reflection on planning around the 21-year deemed disposition rule. The authors also provide additional commentary on spousal planning and potential planning involving an unlimited liability company (ULC). This is a must-read for anyone with cross-border family clients.

Finally, we would like to invite all of our readers and STEP members who enjoy expressing your ideas and experience to consider writing an article for *STEP Inside*. Please send your proposal to news@step.ca—we look forward to hearing from you!

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Documenting Intentions: Honouring Intentions or Paving the Road to Hell?

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Clients are increasingly seeking bespoke estate-planning documents that reflect their unique wishes, voice, and vision. As estate practitioners, our job is, first, to find out what those wishes are and, second, to document those wishes. Spelling out a client's wishes can be challenging if the client does not really know, or does not express, those wishes, or if the client's true wishes run counter to public policy and would not withstand court scrutiny because they do not meet the client's moral and legal obligations to family.

Practitioners must walk a fine line between giving enough clarity to a fiduciary to carry out a client's wishes, and allowing the fiduciary enough flexibility and discretion to respond to a myriad of unpredictable future events.

In recent years, the law has adapted to reconcile two competing principles: the importance of formality, certainty, and solemnity on the one hand, and the need to be accessible and adaptable to changing ways of documenting a client's wishes on the other. Across Canada we have seen changes in legislation that allow the court either to cure formally deficient wills or to partially or wholly dispense with the need for formalities.

Practitioners have increasingly adopted tools such as "letters of wishes" or "memorandums to trustees" to supplement formal documents, to more fully capture the client's wishes, and to give the client a stronger voice. These supplemental documents also serve a practical purpose: they appease and reassure clients that their voice will be heard.

But by documenting these intentions more fully, are we, as the expression goes, paving the road to hell? What are the risks of reducing the need for formalities? What are the disadvantages of providing direction to the fiduciary as to how to exercise their discretion?

To answer these questions, we review the history and reasoning behind this pendulum swing, from a preference for formalities to an honouring of intentions, by looking at how British Columbia and Quebec have adapted. Then we discuss some of the pros and cons of this new intention-driven landscape.

British Columbia's Approach

Until March 31, 2014, when B.C. significantly updated its wills legislation, British Columbia required strict compliance with the formalities of will execution in order for a will to be valid. Specifically, at the end of the will-drafting process, the will-maker[1] had to sign the will in the presence of two witnesses, each of whom then had to subscribe the will in the presence of the will-maker. The courts in British Columbia and other strict-compliance jurisdictions had no ability to waive compliance, which led to arguably absurd results that defeated the deceased's intentions.[2] In 1997, the Manitoba Court of Appeal said that "[r]elief from literal compliance with" the formal execution requirements was "an idea whose time has come."[3]

That time arrived in British Columbia with the enactment of the *Wills, Estates and Succession Act* (WESA) on March 31, 2014. Section 58 of WESA is a dispensing provision, also called a curative provision or saving provision.

1 Until the *Wills, Estates and Succession Act*, SBC 2009, c. 13 (WESA) came into effect on March 31, 2014, British Columbia used the term "testator" or (less commonly in later years) "testatrix" to describe the person whose will was in question. WESA uses the gender-neutral term "will-maker," which will be used in the discussion of BC law.

2 See, for example, *Toomey v. Davis*, [2003] BCJ No. 1847 (SC), where the deceased signed a codicil in the presence of two witnesses, but one of those witnesses signed the codicil later, not in the presence of the deceased. The codicil was deemed to be invalid. Similarly, in *Re Wozciechoweicz*, [1931] 4 DLR 585 (Alta. CA), the Alberta Court of Appeal held that the two witnesses did not sign "in the presence" of the will-maker, who was lying ill in his bed facing the wall while the two witnesses signed the will in his hospital room, since he could not physically see them subscribe the will. In *Re Brown Estate*, [1954] OWN 301 (Surr. Ct.), the Ontario Surrogate Court held that a will was invalid where the will-maker signed her name in the presence of one witness, who then signed her name, before the two of them walked to another room in the house to meet the second witness. The will-maker and the first witness each acknowledged her respective signature, and the second witness signed. However, because the first witness did not again subscribe the will after the deceased acknowledged her signature before both of them, the formal requirements were not met.

3 *George v. Daily*, [1997] MJ No. 51 (CA), at paragraph 1.

It allows the court to recognize a document or writing as a valid testamentary document even where none of the formal execution requirements have been met.

The introduction of a dispensing provision moved British Columbia away from a strict-compliance regime by specifically empowering the court to review the circumstances of the execution, writing, or alteration of the document and to determine whether to recognize the document as a will. While this is a very broad power, there are still reasonable parameters within which the court will exercise its power. Specifically, the evidence must satisfy the court that

- the document or writing is authentic; and
- the document or writing represents the testamentary intentions of the deceased—that is, that it "records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death."[4]

To date, the BC courts have used the dispensing provision to recognize effective testamentary documents ranging from a will that was drafted by a solicitor but not executed,[5] to a single line in a computer document labelled "Budget" stating "Get a will made out at some point. A 5-way assets split for remaining brother and sisters. Greg, Annette or Trevor as executor."[6]

These decisions turn on a consideration of the evidence surrounding the creation of the document, statements made by the deceased regarding estate planning, where and how the document was kept, whether the deceased had disclosed the document to others, the nature of the deceased's relationships with friends and family, and, of course, a close consideration of the document or writing itself. The BC Court of Appeal confirmed the broad scope of evidence to be considered on section 58 applications, saying that "the court will benefit from learning as much as possible about all that could illuminate the deceased's state of mind, understanding and intention regarding the document."[7]

Yet, the BC Court of Appeal has held that the dispensing provision does not provide carte blanche to carry out all types of post mortem planning. In *Quinn Estate v. Rydland*,[8] the will itself had been properly executed, in compliance with the formal requirements. However, it contained a "pour-over clause" whereby the residue of the estate would pour over into an inter vivos trust. The trust was in existence when the will was made and was properly referenced by name. However, the trust permitted amendments and revocation, and in fact Mr. Quinn did amend the trust after executing his will. The amendments were not executed before two witnesses.

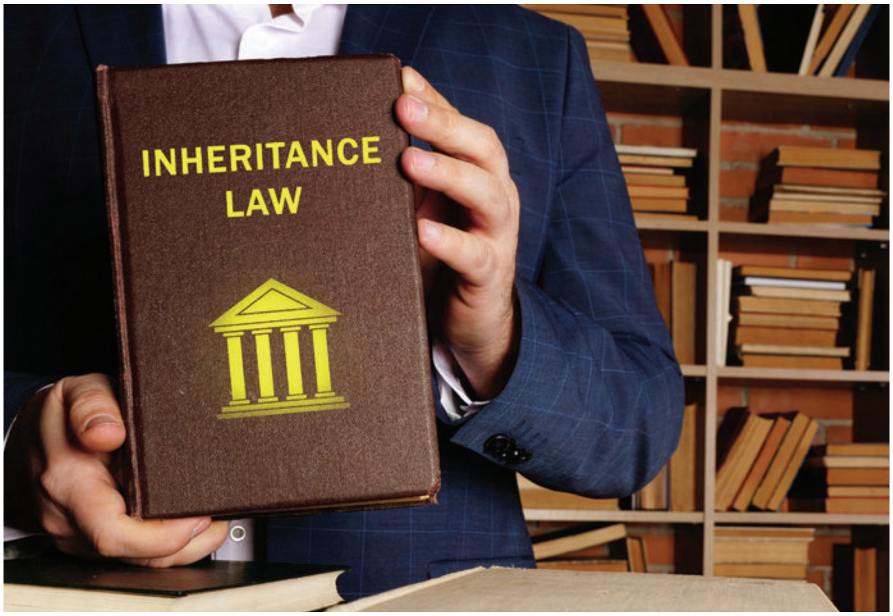
The court considered the nature of the application. It was not asked to find that the trust was valid as a testamentary disposition, but rather to find that clause 6 of the will was effective despite referencing a trust that had been subsequently amended not in compliance with the formal requirements. The court recognized that using the curative provision to permit the pour-over clause to be effective would "allow the will-maker to circumvent the formalities altogether,"[9] and held that section 58 did not apply on these facts.[10]

The introduction of a dispensing provision in British Columbia has not created significant uncertainty or a litigation tsunami. Rather, it has provided the court with the power to give effect to the deceased's testamentary wishes where the formal execution requirements have not been met. The courts have recognized and applied a clear test and have considered a broad range of evidence to discern the deceased's intention. Thus, rather than paving the road to hell, the provision permits the court to honour the deceased's intentions.

Quebec's Approach

The role of testamentary intention in Quebec took a decidedly more liberal turn after the conquest of New France by England. Up to that point, New France was governed by the *Coutume de la prévoté et vicomté de Paris*, which was the system of law that governed Quebec for over 300 years and was the foundation for the *Civil Code of Lower Canada* (CCLC), enacted in 1866. The *Coutume de Paris* both limited a person's right to dispose freely of most of his or her property and prescribed

4 *Estate of Young*, 2015 BCSC 182, at paragraph 35.
5 *Gibb Estate (Re)*, 2021 BCSC 2461.
6 *Hubschi Estate (Re)*, 2019 BCSC 2040, at paragraph 1.
7 *Hadley Estate (Re)*, 2017 BCCA 311, at paragraph 40.
8 *Quinn Estate v. Rydland*, 2019 BCCA 91. Note that the section 58 argument was made in the alternative, but was addressed by the court.
9 Ibid., at paragraph 37.
10 The following year, a similar case with a pour-over clause came before the BC Supreme Court, *Waslenchuk Estate*, 2020 BCSC 1929. Here, there was no evidence that the inter vivos trust had been amended subsequent to the execution of the will. The court held (at paragraph 78) that regardless of whether the trust is in fact amended, the reasoning in *Quinn* applied.



strict formalities for wills that made testamentary depositions virtually non-existent in New France. The *Quebec Act, 1774* ushered in changes to testamentary freedom while restoring civil law in Lower Canada. It simplified the will-making process and rejected the application of the hereditary reserve that limited a person's ability to dispose of his or her property.

The respect for testamentary freedom and for testamentary intention was expressly integrated in the CCLC. Not only was a person free to dispose of his or her property by more simplified forms of wills, the courts were empowered to reduce the strict harness of the legal formalities of one form of will if the legal formalities of another form were met.[11]

When the *Civil Code of Québec* (CCQ) entered into force in 1994, the legislator retained this principle[12] and introduced CCQ article 714, which provides that a holographic will or a will made in the presence of witnesses may be saved if the essential requirements as to its form are present and if it contains the unquestionable and unequivocal last wishes of the deceased.

The key question is the degree to which CCQ article 714 permits a court to save a defective will. For example, can a court ignore all formalities if testamentary intention is unequivocally present? Which formalities are essential and which are not? Can the existence of certain formalities vary depending on the strength of evidence of testamentary intention?

Over the past 28 years, a significant number of decisions have applied CCQ article 714. As with all paradigm shifts, there were bound to be some difficulties in determining the limits of the provision. Fortunately, CCQ article 714 has received the attention from the Quebec Court of Appeal on a number of occasions.

The Quebec courts have generally accepted that CCQ article 714 involves the meeting of a two-step test, namely:

1. the defective will must meet the "essential requirements" of its form, and
2. the defective will must unequivocally contain the last wishes of the deceased.

The first step of the test is a reiteration of the rule that, in the law of wills, certain formal requirements must be met, which are necessary to ensure the subjective understanding that the person intended to make a will. The writer of the will is thus transformed into a testator by completing certain formalities that can objectively be understood as a reflection of subjective intent. The difficult part of this test, however, is determining which requirements are essential.

The second step of the test focuses on the subjective intention of the writer. Simply put, the defective will must express the unquestionable and unequivocal *animus testandi* of the testator.

The discretionary power of the verifying judge is not absolute. This power is limited by the very wording of CCQ article 714, in that the judge cannot set aside the failure to meet certain formal conditions, which are essential, by relying solely on the clear and unequivocal will of the deceased. Fortunately, the Quebec Court of Appeal has adopted a structured approach to CCQ article 714, which can be of useful precedential value to other jurisdictions new to substantial compliance.[13]

The role of intention also plays a critical role in Quebec trusts. A Quebec trust can be fully discretionary,

11 CCLC article 855.
12 CQLR c. CCQ-1991 (CCQ), article 713.
13 We explore the structured approach to CCQ article 714 in more detail in Amy Mortimore, Troy McEachren, and Rhonda Johnson, "Documenting Intentions: Honouring Intentions or Paving the Road to Hell?" presentation at the STEP Canada 24th National Conference, June 16, 2022.

whereby the trustee is given broad discretionary powers. Absent limitations imposed by a settlor, a trustee's discretion is limited only where it is exercised in an unreasonable, arbitrary, or malicious manner, or if the exercise of that discretion is contrary to the objectives of the trust.[14] Thus, the settlor's intention is the driving force behind the creation and the future administration of a trust and the property that it contains. It is arguable that a settlor can express his or her intention both at the time of the creation of the trust in the trust document and in an external letter of wishes that postdates the trust's creation. This was the conclusion of the High Court of New Zealand in Kain v. Public Trust. While Kain is a common-law decision, the legal reasoning in it is compelling.

Pros and Cons of Documenting Intentions

If, as the trend seems to be, clients are seeking more input into documenting their wishes, what are some of the risks to avoid?

The two extremes of this trend are under- and over-documenting intentions. If the will-maker's or settlor's intentions are under-documented, the fiduciaries and the courts are left to surmise what they may have been. The most common example of this can be seen with a spousal trust that provides little direction regarding how much or how little of the capital should be used to benefit the spouse. What is "proper" is in the eye of the beholder, and a lack of direction invites tensions between disparate classes of beneficiaries, such as the second spouse and the children. With an interest in dynastic trusts on the rise, where the settlor's legacy is meant to last for generations, some direction by the settlor is legally and practically very useful to set the guiding principles and purposes of the trust.

On the other hand, over-documenting the will-maker's or settlor's intentions may hinder the fiduciary's ability to respond to unforeseen circumstances. For example, a settlor might prefer that the trustees put funds solely into a conservative investment vehicle. That restriction might prevent the trustees from maximizing the benefit to the beneficiaries. Often, the will-maker's or settlor's wishes are contained in a separate document, outside the will or the trust deed, that includes standard phrasing such as, "This is my letter of wishes. It is my hope that it provides guidance to my trustees but it does not form part of my will and it is not a legally enforceable document." If this is the case, then the usual standard applies in how the trustees should exercise their discretion. They must consider all relevant factors, and disregard irrelevant factors. So they might prepare their trustees' resolutions, acknowledge that they have reviewed and considered the letter of wishes regarding investments, and then outline their reasons for taking a different approach. If these wishes are mandated in the will or trust deed, the trustees' discretion is prescribed by the terms of the deed and they will not be able to do anything beyond the scope of the deed without court approval.

Over-documenting might also invite scrutiny of the capacity of the will-maker or settlor, particularly where the wishes are inconsistent, factually wrong, or delusional. It might also be tempting to sanitize the settlor's letter of wishes. Modifying or excluding various portions may be well-intended, but the drafter should ensure that the document still reflects the will-maker's or settlor's authentic voice. Otherwise, its moral persuasiveness with the family may be lost.

Ultimately, practitioners must reconcile a client's desire to "control from the grave" with the fact that it is the will-maker's or settlor's intentions that are paramount. Setting the general course and direction, and then allowing the fiduciary to choose the specifics of how to proceed on that course, may be the best way of avoiding the road to hell.

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14 John B. Claxton, *Studies on the Quebec Law of Trust* (Toronto: Thomson Carswell, 2005) at para. 8.22.

With the Benefit of Hindsight: Tips for Estate Planners when Undertaking an Estate Freeze

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Introduction

Estate planning involves arranging for the orderly transfer of a client's assets to the people and entities named as beneficiaries by the client. Every client's situation is different, requiring estate planners to have both depth and breadth of knowledge and experience so that they can anticipate both foreseeable and unforeseeable events. With the benefit of hindsight, we would all have designed the perfect estate plan for our clients.

In this article, we review five common fact scenarios which together illustrate the importance of contemplating and addressing possible future events when undertaking an estate freeze involving the settlement of a family trust to hold growth shares of a private company.

The Family Fact Scenario

A few years into their marriage, Alfred and Louise Porter incorporated Doors R Us Limited ("DoorCo") in Ontario in 1979. Their company, which was originally owned equally by Alfred and Louise, manufactures and distributes doors.

Alfred and Louise successfully operated the company for 25 years, and by 2004 the company was worth $2 million. Over the same period, they raised three children, Wayne, Maria, and Scarlett.

In 2004, their estate planning lawyer recommended that they undertake an estate freeze and in the context of that freeze establish a discretionary family trust to hold the common shares representing the growth in the value of the company going forward. This routine corporate restructuring allowed Alfred and Louise to "freeze" the value of their assets in DoorCo by swapping their common shares, worth $2 million, for fixed-value preferred shares. New common shares of DoorCo were then issued to the newly settled Porter Family Trust (PFT) for a nominal value.

The trust indenture relating to the PFT is basic and silent on many issues, including whether the trustees have an express obligation to provide disclosure. It does not contain an amendment clause and provides no power to add or remove beneficiaries, through either discretionary or non-discretionary power.

Maria has been active in the business, assisting her parents with management decisions. As directors of the company, Alfred and Louise had diligently managed DoorCo's cash flow, allowing them to redeem $1.5 million of their preferred shares, declare dividends to Maria indirectly through the PFT, and increase the company's excess cash balance to $1 million. From the time of the freeze to the present, DoorCo's value has increased to $3.5 million, with $500,000 attributable to the remaining preferred shares and $3 million attributable to the common shares held by the PFT.

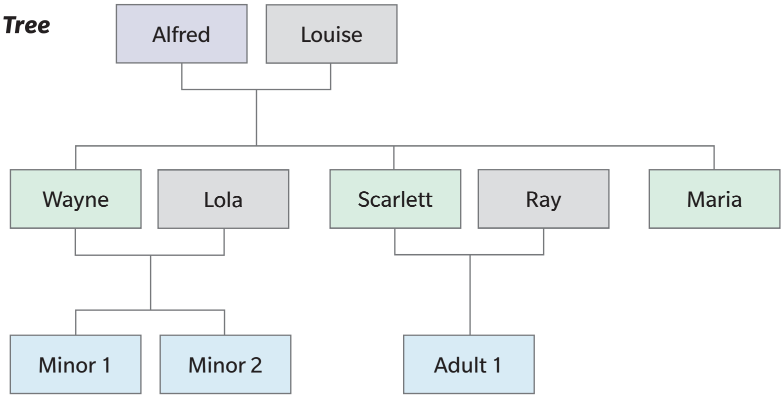
The other two children, Wayne and Scarlett, are not involved in DoorCo. Wayne, who is married to Lola with whom he has two minor children, is a computer programmer for the federal government. Scarlett and her common-law partner, Ray, have established a successful private company that manufactures and distributes windows.

Alfred and Louise have been hearing horror stories from their friends about how the spouses of children can cause havoc within family companies. With

The settlor, beneficiaries, and trustees of the PFT

Settlor	Trustees	Beneficiaries
Alfred's mother	Alfred Porter	Alfred Porter
	Louise Porter	Louise Porter
	Irwin (accountant)	Issue of Alfred and Louise Porter
	Sarah (accountant) - Alternate	Spouses of the issue of Alfred and Louise Porter
		Anabela (Alfred Porter's niece)

Family Tree



the increase in the value of DoorCo, Alfred and Louise are nervous about a son or daughter-in-law causing trouble and have asked their children not to disclose to their spouses any information regarding DoorCo or the PFT.

Scenario 1: Wayne's Marriage Is Ending

Wayne and Lola separated six months ago. Their separation has been adversarial, and tensions are high. Lola is seeking a sizable equalization payment and financial support in respect of the minor children. Wayne told his lawyer about the existence of DoorCo and his interest in the PFT, and said that his parents asked him not to disclose any information to Lola. Wayne's lawyer is concerned about Wayne's unwillingness to disclose his interest in the PFT even though Wayne has never received a distribution from the trust.

Comments

In Ontario, as in most (if not all) provinces, Wayne has an obligation to make a full, material financial disclosure in conjunction with the negotiation of his separation agreement with Lola. Accordingly, he must disclose that he is a discretionary beneficiary of the PFT. In the context of that disclosure, he will most likely be required to produce a copy of the trust indenture. If he fails to disclose the existence of and his interest in the PFT, Lola will be in a position to set aside any agreement in the future

It should be noted that as Wayne's spouse, Lola is herself a beneficiary of the PFT per the trust indenture. Accordingly, she has the right to certain trust documents (such as the trust indenture) and particulars of the assets of the trust during the period she was a beneficiary, and could compel the trustees to pass their accounts for the period she was a beneficiary. Even if Lola were not a beneficiary, her lawyer would be able to press for further disclosure given the potential value of Wayne's interest in the PFT, which will factor into the calculation of any equalization or support payments.[1] Thus, Lola could make an application to the court in the context of matrimonial proceedings for an order compelling the trustees to make broad disclosure.

The fact that the trust indenture is silent on the issue of disclosure could result in the trustees being required to disclose more information and documents than they would otherwise be comfortable doing. With the benefit of hindsight, the trust indenture would have contained a provision that limits the scope of production of information and documents to the beneficiaries and requires the beneficiaries to sign a confidentiality agreement, before any information or documents are disclosed.

The fact that the trustees failed to inform Lola that she was a beneficiary of the PFT may be problematic in other ways. The trustees may face a potential penalty under the *Income Tax Act*[2] equal to 5 percent of the fair market value of the trust's property if they knowingly (or as a result of gross negligence) omitted Lola's information[3] when reporting beneficial ownership information to the Canada Revenue Agency (CRA).[4] The penalty-relieving provision in proposed section 204(2) of the Income Tax Regulations will not apply when the information is omitted for known and ascertainable beneficiaries.

Scenario 2: Scarlett Presses for Distributions

Scarlett and Ray are in need of money to expand their business. They could not obtain third-party financing, and Scarlett's parents also refused to provide financing. Scarlett told Ray about the PFT, and they then spoke to their lawyer about their rights as beneficiaries to the assets held in the trust. Their lawyer has made an expansive request of the trustees for documentary disclosure as a precursor to litigation.

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1 The PFT was settled prior to the marriage. Pursuant to Ontario law, disclosure of the trust assets on marriage and on matrimonial breakdown, as well as trust payments made during the marriage, may be necessary for equalization calculations. If the trust had been settled after the date of marriage (making the PFT "excluded property" and not subject to equalization), Wayne's interest in the trust might still be taken into account with respect to his ability to pay spousal and/or child support, and trust income might be imputed to Wayne.

2 RSC 1985, c. 1 (5th Supp.), as amended (ITA).

3 Proposed section 204.2(1) of the Income Tax Regulations requires the following information to be disclosed to the CRA: name, address, date of birth, jurisdiction of residence, and tax identification number.

4 On the basis of revised draft legislation, reintroduced on August 9, 2022, the beneficial ownership reporting will apply to a trust's taxation year ending after December 30, 2022. https://fin.canada.ca/drleg-apl/2022/ita-lir-0822-l-2-eng.html

Comments

The PFT is a completely discretionary trust. Accordingly, no beneficiary has a right to demand distributions of either income or capital. The trustees have wide latitude with respect to the exercise of their discretion, and absent bad faith or consideration of inappropriate factors, a court will not interfere with the exercise of their discretion.

That said, beneficiaries have common law rights with respect to disclosure and accounting. As a result, Scarlett and Ray can make a nuisance of themselves by pressing for a full accounting of the administration of the PFT. They might seek to challenge the distributions made to Maria or the failure to make any distributions to them in the context of an application to pass accounts.

The trust indenture does not contain any provisions with respect to a beneficiary's right to information. Clauses limiting a beneficiary's right to information are often included in a trust indenture. However, it should be noted that these clauses may not be enforceable against the beneficiaries if they run contrary to public policy (for example, if they seek to completely oust the jurisdiction of the court to supervise the administration of the trust). Failure to provide adequate disclosure to a beneficiary could result in the beneficiary compelling the trustee to pass its accounts.

As a result of the disclosure request, Scarlett and Ray's accountant discovers that their company is associated with DoorCo pursuant to paragraph 256(1.2)(f) of the ITA, which deems each beneficiary to own the shares held by the trust. The trust indenture does not provide for the automatic or discretionary removal of beneficiaries, which, in hindsight, could have alleviated this association problem.

Scenario 3: Alfred and Louise Need More Money

Alfred and Louise's accountant had recommended that they redeem some of their fixed-value preferred shares each year as part of their annual compensation. By 2022, they have only $500,000 in preferred shares remaining. This is not enough to fund their retirement, and Alfred and Louise need a plan that allows them to tax-efficiently extract some of the value of the company going forward.

Comments

The advice that the accountant gave to Alfred and Louise to redeem some of their preference shares each year may have lowered the overall tax that their estates will bear on their death, but it was short-sighted because they no longer have enough money to fund their retirement. It is unlikely that Alfred and Louise will be able to receive salary or dividends from the company once they are fully retired, so it is important that they develop a plan to extract additional value from DoorCo on a tax-deferred basis now, while they still have control of the company.

The trustees of the PFT hold voting control of DoorCo, and two of the trustees (Alfred and Louise) are also directors of the company.

Alfred and Louise must be mindful of their duties, both as trustees of PFT and as officers and directors of DoorCo. The recent decision of the BC Court of Appeal in *Pirani v. Pirani*[5] reminds us of the fiduciary duty imposed on trustees and the potential conflict of interest that may occur when trustees also act as officers or directors. Given the current family situation in scenarios 1 and 2, attempts to extract additional value from DoorCo's common shares for Alfred and Louise at the expense of the current beneficiaries of the PFT may result in litigation.

With the benefit of hindsight, Alfred and Louise should have considered doing the following when they undertook the estate freeze in 2004:

- Ensured that their fixed-value preference shares had an entitlement to dividends and opted to declare dividends on their shares rather than redeeming them over the past number of years;
- Issued voting shares directly to themselves in order to maintain direct control of DoorCo so as not to be criticized for breaching their fiduciary duties as trustees of PFT when restructuring the company for their personal benefit;[6] and
- Named a corporate beneficiary of the PFT which they owned.

Louise and Alfred find themselves in a difficult situation. They are likely going to have to make full disclosure to their children and their spouses of their retirement needs if they have any hope of securing funding from the company. As Wayne is in the midst of divorce proceedings and Scarlett and her husband are pressing for distributions, any steps Louise and Alfred might plan to take now might give rise to litigation.

Scenario 4: Irwin Retires as Trustee

DoorCo's accountant, Irwin, has retired from his accounting firm and given

5 2022 BCCA 65.

6 In family-owned businesses, individuals acting as trustees typically have multiple overlapping roles, which may be perceived to result, or actually result, in a conflict of interest when they exercise their duties of each specific role. The separation of DoorCo control from the trustees does not completely alleviate the possible conflict of interest, because Alfred and Louise would still individually have control of DoorCo and act as officers and directors of the company. It would be very important to properly document which role Alfred and Louise are exercising each time decisions are being made.

notice of his intention to resign as a trustee of the PFT. At the request of Alfred and Louise, the accounting firm has agreed to allow their new accountant, Sarah, to replace Irwin as trustee.

Comments

The concern with the replacement of Irwin as trustee relates to the possibility that a loss restriction event will be created through an acquisition of control (AOC). DoorCo's only voting shares are held by the trustees of the PFT, and the CRA's position[7] is that, in the absence of evidence to the contrary, there is a presumption that all of the trustees constitute a controlling group, and the replacement of a single trustee of that controlling group would result in an AOC.[8]

There are two independent legislative exceptions to the AOC, but each exception has a specific requirement:

1. clause 256(7)(a)(i)(A)—the replacement trustee must be related to the resigned trustee; or
2. paragraph 256(7)(i)—there is no change in beneficial ownership, and the trustees do not have discretion over the distribution of income or capital.

Because it is contemplated that Sarah will replace Irwin as a trustee of the PFT, neither of the legislative exceptions applies. Sarah is not related to Irwin, and the trustees have the discretionary power over the distribution of income and capital.

Sarah's appointment as a trustee of the PFT would trigger a deemed year-end and specific loss restrictions through the application of the AOC rules. This outcome may not necessarily be negative, but a detailed analysis is still warranted to determine whether Sarah's appointment as trustee would be problematic.

When the estate freeze was implemented, Alfred and Louise's estate planner should have been more diligent about setting down the terms for determining control of DoorCo and PFT's replacement trustees. It is arguable that Irwin should have declined the trustee role and that potential successor trustees should have been related to Alfred and Louise. Another option would have been to issue special voting shares of DoorCo directly to Alfred and Louise, thereby avoiding the situation where the trustees of PFT have control over DoorCo.

Scenario 5: The Problem with the Niece Being a Beneficiary

Sarah, in her capacity as accountant, recently recommended that Alfred and Louise undertake a tax-deferred corporate restructuring to purify DoorCo of its excess cash. The restructuring will allow the company to regain its "qualified small business corporation" status for the purposes of the lifetime capital gains exemption.

Upon detailed review of the trust indenture, Sarah notes that Alfred's niece, Anabela, is a beneficiary of the PFT.

Comments

The trust indenture does not give the trustees or any other person the power to add or remove beneficiaries, nor does it provide that a beneficiary is automatically removed in certain specified circumstances.

To purify DoorCo on a tax-deferred basis, the shareholders (including the trustees of the PFT) would seek to rely on the "related-party exception" under paragraph 55(3)(a) of the ITA. However, the fact that Alfred's niece is a beneficiary of the PFT means that the related-party exception cannot be used, and the reorganization would proceed on a taxable basis. This is because Anabela is not considered to be related to Alfred or the other beneficiaries of the trust under subsection 251(2) of the ITA. The related-party exception applies only when a person and a trust are deemed to be related, and this can occur only if a person is related to each beneficiary of the trust. As a result, the unrelated niece taints the trust so that no person can be related to all beneficiaries, which makes the related-party exception inaccessible.

It is extremely important to understand the potential consequences of naming certain beneficiaries in the trust indenture (such as non-related persons or entities). It is good practice to limit the beneficiaries to the client's immediate family members. The trust indenture should also provide some flexibility to add or remove beneficiaries, through either discretionary or non-discretionary power.

Conclusion

Estate planners must use their knowledge and experience to anticipate how a corporate structure, involving a family trust, will operate into the future after an estate freeze. While a "perfect" estate plan may not be attainable, estate planners can mitigate the risk of not achieving their client's goals by turning their mind to future scenarios like the ones outlined in this article and planning and drafting accordingly. Foresight is the next best thing to hindsight!

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7 CRA document no. 2004-0087761E5 issued May 24, 2005.

8 *Technical News* No. 34, April 27, 2006. The CRA acknowledges that a review of all pertinent facts, including the terms of the trust indenture, is crucial for determining whether an AOC has occurred.

Lessons from Recent Cases

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A number of interesting trust and estate decisions were released in 2021 and early 2022. In this article we review some of the more notable cases and outline the lessons to be drawn from them.

Interpretation of Wills

In *Clément c. Lemieux*,[1] the deceased, Caron, while hospitalized with terminal cancer, signed a will in front of witnesses. One week later, she signed the identical will in front of a notary, Clément. She left four revenue properties to her mother and siblings and appointed her spouse, Lemieux, as liquidator and universal (residual) heir. The will provided that taxes payable as a result of her death should be paid out of the estate. Lemieux asked the court to declare that the particular legatees rather than the estate were responsible for paying the taxes and, subsidiarily, he asked that the notary be held liable for that amount as a result of having failed to advise the deceased on the tax implications of her will. Although under the *Civil Code of Québec* (CCQ) judges may interpret wills, they should only do so if the will contains an ambiguity. Since there was no ambiguity in the will, both the trial and appeal courts held that the taxes were to be paid by the estate—that is, from Lemieux's share. However, contrary to the trial judge, the Quebec Court of Appeal held that the notary was not liable to the estate for professional fault because his mandate did not include providing tax advice.

In *Succession de Glickman*,[2] the will provided that should any of the testator's children predecease her "or die before receiving their full share of the capital," then that share would accrue to her other children if the deceased child left no living child of his or her own. The testator's children received provisional distributions, but her son died before receiving his share of the remaining capital. While the trial judge held that the will was ambiguous and required interpretation, the Quebec Court of Appeal disagreed and held that the condition established by the testator that the capital would accrue to her remaining children was valid. The remaining capital therefore accrued to the testator's remaining two children.

Pour-Over Clauses

Several recent cases expanded on the law related to pour-over clauses as set out in *Quinn Estate v. Rydland*,[3] in which the BC Court of Appeal found a pour-over clause to be invalid where it poured into a trust that could be amended, and had been amended after the date of the will. These cases considered the validity of pour-over clauses where amendable trusts had not been amended.

In *Waslenchuk Estate*,[4] the BC Supreme Court did not distinguish *Quinn* based on the fact that the trust under consideration had not been amended. Instead, the court found that *Quinn* "turns on whether the pour-over clause is to an amendable or revocable trust"[5] (that is, it was not the actual amendment but the mere possibility of amendment that was problematic).

… the BC Court of Appeal found a pour-over clause to be invalid where it poured into a trust that could be amended, and had been amended after the date of the will.

In contrast, in *MacCallum Estate*,[6] the Nova Scotia Supreme Court distinguished *Quinn* on the basis that there had been no amendment to the trust in that case. The court did not reference *Waslenchuk*, but looked instead to

1 2021 QCCA 1676.
2 2021 QCCA 260.
3 2019 BCCA 91.
4 2020 BCSC 1929.
5 Ibid., at paragraph 118.
6 2022 NSSC 34.

historical cases involving secret trusts and the public policy presumption against intestacy, noting the irony that would result if holograph wills (which do not meet traditional will formalities) could be upheld but pour-over clauses could not.

Most recently, the Ontario Superior Court considered each of these cases in *Vilenski v. Weinrib-Wolfman*,[7] and determined that it favoured the BC approach, noting the potential issues that arise from a retrospective consideration of whether there has been an amendment to a trust and the public policy of preventing abuses.

Disclosure Obligations

Lambie Trustee Limited v. Addleman[8] is a decision from the New Zealand Supreme Court dealing with a trustee's obligation to disclose to a beneficiary legal advice obtained by the trustee and paid for with the trust's assets, including advice regarding the exercise of the trustee's discretion to make a distribution to the beneficiary. The court found that the beneficiary was entitled to disclosure based on a "joint interest exception" to solicitor-client privilege, on the assumption that the legal advice must have been obtained for the beneficiary's benefit. The court stated that "[w]hat is required for the joint interest exception not to apply is that the advice be sought for the dominant purpose of defending litigation."[9]

In *Duhn Estate*,[10] the Alberta Court of Queen's Bench considered the obligations of an estate trustee to disclose inter vivos gifts, and would not order disclosure of financial information where there was significant evidence that the testator retained capacity throughout her life. Competent testators are allowed to keep their financial decisions private, and applicants for an accounting must meet at least a "minimal evidentiary threshold" suggesting that the testator lacked capacity or that there were "suspicious circumstances."[11] In the subsequent case of *Gow Estate (Re)*,[12] the same court, citing *Duhn*, simply stated that "[t]he testator's pre-death financial life is confidential."[13]

In *Sherman Estate v. Donovan*,[14] the Supreme Court of Canada recognized a new public interest ground for granting a sealing order and outlined the test for setting aside such an order. The case involved the murder of a prominent couple, which garnered considerable media attention. The estate trustees sought sealing orders for the probate files to minimize press scrutiny, which was opposed by media interests. The court recognized potential grounds for a sealing order, but noted that the test for discretionary limits on court openness is fact-specific, and the bar is set very high. The information needs to reveal "something intimate and personal about the individual, their lifestyle, or experiences."[15] Individual sensibilities or "mere personal discomfort" arising from the open nature of a court proceeding is not enough. The court found that the estate failed to establish a serious risk to an important public interest and affirmed the decision to set aside the sealing order.

Characterization of Documents as Testamentary Versus Inter Vivos

Two notable decisions examined beneficiary designations and resulting trusts in light of *Calmusky v. Calmusky*,[16] in which the Ontario Superior Court had applied the reasoning from *Pecore v. Pecore*[17] and found that the presumption of resulting trust applies to beneficiary designations. (Because *Pecore* applied only to inter vivos gifts, beneficiary designations would therefore also be inter vivos.)

In *Mak (Estate) v. Mak*,[18] the Ontario Superior Court again considered this issue, and came to a different conclusion—namely, that the presumption of resulting trust does not apply to a beneficiary designation, in part because beneficiary designations are not inter vivos gifts.

The Alberta Court of Queen's Bench came to a similar conclusion in *Roberts v. Roberts*,[19] finding that beneficiary designations made under Alberta's *Wills and Succession Act* are testamentary in nature, and therefore the presumption of resulting trust does not apply.

Estate practitioners would be wise not to assume that the law is settled,

...the Supreme Court of Canada recognized a new public interest ground for granting a sealing order and outlined the test for setting aside such an order...The court found that the estate failed to establish a serious risk to an important public interest and affirmed the decision to set aside the sealing order.

7 2022 ONSC 2116.
8 [2021] NZSC 54.
9 Ibid., at paragraph 92.
10 2021 ABQB 35.
11 Ibid., at paragraph 19.
12 2021 ABQB 305.
13 Ibid., at paragraph 90.
14 2021 SCC 25.
15 Ibid., at paragraph 77.
16 2020 ONSC 1506.
17 2007 SCC 17.
18 2021 ONSC 4415.
19 2021 ABQB 945.

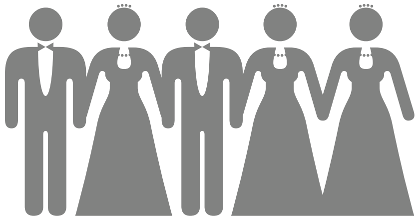
and to continue documenting a client's intentions wherever possible.

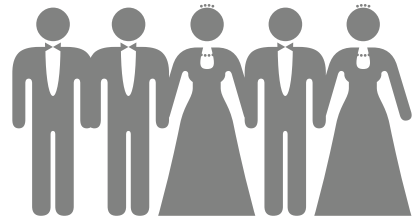
In *Gough v. Leslie Estate*,[20] the issue turned on the nature of a side agreement, executed on the same day as a will, that imposed obligations on a beneficiary. The trial court had found that the agreement was testamentary and therefore was revoked by a later will. The Nova Scotia Court of Appeal instead characterized the agreement as a secret trust, which was inter vivos, and therefore was not revoked by the later will.

Modern Families

In *British Columbia Birth Registration No. 2018-XX-XX5815*,[21] the BC Supreme Court recognized additional parents in polyamorous relationships. The petitioners, a man and two women, had been living together in a committed relationship for several years. The man and one of the women were the child's biological parents and were named on the child's birth registration. All three petitioned the court, seeking a declaration that the second mother was the child's third legal parent and that the child's birth registration should be amended accordingly. The court granted the petitioners' request, exercising its *parens patriae* jurisdiction, even though the BC *Family Law Act* does not recognize this possibility. This evolving area of law could have significant future impacts on intestacy and wills variation claims.

Boughton v. Widner Estate[22] was an intestacy case brought by an alleged common-law spouse of the deceased and her infant children. The deceased





was married to the defendant and had a common-law relationship with the plaintiff. He maintained two separate households by lying to his wife that he was working part of the week on the other side of Vancouver Island. The BC Supreme Court found that both women were spouses under British Columbia's *Wills, Estates and Succession Act*.

In contrast, *Mother 1 v. Solus Trust Company*[23] (a fascinating case with facts described by the judge as "unquestionably bizarre") involved a plaintiff who was one of five mothers of the deceased's children. At trial, the BC Supreme Court found that, even though there can be more than one spouse at law, there was no "marriage-like relationship" in this case because the deceased chose to live a "playboy" lifestyle without committing to any relationship.

The Ontario Court of Appeal dealt with the challenging topic of elder marriages in *Tanti v. Tanti*.[24] The plaintiff son of an elderly father sought guardianship for his father, who had married someone much younger. The court reviewed the factors to consider in determining a person's capacity to marry. The test for capacity to marry is lower than the test for capacity to create a will, which can create significant problems for estate planners and their clients alike.

In *Goulet c. Héritiers de Guay*,[25] the Quebec Court of Appeal considered the validity of a legacy to an ex-spouse. Article 764 of the CCQ provides that a legacy made to a spouse prior to a divorce is revoked unless the testator demonstrated the intention of benefiting the spouse despite the dissolution of the marriage. The deceased, Guay, made her will in 2001, while living with Goulet. They married in 2004 and divorced in 2012. They remained close and Guay never changed her will. Despite references in

the Quebec Court of Appeal considered the validity of a legacy to an ex-spouse. Article 764...provides that a legacy made to a spouse prior to a divorce is revoked unless the testator demonstrated the intention of benefiting the spouse despite the dissolution of the marriage.

20 2022 NSCA 25.
21 2021 BCSC 767.
22 2021 BCSC 325.
23 2019 BCSC 200; aff'd 2021 BCCA 461; leave to appeal to the Supreme Court of Canada dismissed August 4, 2022.
24 2021 ONCA 717; leave to appeal to the Supreme Court of Canada dismissed April 7, 2022.
25 2021 QCCA 1680.

Guay's will to Goulet as her spouse, the Court of Appeal held that the legacy should not be revoked because it was made well before their marriage, and therefore the marriage was not a condition of the legacy. Their close relationship after the divorce demonstrated the testator's intention to benefit her ex-husband.

There was no debate that the email was written by the testator, but the document could not be probated as a holograph will because it had not been handwritten and signed by the testator.

Holograph Wills

In *Succession de Leclerc*,[26] the testator's daughter typed out his handwritten codicil, which he later signed in front of one witness. The codicil benefited the daughter who transcribed it. Her sister contested the codicil, saying that it did not respect the essential formal requirements, which were that it be signed in the presence of two witnesses and that it be written by a third person. The Quebec Superior Court refused to probate the codicil because the daughter who transcribed it could not be considered a third person. Further, although some Quebec jurisprudence has accepted wills signed before only one witness, in this case the requirement of two witnesses was considered essential. The will could therefore not be probated, rendering it invalid.

In *Bitton c. Bitton*,[27] the Quebec Superior Court refused to probate a will written by email while the testator was hospitalized as a result of COVID-19. There was no debate that the email was written by the testator, but the document could not be probated as a holograph will because it had not been handwritten and signed by the testator. The Court of Appeal upheld the decision.[28]

Wills Variation

In *Perreault c. Beaudoin*,[29] Beaudoin and the deceased Perreault co-owned property. They had signed an agreement providing that, on the death of one of them, the deceased's heirs must transfer the deceased's rights in the property to the other co-owner. This agreement was referenced in Perreault's will, but the will contained no testamentary disposition to that effect. Perreault's son, the universal heir, challenged the agreement. Beaudoin then requested that the court modify the deceased's will to reflect his intention to leave his half of the property to her. The court agreed, going so far as to draft a clause that would, by judgment, form part of the will.

In *Nova Scotia (Attorney General) v. Lawen Estate*,[30] the Nova Scotia Court of Appeal considered a constitutional challenge to the province's wills variation legislation, which, like British Columbia's legislation, allows dependants (including adult independent children) to apply to vary wills. In a decision eagerly awaited by estate practitioners, the court dismissed the constitutional challenge based on evidentiary reasons alone, and leave to appeal was dismissed. A determination of the constitutional validity of wills variation provisions waits for another day.

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26 2021 QCCS 1642.
27 2021 QCCS 4649.
28 2022 QCCA 349.
29 2021 QCCS 5000.
30 2021 NSCA 39; leave to appeal to the Supreme Court of Canada dismissed January 20, 2022.

Cross-Border Tax Issues and How to Solve Them*

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With the relaxation of COVID-19 restrictions and the ongoing shakeup of the labour market caused by the "Great Resignation," in addition to the traditional allure of building a career on Wall Street or in Silicon Valley, many wealthy Canadian families must contend with the phenomenon of younger generations moving to the United States to work and live permanently. When an estate plan is being designed for Canadian clients with family members who are US citizens or individuals who are or who intend to become US tax residents (collectively, "US tax persons"), US income, estate, and gift tax rules must be carefully considered in order to minimize the burden that can arise from taxation in both countries.

Cross-Border Estate Freezes

An estate freeze is a corporate reorganization that is commonly undertaken for Canadian estate-planning purposes. A freeze defers, for one or more generations, the recognition of some or all of the capital gains tax liability inherent in the shares of a Canadian private corporation held by a Canadian-resident individual at the time of his or her death. The original shares are exchanged, on a tax-deferred basis, for a new class of redeemable and retractable preferred shares whose value is fixed at the fair market value of the original shares as of the date of the freeze. From a Canadian tax perspective, the holder of the freeze shares can anticipate the amount of capital gains that will arise on his or her death in respect of the fixed-value preferred shares. When family members or, more commonly, a family trust subscribe for new common shares of the corporation, the growth in the value of the underlying corporation will accrue exclusively to the benefit of the new common shareholders.

In situations where US tax persons are among the beneficiaries of the family trust, the terms of the trust must be structured in order to comply with US and Canadian tax rules with respect to both the property of the trust and the decision-making powers of the trustees.

CFC and PFIC Issues and Attributed Ownership

Beneficial ownership by a US tax person of the common shares of a Canadian corporation through a Canadian discretionary trust immediately raises certain tax and reporting issues under the US tax rules applicable to non-US corporations. This is especially true if the non-US corporation is classified as a "controlled foreign corporation" (CFC) or a "passive foreign investment company" (PFIC).

A Canadian corporation will be classified as a CFC if US tax persons each owning 10 percent of the corporation's shares collectively own more than 50 percent of the corporation's shares (measured by vote or value). Anti-deferral rules require US tax persons to include in taxable income on a current basis their pro rata share of the corporation's passive income and certain business income, regardless of whether that income has been distributed to the US tax person.[1] Unfavourable tax rules also apply to the disposition of the shares of the Canadian corporation. As a result of rules introduced in 2017, a Canadian corporation may be considered to be a CFC of a US tax person, even if the US tax person owns no voting shares of the Canadian corporation. In addition, a US tax person may be treated as owning shares of a CFC, even if that individual owns less than 10 percent of the shares of the Canadian corporation directly, because shares that are held by certain non-US family members may be attributed to the US tax person in some cases.

A Canadian corporation will be classified as a PFIC if it is considered to earn

* This article is based on a presentation given by the authors at the STEP Canada 24th National Conference on June 16, 2022, also entitled "Cross-Border Tax Issues and How to Solve Them." The authors wish to thank Jesse Boretsky of Davies Ward Phillips & Vineberg LLP for his assistance in the preparation of this article.

1 Passive income is included under the subpart F rules of the *Internal Revenue Code*. Business income is included under the global intangible low-taxed income (GILTI) rules, which were introduced by the US *Tax Cuts and Jobs Act* of 2017. The income inclusions are subject to certain "high-tax kick-out rules."

at least 75 percent of its gross income from passive activities or if at least 50 percent of its assets produce passive income. Unfavourable US throwback rules and interest charges apply on most distributions from the Canadian corporation to the family trust and on the trust's disposition of the shares of the Canadian corporation.

One way to avoid the application of the CFC and PFIC rules is to continue the Canadian corporation under the laws of a province with "unlimited liability company" (ULC) legislation before completing the freeze.[2] A corporate continuance is a non-taxable event in Canada, and because a ULC is not considered to be a corporation for US tax purposes, it cannot be considered a CFC or PFIC. Further, conversion to a ULC is treated as a liquidation for US tax purposes, so the basis in the underlying assets can be stepped up for US tax purposes.

The disadvantage of the ULC approach is that the flowthrough treatment of the ULC for US tax purposes requires the annual distribution of income from both the ULC and the upper-tier trust in order to avoid the US trust "throwback" rules. These rules, which discourage the accumulation of income and capital gains in foreign trusts, levy an interest charge on undistributed income of a non-US non-grantor trust when it is distributed to a US tax person in a subsequent year, thus minimizing the overall benefit of the freeze.

Foreign Grantor Trust

An alternative approach involves the use of a Canadian trust that qualifies as a foreign "grantor trust" for US tax purposes as part of the freeze. A grantor trust is a trust in which the individual settling the trust (the "grantor") retains control over the trust's income and assets, typically by designating the grantor or the grantor's spouse as the sole beneficiary of the trust during the grantor's lifetime. For US tax purposes, the grantor is deemed to have never relinquished ownership of the trust property. As a result, all of the trust's income will be attributed to the grantor. Where the grantor is not a US tax person and the trust owns non-US assets, such attribution has no US tax consequences.

Where the grantor is not a US tax person, structuring the trust as a grantor trust under US tax law requires that either (1) the only persons to whom amounts can be distributed from the trust during the lifetime of the grantor are the grantor or the grantor's spouse; or (2) the grantor is able to revest the property transferred to the trust pursuant to a power that is exercisable solely by the grantor, without the approval or consent of any other person. Generally, the latter approach will be preferable in a cross-border freeze because it will allow a broad range of beneficiaries to share in income while maintaining grantor trust status.

The principal benefit of using a grantor trust as part of the freeze is that no US tax persons will be regarded as having any direct or indirect ownership interest in the underlying Canadian corporation. Accordingly, grantor trust status avoids the need to determine whether the Canadian corporation is a CFC or PFIC. At the same time, grantor trust status ensures that no income from the Canadian corporation can be imputed to the beneficiaries of the trust who are US tax persons, thereby avoiding the associated US tax payment and filing obligations.

Subsection 75(2) Attribution Rule

From a Canadian tax perspective, the grantor of a grantor trust will not be subject to tax on the trust income as long as the trust falls outside the parameters of subsection 75(2) of the *Income Tax Act* (Canada).[3] If subsection 75(2) does apply, property income (including capital gains) is allocated

2 Alberta, British Columbia, and Nova Scotia permit the incorporation of ULCs.
3 RSC 1985, c. 1 (5th Supp.), as amended.

back to the grantor, and there will be no tax-deferred rollout on a subsequent capital distribution of trust property to the trust's Canadian-resident beneficiaries.

In order to both meet the requirements of grantor status in the United States and avoid the application of subsection 75(2), care must be taken in designating appropriate family members as trustees of the trust with the power to make decisions with respect to distributions or dispositions of trust property by majority rule. Accordingly, the selection of the initial trustees, as well as any replacement trustees, is crucial to ensuring that these conditions are satisfied throughout the lifetime of the grantor.

21-Year-Rule Planning

Under Canadian tax rules, a deemed disposition of all of a trust's property occurs on the 21st anniversary of the settlement of the trust. Assets of a trust (with limited exceptions) cannot be rolled out on a tax-deferred basis to non-residents of Canada. Therefore, using a grantor trust structure in a cross-border freeze requires appropriate discussion of what should be done before and after the trust's 21st anniversary to address the tax consequences arising from the deemed disposition.

Other Cross-Border Estate-Planning Steps

Implementation of a cross-border estate freeze should also prompt Canadian individuals and their advisers to consider other aspects of their estate planning in order to make appropriate provision for heirs who are US tax persons.

US Citizen Spouse

Where a US citizen spouse is involved, it may be possible to structure a spousal trust to comply with both the Canadian and US tax rules and to achieve cross-border income and estate tax benefits. For this purpose, a Canadian trust that qualifies as both a spousal trust for Canadian tax purposes and a "bypass trust" for US tax purposes may be used. No Canadian capital gains will be triggered on the death of the Canadian individual, and no US estate tax will be triggered on the subsequent death of the US citizen spouse. The powers granted to the US citizen spouse as a trustee of the spousal trust will need to be limited so that the spousal trust will qualify as a bypass trust. Typically, this means the US citizen spouse trustee's distribution authority must be limited to an "ascertainable standard," such as distributions for health, education, maintenance, or support.

ULC Planning

A Canadian individual who holds US-situs assets other than US real estate or a US active business, such as US marketable securities, through a Canadian corporation can protect against US estate tax. For US estate tax purposes, the Canadian individual is treated as owning the Canadian corporation's shares, which are not subject to US estate tax because the corporation is not located in the United States. However, without additional planning, this structure can cause US heirs to inherit shares of a CFC or PFIC.

One way to avoid this result is to integrate ULC planning into the structure. Common ULC planning involves continuing the Canadian corporation as a ULC during the Canadian individual's lifetime and forming two new ULCs to hold 50 percent of the shares of the continued ULC, with each ULC electing or "checking the box" to be treated as a foreign corporation for US tax purposes. On the death of the Canadian individual, the elections are reversed such that the lower-tier continued ULC is unchecked effective the day before death and the upper-tier ULCs are unchecked the day after death. Each unchecked election is a deemed sale of the ULC assets for US income tax purposes. Because the lower-tier continued ULC is a non-US tax person, the deemed sale is non-taxable in the United States, and therefore the US assets receive a tax base step-up without incurring a US tax liability. The subsequent unchecked elections terminate any CFC or PFIC status of the upper-tier ULCs while triggering only one day's worth of accumulated gains, if any. Thus, the Canadian individual avoids US estate tax, and the US tax person heir receives non-CFC or non-PFIC shares in the ULC while triggering minimal US tax liability.

Will Planning: Allocations and Equalization Payments

No adverse US gift or estate tax consequences arise from bequests to US tax persons. Accordingly, it is sometimes preferable to implement traditional non-will Canadian estate-planning measures for the benefit of Canadian family members, and to thereafter provide in the will for corresponding bequests to US tax persons as equalization payments, in order to reflect benefits obtained under the overall estate plan by Canadian family members. The will should also provide that any capital dividends (such as those arising on the receipt of insurance proceeds) are to be allocated to the share of the estate bequeathed to Canadian-resident family members, because an allocation to a non-resident will be subject to withholding tax.

IN THE HEADLINES

RECTIFICATION UNDER BC'S WESA: CONSIDERING THE WILL-MAKER'S INTENTION

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Section 59 of British Columbia's *Wills, Estates and Succession Act*, SBC 2009, c. 13 (WESA) allows the court to rectify a will if it determines that the will fails to carry out the will-maker's intentions because of an error arising from an accidental slip or omission, a misunderstanding of the will-maker's instructions, or a failure to carry out the will-maker's instructions. Central to an application for rectification, therefore, is the need to provide evidence of the will-maker's intention with respect to the relevant provisions of the will. In the recent BC Court of Appeal decision in *Simpson v. Zaste* (2022 BCCA 208), the court considered this issue.

The deceased, Mr. Simpson, was survived by his wife, Ms. Zaste, and his two adult children from a prior relationship. At the time of his death, the deceased owned 50 percent of the shares of a private company. His will directed that those shares be transferred to his two children, and the balance of his estate was left to his wife.

However, the shares were subject to a shareholders' agreement that required that they be sold to the surviving shareholder on the death of the deceased at a price equal to the fair market value of those shares, less any proceeds payable under the life insurance policies that the agreement required each shareholder to obtain. Mr. Simpson's life insurance policy named Ms. Zaste as his designated beneficiary.

As a result, the gift of shares under the will could not be completed, because the estate was bound by the shareholders' agreement and was required to sell the shares to the surviving shareholder. The children, therefore, received nothing under the will, and Ms. Zaste received both the insurance policy proceeds and the modest share purchase price payable to the estate by the surviving shareholder under the agreement's buyout clause. The lower court found that it was the deceased's intention for his children to receive the fair market value attributable to those shares and rectified the will accordingly.

The Court of Appeal in *Simpson* restated the general principles of rectification set out by the Supreme Court of Canada in its decision in *Fairmont Hotels* (2016 SCC 56) within the context of section 59 of WESA: "rectification aligns the will with what the will-maker intended to do, and not what, with the benefit of hindsight, the will-maker *should have* intended to do" (at paragraph 99; emphasis in original). The court's job is to determine whether the evidence establishes true intention.

british columbia

> It is imperative not only to question the facts of a client's situation (such as reviewing the terms of an applicable share-holders' agreement), but also to question and document the client's intentions in making gifts of specific assets.

The Court of Appeal found that the lower court judge committed a palpable and overriding error of fact when considering the deceased's intentions. In concluding that if the deceased wanted his children to have the shares, he must have wanted them to have the fair market value equivalent of those shares, the judge "allowed his reasoning to outpace the evidence" (at paragraph 102). In other words, the Court of Appeal explained, the lower court judge based his decision on what he thought the will-maker should have intended to do, and not on actual evidence of intention.

The evidence showed that the deceased was aware of the buyout clause and how the buyout would be structured. If the deceased's intention was for his children to inherit the shares, the court reasoned, they would have been required to sell the shares to the surviving shareholder at fair market value less the insurance proceeds and would not have received full fair market value under the terms of the shareholders' agreement.

The Court of Appeal allowed the appeal and set aside the lower court's order for rectification. It then directed that the will be rectified to provide that the deceased's children were entitled to the amount payable under the buyout clause if the shares were transferred to the surviving shareholder under the terms of the shareholders' agreement (which amount netted off the value of the life insurance policy).

This case is an instructive reminder to estate planners and other advisers that a client's circumstances are rarely as simple as they seem. It is imperative not only to question the facts of a client's situation (such as reviewing the terms of an applicable shareholders' agreement), but also to question and document the client's intentions in making gifts of specific assets. Discussion with the client as to his or her ultimate intentions will most likely lead to a more clearly drafted will and less likelihood of dispute in the future.

ALBERTA'S NEW TRUSTEE ACT

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Alberta's Bill 12, a new *Trustee Act*, SA 2022, c. T-8.1, received royal assent in the legislature on April 29, 2022. By Order in Council signed September 27, 2022, the new act will come into force on **February 1, 2023**. Once in force, it will apply to all trusts, including trusts created before the legislation comes into force (subject to specific exceptions).

The new act is the result of substantial research and consultation. In 2012, the Uniform Law Conference of Canada adopted the Uniform Trustee Act (UTA). In November 2015, the Alberta Law Reform Institute (ALRI) issued *Report for Discussion 28*. In January 2017, ALRI issued *Final Report 109* with recommendations to adopt the UTA with some provisions modified and some existing provisions continued to reflect best trust practices in Alberta.

Highlights of the New Act

- The trust instrument prevails, with specific exceptions expressly set out in the legislation (section 3).
- A temporary trustee may be appointed when a trustee is absent or incapacitated (section 11).
- A trustee may appoint an attorney by power of attorney to act in the trustee's place. However, an enduring power of attorney cannot be used when a trustee is incapacitated (section 14).
- An unfit trustee may be removed by the other trustees (section 21).
- A duty of care applies in administering a trust that requires a trustee to act in good faith and in accordance with the terms of the trust, the best interests of the objects of the trust, and the act (section 27(1)).
- In the performance of a duty or the exercise of a power, a trustee must exercise the care, diligence, and skill that a person of ordinary prudence would exercise in dealing with the property of another. However, a professional trustee must exercise a greater degree of skill (sections 27(2) and (3)).
- A conflict of interest is defined, and a process allows a trustee to act in certain ways despite a conflict (section 28).
- A trustee has a duty to report to and communicate with qualified beneficiaries (section 29).
- In investing trust property, a trustee must exercise the care, diligence, and skill that a prudent investor

would exercise. However, a professional trustee who possesses skills relevant to the investment of trust property must exercise a greater degree of skill in investing trust property (section 35).

- If there are more than two trustees, the trustees may act by majority for those trusts established after the new legislation comes into force. For trusts established before the new legislation comes into force, the trustees may agree to have the majority rule apply if it is consistent with the terms of the trust (section 60).
- A person is entitled to fair and reasonable compensation for services provided as a trustee (section 69).
- Non-charitable purpose trusts are validated and regulated (section 77).
- In determining the settlor's intention, the court may admit extrinsic evidence (section 89).

Provisions Continuing from the Existing Act

- Trust property that vests in more than one trustee will vest in the trustees as joint tenants (section 25).
- If a trustee lacks the power to make a transfer of trust property, the court may grant the necessary power to the trustee where the court is satisfied that it would be expedient and in the best interests of the objects of the trust (section 32).
- A trustee must invest trust funds prudently with a view to obtaining a reasonable return while avoiding undue risk (section 33).
- A trustee will not be liable for a loss if the overall investment strategy is prudent (section 36).
- A trustee may pay income to a minor or adult beneficiary for their maintenance, education, benefit, or advancement in life (section 47).
- A trustee may appoint an agent, but the trustee must personally select the agent, be satisfied of the agent's suitability, and establish the terms of the agent's authority (section 51).
- Court approval will be required for a proposed variation of a trust not provided for in the trust instrument (section 67).
- A trustee may apply to the court for directions (section 82).
- A trustee may be relieved of liability for breach of trust (section 84).
- A trustee may pay or deposit trust money or trust securities into court (section 87).

SALE OF REAL PROPERTY FROM AN ESTATE: SASKATCHEWAN CASE LAW UPDATE

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Saskatchewan advisers who assist personal representatives with the administration of estates should be aware of two recent court decisions that provide guidance on when beneficiary consent is required prior to the sale of real property in an estate.

Section 50.5 of The Administration of Estates Act

The relevant provisions of *The Administration of Estates Act* (Saskatchewan), SS 1998, c. A-4.1 (AEA) are as follows:

- 50.5(1) The executor or administrator shall not sell real property for the sole purpose of distributing the estate among the persons beneficially entitled to it unless those persons concur in the sale.
- (2) Subject to subsections (4) to (6), any sale of real property in contravention of subsection (1) is invalid with respect to any person beneficially interested who did not concur in the sale.
- (3) If an adult beneficiary accepts a share of the purchase money from a sale of real property for the sole purpose of distributing the estate, knowing it to be such, the adult beneficiary is deemed to have concurred in the sale.

Alternatively, where consent is not obtained, section 50.5(4) of the AEA allows for an executor/administrator to apply to court for an order approving the sale of real property in certain circumstances.

Recent Case Law

Two recent decisions of the Saskatchewan courts considered the application of section 50.5 of the AEA: *Choquette v. Viczko* (2021 SKQB 167; application to extend time to appeal denied, 2022 SKCA 11) and *McCabe v. Kowalyshyn* (2022 SKCA 56; aff'g 2021 SKQB 144).

In *Choquette*, the deceased named her daughter as executor and trustee and expressly included in her will a power to sell property. The will also explicitly stated that the property was given to the trustee to sell for the benefit of the beneficiaries. The property was appraised and sold for the appraised value. The net proceeds of sale were divided among the beneficiaries. However, after the land was sold and the proceeds were divided, one of the beneficiaries objected to the sale and claimed that it was invalid because her consent was not obtained pursuant to section 50.5 of the AEA.

The Court of Queen's Bench found that section 50.5 of the AEA applied only to a person's beneficial entitlement to the real property itself, and not to the proceeds or a share of the proceeds of sale of the property. Because the beneficiary in question was entitled only to a portion of the proceeds of sale, her consent was not required for the sale to be valid. In addition, because there was an express direction from the testator to sell the land, the executor did not have to rely on legislation to have a valid land sale. The executor had full authority and discretion to complete the land sale subject only to the legal principles governing the conduct of an executor/trustee.

In *McCabe*, the deceased left a life interest in eight quarters of farmland to his wife, with a remainder interest to their 12 adult children (to be divided equally). Before the death of the deceased's wife, the land had been leased to two of the beneficiaries. After the death of the wife, discussions ensued as to how the land could be shared equally.

The parties sought direction from the court, and it was decided that the estate would sell the land to the highest bidder among the beneficiaries, on certain terms and conditions. Any sale would be subject to beneficiary consent or the approval of the court. The bidding occurred, and the executor agreed to sell the land to one of the beneficiaries (who bid $1,325,000). The winning bid was less than the fair market value of the land. A disgruntled beneficiary challenged the sale. The court affirmed the sale at $1,325,000 and stated that the application of section 50.5 of the AEA is inherently discretionary, and while prior cases may be a helpful guide, they are not determinative. In addition, although it is the executor's duty to "try to get the best price possible," a sale at fair market value is not required.

Concluding Thoughts

The *Choquette* and *McCabe* decisions provide some helpful guidance to executors who are trying to determine whether consent is required prior to a sale of property from the estate.

It is clear that the requirement for beneficiary consent (or court approval) applies only when a person has a beneficial entitlement to the property itself, and not just an entitlement to the proceeds of sale. Therefore, if the will in question contains an express direction to sell and split the net proceeds, section 50.5 of the AEA does not apply.

Where the will provides no express direction to sell (and where the will indicates that the property itself should be divided among the beneficiaries), consent to a sale is required, either by the beneficiaries or by the court. The executor must consider whether the sale is "in the interest and to the advantage of the estate of the deceased" and its beneficiaries, in accordance with section 50.5(5) of the AEA. This does not necessarily mean that the executor has to sell to the highest bidder or get fair market value for the property.

Aside from the matter of whether beneficiary consent is required under section 50.5 of the AEA, the executor should exercise prudence when contemplating a sale of land owned by an estate, and should consider the following:

- Some form of appraisal for the land should be obtained, in order to provide a benchmark for an appropriate value.
- There should be an agreed-upon format for bidding. It can be done either by way of public auction or privately among the beneficiaries. If the bidding is private, consider having all beneficiaries sign off on the process and/or obtain court approval for the process.
- When a bid is chosen, the executor should have a clear basis for deciding why the winning bid was the most attractive. As the court in *McCabe* indicated, the winning bid does not have to be the highest one.

It is clear that the requirement for beneficiary consent (or court approval) applies only when a person has a beneficial entitlement to the property itself, and not just an entitlement to the proceeds of sale. Therefore, if the will in question contains an express direction to sell and split the net proceeds, section 50.5 of the AEA does not apply.

MANITOBA'S PARENTS' MAINTENANCE ACT: UPDATING AN OUTDATED LAW

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We are all familiar with the obligation to support a child, but the less common support obligation of parental maintenance has been brought to the spotlight in Manitoba. The province's *Parents' Maintenance Act*, CCSM c. P10 (PMA), having remained untouched for 89 years, is undergoing a review by the Manitoba Law Reform Commission.

Under the current PMA, where a parent is unable to support themselves and their child has sufficient means to provide for the parent, taking into account the circumstances of that particular child and parent, the court may order parental support. One might consider it reverse child support.

In June 2022, the commission released a consultation paper focused on whether the existing PMA should be updated or repealed. The PMA has been historically underutilized, with only three documented applications in its history. That is not shocking, given that the PMA limits support orders to $20 per week per child. Effectively, the maximum annual support that a parent could receive from a child under the outdated law is $1,040.

Parental support laws exist in all Canadian provinces and territories with the exception of British Columbia, Alberta, and Saskatchewan. Manitoba's parental support laws were enacted in 1933 and have essentially remained unchanged since that time. The laws were implemented across the country following the First World War in response to economic recession.

Some provinces have chosen to eliminate parental support laws. Most recently, in 2018, Saskatchewan repealed its *Parents' Maintenance Act* because it had become outdated and obsolete. Alberta dropped parental support provisions in 2003 when the *Maintenance Order Act* was replaced by the *Family Law Act*. Reportedly, the view in Alberta was that parental support laws were inconsistent with the goal of encouraging financial independence of disabled older adults. Similarly, in 2011, British Columbia dropped its parental support provisions when the *Family Relations Act* was replaced by the *Family Law Act*. In British Columbia, support orders were rarely sought and, when obtained, were still insufficient to meet the financial needs of parents. The financial cost of support orders and the impact of applications on the relationship between parent and child were also cited as factors in the decision to repeal the provisions. Existing government programs, including the Canada Pension Plan, old age security, and subsidized housing, were viewed as more effective in addressing poverty among seniors.

> We are all familiar with the obligation to support a child, but the less common support obligation of parental maintenance has been brought to the spotlight in Manitoba.

Proponents of the revision of parental support laws in Manitoba anticipate savings in other government programs supporting low-income parents. Proponents do not suggest that parental support will extinguish poverty among dependent parents, but view it as an additional support tool. Proponents also suggest that parental support laws can strengthen solidarity among family members who do not voluntarily respond to the needs of a distressed parent. The implementation and publicity of these laws could impart a moral obligation in children where that obligation is not felt naturally.

Opponents of parental support laws argue that the adversarial nature of support claims will not foster healthy long-term relationships between parents and children. Children contributing financial support may withdraw or reduce other caregiving services that they would otherwise provide to their parent. Greater financial strain on child caregivers may also lead to more instances of elder abuse where children are balancing caregiving roles for multiple family members. The division of limited assets within an individual family also perpetuates financial strain among generations of the family and may hit certain demographics harder than others.

Parents are further expected to face a number of barriers to accessing support. Under the PMA, a parent entitled to support may be dependent by reason of age, disease, infirmity, or if the parent is unable to maintain themself without assistance. A parent who fits that category would be expected to struggle with navigating the court system in the manner required to obtain a support order. Parents making an application also presumably lack the financial resources to hire a lawyer. If revisions to the law are made, an expansion of other services such as legal aid will be required to enable parents to enforce their support rights. This stream of support is also not particularly reliable. Enforcement of support orders will be an issue, as it is for child or spousal support.

If parental support laws are to be continued in Manitoba, issues for consideration include how "child" and "parent" should be defined under the PMA; clarification as to whether "maintenance" of a parent means meeting basic needs or something more; whether past conduct of a parent should be considered; whether the court should have a power to override support agreements between parents and children; and whether complete discretion should be given to the court to quantify support, or if the support should be set by regulation, similar to child support guidelines.

With Canadians living longer and our elderly population being one of the fastest-growing age groups in Canada, the poverty rate of low-income seniors is expected to rise. Whether parental support laws are a part of Manitoba's future will hopefully become clearer with the release of the commission's final report on *The Parents' Maintenance Act*.

RRSP/RRIF TRUST AND BENEFICIARY DESIGNATION

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The recent Ontario Superior Court decision in *Hayduk v. Gudz*[1] may be of interest to estate advisers because it deals with a beneficiary designation of a registered account—a registered retirement income fund (RRIF) or a registered retirement savings plan (RRSP). Advisers understand that one may execute a beneficiary designation, either as a separate document or in a will, by directing the transfer of the balance of the registered account to a trustee, who must then administer the funds for the benefit of someone else. Executing a beneficiary designation in this way essentially establishes a RRSP/RRIF trust.

One of the issues facing the court in *Hayduk v. Gudz* was whether the beneficiary designation in the testator's 2012 will was valid. The will did not explicitly revoke the previous beneficiary designation, made in 2008 by letter from the testator to the bank that held the registered account. The court ultimately applied section 52(2) of Ontario's *Succession Law Reform Act*[2] and held that the beneficiary designation in the will *automatically* revoked the previous designation to the extent of any inconsistency.

The beneficiary designation in the will also incorrectly identified the RRIF by citing the wrong account number and institution. The court therefore also considered legal principles that require a court to try to give effect to gifts in a will; to correct a misdescription in a will if doing so provides sufficient certainty of subject and object; and if section 51(2) of the SLRA applies to give effect to a designation in a will where the designation relates expressly to a plan either generally or specifically. In reviewing these principles and the SLRA, the court further declared that the proceeds of the RRIF were to be transferred into a testamentary trust for the sole benefit of the named beneficiary in the will for her lifetime.

This decision serves as a cautionary reminder to will drafters that beneficiary designations must comply with the statutory criteria established in the SLRA. Further, establishing an RRSP/RRIF trust requires the testator to execute a designation appointing and designating someone in his or her capacity as trustee to receive the funds (and administer the funds in accordance with the associated fiduciary duties). Doing so would establish a RRSP/RRIF testamentary trust as in *Hayduk v. Gudz*.

When Tax and Estate Collide

The decision in *Hayduk v. Gudz* permitting the transfer of RRSP/RRIF proceeds into a testamentary trust is consistent with the Canada Revenue Agency's (CRA's) position that a testamentary trust may be funded from the proceeds of an RRSP/RRIF available on the death of an individual by way of a beneficiary designation appointing the trustees of the trust, as long as specific criteria are met.[3] One criterion is that the beneficiary designation must qualify as such under provincial statute—which, in Ontario, is the SLRA. Unfortunately, the SLRA lacks the precision of, for example, section 192 of Ontario's *Insurance Act*.[4] The fact that the court in *Hayduk v. Gudz* confirmed the validity of the instructions supports the contention that separate testamentary RRSP/RRIF trusts may be established under the SLRA. If that is in fact the case, RRSP/RRIF trusts could offer an alternative estate-planning strategy to estate practitioners.

1 2022 ONSC 2249.
2 RSO 1990, c. S.26 (SLRA).
3 CRA document no. 2002-0143685,January 29, 2003.
4 RSO 1990, c. I.8.

In the context of estate planning for a blended family, an RRSP/RRIF testamentary spousal trust[5] could be considered as an alternative strategy of providing for the surviving spouse, by ensuring that on the death of the surviving spouse, any remaining funds could be distributed to specific individuals, such as the children of the testator. Such a trust could be set up separately from the residue of the estate, thus providing an opportunity to diversify the assets available to the surviving spouse while avoiding probate taxes.[6]

Miscellaneous Outstanding issues

One may wonder whether a beneficiary designation would apply only to a plan that is in existence at the time the will is signed.[7] If a testator, when drafting a will, refers to an RRSP, but subsequently converts the RRSP to a RRIF without updating the reference in the will, could *Hayduk v. Gudz* be relied upon to establish intent and overcome the fact that the RRIF was not in existence when the will was signed? Obviously, clients should be advised to revisit their wills when RRSPs are converted into RRIFs, but *Hayduk v. Gudz* may be worth reviewing to see if the argument may be of assistance.

Finally, would a properly constituted RRSP/RRIF trust avoid probate fees, as an insurance trust does? If the beneficiary designation establishes a self-contained trust, if the clause occurs before the vesting language in the will, and if the drafting unequivocally states the RRSP/RRIF proceeds are not to form part of the residue of the estate, an argument may be made that the RRSP/RRIF trust may avoid probate. Essentially, if the RRSP/RRIF benefits never fall into the control of the executor, the convention is to not include their value in the calculation of the probate fees. *Hayduk v. Gudz* may offer an opportunity to revisit this probate-saving strategy.

SIGNIFICANT CHANGES TO QUEBEC'S CHARTER OF THE FRENCH LANGUAGE COULD IMPACT ESTATES AND TRUSTS

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Quebec's Bill 96, adopted by the National Assembly in May 2022 and given royal assent on June 1, 2022, brings significant amendments to the *Charter of the French Language*.[8] One of the main purposes of the bill is to "affirm that the only official language of Quebec is French" by strengthening French-language requirements in numerous public and private institutions.[9] Some of these changes will have impacts on trust and estate planning and administration in Quebec, including new French-language requirements for judicial proceedings, dealings with tax authorities, and real estate contracts.

Before the adoption of Bill 96, a legal person could file legal proceedings in either French or English. Now, English pleadings must be accompanied by a certified French translation at the party's expense.[10] Also, a party seeking the recognition or the enforcement of foreign judgments and arbitration awards will have to file certified French translations.[11] These new language requirements apply only to legal persons, as distinct from natural persons or other entities. Interestingly, Bill 96's distinction between legal and natural persons means that many of the enhanced language requirements, including French pleading requirements, will not apply to trusts[12] or estates,[13] because they fall under neither category. Nonetheless, legal persons such as corporate entities will now face the added burden of engaging a certified translator, which adds costs and delays to an already slow and expensive system. A certified translator will also be required where a corporate trustee is a party to a proceeding in that capacity. Of note, on August 12, 2022 the Quebec Superior Court temporarily suspended these requirements, which were due to come into force on September 1, 2022. The suspension is pending a determination on the merits of the constitutionality of the requirements, which is being challenged.[14]

5 Such spousal trust does not have to qualify as a spousal trust for tax purposes.
6 Note that any income tax payable on death associated with the RRSP/RRIF proceeds would be borne by the residuary beneficiaries unless the testamentary trust provides that the trust is pay the income tax.
7 See part III of the SLRA.
8 *An Act respecting French, the official and common language of Québec*, SQ 2022, c. 14 ("Bill 96"); *Charter of the French Language*, CQLR c. C-11 ("the Charter").
9 Preamble to Bill 96.
10 Section 5 of Bill 96, which amends section 9 of the Charter. See also section 119 of Bill 96, which creates section 208.6 of the Charter.
11 Sections 144 and 145 of Bill 96, which amend articles 508 and 652 of the *Code of Civil Procedure*, CQLR c. C-25.01.
12 Marc Guénette, *Les différentes formes d'entreprises au Canada* (Cowansville, QC: Yvon Blais, 2015), c. 4, at para 4.1.
13 Germain Brière, *Les successions* (Cowansville, QC : Yvon Blais, 1994), Introduction, at para 1
14 *Mitchell c. Procureur général du Québec*, 2022 QCCS 2983.

There will also be new language requirements for judges and judgments. Provincially appointed judges will no longer need to be proficient in a language other than French,[15] which may force parties to plead their case in French if they are faced with a unilingual French-speaking judge. Since many trust and estate matters are heard before provincial courts, this may amount to a considerable burden for English parties to a Quebec dispute. Although pleadings can continue to be made in English and French, unless a corporate party is involved,[16] final court rulings must be accompanied by a French translation,[17] which may lead to further delays while decisions undergo official translation.

Bill 96 also requires greater use of French for the civil administration in Quebec, including Revenu Québec. Revenu Québec's previous language policy was to "give French a prominent place when drafting and publishing texts and documents,"[18] even though it was under no obligation to communicate in French with taxpayers whose establishment is outside Quebec. The previous policy also required the use of French in communications and documents only from Quebec-based legal persons.[19] Under Bill 96, Revenu Québec will have to "use the French language ... in an exemplary manner," including the exclusive use of French in many more of its activities.[20] The exceptions, as outlined in the Charter, are limited to providing services to those eligible to receive English education, providing services to immigrants during the first six months following their arrival in Quebec, and providing services and maintaining relations outside Quebec.[21] Many of the impacts that Bill 96 will have on Revenu Québec's use of French will not be known until its language policy is updated. However, taxpayers should expect that the agency's use of English will be more limited.

Before the adoption of Bill 96, a legal person could file legal proceedings in either French or English. Now, English pleadings must be accompanied by a certified French translation at the party's expense.

Bill 96 also requires that contracts and agreements with the civil administration in Quebec now be written exclusively in French.[22] For taxpayers, the practical effect of this requirement is that agreements related to ongoing tax litigation will have to be in French. Even where a party falls under one of the exceptions for communications with Revenu Québec outlined above, the final agreement must be in French.

With respect to real estate dealings in Quebec, Bill 96 requires that all filings with the land register and the register of personal and movable real rights be made in French,[23] including all declarations of co-ownership and amendments.[24] This obligation applies to both legal and natural persons, although there is an exception for amendments to existing land registrations that were effected in a language other than French prior to Bill 96.[25] Further, contracts of sale or exchange involving certain residential immovables held in co-ownership (as well as related offers for sale and disclosure memorandums) must be drafted in French, unless the parties expressly wish to use another language.[26] Even so, a French version must be provided to the Land Registry, which will require translation if the original was written only in English.[27]

While ongoing legal challenges may reduce Bill 96's scope, which scope may also be clarified and circumscribed by implementing regulations that should be adopted after the next provincial election in October, it is safe to say that Bill 96 will result in increased requirements regarding the use of French generally in the administration of trusts and estate planning in Quebec.

15 Section 5 of Bill 96, which amends section 12 of the Charter.
16 Section 133 of the *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3; section 7(4) of the Charter.
17 Section 5 of Bill 96, which amends section 10 of the Charter.
18 https://www.revenuquebec.ca/en/policies-and-instructions/language-policy/.
19 Ibid.
20 Section 6 of Bill 96, which amends section 13.1 of the Charter.
21 Section 15 of Bill 96, which creates section 22.3 of the Charter.
22 Section 14 of Bill 96, which adds to the existing requirements under section 21 of the Charter.
23 Sections 129 and 130 of Bill 96, which amend articles 2984 and 3006 of the *Civil Code of Québec*, CQLR c. CCQ-1991.
24 Sections 127 and 128 of Bill 96, which amends article 1060 and creates article 1070.1.1 of the *Civil Code of Québec*.
25 Section 212 of Bill 96.
26 Section 46 of Bill 96, which creates section 55.1 of the Charter.
27 Sections 129 and 130 of Bill 96, which amend articles 2984 and 3006 of the *Civil Code of Québec*.

RECENT AMENDMENTS TO NOVA SCOTIA'S POWERS OF ATTORNEY ACT

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Recent amendments to Nova Scotia's outdated *Powers of Attorney Act*, effective as of July 7, 2022 ("the amended PAA"), bring significant changes to the preparation and use of powers of attorney in Nova Scotia. The amendments show a commitment by the province to increasing protection for incapacitated individuals and addressing issues of financial abuse, as well as modernizing key aspects of the legislation. Consequently, the preparation of powers of attorney in Nova Scotia is now a more complex endeavour than it was before. This article summarizes the key changes made in the amended PAA.

Execution Requirements

Section 3 of the amended PAA now requires that every power of attorney be executed by the maker of the power of attorney ("the donor") in the presence of two independent witnesses, who (1) must be 19 years or older, (2) must both be present at the time the donor signs the document, and (3) cannot be the attorney or the spouse, registered domestic partner, common-law partner, or child of the attorney.

Springing Powers

The amendments codify the common-law approach previously employed in Nova Scotia with respect to "springing powers of attorney," which come into effect only upon the donor's incapacity.

Section 8(5) of the amended PAA provides that the attorney's authority may be exercised only once it is determined that the donor lacks capacity with respect to property and financial affairs. Section 8(3) of the amended PAA provides that, in addition to a medical practitioner, the donor may name a specific individual, including the attorney, to determine that the donor lacks capacity.

Regulations drafted under the amended PAA have not been made available yet, but there may be more information to come regarding this role.

No Gifting

Section 11 of the amended PAA provides that, except as otherwise expressly provided in the power of attorney or as directed by the donor, an attorney may not effect gifts from the donor's estate. Even when directed or authorized to make such gifts, an attorney may not make a gift where it would compromise the estate's ability to fund the donor's needs.

Evaluation of Capacity

Section 2A of the amended PAA introduces a more robust capacity analysis than the common-law test that used to apply. In particular, at the time of execution, the donor must be able to understand and appreciate the type of property the donor owns and its approximate value, the legal obligations the donor owes to dependants, the attorney's role and the risks associated with appointing an attorney, and the donor's ability to revoke an attorney's appointment while the donor remains capable.

Under section 2B of the amended PAA, an attorney must now consult with a donor even after the donor has lost capacity (if it is reasonable to do so), in order to ascertain instructions prior to acting. If the donor is able to provide instructions, the attorney must follow the most recent relevant instructions from the donor, even if they are inconsistent with prior instructions.

Interested Persons

The former *Powers of Attorney Act* contemplated persons being interested in the estate of the donor, in broad terms, but did not provide a definition of such individuals or of their rights as against an attorney. Section 1A(g) of the amended PAA now establishes a definition for an "interested person." In contrast with recent case law in Nova Scotia, common-law couples are included, giving them standing to bring forward issues against an attorney or to seek direction from the court in connection with the power of attorney.

Accounts and the Role of the Monitor

In keeping with the trend toward broader accountability and oversight, attorneys have a duty, pursuant to section 12 of the amended PAA, to preserve and keep records regarding the donor's assets and liabilities and the attorney's transactions. Regulations (which will be forthcoming) may prescribe other information for which an attorney must keep records. The donor, interested persons, or the monitor (discussed below) can request that these records be presented at any time.

> An attorney who resigns must give either the donor, the monitor, the other attorneys, or the immediate family members notice of the resignation. If there is no individual available to receive such notice, it must be served by the attorney on the Nova Scotia Public Trustee.

A donor may now appoint a monitor in a power of attorney, pursuant to section 16 of the amended PAA. A monitor is an individual who is not the attorney, but who may visit and communicate with the donor, request records from the attorney, demand an accounting, and apply to the court for direction or any other application available under section 18(1) of the amended PAA. A monitor effectively acts as a supervisor of the attorney, and keeps the donor and any other co-attorneys informed of the conduct of one or more of the attorneys.

Presumption to Act Jointly and Majority Rules

Section 14 of the amended PAA provides that where the donor has appointed multiple attorneys under a power of attorney, the attorneys shall act jointly unless the document provides otherwise. If there are more than two attorneys, the decision of the majority is deemed to be the decision of all.

Notice of Acting, Revocation, and Variation

Under section 15 of the amended PAA, when an attorney begins to act, the attorney must give notice to the persons to whom notice is required to be given, pursuant to the terms of the power of attorney. If the document itself does not specify any such individuals, the attorney shall deliver notice to the immediate family members of the donor, as well as to any delegate appointed under a personal directive.

An attorney who resigns must give either the donor, the monitor, the other attorneys, or the immediate family members notice of the resignation. If there is no individual available to receive such notice, it must be served by the attorney on the Nova Scotia Public Trustee.

A new burden on donors is the requirement to provide notice to each attorney upon the variation or revocation of a power of attorney, whether or not that attorney had begun to act. Section 17(4) of the amended PAA provides that until such time as this notice is given to the attorneys and any other individual prescribed by the forthcoming regulations, the variation or revocation will not be effective.

Powers from Outside of Nova Scotia and Substantial Compliance

Under section 20 of the amended PAA, a power of attorney made outside Nova Scotia will be deemed to be valid in Nova Scotia if (1) a person gives another person authority under the document to act on the person's behalf in relation to matters of property and finances; and (2) the document is valid according to the law of the place where it was made. This is consistent with other provinces' legislative provisions, and formally acknowledges that powers of attorney made in other jurisdictions are, in fact, valid and usable in Nova Scotia.

Further, section 18(1)(b) of the amended PAA provides the court with the ability to confirm and validate an otherwise invalidly executed power of attorney. Doing so provides flexibility and does not require an attorney to conform strictly to the rigidity of the amended PAA, while bringing a non-conforming power of attorney under scrutiny by the court.

Finally, section 19 of the amended PAA provides that existing powers of attorney that do not conform to the strict formalities set out in the amended PAA, but that were validly made under the former *Powers of Attorney Act*, remain valid and effective under the amended PAA.

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COHORT D: January 31 & February 1, 2023 – start time 11:15 am ET
COHORT E: February 7 & 8, 2023 – start time 12:15 pm ET

Why attend: This original course has been designed for practitioners in law, accounting, financial planning, or insurance whose clients face cross-border estate-planning and US taxation issues. The curriculum will equip attendees with a thorough description and understanding of relevant law and planning strategies they need to serve their clients, and will enable them to identify these issues and implement the appropriate plan of action. Numerous practical examples, case studies, and strategies will be provided.

COURSE FOCUSES:

Overview of US Income, Gift, and Estate Taxes. This introductory session will include a discussion of who is a US citizen, which is not always obvious because of transmission requirements for US citizenship, as well as a discussion of "accidental Americans"—those who were born in the United States but who have no other ties to the country. This hour will include an overview of how these rules apply to US citizens and what constitutes US-situs property for Canadians. The application of the US-Canada treaty will also be incorporated.

Cross-Border Estate-Planning Design and Drafting. This session will cover the design of wills, inheritance trusts for US children of Canadian parents, and the appropriate selection of fiduciaries for estates. The hour will include case studies dealing with common scenarios, mixed marriage, and US children.

Trusts, Trusts, and More Trusts. This session will provide in-depth consideration of the use of foreign grantor and non-grantor trusts in cross-border estate planning. Discussion will cover the US accumulation distribution rules applicable to Canadian trusts, the US treatment of bare trusts, and life insurance trust planning.

Everyone's Worst Nightmare: The US Anti-Deferral Rules. This session will provide an overview of the controlled foreign corporation (CFC) and passive foreign investment company (PFIC) rules and trust ownership of these entities. Discussion will consider ways to avoid or minimize the impact of the US anti-deferral rules, including planning considerations and the potential use of a Canadian unlimited liability company (ULC) as an alternative to a Canadian corporation.

In-Depth Cross-Border Pre-Mortem and Post-Mortem Planning Involving Corporations and Trusts. The first hour of this session will focus on pre-mortem estate planning techniques such as the Canadian freeze transaction, 21-year deemed disposition planning, and the use of alter ego and joint partner trusts. The second hour will focus on post-mortem planning when a Canadian corporation is an asset of the estate, including US considerations in pipeline planning. Case studies will be presented to illustrate the application of these rules.

Comings & Goings. This session will focus on the US tax rules that must be considered when a Canadian resident is departing Canada and moving to the United States. Discussion will cover the potential use of pre-immigration trusts, as well as income tax benefits under the US-Canada treaty. The converse scenario—the expatriation of a long-term green card holder or US citizen—will also be discussed. The US income and estate tax implications of being a covered expatriate will be addressed, as will the current immigration procedures for US citizens renouncing their citizenship in Canada.

Canadians Who Winter in the United States. This session will cover the income tax, estate tax, and probate considerations when Canadians buy residential real property in the United States. Topics will include personal ownership of US real property and the use of US wills. Various structuring options, including the use of trusts and limited partnerships, will also be considered.

REGISTRATION OPENING SOON! Members $425 | Non-Members $575

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CHAIR'S MESSAGE

CHRIS IRELAND

Each year when the summer days start getting shorter, there is a feeling in the air of something new and fresh. Members of STEP Canada will see a lot of new activities and projects during the coming education season, through the formal education programs, the valuable and topical branch and chapter seminars that make up the regional bundles, a new two-day online cross-border course, the ongoing efforts of our technical committees, and the return of our in-person national conference in June 2023, when we will celebrate our 25th anniversary. These opportunities are created and built through the skill, aptitude, and dedication of so many volunteers at local, regional, national, and worldwide levels. Thank you to all who have contributed, delivering first-class offerings of education and networking to our members.

In early July, a few members of the executive committee attended the STEP Worldwide Global Congress in London, UK. The program was designed as a thought leadership forum, and this theme was delivered over several excellent sessions. The session topics included the metaverse and its impact on private business, modernization of the estate industry (which looked at different platforms that could be used in the future), and "Trusting Trusts—Keeping the Faith in a Hostile World." STEP Canada was proudly represented by five outstanding speakers: Cindy Radu, Sara Johnson, Margaret O'Sullivan, Kim Whaley, and Kathleen Cunningham.

Eight Canadian organizations have been 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. I look forward to reporting back after the event on December 13 in London.

On June 17, the Tax Technical Committee (TTC) sent a submission to the Department of Finance on section 84.1 of the *Income Tax Act*. The submission—STEP Canada's response to the consultation process announced in Budget 2022—expressed the TTC's views on how the rules in section 84.1 (including changes arising from the passage of Bill C-208) could be strengthened to protect the integrity of the tax system while permitting genuine intergenerational business transfers. In addition to the submission, the TTC prepared a background document for members who might be less familiar with the rules in section 84.1 and the events leading up to the consultation process. This was a worthwhile undertaking and proved to be an excellent resource for members.

Enthusiastic thanks are due to the 2022 conference committee, the speakers and moderators, our generous sponsors, and the 960 delegates who once again made our conference the best-attended STEP event in the world. The committee is always looking for ways to increase the value and experience of the conference for delegates, and this year it introduced some new twists to the program and delivery. Corina Weigl and Paul Taylor did an outstanding job as our conference hosts, and Michael Cadesky and Kim Moody delivered excellent post-round table commentary. Delegates were invited to attend regional in-person social events in 11 different cities across the country, and they were able to network with colleagues in local movie theatres while enjoying some popcorn. And because the conference broadcast was spread over three days instead of only two, we were able to add additional technical sessions to the program.

This issue of *STEP Inside* features four articles from some of the top-rated sessions of the 2022 conference. Double thanks to these contributing authors, who first prepared and presented excellent material for conference attendees and who have now put pen to paper for every member of STEP Canada.

Planning for the 2023 conference is already under way, and everyone is encouraged to mark the dates on your calendars: Monday and Tuesday, June 19 and 20, 2023. The conference planning committee, chaired by Corina Weigl, will take the next few months to fill out the lineup of technical sessions and expert speakers for delegates. Not only will this be our first in-person conference in four years, it will mark the 25th anniversary of STEP Canada.

As with each milestone anniversary, we are planning an 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.

Members are welcome to send ideas for conference sessions to jarmstrong@step.ca. All submissions will be considered by the committee. Similarly, everyone is welcome to send in questions for consideration for the 2023 CRA/STEP Canada Round Table to steproundtable-questions@step.ca. The deadline for submitting questions is early February 2023.

The 2022-23 branch/chapter bundles are off to a promising start—both delegate registration and sponsorship are strong. This year, as we transition back to in-person events, the bundles will provide a hybrid delivery for almost every local branch and chapter seminar in bundles of six. All bundles include the two national seminars, "Drafting the Inclusive Estate Plan for the Modern Canadian Family" that broadcast on September 21 but is still available on demand, and "Planning for Family Members with Disabilities" on January 19. Thanks are due to all the members who contributed to the development of 46 seminars across the country. It takes a lot of planning and time to design such dynamic and topical programs, and then to secure the presenters to execute the vision of the planning committees. All delegates who attend will benefit from these efforts.

Another new and fresh initiative is the delivery of a two-day online course, "Canada/US Cross-Border Estate Planning (2023)," to five cohorts of 80 delegates each, with two hours of live interaction between delegates and the subject-matter experts sprinkled into the program. This delivery model increases accessibility to more delegates from all regions of the country, without additional travel expenses. The course dates will fall from mid-January to early February, so watch for exact date and registration details in the coming weeks.

In addition, a conference planning committee for the fall 2024 Canada-US in-person conference has been established with representatives from the two countries. This event will invite delegates from both countries with cross-border practices to meet, learn, and network.

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.

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