JANUARY 2025 ■ VOLUME 24 NO. 1

STEP Inside

NEWSLETTER OF THE SOCIETY OF TRUST AND ESTATE PRACTITIONERS (**CANADA**)

STEP Inside

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STEP Inside is published three times a year by the Society of Trust and Estate Practitioners (Canada), an organization of individuals from the legal, accounting, corporate trust and related professions who are involved, at a specialist level, with the planning, creation, management of and accounting for trusts and estates, executorship administration and related taxes. STEP Canada has branches in the Atlantic region, Montreal, Ottawa, Toronto, Winnipeg, Edmonton, Calgary, and Vancouver; and three chapters in London and Southwestern Ontario, the Okanagan Valley, and Saskatchewan.

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ISSN: 14960737

Tying the Issues Together—Easier Said Than Done

The art of estate planning consists in navigating a client's assets and characteristics and tying all the issues together. This edition of *STEP Inside* reviews the intricacies of planning for the succession of a wide range of unique and unusual assets, including copyrights, trademarks, and patents; digital accounts, including loyalty and reward programs; collectibles, firearms, and ammunition; and artifacts and cultural items.

The complexities involved in the succession of these unique assets are such that advisors must pause and review the law and rules prior to counselling their clients. Clients rely on the expertise of their advisors to assist with the tax treatment of unique assets and their transfer to loved ones—but providing the necessary help is easier said than done. Asking the right questions at the discovery meeting is key. When dealing with unique assets, advisors need to review the specific rules and be proactive in delineating the requirements and options, and the risks and opportunities, in the succession of such assets, while simultaneously educating the testator and the executor about the need for a hands-on approach.

For entrepreneurs, their business may depend on their trademarks, copyrights, and patents. Estate planning involving these assets must be proactive, and may require educating the executor (and beneficiaries) about what is required to maintain the assets. The value of the business and the estate may literally depend on it. K. Thomas Grozinger and Holly LeValliant each discuss key considerations when planning the succession of unique assets.

Let's not forget how the advancement of science can also bring many challenges. The legislation in this field evolves quickly, so staying current is no easy task. How does one plan for bequests of human reproductive material as part of an estate? Even bringing up the topic at the discovery meeting may cause some unease. Carole Willes provides a glimpse of the issues that need to be considered by estate advisors.

Digital accounts are rapidly proliferating, yet digital legacies are bound by the "I agree" consent forms that must be signed in order to create the accounts. These agreements can present an array of roadblocks for advisors and clients. Contributors to this edition touch on several considerations that should be reviewed as part of an estate plan, and discuss how the executor and beneficiaries may access a client's digital legacy—if it can be accessed at all.

In many instances, planning for the succession of unique and unusual assets may require a family discussion, notably on the appointment of the appropriate executor and possible restrictions on the timing of disposition of the assets. Advisors also need to consider valuation issues and the related tax implications—a minefield for all involved.

Unique assets bring their share of challenges to drafting lawyers, executors, and even beneficiaries. As TEPs, we are relied upon to propose solutions that are seen as fair and reasonable in accordance with the client's specific circumstances.

We hope that this edition of *STEP Inside* provides readers with a sense not only of the range of clients' unique assets but also of the unique considerations they raise, as well as an idea of some solutions that can serve all parties.

Those Coveted Collectibles: Planning for and Administration of Unique Collectibles

K. THOMAS GROZINGER, CS, LLB, TEP
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We humans love to collect things. What starts out as a rock or seashell collection may evolve later in life to a collection of artifacts such as stamps, coins, artwork, comics, stuffed toy animals, antiques, wines, sports memorabilia, or gaming cards—the list goes on. What may come as a surprise is that some collections may have considerable value. For example:

- A Saskatchewan collector's trove of "16 sealed boxes of O-Pee-Chee's 1979-80 hockey card collection, amounting to more than 10,000 cards"—which could potentially include several copies of Wayne Gretzky's rookie card (one of which in mint condition sold for US$3.75 million in a 2021 auction)—was bought by a winning bidder from Thornhill, Ontario for more than Cdn$5 million.[1]
- A collection consisting primarily of coins and medals amassed by the late Lars Emil Bruun, a Danish butter merchant who died in 1923, was valued at US$72 million. His will provided that his collection was to be retained for 100 years before being sold at auction, and it appears that he intended his collection to be a form of "backup" in case something happened to the Royal Danish Collection of Coins and Medals.[2]
- A "Black Lotus" card from the trading card game *Magic: The Gathering* ("MTG") was sold privately for $3 million to an undisclosed buyer, making it the most expensive sale in MTG history;[3] and the unique "The One Ring" card from MTG's *Tales of Middle Earth* set was purchased by Post Malone in 2023 for $2.64 million.[4]
- A copy of 1938 *Action Comics* #1 (the first appearance of Superman) sold at auction in April 2024 for US$6 million.[5]

Collectibles with considerable value require special consideration both for estate-planning and estate administration purposes.[6]

Estate-Planning Considerations

The following are some questions to consider when planning estates that include collectibles:

- Should (can) multiple wills be used (for probate planning)?
- Should a "special executor" be appointed?
- How should the executor be compensated?
- How should the collectibles be distributed? For example, will the collection as a whole be gifted to one individual? Will the collectibles be parceled out to different beneficiaries? Will a particular collectible be gifted to more than one person, and if so, will the gift be joint or as tenants in common (for common-law jurisdictions)?
- If a minor may be the beneficiary of a collectible, how should the gift be made? Should it be held in trust?

Inventory

To assist with both planning and administration, collectors should create inventories of the items in their collections. This inventory should, where possible, include the purchase price of the collectibles and, if relevant, any stories regarding acquisition that could be passed on to beneficiaries and substantiate the provenance of the items should this prove necessary.

For some collectibles, there are online programs that can assist in both listing and valuing collectibles.

Insurance

If the collectibles have sufficient value, testators may want to consider adding a rider to their home insurance policy to cover such collectibles in case of loss during lifetime.

Effect of Boilerplate Clause Gifting "Personal Effects"

What if a will does not expressly identify a gift of the collectibles and instead contains a typical boilerplate clause gifting "personal effects" or "household effects" to Beneficiary X. Would MTG cards (or any other collection of articles) fall under the category of "personal effects" or "household effects" and belong to Beneficiary X? Or could they be something else and therefore fall into the residue of the estate, to be dealt with according to the instructions for the distribution of the residue (which might instead divide the residue equally between Beneficiaries Y and Z)?

Jurisprudence supports the view that stamps and gold coins collected as part of a testator's hobby are "personal effects."[7] However, sometimes testators use the term "household" instead of "personal" when describing "effects." Do "household effects" encompass articles such as cards, comics, stamps, or coins?

It seems that a collection of assets acquired by a testator that are (1) *not* adapted for use in the home or to adorn the home by being on general display or (2) *not* associated with the use, enjoyment, or proper functioning of the home will generally be considered "personal effects," because such assets belong to the testator and are associated with him or her, whereas household effects are articles that belong to the house.[8] In *Re Sonya Lyttle*, Justice Handrigan stated:

> [I]t is the role that chattels play in the "use, enjoyment and proper functioning of the ... home" that gives them their identity, so that in appropriate circumstances, gun, antique car and art collections could be "household effects"; as the court found in *Moyls Estate (Re)*, where "[t]he painting and print had hung on the wall for such a long time that they had become part of the 'household effects.'"[9]

The foregoing jurisprudence suggests that a testator's trading card collection (or any other collection) acquired as a hobby would be considered part of the testator's "personal effects." A testator presumably collects such cards as a hobby, keeping them for their sentimental or artistic value and, in many cases, for the enjoyment of using them in games. Even if the testator occasionally sold some of the cards in the collection, it would not change their nature as personal effects.[10]

Clearly, where a testator has personal effects that either are already of significant value or have the potential to be so, it would be prudent to expressly address in the will how they are to be administered, in order to avoid any confusion or ambiguity and to prevent the estate from being saddled with the potential costs and delays of a court proceeding.

To assist with both planning and administration, collectors should create inventories of the items in their collections.

Estate Administration Considerations

Insurance

One of the duties of personal representatives is to ensure that the assets of the estate are safeguarded.[11] In the case of personal effects, this means ensuring

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This article is intended to provide general information on unique collectibles in the context of estate planning and administration and not intended, nor to be construed, as legal, tax or other advice. No one should act on the information provided herein without first obtaining their own independent legal advice.

1 Rob Drinkwater, "Winning Bidder of Classic Hockey Cards Feeling Remorse over $3.7M Purchase," *GlobalNews.ca*, April 15, 2024 (https://globalnews.ca/news/10423918/hockey-cards-winning-bidder-remorse/).

2 Bloomberg News, "Danish Heirs to Sell $72 Million Rare Coin Collection After 100 Years," Toronto Sun, April 23, 2024 (https://torontosun.com/news/world/danish-heirs-to-sell-72-million-rare-coin-collection-after-100-years).

3 Jack Bye, "Black Lotus Sale for $3M Is Most Expensive in MTG History," *Dexerto.com*, April 30, 2024 (https://www.dexerto.com/magic-the-gathering/black-lotus-sale-for-3m-is-most-expensive-in-mtg-history-2670223/); and Nathan Ball, "Massive $3 Million Black Lotus Sale Shatters MTG Records!" *MTGRocks.com*, April 29, 2024 (https://mtgrocks.com/black-lotus-sale/).

4 Lane Harrison, "Toronto Man Sells Ultra-Rare 'One Ring' Card to Rapper Post Malone for $2.64M," *CBC News*, August 2, 2023 (https://www.cbc.ca/news/canada/toronto/post-malone-one-ring-canada-1.6925849).

5 Michael Cripe, "Action Comics #1 Auctions for $6 Million to Become the Most Expensive Comic Ever," *IGN*, April 4, 2024 (https://www.ign.com/articles/action-comics-1-auctions-for-6-million-to-become-the-most-expensive-comic-ever).

6 This article does not address the legal restrictions that can apply to some collectibles. For example, subject to specified exceptions, the *Importation of Intoxicating Liquors Act*, RSC 1985, c. I-3, section 3(1), prohibits the importation of wines except by authorized entities, and provincial laws can restrict the ability of, for example, legal representatives of an estate to sell wines privately: see, for example, *Liquor License and Control Act, 2019*, SO 2019, c. 15, schedule 22, especially section 2. See also *Cultural Property Export and Import Act*, RSC 1985 c. C-51.

7 *Re Collins's Settlement Trusts; Donne and Another v. Hewetson and Others*, [1971] 1 All ER 283 (Ch. D.) ("*Re Collins*").

8 See *Moyls Estate (Re)*, 2010 BCSC 1150; and *Re Sonya Lyttle*, 2014 CanLII 66458 (NLSC).

9 *Re Sonya Lyttle*, supra note 8, at paragraph 8.

10 In *Re Collins*, supra note 7, at 284, Brightman J noted that "[a] small quantity of the loose stamps was in the hands of various dealers for sale."

11 See, for example, *Rooney Estate v. Stewart Estate*, [2007] OJ No. 3944; 161 ACWS (3d) 177, at paragraph 17.

that the assets are in a secure location and, in the case of valuable assets, that proper insurance is in place.

Who is responsible for the cost of insurance on personal effects? The testator could, of course, stipulate responsibility for the costs of preserving personal effects. But where the will is silent and provides beneficiaries with the ability to choose from among a testator's personal effects, jurisprudence stands for the proposition that the cost of preserving such articles, including storage and insurance, from the death of the testator to the date of selection by the beneficiaries will be borne by the estate.[12] But where the will provides for a specific gift of a personal effect to a particular beneficiary, that beneficiary appears to be responsible for the costs of preservation incurred from the date of the testator's death to the date of the executor's assent to the gift of the personal effect in the will.[13]

Determining the Value of Collectibles

In order to apply for probate, executors will have to determine the value of the estate on which the relevant jurisdiction's "probate tax" will be charged. When it comes to items in a collection, executors may need to engage a valuator or find some other way to value the items. For example, where the testator's collectibles consist of cards that may have the potential for significant value, there are several card-grading services, such as Professional Sports Authenticator (PSA) and Beckett Grading Services (BGS), which for a fee will evaluate the condition of a card and assign it a grade, generally on a scale of 1 to 10 ,with 10 being "mint" or "near-mint" condition.[14] The higher the grade, the better the condition or quality of the card, which in turn should translate into a higher value for the card. Such grading can therefore provide potential buyers with some confidence that the price being charged for a card is supported by the condition or quality of the card.

Responsibility for Costs of Delivering Collectibles When the Will Is Silent

If the intent of a testator is to gift collectibles to beneficiaries, the will should expressly set out who pays for shipping costs and related insurance if the recipients do not live near the testator. Absent such express instructions, questions may arise whether the estate should pay for shipping (and insurance), or whether these costs are the responsibility of the beneficiary to whom the collectible(s) or collection was gifted.

Hayes v. Swift (Executor of the Estate of Bernard William Hayes)[15] confirms that the duty of an executor is to assent to the gift of the items to a specified beneficiary pursuant to the terms of the will. Subject to any express terms in the will, it appears that an executor has discretion to incur "moderate and reasonable" shipping costs to deliver such items to the intended beneficiary. However, in exercising this limited discretion, the executor should take into account

- the value of the estate,
- the cost of shipping or transportation,
- the value of the asset or chattel, and
- the nature of the asset or chattel.

Tax

Benjamin Franklin wrote, "In this World nothing can be said to be certain, except death and taxes."[16]

Personal effects are a type of personal property, being assets other than real property assets. Canada's *Income Tax Act*[17] (ITA) describes two types of personal property: listed personal property (LPP) and personal-use property (PUP). LPP is a subset of PUP. Section 54 of the ITA defines LPP as follows:

> *listed personal property* of a taxpayer means the taxpayer's personal-use property that is all or any portion of, or any interest in or right to—or, for civil law, any right in or to—any
>
> a. print, etching, drawing, painting, sculpture, or other similar work of art,
> b. jewellery,
> c. rare folio, rare manuscript, or rare book,
> d. stamp, or
> e. coin.

PUP, on the other hand, is defined in part in section 54 of the ITA as follows:

> *personal-use property* of a taxpayer includes
>
> a. property owned by the taxpayer that is used primarily for the personal use or enjoyment of the taxpayer or for the personal use or enjoyment of one or more individuals each of whom is
>
> i. the taxpayer,
> ii. a person related to the taxpayer, or
> iii. where the taxpayer is a trust, a beneficiary under the trust or any person related to the beneficiary. [Underlining added for emphasis.]

Subsection 70(5) of the ITA deems there to be a disposition of all of an individual's capital property on death, unless the conditions in subsection 70(6) apply to allow for a rollover of the assets.

Consequently, absent any applicable rollover, this deemed disposition will apply to the collectibles of a taxpayer on death. Where the collectibles are considered PUP (as in the case of MTG cards), each card will generally be deemed to have an adjusted cost base (ACB) of, and deemed proceeds of, $1,000 (assuming that the original ACB and the proceeds of disposition were less than $1,000). As a result, there will be no deemed capital gains and no tax owing on the deceased taxpayer's T1D return. The collection of MTG cards may also be considered a "set" such that the ACB and deemed disposition will be a minimum of $1,000 for the entire collection. If a collectible's value exceeds $1,000 on death, the capital gains realized as a result of the deemed disposition on death will be included in the deceased taxpayer's return at the applicable inclusion rate.[18]

> Personal effects are a type of personal property, being assets other than real property assets.

Where the collectible is LPP, the major tax difference from PUP is that losses on disposition (such as might arise on the deemed disposition on death) can be carried back and applied against realized gains from LPP in the three years prior to death. While the ITA allows LPP losses to be carried forward for seven years, losses on a T1D cannot be transferred to the estate, so that LPP losses cannot be carried forward after a taxpayer's death.

Conclusion

Collecting stamps, coins, comics, cards, teacups, porcelain figurines, art, or any other category of "things" is an enjoyable (if sometimes expensive) activity for many people. But collectibles also give rise to estate-planning and administration considerations, which may not always be contemplated until it is too late.

There is no magic wand that a testator can wave to create a litigation-proof will that addresses the testator's unique collectibles, but this article has provided some relevant and practical insights into the various estate-planning and administration issues that can have a bearing on such property. A collector is well advised to seek the guidance of an estate lawyer when preparing his or her will to ensure that the will effectively addresses the collectibles. Likewise, following the death of a collector, his or her personal representatives may find it prudent to seek the guidance of a lawyer familiar with estate administration to ensure that the collectibles do not become the battleground for disgruntled beneficiaries coveting them for themselves.

12 *Re Collins*, supra note 7, at 288.
13 Ibid., at 287-88.
14 David Royale, "The Top 15 Card Grading Services for TCGs Ranked," *Draftsim.com*, October 22, 2024 (https://draftsim.com/card-grading-services/#:~:text=%231.,-).
15 *Hayes v. Swift (Executor of the Estate of Bernard William Hayes)*, 2021 SKQB 132.
16 Quoted in *Kinnaird (Re)*, 2012 ONSC 4506.
17 *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), as amended.
18 The inclusion rate is one-half of capital gains until June 24, 2024, and thereafter two-thirds of capital gains exceeding $250,000, assuming that proposals in the 2024 federal budget are enacted. See also the STEP Canada/CRA Roundtable 2023, question 1, "Personal-Use Property" (available on Wolters Kluwer CCH Answer*Connect*) for tax considerations where the estate sells the collectibles but neither the estate nor any beneficiary of the estate or persons related to them were using the collectibles for personal use and enjoyment after death and prior to sale.

Copyright in Estate Planning and Administration

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Meaning of Copyright

Individuals often create works of writing.[1] Canadian law protects such expressions by delineating who has the right to "copy" the literary works of an author. Specifically, the *Copyright Act* provides that the first owner of the copyright in a work is the author of the work (section 13(1) of the Act).

Who Can Grant Permission to Copy a Work After the Author Dies?

Sections 13(4) and 14(1) of the Act suggest that an individual is entitled to transfer copyright by a written and signed will.[2] If the will is silent with respect to copyright, "it appears that copyright which is not mentioned in the will passes under the gift of residue to the residuary beneficiaries."[3]

Consequently, in cases of testacy, the persons who can give permission to copy the works of a deceased author will be either (1) the beneficiary or beneficiaries to whom the copyright was gifted under the deceased's will, or (2) in the absence of a specific provision in the will relating to copyright, the residuary beneficiaries. In cases of intestacy, it is assumed that the intestate heirs will be entitled to receive the interest in the copyright of the deceased, and so will be the persons entitled to grant permission to copy the deceased's works.

However, what if an estate has not been fully administered? Who then can give such permission?

Generally, on the death of an individual who dies testate, the deceased's property (other than property that devolves by right of survivorship or, arguably, pursuant to a proper beneficiary designation) is considered to vest in the hands of the deceased's executors. In Ontario, this vesting in an executor or administrator is also achieved by statute.[4] Section 2(1) of Ontario's *Estates Administration Act*[5] expressly provides that "[a]ll real and personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition, devolves to and becomes vested in his or her personal representative."

In *Regina v. Stewart*, Cory J stated that "*[c]opyright* is a form of property analogous to *personal property*. It may be sold or transferred by will."[6] It has been described as "incorporeal property."[7]

"Assent" of Personal Representative Required to Pass Copyright to Beneficiaries

Therefore, on the death of an individual, copyright passes to the deceased's personal representative, who is to administer it as part of the deceased's estate. Even where an author assigned or granted an interest in copyright prior to death and otherwise than by will, copyright clearly forms part of the estate. Section 14(1) of the Act expressly provides that after June 4, 1921, any such assignment or grant will not operate to vest in the assignee or grantee any rights in the copyright beyond 25 years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period will, on the death of the author and despite any agreement to the contrary, "devolve on his legal representatives as part of the estate of the author." Consequently, if the reversionary interest in copyright 25 years after the death of the author is considered by the Act to be part of the estate of the author in situations where the author assigned or granted an interest in the copyright other than by will, it seems reasonable to conclude that copyright forms part of the author's estate in other situations as well (such as when it is dealt with under the author's will).

However, as with all property forming part of a deceased's estate, until the personal representatives give their "assent" in respect of a deceased's copyright, title rests with the personal representatives.[8]

After assent, the personal representative is in a position to assign/transfer the copyright to the beneficiary(ies) entitled under the will to receive it.

As section 13(4) of the Act provides, copyright can be assigned "either wholly or partially, and either generally or subject to [certain] limitations."

Estate-Planning and Estate Administration Considerations

Section 6 of the Act provides that, except as otherwise provided in the Act, following the death of an author, copyright in the work of an author subsists for the remainder of the calendar year in which the author dies plus 70 years following the end of that calendar year.[9] Section 14.2(1) of the Act provides that "moral rights" (discussed below) in respect of a work subsist for the same term as the copyright in the work. Ideally, for those individuals who are recognized as authors or individuals whose written works have commercial value or will result in requests for copying, their copyright interest will be specifically addressed in their will when they undertake their estate planning. If a deceased's copyright interest is not addressed in the will, the personal representative should recognize that copyright forms part of the residue of the deceased's estate, and should consider formally assenting to the assignment or transfer of the copyright to the residuary beneficiaries in proportion to their respective interests. Such assignment or transfer can be evidenced by way of a deed of assignment/transfer.

It is important to realize, though, that a gift of the work itself, without mention of the copyright interest therein, does not necessarily result in the beneficiary receiving the copyright. The beneficiary will merely become the owner of the work, with no right necessarily to grant permission to copy it, unless the beneficiary is also the sole residuary beneficiary. As stated by Duff CJ in the Supreme Court of Canada's decision in *Massie & Renwick v. Underwriters' Survey Bureau Ltd.*: "It is clearly settled now, by the authority of *In re Dickens* [[1935] Ch. D. 267] that the author, in transferring the property in his manuscript, does not thereby necessarily assign the incorporeal right."[10] The implication is that a testator or testatrix should expressly provide for a gift of copyright if it is intended to belong to a beneficiary who is to receive the works of the testator or testatrix and who is not a sole beneficiary under the will.

...copyright passes to the deceased's personal representative, who is to administer it as part of the deceased's estate. Even where an author assigned or granted an interest in copyright prior to death and otherwise than by will, copyright clearly forms part of the estate.

Moral Rights

The *Copyright Act* also grants "moral rights" to authors, which are rights different from "copyright." Section 14.1(1) of the Act describes such moral rights as follows: "The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in

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This article is intended to provide general information on copyright issues in the context of estate planning and administration and not intended, nor to be construed, as legal, tax or other advice. No one should act on the information provided herein without first obtaining their own independent legal advice.

1 "Works of writing" refer to those works in which copyright subsists in Canada pursuant to the federal *Copyright Act*, RSC 1985, c. C-42 ("the Act"), and include every original literary, dramatic, musical, and artistic work (see section 5(1) of the Act).

2 See *Wing v. Van Velthuize*, 2000 CanLII 16609; [2000] FCJ No. 1940 (FC).

3 Ibid., at paragraph 47.

4 Hereafter, "personal representative" refers to either an executor appointed in a will ("estate trustee with a will" in Ontario), or an administrator in the case of an intestacy, as the context permits.

5 *Estates Administration Act*, RSO 1990, c. E.22.

6 *Regina v. Stewart*, 1983 CanLII 1650; 42 OR (2d) 225 (CA); rev'd on other grounds [1988] 1 SCR 963; 50 DLR (4th) 1. This statement from the Court of Appeal decision was cited with approval in *Keatley Surveying v. Teranet*, 2016 ONSC 1717, at paragraph 5; leave to appeal to ONCA dismissed 2017 ONCA 748; leave to appeal to SCC dismissed 2019 SCC 43.

7 *Underwriters' Survey Bureau Ltd. v. Massie & Renwick Ltd.*, [1938] Ex. CR 103; 1938 CanLII 236 (per Maclean J,] at paragraph 12); aff'd in part [1940] SCR 218; 1940 CanLII 1.

8 See Albert Oosterhoff's excellent paper: *Locus of Title in an Unadministered Estate and the Law of Assent* (20th Annual Estates and Trusts Summit, October 16, 2017). The author notes that while residuary beneficiaries have no property interest in an unadministered estate, it is less clear as to the nature of the interest of specific beneficiaries prior to assent (at 21-22). Professor Oosterhoff is also of the view that assent can be granted by the personal representative whether the deceased died testate or intestate: Albert Oosterhoff, "No Assent—Property Does Not Vest," *WEL Blog*, October 3, 2022 (https://welpartners.com/blog/2022/10/no-assent-property-does-not-vest/).

9 Except if the author is unknown or the work is published posthumously: see sections 6.1, 6.2, and 7 of the Act.

10 Supra note 7 (SCR), at 229.

section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous." According to section 14.1(2) of the Act, moral rights may not be assigned, but they can be waived in whole or part. Sections 14.2(2) and (3) describe the succession to an author's moral rights. To the extent that moral rights are a form of property, it appears that they too vest in the personal representative on death, but since they cannot be sold and the Act already provides for the succession of moral rights, it is arguable that assent is a foregone conclusion.[11]

Moral rights should also be considered in the estate planning of any individual where they may be relevant, and in the estate administration of any such person.[12]

Conclusion

Unlike a physical asset, copyright is considered "incorporeal property." However, as with some physical assets, the value of an individual's copyright in his or her works may be significant. Accordingly, copyright (and any other forms of intellectual property that may be owned by an individual) should be considered in any estate planning and administration.

11 But query what happens if the deceased was involved in litigation relating to moral rights—would the personal representative continue the proceedings, or the beneficiaries entitled under the Act (or both)?

12 Note that the Act also provides for "moral rights" for performers: see section 17.1(1).

Trademarks and Patents, Real Estate, and Non-Traditional Investments as Estate Assets: Taylor Swift, Moustache Guards, and Kiwis

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In 2008, Lucasfilm registered a trademark for the sound of Darth Vader, which, according to the filing, "consists of the sound of rhythmic mechanical human breathing created by breathing through a scuba tank regulator."[1] Trademarks, patents, and other forms of intellectual property may represent substantial assets within an estate and can provide significant and enduring challenges for both the drafting lawyer and the executor of an estate. This article examines intellectual property and other unique assets as part of an estate plan.

Trademarks

A trademark may include sounds, words, or designs that are used to distinguish the goods or services of one person from others in the marketplace.[2] An executor dealing with a trademark as an estate asset needs to know that trademarks can be valuable. A trademark provides legal protection of the identifying elements of a business, it prevents people from trying to pass off the goods and services of others as their own, and it enhances the reputation of the business. The golden arches of McDonald's are an excellent example of a trademarked design that is known worldwide.

The laws relating to trademarks vary between jurisdictions. The applicable legislation in Canada is the *Trademarks Act*.[3] Where an estate contains a trademark, the executor must continuously police it, because what makes a trademark unique from other types of intellectual property is that, as they say, if you don't use it, you lose it. The executor must prevent competitors from causing consumer confusion, from free-riding on the goodwill of the trademark owner and from harming the brand's reputation.

For many industries, intellectual property has not been a concern, but this bears reconsideration. Such was the case with the taxi industry, which was disrupted by ride-sharing businesses. The success of a particular ride-sharing company is explained in part by the fact that its app is protected by patents and industrial design, making it difficult for the taxi industry to compete.

In Canada, trademarks are transferable.[4] For estate-planning purposes, the owner of a trademark may choose to register the trademark in the name of a corporation so that it can transfer the shares of the corporation to a beneficiary. After the transfer, the beneficiary owns the trademark.

Trademarks: Taylor Swift's Estate

If I were administering Taylor Swift's estate, I would have to continuously monitor the trademarked lyrics "This sick beat," "Party like it's 1989," and "'Cause we never go out of style," among others. For example, if I discovered that someone was manufacturing clothing bearing those lyrics, I would risk liability as an executor because the estate could lose its trademark rights if the estate's official merchandise was not distinguishable from the competitor's products. Artistic works involve copyright, but because song titles and lyrics generally are not protected by copyright, Taylor Swift turned to trademarks for protection.[5]

Protecting Taylor Swift's trademarks from infringement would be an immense undertaking that would span jurisdictions and legal systems worldwide, and the duty would continue until the estate was administered in its entirety. In China, Taylor Swift has registered her own name as a trademark to stop competitors from selling knock-off products under her name. She launched her own clothing line targeted at Chinese consumers and uses an authentication feature

1 Justicia Trademarks, "Image Trademark with Serial Number 77419252" (https://trademarks.justia.com/774/19/n-77419252.html).

2 Canadian Intellectual Property Office, "Learn Trademarks" (https://ised-isde.canada.ca/site/canadian-intellectual-property-office/en/learn-trademarks-canadian-intellectual-property-office).

3 *Trademarks Act*, RSC 1985, c. T-13.

4 *Trademarks Act*, section 48(1).

5 Michael Kondoudis, "Taylor Swift Trademarks: A Complete Guide," (https://www.mekiplaw.com/taylor-swift-trademarks-explained/).

to allow customers to verify whether their products are truly hers. One of the many jurisdictional differences between China's trademark laws and Canada's is that China registers trademarks using a first-to-file rather than a first-to-use system. Because a competitor was the first to file her name in association with bathing suits, Taylor Swift is unable to sell bathing suits in China under her name.

Patents

What is the symbol of a true gentleman, if not his moustache? The moustache guard was patented in 1876 to protect the user's moustache during holiday feasts. It was described in the patent application as a "curved and concave shield, which may be made of vulcanized rubber, metal or any other suitable material," and it promised to keep moustaches out of harm's way while the user indulged during the holiday season.

Regardless of the absurdity of the invention, a patent provides a time-limited, legally protected, exclusive right to prevent others from making, using, and selling someone else's invention. An invention could be a number of things, including a product, a composition, a machine, a process, or an improvement upon any of these.

Patents in Canada

An executor of an estate that involves patent rights needs to be knowledgeable about patent law in the relevant jurisdiction to protect it from infringement. In Canada, an invention is patentable if it has (1) novelty (the invention must be new and not publicly disclosed); (2) utility (the invention must work); and (3) ingenuity (the invention cannot be obvious to a person of ordinary skill in the technology involved).

Unlike copyright and trademark, a patent must be registered for the owner to exercise the rights associated with it. Only an inventor or their legal representative (which includes an executor) can apply for a patent in Canada.[6] An executor can even apply for a patent after the testator's death, thereby creating a new estate asset.

> A professional executor may be helpful where intellectual property rights are involved, because the failure to properly deal with what can be a very valuable asset can create economic loss and executor liability.

In Canada, a patent, or the right to obtain one, can be assigned in a will.[7] When planning an estate where a patent is involved, the drafting lawyer needs to be knowledgeable about the relevant legislation to ask the testator questions to uncover important issues such as ownership of the rights. Under common law in Canada, an inventor's employer can own a patent, which would be an important consideration for the lawyer drafting the inventor's estate plan.

Intellectual Property Rights: A Case for a Corporate Executor

Intellectual property is often not fully understood or well leveraged. An executor dealing with intellectual property as an estate asset needs to understand the value of the estate's intellectual property and how to properly protect and manage it. A professional executor may be helpful where intellectual property rights are involved, because the failure to properly deal with what can be a very valuable asset can create economic loss and executor liability.

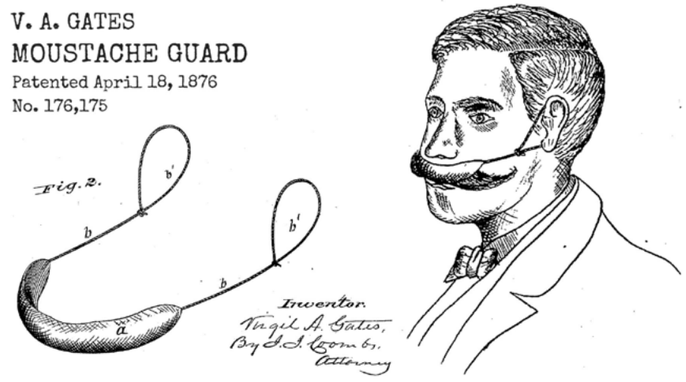
A good example of what can happen when intellectual property rights are not asserted and protected involves kiwi fruit. In 1924, a New Zealand horticulturalist developed the Hayword, a new cultivar of kiwi that has become the most economically successful variety of the fruit. Unlike modern breeders of economically significant plants, the inventor did not secure any legal protection over the new variety that he had invented, and other growers quickly began to produce and sell it without his permission or compensating him. He therefore lost his commercial advantage and suffered significant financial loss.

An executor managing intellectual property needs to understand (1) the relevant legislation that applies; (2) whether the deceased was party to an agreement that bound the estate and affected the estate's rights and control over the intellectual property; (3) when the rights expire; (4) the correct terminology and laws in other countries, if there are cross-border intellectual property rights; and (5) the purpose of the intellectual property.

An executor should be aware of the different purposes of intellectual property. Intellectual property may be used as an asset to generate revenue. It may be used proactively, to stop imitation and to maintain market share. It may be used defensively, because a strong intellectual property portfolio can deter a competitor from replicating its products or services. It could also be used to build an ecosystem: by sharing intellectual property or using it to set an industry standard, others may develop offerings that are complimentary. For example, an App Store on an iPhone is attractive to customers because there are many apps available to download. Most of the apps were created by third-party developers and were built on intellectual property that Apple Inc. licensed to them for free.

Where there are cross-border intellectual property assets, an executor needs to understand the correct terminology and the laws in relevant jurisdictions. In Canada, the term "patent" is used synonymously with intellectual property. In the United States, industrial designs are often referred to as patents. Therefore, when compiling information about the intellectual assets of an estate, a drafting lawyer should use the precise terms with their intended meanings. Intellectual property laws are national, and they are not identical. In some countries, including Canada, intellectual property laws are codified. In other countries, including the United States, intellectual property rights are dependent on the court's discretion. An executor who is dealing with an international business needs to understand the laws in all relevant jurisdictions.

One of the fundamental duties of an executor is to preserve the assets of the estate. Where intellectual property is involved, that duty includes preserving the intellectual property strategy. To do that, it is important to understand the relevant factors in the strategy, including:



1. The nature of the industry in which the business operates. For example, pharmaceuticals are patent-intensive, while entertainment and cultural products are copyright-intensive. The executor needs to understand the type of intellectual property rights involved and how to best protect that type of asset.
2. The stage of the business. A startup company that has not caught the attention of competitors may be able to avoid paying for licences at first, while a more established company could rely heavily on its intellectual property to prevent competition.
3. The target market for the product. With a product that is available globally, unauthorized copying may be more of a problem compared to a product that is only available locally.
4. The competitive landscape. If competitors are developing complementary products or services, it might be advantageous for the business to participate in the arrangement.
5. The quality of intellectual property expertise that is accessible to the organization. Having an intellectual property strategy does not guarantee success, and businesses that fail to properly leverage intellectual property rights can suffer damages.

Venture Capital and Private Equity

An increasing number of high net worth individuals are requesting alternative assets as part of their investment portfolios. It is not uncommon for a portfolio to have a 10-15 percent weighting in alternative investments. Investments in early-stage or privately held companies can be lucrative, but they can also lack liquidity as estate assets.

The illiquidity of venture capital and private equity can pose a unique problem for an executor. The deceased's family may have an immediate need for funds, but this type of investment may not be accessible for some time. Because an estate is deemed to dispose of an asset upon the deceased's death, income tax with respect to the asset will be due but the asset may not be easily liquidated. For example, an estate owns a $10 million investment in private equity and venture capital, but the assets cannot be sold for years. Although those assets still have value, they may be non-transferable, and designating an asset class may be difficult. Some asset classes may be non-transferable,

6 *Patent Act*, RSC 1985, c. P-4, section 27(1).
7 *Patent Act*, section 49(1).

depending on the agreement, and if a transfer were permitted, the class to which the assets may be given could be limited. An executor managing an investment that will not be profitable for years would be dealing with many challenges, including the needs and wants of the beneficiaries of the estate and potential dependants who need access to funds immediately.

Family dynamics and emotion can create situations where real estate ceases to be a simple asset that needs only to be valued and sold and becomes a unique asset. Real and intended use, inequality in benefit, and the involvement of external parties create complexity, both for beneficiaries and the executor.

An estate drafting lawyer should learn as much as possible about the investment in order to prevent potential issues for the beneficiaries when the testator dies. A family discussion about the unique assets could also be helpful. The testator's choice of executor is important, because an estate with such assets should be managed by someone with expertise. The executor has a duty to maximize the value of the estate, so the executor needs to have the required knowledge about the particular investment and its investment period to properly manage the estate. The executor may need, for example, to consider any restrictions on selling the investment and whether there is an opportunity for one of the beneficiaries to take ownership of the asset while it is illiquid.

Valuing these types of investments can be difficult until the asset can be monetized. An executor would need to determine the value of the asset for probate and income tax purposes, and it may be difficult to know if a prospective business valuation is accurate. It is clear to see that there is risk involved with these types of assets for an executor, who needs to maximize the value of the estate and ensure that its value is accurate.

Non-Traditional Investments

Non-Traditional Investments: Real Estate

Real estate is sometimes a simple estate asset that needs only to be valued and sold, but it can also raise complex issues that make it a unique asset. Where a rental property is an estate asset, an executor may need to balance their legal responsibilities to tenants and their duties to the beneficiaries of the estate. The family cottage as an estate asset is often fraught with difficulties; for example, there may not be enough money in the estate to maintain it or to pay the capital gains tax.

Multi-generational family homes present a myriad of potential pitfalls. The Ontario case of *Sidhu v. Sidhu*[8] looked at how the equitable remedy of unjust enrichment applies to multi-generational homes where a family shares expenses. The matriarch purchased the home in 2004, after her husband passed away. Her three adult sons moved into the house, and then two got married and their wives moved in too. Things became complicated. The mother brought an application for partition and sale of the property. One of her daughters-in-law brought a cross-application claiming unjust enrichment and a 50 percent interest in the property, describing it as a joint family venture in which they all contributed to the mortgage, household expenses, and maintenance. Her husband argued that he was the house manager who maintained the family bank account. The mother argued that the house was entirely hers and that the respondents' financial contributions were in lieu of rent. The unjust enrichment claim failed. The court held that the family account made it difficult to determine whose funds belonged to whom, and that the respondents had failed to prove that they had suffered a detriment: all parties benefited from the arrangement, including the respondents, who benefited from the grandmother looking after the grandchildren.

Family dynamics and emotion can create situations where real estate ceases to be a simple asset that needs only to be valued and sold and becomes a unique asset. Real and intended use, inequality in benefit, and the involvement of external parties create complexity, both for beneficiaries and the executor.

Conclusion

Unique assets create complexities for a drafting lawyer and an executor. It is our duty as TEPs to arrive at fair, equitable, and defensible conclusions related to estate assets, both tangible and otherwise.

8 *Sidhu v. Sidhu*, 2023 ONSC 4618.

Planning for Unique and Unconventional Assets: Who Will Milk the Cows Tonight?

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Whenever interesting, unusual, and unique assets pass from one generation to the next on death, special care may be required to manage that process. An executor may need to verify the precise nature of a certain estate asset and protect it from harm while preserving its value. Establishing a special item's value can be a journey in itself, as can determining how to legally and safely dispose of or transfer a unique asset. Some thoughtful preplanning for special items and preparations for the executor will pave the way for a smoother estate administration.

Ascertaining whether an asset is unique might be the first challenge. Some very ordinary things can present obstacles. Essentially, any assets that, owing to their characteristics, may require expertise, special handling, or special considerations to value, preserve, and transfer fall in that category.

Our Digital Presence

From our social media footprint to online personas, purchases, and subscriptions, we leave behind a digital debris field that may not be clearly visible. Experts estimate that the average Canadian has between $10,000 and $50,000 stashed in digital assets.[1] Executors may need to become detectives scouring devices and banking statements, looking for evidence of a deceased's online life. Once such evidence is found, executors often have to deal with uncooperative service providers who refuse access to the deceased's accounts, as well as the challenge of valuing assets in the ether.

Every digital account we open takes us to its contractual terms and conditions page. Research shows only 9 percent of us actually read such information before clicking "I agree."[2] Unsurprisingly, executors are held to those contracts, with the inevitable result that the estate owns the digital content but the provider controls all access to it. The best example of a provider wielding such control is Apple, which permanently deletes all content—photos, music, iCloud content, and even the deceased's Apple ID—unless a "legacy contact" was identified during the account holder's lifetime. Even then, Apple provides access only to sentimental data, never to paid items or the deceased's Apple ID. Most social media sites provide only two options after the death of a user: memorialize the deceased's account or permanently delete it. Facebook offers a third, hybrid option: nominate a legacy contact to manage the deceased's page after death.

While our social media sites hold sentimental content, gaming and commercial platforms commonly store both monetary balances and liabilities. Games create winnings and losses, and online shopping necessitates either that items be paid for and received, or be sold and delivered, with digital wallets storing and transmitting our funds. Without access to a deceased's accounts, executors must deal with each platform provider individually to extract the balance and close the account. Some providers have no protocols for issuing refunds, thereby trapping value inside the account. And with digital contracts often governed by the jurisdictional laws of another country, executors may be left without recourse.

Loyalty and Reward Programs

Stiff retail competition and greater consumer choices have generated an explosion of loyalty programs aimed at encouraging buyers' repeated patronage. In pre-COVID times, it was estimated that the average family belongs to at least eight loyalty programs.[3] Are these "assets" transferable at death? Unfortunately, the answer is, it depends. Each reward program publishes its own rules concerning the transferability of points on the death of the owner, and a thorough reading of the program agreement is required to

1 Noor Ibrahim, "Does Your Social Media Profile Belong in Your Will? Why Canadians Should Plan Their 'Digital Inheritance' Now," *Global News*, November 26, 2021 (https://globalnews.ca/news/8386984/canada-planning-digital-inheritance/).

2 "Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information" Pew Research Centre survey, November 15 2019.

3 Jackie Dunham, "What Happens to Your Loyalty Program Rewards When You Die?" *CTV News*, June 20, 2019 (https://www.ctvnews.ca/canada/what-happens-to-your-loyalty-program-rewards-when-you-die-1.4474850).

determine what those rules might be. Some programs permit full transfer, while others authorize only redemption for gifts by an eligible user, such as the personal representative of the deceased. In addition, points may have to be valued for probate and estate calculation purposes. The latest industry practice is to ascertain the value of a basket of goods or services that could be acquired with the points.

Wording may be included in a will authorizing the executor to deal with points balances and to make any estate gift of eligible, transferable points. This authority also simplifies dealing with the program's administrators after death. Executors should be aware of strict time limits that must be adhered to for the transfer and redemption of points after death. And, as a rule, all transfers or redemptions must be completed prior to the closing of the loyalty program account.

In 2016, the Uniform Law Conference of Canada, a think tank of policy lawyers, analysts, and legal reformers, drafted the *Uniform Access to Digital Assets by Fiduciaries Act* (2016),[4] and recommended its enactment by provincial governments. The Act identifies four types of fiduciaries: personal representatives, legal guardians, attorneys for property, and trustees. It authorizes them to gain access to the digital assets of a deceased or incapable person by confirming that the usual powers of fiduciaries extend to digital assets, with whatever practical implications that may have. The Act intends for access to include access to electronic records but not to any underlying tangible assets or liabilities. To date, four Canadian jurisdictions have adopted the Uniform Act—Saskatchewan, Prince Edward Island, New Brunswick, and the Yukon.

As best practices evolve, will-makers should be encouraged to inventory their digital presence, understand the terms and transferability of their online assets on death, and empower their personal representatives in their wills and powers of attorney to deal not only with these assets but with service providers as well. As advisors, we can best assist clients with their digital footprint by helping them to determine its extent and value, explaining the impact of applicable laws, drafting documents that address their concerns, preparing their executors, and encouraging them to organize access to online sites. (Be wary of password organizers, which can, in themselves, constitute a breach of a digital provider's contractual terms.) Executors must also understand that certain digital assets are subject to both probate fees and federal taxes.

Photographs

Few assets calm family grief more than photographs. They are the storehouse of everything memorable about the deceased. However, few assets also cause more arguments. In most families, the bulk of photos are tangible things, filling albums and boxes. Who should keep the original prints and negatives? Who should pay for reproducing them for everyone? Digital photography is alleviating some of these headaches, but recall that any cloud platform that holds those digital photos may permanently delete them after death unless they are also stored on a tangible device.

Wills and memoranda to executors should clearly lay out the responsibility to sort, scan, and catalogue family photos and name those who should bear the cost.

Artifacts and Cultural Items

Valuation and provenance can pose significant estate challenges for artifacts and cultural items such as paintings, sculptures, collectibles, and other cultural objects. Establishing the value of an artistic item is an exercise in discerning authenticity and background. Many variables can alter an object's current value, including its historic chain of ownership, the dealers who were involved in previous transfers, and any prior registrations of the object.

Occasionally, estate administrators will encounter cultural property of historical, archaeological, or ecological significance that may be subject to legislation, directing that the property be seized or returned to its country of origin. The significance of any particular item may not be readily apparent to the untrained eye. Telling the difference between a historical cultural artifact and a modern souvenir can be difficult, and beneficiaries may balk at the cost of expert appraisals for such items.

Will-makers need to leave clear directives to identify these objects in their possession, as well as instructions about obtaining appraisals and transferring sensitive items, including the names of trusted experts and dealers. If permits are required under the *Cultural Property Export and Import Act*,[5] executors will be liable for obtaining them in order to transfer defined items of historical, cultural, or scientific significance. These restrictions may prohibit any transfer outside Canada.

4 Uniform Law Conference of Canada, *Uniform Access to Digital Assets by Fiduciaries Act*, adopted August 2016 https://www.ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Access-to-Digital-Assets-by-Fiduciaries-Act-(2016).pdf).

5 *Cultural Property Export and Import Act*, RSC 1985, c. C-51.

Firearms and Ammunition

Few estate assets cause more trepidation for executors than firearms. An executor's rights and obligations around estate firearms are set out in the federal *Firearms Act*,[6] which confers on the executor the same rights as the deceased to possess the firearms during the administration of the estate. An executor must promptly lodge with the RCMP a completed form 6016, "Declaration of Authority to Act on Behalf of an Estate," together with official proof of death.

Individuals are *licensed* under a government-issued possession and acquisition licence (PAL). Firearms themselves are *classified* as non-restricted, restricted, or prohibited; the latter two classes of firearms require registration. Unregistered restricted or prohibited firearms are subject to seizure, and estate firearms are sometimes non-compliant as war trophies or owned by scofflaws.

The executor must find the PAL of the deceased in order to determine the deceased's rights of possession and to locate registration certificates for the firearms, if applicable. Once located, the firearms should always be treated as loaded and carefully handled. Storage procedures are dictated by law; improper storage carries the risk of seizure by authorities. Ammunition should always be stored separately from firearms. Firearms may only be transported with trigger locks in place, and must be in secure containers if they are classed as restricted.

Any beneficiary who receives a firearm must be a qualified recipient—that is, at least 18 years of age holding a valid PAL with the correct privileges. If there is no eligible or willing beneficiary, the executor has no choice but to sell, donate, or export firearms to a qualified recipient, or surrender them to the police. Once surrendered or seized, firearms are irretrievable, so they should not be surrendered to the police before the executor ascertains the deceased's instructions.

Living Assets: Animals and Crops

When we think about living assets, it is natural to think of domestic pets, but estates may also include exotic animals, some of which enjoy lifespans greater than their human owner. All living creatures need immediate and ongoing care, which may be in jeopardy when their owner dies. However, the safety of the executor is just as important. No executor wants to remove unusual or potentially dangerous insects or reptiles from a deceased's home and either find or provide care for them. Especially difficult is the situation of commercial animals that have regular, demanding needs. When a dairy farmer passes away, it's important to know, who will milk the cows tonight?

Both commercial animals and agricultural crops pose unique challenges for estates. Dairy cows and laying hens require constant care to maintain their health and productivity, in order to sustain the value of the farming operation as well as the quality of the produce they provide for the estate. Cash crops demand experienced stewardship, from planting to harvest, to realize their potential for the estate. Determining whether a crop actually belongs to the estate should be investigated early. Just because a crop stands in a deceased farmer's field does not mean that it was owned by the deceased; the field could be rented to another farmer, or the crop could be presold on a commodity futures market. Examining the farmer's pre-existing contractual commitments and interviewing business contacts can be instructive.

Estate planners and executors must also be mindful of environmental responsibilities, and should inquire about adequate crop insurance to ensure that the value of these living assets is preserved. Farming operators may wish to include robust environmental clauses in their will to protect their executor from unexpected liability for environmental problems. Nominating an agent for their estate who knows their agricultural operation well is an excellent strategy to assist an executor in stewarding the farm assets.

Pet owners who wish to construct failsafe provisions for the care and disposition of their pets would be well advised to make those clear in their will. These provisions arm the executor with authority to manage the care and transfer of a pet according to specific wishes, including making a cash gift to the chosen caregiver for the upkeep of the animal. Allocating money for the care of animals after death can become complicated when a caregiver declines the responsibility or passes away. Such monetary gifts should be structured carefully in consultation with an estate expert and the intended pet foster parent.

Human Reproductive Material

Sperm, eggs, and embryos are potential estate assets that require very special attention from their donors and estate advisors. With proper written consent from the donor, as prescribed under the federal *Assisted Human Reproduction Act*,[7] a spouse or common-law partner can use stored

6 *Firearms Act*, SC 1995, c. 39.

7 *Assisted Human Reproduction Act*, SC 2004, c. 2.

reproductive material to posthumously conceive a child with their deceased partner. Even posthumous harvesting of reproductive material is permitted with the deceased's prior consent.

In two Canadian provinces, British Columbia and Ontario, posthumously conceived children are now qualified estate heirs, provided that the intended parent gives notice to the estate beneficiaries and the child is born within two to three years. Estate planners will need to build comprehensive intake surveys to discover whether anyone in the family has preserved reproductive material and record the form and location of the donor's consent. Contingent beneficiary clauses will need careful drafting to reflect the will-maker's wishes regarding posthumous heirs, and longstanding "born outside of marriage" exclusion clauses will need to be rethought in the brave new world of reproductive technology and surrogacy.

Executors must also be mindful not to distribute class gifts until all the members of the class, including post-death conceived heirs, can be determined. Intestate succession, which generally follows biology, may also need to be adjusted and estate distributions postponed until all the players are known.

The Most Unique Asset of All—You!

Navigating wishes around the disposition of human remains can be emotionally demanding for families, fraught as it may be with custody disputes, philosophical differences, and regulatory impediments. Trends and preferences are evolving for the distribution of human remains. Previous generations commonly buried their loved ones in family plots, but Canadians are increasingly choosing cremation and scattering the ashes in locations meaningful to the deceased, often abroad. Turning Grandma into a diamond and fertilizing Uncle Jimmy's favourite tree with his cremains are now quite realistic endings.

At law, the executor has responsibility for dealing with the deceased's earthly remains. Often, will-makers provide specific instructions to family members in this regard, which can become the source of confusion or conflict. Family disagreements over the disposition of their loved one can delay final closure and prolong lasting differences. In some cases, cremated remains can be divided and distributed among family members to satisfy competing views on the ashes' place and manner of disposition, although this kind of custody battle is probably the last thing the loved one hoped for.

If a will-maker intends to leave their body to a medical institution for research or has committed organs for donation, it is important for close family members to be aware of these arrangements lest cremation or embalming occur and ruin the plan. Few contracts require such rapid fulfillment as these for the donation of remains, and any hesitation can make them unviable. Be aware that immediate family members may be able to counter such legal prearrangements. No research facility wants to enforce a contract that upsets the deceased's family so preparing loved ones around these wishes is a crucial step.

The burial of an uncremated body can be arranged only in a regulated cemetery through the purchase of a plot. It is also possible to purchase rights to bury or scatter cremated remains in a cemetery. Scattering ashes elsewhere must be approached with care. On private land, one should always obtain permission and, depending on the jurisdiction, it may be necessary to register scattering activity with municipal authorities. Disney regularly reports having to shut down rides so that distressed staff can remove ashes surreptitiously scattered by families wanting their loved one to spend eternity at "the Happiest Place on Earth." Crown land, national parks, and some municipal parks generally permit the scattering of ashes. To be safe, though, unless you are on open water, it is always best to ask.

When preplanning final arrangements, executors and family members appreciate clear, written personal wishes with copies of these instructions in multiple places and the nomination of a decision-maker to arbitrate any disputes.

Planning Due Diligence

Regardless of the estate, big or small, something usual that becomes unusual creates stress for the parties and adds delay and expense for the estate. Helping will-makers to identify and catalogue their unique assets, explain what they *think* they own and how *they* value it, and determine what should happen to it after death goes a long way to facilitating a problem-free administration of their estate. If it is anticipated that there will be conflict among beneficiaries, flag it! If there are restrictions or a contract limiting an asset's transfer, find them! As always, strong planning makes for easy administration.

NEWS

IN THE HEADLINES

PREFERENTIAL TREATMENT BASED ON GENDER: LAM V. LAW ESTATE

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"[T]estamentary autonomy must yield to what is adequate, just and equitable."[1] This is not a new concept in British Columbia, and is codified in section 60 of the *Wills, Estates and Succession Act*,[2] which provides:

> Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.

This section, with its applicability to adult, independent children, frequently generates discussion between academics and clients alike. Recently, it was the focus of an action commenced in the British Columbia Supreme Court by an adult, independent daughter who sought to vary her mother's last will, despite being given a share of the residue of her mother's estate equal to that of her brother. The daughter was successful.

Mrs. Yat Hei Law immigrated to Canada from China after her husband, Mr. Kwok Man Law, in 1970. Mr. and Mrs. Law had two children: Ms. Ginny Lam (the plaintiff) and Mr. William Law (the defendant). Both are healthy, financially independent adults. In 1992, Mr. Law won $1 million in the lottery. Mr. and Mrs. Law subsequently purchased three rental properties. Mr. Law died in 1999, and Mrs. Law inherited the family home, the three rental properties, and the remaining funds from the lottery win and other savings.

Shortly before Mr. Law's death, Mr. and Mrs. Law made mirroring wills that appointed each other as executor, trustee, and sole beneficiary of the other's estate, with a gift-over equally between the plaintiff and the defendant. After Mr. Law's death, Mrs. Law executed new wills twice: once, to effectively disinherit the plaintiff; and again, after her estate was worth significantly less, to execute a will affirming that her principal residence was held jointly with the defendant with right of survivorship. The second will also made a specific gift of a rental property to both the plaintiff and the defendant in equal shares, as well as an equal division of the residue of her estate (which was of no value) between the plaintiff and the defendant.

Mrs. Law died in 2021, and the plaintiff commenced an action to vary the second will, arguing that Mrs. Law made inter vivos and testamentary gifts to the defendant of the vast majority of her estate. The plaintiff successfully argued that Mrs. Law did not make gifts to the defendant to acknowledge the work he did in managing the rental properties or caring for Mrs. Law, since

1 *Lam v. Law Estate*, 2024 BCSC 1561, at paragraph 161, quoting *Tataryn v. Tataryn Estate*, infra note 5, at 815-16.
2 *Wills, Estates and Succession Act*, SBC 2009, c. 13.

the plaintiff also spent considerable time and effort in caring for Mrs. Law, but rather because Mrs. Law held "the view that sons were entitled to most or all of a parent's estate, rather than daughters."[3]

It has long been established that proper maintenance and support is not limited to the necessities of life and should be determined on the basis of the circumstances.[4] Furthermore, the Supreme Court of Canada has held that what is adequate, just, and equitable should be determined in accordance with contemporary standards, not bound by earlier views and awards.[5] In *Lam v. Law Estate*, the British Columbia Supreme Court applied the objective standard of a reasonable testator and current social norms to the specific facts of the case to determine what was adequate, just, and equitable in the circumstances of the Law family.

The Honourable Madam Justice Morellato noted the stark effect of Mrs. Law's discrimination. She held that "[c]ontemporary justice does not countenance preferential treatment towards certain children over others based on their gender,"[6] and ordered that the plaintiff receive 85 percent of the specific gift of the rental property.

The defendant has filed a notice of appeal of the court's decision.

COHABITATION REQUIREMENT FOR ADULT INTERDEPENDENT PARTNERS: ABBOTT V. MAMDANI

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In the course of administering an estate, it is necessary to determine whether there is any surviving spouse or common-law partner (referred to in Alberta as an "adult interdependent partner," or AIP) of the deceased. This determination may be straightforward, in cases where the deceased was legally married or had entered into an adult interdependent partner agreement pursuant to section 7 of the *Adult Interdependent Relationships Act*,[7] or where there is no dispute that the deceased had lived with another person in a relationship of interdependence for a continuous period of not less than three years, or in an interdependent relationship of some permanence, if there is a child of the relationship by birth or adoption.[8] However, where the facts are unclear or in dispute, a person who claims to be an AIP of the deceased but who had no AIP agreement and no children with the deceased has the onus of proving that the deceased lived in a relationship of interdependence with the person for at least three continuous years.[9] A recent decision of Justice M.R. Gaston of the Alberta Court of King's Bench, *Abbott v. Mamdani*,[10] provides an excellent summary of the case law interpreting the first element of this test—the requirement that the parties "lived together."

In *Abbott*, the applicant (Ms. Abbott) and the respondent (Mr. Mamdani) maintained "an exclusive and committed relationship" for four years.[11] During that period, the parties maintained separate residences. Although Ms. Abbott often stayed with Mr. Mamdani at his home and occasionally hosted social gatherings there, she did not have access to Mr. Mamdani's home when he was away, and neither party had any interest in nor any responsibility for maintaining the other's residence. After the relationship ended, Ms. Abbott sought a declaration that she and Mr. Mamdani were AIPs on the basis that they "were an economic and domestic interdependent unit" and that they "'lived together,' notwithstanding maintaining separate residences." Mr. Mamdani opposed Ms. Abbot's claim, arguing that the parties only ever had a "dating relationship, and he intentionally never 'lived with' Ms. Abbott because the relationship did not progress to the level of trust and long-term commitment necessary for the parties to move in together."[12]

Justice Gaston reviewed the elements required to establish the existence of an AIP relationship, and ultimately dismissed Ms. Abbott's claim on the basis that she had failed to prove both the existence of a relationship of interdependence and that the parties had lived together at all, let alone for the required three-year period. In reaching this conclusion, Justice Gaston referred to previous case law establishing that "living together" is a prerequisite for the creation of an AIP relationship and requires "cohabitation under the same roof."[13] Justice Gaston acknowledged that the courts in a number of recent cases had found that an AIP relationship existed even though the parties did not meet a strict test of cohabitation, but she determined that this line of cases could be reconciled with the requirement of "living together" by adopting "a flexible approach [that] accommodates couples who mutually intended to live under the same roof but were prevented or interrupted from doing so by external circumstances."[14]

In reaching this conclusion, Justice Gaston acknowledged that external circumstances may prevent a couple from living together when they would otherwise choose to do so and thereby qualify as AIPs, while reiterating the importance of upholding the general requirement of cohabitation set out in the Act, in order to give couples certainty in the legal ramifications of their relationships:

> [E]xtending the financial consequences of the adult interdependent partnership to persons who have never cohabited and have not entered into an adult interdependent partnership agreement would dramatically change the legal landscape. Dating relationships, albeit ones which extend for more than a three-year period, could suddenly create financial claims that neither party anticipated. ... It is highly unlikely that the Legislature would have intended such a dramatic result without clearly stating so, both in its introduction to the legislation during debate and within the legislation itself.[15]

Abbott provides a restated test for determining whether one person has "lived with" another for the purpose of establishing an AIP relationship under the Act in the absence of an AIP agreement (and any children of the relationship). First, one must determine whether the parties lived together "in the same residence" for at least three continuous years. If they did not, one may then consider whether the parties had "a mutual intention to cohabit in the same residence for a continuous period which period was interrupted by external circumstances such as employment, academic, financial or health care obligations or requirements."[16]

In cases such as *Abbott*, where cohabitation is not prevented by external circumstances but rather is simply not chosen by the parties, the prerequisite of "living together" cannot be established, and thus no AIP relationship can be found.

BEYOND THE GRAVE: DEALING WITH HUMAN REMAINS IN SASKATCHEWAN

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The completion of an estate-planning engagement often includes a discussion of whether the testator wishes to be buried or cremated, and potentially what should happen to the person's remains upon death. It is important to recognize that in Saskatchewan, the ultimate authority with respect to the disposal of human remains rests first with the executor of the estate, and if no such executor has been named in the will, provincial legislation sets out a list of prescribed persons who could make the decision. In addition, there are exceptions when dealing with the disposal of cremated remains.

Relevant Legislation: The Funeral and Cremation Services Act

The Funeral and Cremation Services Act (SS 1999, c. F-23.3) ("the Act") provides for the identification of an "authorized decision-maker" to deal with "human remains," which are defined as meaning "a dead human body, but [do] not include cremated human remains."

Pursuant to section 91 of the Act, an executor named in the will of the deceased (so long as that person has capacity, which is not defined in the Act) is deemed to have the authority to control the disposition of human remains. In the event that there is no executor named in the will of the deceased, section 91 sets out a list of persons who could fill that role, including (but not limited to) a spouse, an adult child, a parent or legal custodian, and a sibling of the deceased. If there are competing applications, the persons are to be chosen in the order mentioned in the Act, with preference being given to the elder or eldest of persons within the same category. For the purposes of section 91, adoptive relationships count as full relationships.

3 *Lam v. Law Estate*, supra note 1, at paragraph 51.
4 *Walker v. McDermitt*, [1931] SCR 94; 1930 CanLII 1.
5 *Tataryn v. Tataryn Estate*, [1994] 2 SCR 807, at 815-16.
6 *Lam v. Law Estate*, supra note 1, at paragraph 165.
7 *Adult Interdependent Relationships Act*, SA 2002, c. A-4.5 ("the Act").
8 Section 3(1) of the Act.
9 Section 11 of the Act.
10 *Abbott v. Mamdani*, 2024 ABKB 342 ("*Abbott*").
11 Ibid., at paragraph 3.
12 Ibid., at paragraphs 13-14.
13 Ibid., at paragraph 18. Justice Gaston's analysis at paragraphs 18-22 cites *Henschel Estate*, 2008 ABQB 406, and *Nelson v. Balachandran*, 2015 ABCA 155.
14 *Abbott*, at paragraph 24. Examples of cases involving such external circumstances are cited at paragraph 23.
15 *Henschel Estate*, supra note 7, at paragraph 41, quoted in *Abbott*, supra note 1, at paragraph 24.
16 *Abbott*, supra note 1, at paragraph 25.

Application to Cremated Remains

In *Saunders v. Saskatoon Funeral Home Company Limited* (2016 SKQB 217), there was a dispute between two parents over how to dispose of the cremated remains of their child. Because the child was underage and had no will, spouse, or children, authority to control the disposition of her remains fell to her parents pursuant to section 91 of the Act. The father was older than the mother, so he took priority as an authorized decision-maker under the legislation.

The father authorized the cremation of his daughter's remains; then, despite the fact that the definition of "human remains" in the Act expressly excludes "cremated human remains," he directed that the cremated remains be returned to the funeral home. At issue before the court was whether the Act empowered the father to take the actions he did, and further whether the father could dispose of the cremated human remains.

The court held that the father was authorized to direct the funeral home to cremate the human remains, and that he was further authorized to direct the crematorium to return the cremated remains to the funeral home, and then have the funeral home deliver those cremated remains to him. However, the court held that he had no authority under the legislation to dispose of the cremated remains. The disposition of the cremated remains is left to the person who applies to the court to be appointed as administrator of the deceased's estate.

Who Is a Parent?

In a recent decision, *M.G. v. Saskatchewan (Social Services)* (2023 SKKB 59), the court was faced with determining whether a "person of sufficient interest" (PSI), pursuant to the meaning of that term in *The Child and Family Services Act* (SS 1989-90, c. C-7.2), was entitled to have a body released to them. The applicant had been appointed as a PSI and granted indefinite custody pursuant to the legislation. The court found that the applicant had been granted custody, the deceased had resided with her, and she had stood in the place of a parent for 13 years. This was sufficient for the applicant to be considered a "parent" within the meaning of that term in *The Child and Family Services Act*, and to have priority to control the disposition of the body pursuant to section 91 of *The Funeral and Cremation Services Act*.

Closing Thoughts

For those who have the capacity to make a will, it is important to be aware that the role of executor in Saskatchewan includes the ability to choose either burial or cremation. Therefore, if a testator has a strong preference in that regard, it will be important to appoint an executor who will respect and support those preferences. However, for those who are unable to make a will, or who die without having appointed an executor, the legislation opens up the possibility of competing claims for decision-making authority.

HOMESTEAD RIGHTS IN MANITOBA: SIWAK V. SIWAK

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In Manitoba, married and common-law couples have homestead rights in the home where they reside. Homestead rights, which are governed by *The Homesteads Act* (CCSM c. H80) ("the Act"), were created to protect the home for the non-owning spouse; they derive from the predecessor "dower rights." The Act entitles the surviving spouse or common-law partner (herein collectively referred to as "spouse") to a life estate in the homestead on the death of the owning spouse. This enables the survivor to continue to reside in the home for their lifetime following the death of the owner.

Homestead rights also serve to protect the property from disposition by the owning spouse. The Act prohibits the disposition of the homestead without the written consent of the non-owning spouse or court approval. This prevents the disposition of the spousal home without knowledge or consent of the spouse. Couples are often surprised to learn that, even in circumstances where they are registered as joint legal owners of their home, they each retain underlying homestead rights in the property.

Homestead rights are not often the subject of decisions by the Court of King's Bench. They are unique and complicated rights with curious consequences. The case of *Siwak v. Siwak* (2019 MBCA 60) exemplifies the complexities of these interests and how they are dealt with in an estate setting.

The Siwaks were separated and going through marital property division when Mrs. Siwak suddenly passed away. The marital home, owned jointly during their relationship, had been the subject of earlier debate and court intervention in which Mrs. Siwak sought exclusive occupancy and Mr. Siwak sought partition or sale. Mrs. Siwak was granted exclusive occupancy in those earlier proceedings. Following the proceedings, Mr. and Mrs. Siwak signed separate notices of intent to sever their joint tenancy, with Mrs. Siwak signing the document just three days prior to her death. Despite the fact that Mrs. Siwak's signed notice to sever was not served on Mr. Siwak nor registered on title at the time of her death, the court found that the joint ownership had been severed, having regard to the parties' conduct prior to her death. As a result, Mr. Siwak and Mrs. Siwak's estate each owned a one-half undivided interest in the property as tenants in common.

On Mrs. Siwak's death, Mr. Siwak took the position that his homestead right entitled him to a life estate in the property. He understood that, without his consent, the property could not be sold during his lifetime. He moved back into the home. The tables had now turned. The estate sought partition or sale of the property, and Mr. Siwak contested that course of action.

The severance had caused a change in the legal ownership of the home. Mr. Siwak and Mrs. Siwak's estate each now held a one-half undivided interest as tenants in common. Mr. Siwak's homestead interest was not affected by the transition from joint tenancy to tenancy in common. The change in the form of ownership did not extinguish his homestead right. The court confirmed that Mr. Siwak had both his one-half legal interest in the home pursuant to the severance and a homestead interest in the estate's one-half legal interest in the home. However, the court did not agree with Mr. Siwak's submission that he automatically held a life estate. The court instead found that Mr. Siwak did not have a vested life estate, but only a homestead interest. A conveyance of the life estate to Mr. Siwak was required to vest the life estate in Mr. Siwak. Conveyance would have resulted in Mr. Siwak's life estate interest being reflected on title. This change to the title had not yet occurred.

The court considered the steps available to the estate to dispose of Mr. Siwak's homestead interest. The Act directs that, without the consent or release of the homestead right by the spouse, a court order is required to dispense with the spouse's consent. The court confirmed that it could dispense with Mr. Siwak's consent under the Act in these circumstances. An application under the Act was not required in this case, however, because the court was provided with sufficient authority under section 19(2) of *The Law of Property Act* (LPA) (CCSM c. L90) to dispense with his consent, and was further authorized under section 24 of the LPA to quantify and order compensation for the homestead right. Under section 24, the value of the homestead right is determined according to the principles applicable to the valuation of deferred annuities and survivorships.

The parties were encouraged by the court to agree on a valuation of Mr. Siwak's homestead interest in the home. The value of his interest would be part of a broader family property equalization to be done between the parties. The court noted that if a value could not be agreed on, the parties would be required to retain an expert actuarial opinion, which would come at great cost and cause further delay. Such steps were not viewed as proportional to the value of the assets at issue. If the parties could not resolve the valuation issue, the option to return before a master for a determination remained.

Estate-planning lawyers in Manitoba often address homestead rights when drafting powers of attorney. A form of acknowledgment is generally executed alongside the power of attorney when spouses have homestead property. The acknowledgment is required under the Act to empower the attorney to take such actions as executing a release of the homestead right or consent to a disposition of the homestead. While estate-planning lawyers in Manitoba regularly incorporate authorizations into powers of attorney to address homestead rights, rarely do they have to deal with the conveyance of life estates or valuation issues that arise from homestead rights. The case of the Siwaks provides a valuable reminder of how these rights are dealt with after the death of an owner.

INHERENT JURISDICTION AND PROBATE: JAMES ESTATE (RE)

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In *James Estate (Re)* (2024 ONCA 623), the Ontario Court of Appeal considered an aspect of the Ontario Superior Court's inherent jurisdiction in estate proceedings that is rarely in issue: Does the inherent jurisdiction of the Superior Court empower it to refuse to grant an application for a certificate of appointment as estate trustee with a will ("certificate") if the application is unopposed? In this case, the court concluded that it did.

The deceased, Robert James, executed a will on September 7, 2022, leaving his estate to his children and common-law spouse. In the will, he appointed a friend as the executor. The will was witnessed by the appellant and another individual. The appellant was identified as a "consultant" on the back sheet of the will. The testator subsequently died on April 8, 2023.

Two days after the testator's death, the executor named in the will renounced her right to apply for a certificate. Within a month of the testator's death, all of his children and

his common-law spouse had signed consents for the appellant to apply for a certificate and to waive the requirement to post a bond. The appellant filed his application for a certificate in July 2023, but it did not include the required affidavit in support of an order to dispense with the bonding requirement.

The Estates Registrar referred the application to a judge on the basis that it may raise an issue requiring determination by a judge, although the specific reason for the registrar's referral was not given. The application judge determined that the application raised the issue of whether the court should exercise its inherent jurisdiction to refuse the application. The application judge accordingly invited the appellant and any other person affected by the application to bring a motion for directions, failing which the application judge would make a final determination.

The beneficiaries of the estate brought a motion to grant the application, but did not include any affidavit evidence, nor did the appellant. The beneficiaries simply stated their grounds in the notice of motion. Specifically, they stated that the appellant was a long-time and trusted advisor of the deceased, the beneficiaries had considered the matter and concluded that the appellant was the most trusted and qualified person to be appointed, and the appellant had continued to advise the deceased and family members on important matters.

What, then, was the issue with the appellant's application? The word "continued" in the paragraph above provides a clue. The application judge noted that the appellant had been permanently disbarred by the Law Society of Ontario in 2013, a decision that was upheld by the Divisional Court, on the basis that the appellant had participated in 14 fraudulent mortgage transactions over a period of three and a half years.

The application judge considered prior case law, which noted that a court should defer to the testator's choice of executor, and should pass over the testator's choice only if the interests of the estate are likely to be endangered or if the estate will not be properly administered. However, the application judge distinguished those cases on the basis that the appellant was not in fact appointed by the testator.

While the fact that the appellant had been disbarred did not automatically disqualify him from being appointed as executor, the application judge pointed to the evidence—in part from the heirs' notice of motion—that the appellant may have been engaged in the unauthorized practice of law. In the circumstances, the application judge concluded that it was not appropriate to appoint the appellant simply because that is what the heirs wanted. Moreover, the applicable statutory provision (section 29 of the Ontario *Estates Act*, RSO 1990, c. E.21) did not compel a court to grant an application for a certificate, even where all required consents had been obtained. The application judge balanced the wishes of the heirs with the court's overarching responsibility to promote confidence in the administration of justice and to uphold the rule of law, and refused the appellant's appointment.

On appeal, the Court of Appeal reviewed the application judge's findings on the scope of the court's inherent jurisdiction, which is question of law, on the standard of correctness. Noting in particular the inquisitorial nature of the court's inherent jurisdiction in estate proceedings, the Court of Appeal agreed that the application judge had jurisdiction to deny the application, notwithstanding that it was unopposed. The Court of Appeal further determined that the application judge's exercise of discretion in the case was entitled to deference, and found no reason to interfere with it. It held that this was one of the rare cases where there was a legitimate concern with an unopposed application. The appeal was dismissed.

James Estate provides a succinct overview of the court's inherent jurisdiction in estate proceedings. It is also a reminder that, while it is rare to refuse to grant an unopposed application for a certificate of appointment as estate trustee with a will, the court is not a mere "rubber stamp" when granting probate, even in circumstances where all of the required formalities are otherwise satisfied.

JOINT ACCOUNTS IN QUEBEC AS WILL SUBSTITUTES

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It is quite common to provide for the transmission of property upon death other than by way of a will,[17] both in common-law jurisdictions[18] and in civil-law jurisdictions except for Quebec.[19] Joint accounts, a powerful tool for sharing expenses or organizing finances with a partner, family member, or business associate, are frequently used as will substitutes to create a right of survivorship in favour of the surviving account holder. In Quebec, however, joint accounts come with complexities that require careful consideration, especially in the context of the province's legal framework. The Quebec Court of Appeal has held that since will substitutes pertain to the law of successions, they are governed by the rules of succession.[20]

Quebec law recognizes that bank deposits are contracts of loan between the depositor and the bank.[21] Quebec law also recognizes that two or more persons may hold joint accounts.[22] The rights of each of the account holders are those set out in the account documents, and they can vary from a simple mandate (power of attorney) to withdraw funds deposited by the other account holder, or they can create a true co-ownership, where any funds that are deposited are jointly owned by the account holders in the proportions indicated in the account documents.[23]

Unlike the common law,[24] except for joint accounts held by spouses or former spouses who have made a designation in writing,[25] the civil law of Quebec does not recognize a right of survivorship provided for in bank account documents, unless those documents are testamentary in nature. This is because the civil law of Quebec considers a right of survivorship to be a "donation mortis causa" (a donation in contemplation of death).[26] Donations mortis causa may be made only in wills and in marriage or civil union contracts.[27] Thus, if the account contract meets the form of a testamentary disposition (that is, if it is signed in the presence of two witnesses), a right of survivorship could be considered valid mortis causa. Needless to say, it is highly unlikely that joint account holders ever open joint accounts that comply with the Quebec's rules on testamentary dispositions. Instead, the documentation relating to bank accounts in Quebec generally contains provisions with respect to additions and withdrawals from the accounts. This means that, upon the death of one of the account holders, the ownership of assets in the account is divided between the deceased account holder's succession and the surviving account holder, as determined by the account documents and the nature of the rights created in those documents. Thus, if only a simple power of attorney was given to another person by the person who contributed the funds, the contributor will be the sole owner of the funds upon the death of either person. If a true joint ownership were created, then, upon the death of one of the joint account holders, his or her succession would be entitled to the proportion of the account belonging to the deceased person prior to death.[28]

The legal nature of joint accounts in Quebec is generally rooted in the principles of co-ownership, but the rules governing them can be complex. The intentions of the account holders, the type of joint account chosen, and the involvement of inheritance laws can all affect how a joint account is handled after the death of one of the account holders. Accordingly, it is crucial to clearly understand the legal implications and ensure that proper documentation and agreements are in place when a joint account is set up, especially if the account is being used for significant financial transactions or as part of a broader estate plan.

17 Jeffrey Talpis, "La transmission des biens au décès autrement que par succession en droit international privé québécois," in Barreau du Québec, Service de la formation continue (2010) vol. 324, *Développements récents en successions et fiducies* (Cowansville, QC: Éditions Yvon Blais, 2010), at 119.
18 For example, by way of right of survivorship.
19 For example, in France, by way of a tontine clause.
20 *Succession de Gold*, 2020 QCCA 23.
21 Nicole L'Heureux and Marc Lacoursière, *Droit bancaire*, 5th ed. (Montreal: Éditions Yvon Blais, 2017), at 66.
22 Ibid., at 146.
23 Supra note 1, at 146-47. If proportions are not indicated, the co-ownership is presumed to be equal.
24 *Pecore v. Pecore*, 2007 SCC 17; [2007] 1 SCR 795 (CanLII).
25 Troy McEachren, "A Tentative Tontine? Quebec Set to Introduce a Limited Right of Survivorship for Spouses and Former Spouses" (March 2022) 21:2 *STEP Inside* 24-26.
26 See *Drolet c. Trust général du Canada*, JE 89-1027; 1989 CanLII 571 (QCCA); and *Gauthier v. Gauthier*, 2016 QCCS 2333. A right of survivorship is considered to be a gift inter vivos: *Pecore v. Pecore*, supra note 8.
27 Article 1819 of the *Civil Code of Québec*, CQLR c CCQ-1991.
28 *L.B. c. C.N.*, 2013 QCCS 3593.

THE NEW GUIDE TO PLANNING FOR INCAPACITY: LEGISLATIVE UPDATES FROM PRINCE EDWARD ISLAND

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On November 29, 2023, Prince Edward Island's new *Powers of Attorney and Personal Directives Act* (SPEI 2023, c. 34) ("the new Act") received royal assent. The Act that it replaces (RSPEI 1988, c. P-16) is short and relies primarily

on the common law to impose duties on attorneys. Likewise, no legislation in PEI currently provides for powers of attorney for personal care, or personal directives, as they are called in Nova Scotia. PEI legislation provides only for health-care decisions under the *Consent to Treatment and Healthcare Directives Act* (RSPEI 1988, c. C-17.2). The new Act has not been proclaimed but is expected to be in the coming months. New regulations, currently in the consultation phase, will be enacted after proclamation of the new Act.

The most substantial addition in the new Act is the introduction of personal directives. Previously, individuals had to apply to the Supreme Court of Prince Edward Island to be appointed as guardians of an incapacitated person with respect to personal care decisions beyond those defined in the *Consent to Treatment and Healthcare Directives Act*. Although courts in PEI are quick to respond to guardianship applications, the process is nonetheless time-consuming and costly. Personal directives, as practitioners would know from most other Canadian jurisdictions, offer a streamlined and cost-effective option for individuals planning for incapacity.

The new Act provides precise execution requirements, such as the need for the principal's signature and witness validation. It also broadens exclusions for witnesses, disqualifying family members, minors, and individuals unable to understand the principal's communication. This approach mirrors legislation in New Brunswick and Nova Scotia, with some distinctions. While those provinces prohibit a witness who is the spouse, common-law partner, or child of the attorney, PEI's definition of "family" is broader and includes parents, siblings, grandparents, grandchildren, aunts, uncles, nieces, and nephews.

The new Act codifies an attorney's duties and compensation. Attorneys must now engage the principal in decision making whenever possible, consider the principal's wishes, maintain detailed records, and communicate regularly about the principal's financial matters. The new Act outlines conditions for attorney remuneration and reimbursement for expenses, while protecting attorneys from personal liability if they adhere to their duties.

The limitation of liability differs slightly from the limitation in Nova Scotia's legislation. PEI's new Act focuses on compliance with prescribed duties (a positive obligation that negates damages), whereas Nova Scotia's legislation prescribes a "second look" at the nature of a breach before one is established. Practically, both statutes require attorneys to act honestly and in good faith, notwithstanding these distinctions.

The new Act also introduces comprehensive accounting requirements and mechanisms for verifying the identity and authority of attorneys. We expect that these amendments will assist attorneys in dealings with financial institutions.

The legislature has introduced new regulations to complement the new Act. These regulations may be familiar to practitioners in New Brunswick, since they are similar to the province's General Regulations under the *Enduring Powers of Attorney Act*. There are also notable parallels between PEI's provisions and those in the acts of other Atlantic provinces. The three primary components of PEI's regulations are a list of offences prohibiting someone from acting as an attorney or agent, the form and contents of an accounting, and optional forms of power of attorney and personal directive.

The list of prohibitionary criminal convictions is broader in the new Act than in Nova Scotia's or New Brunswick's legislation. Anyone convicted of assault, sexual assault, violence, intimidation, criminal harassment, uttering threats, theft, fraud, or breach of trust within the past 10 years cannot act as an attorney or agent. This prohibition is removed if a person is pardoned or if the principal acknowledges the conviction, consents in writing, and gets independent legal advice. This is similar to, but more detailed than, comparable provisions in the other provinces' acts. New Brunswick's legislation disqualifies an attorney convicted of offences involving dishonesty unless the attorney has received a pardon or disclosed the conviction to the donor. These regulations remain in the draft phase and may be amended before they are enacted.

The modernization of the law concerning powers of attorney is a positive development. PEI's new Act prescribes many common-law principles that practitioners are familiar with. It also bridges an important gap in the legislation by providing a more timely and cost-effective method for addressing incapacity, and provides guidance to practitioners in delivering sample forms of documents.

CHAIR'S MESSAGE

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Thank you for being so supportive this past year, and best wishes for a rewarding and peaceful new year.

The STEP Canada board held an exhilarating retreat in mid-November. The morning strategy session studied the data and insights collected by our third-party researchers from the Fall Member Survey. Almost 600 members responded to the survey, providing us with invaluable feedback that will inspire more inclusive and accessible technical and social events. In some cases, the data confirmed what is working well; in others, it identified what we need to do better. It was the board's task to figure out how to do that.

The board succeeded in identifying 90+ actionable changes for programs, products, and events and for connecting with all demographics of our membership body. Branch and chapter leadership, national committee chairs, and senior staff have now been tasked with incorporating action items into their 2025-26 planning, or even earlier where possible.

On behalf of the members who attend the branch and chapter educational sessions, I want to thank the local executives and officers who dedicate time and effort to ensure that the programming options and topics are timely and deliver excellent technical content. If you have not yet attended a local seminar, I encourage you to do so! You will be rewarded with excellent content and networking opportunities with local practitioners. Remember, the more you engage, the more you will reap all the benefits of your STEP membership.

In my October message, I was looking forward to the STEP Canada/STEP USA 1½-day in-person stand-alone conference in Chicago on October 6-8. Now, I look back on it with pride. The conference sold out with a capacity of 200+ delegates, 50 American and 150 Canadian. Responses to the post-conference survey were overwhelmingly positive, specifically for the cross-border networking, technical content, and location. My thanks to those on the program committee who crafted the excellent sessions, and to the moderators and speakers who prepared and delivered the presentations.

STEP Canada's biannual full-day course for winter 2025 is *Advising Executors from Death Certificate to Clearance Certificate*. The course will be presented in our 11 branches and chapters through January and March 2025 by course authors and local senior practitioners. The course curriculum was created by three subject-matter experts in law, accounting, and trust administration, with input from the national programs committee and SME guests for focused collaboration, including a Quebec notary, a litigator, and a designated financial planner (for insurance and registered plans). Register early for your local course to avoid disappointment!

Many thanks to our Tax Technical Committee for their fantastic October 16 complimentary member webcast, Impact of the Summer 2024 Tax Changes on Trusts & Private Clients. A record 843 delegates registered to watch or replay the webcast; those who missed it can still register for on-demand replay. Feedback from members who watched it was outstanding!

In November, STEP Worldwide launched the first of two public-facing campaigns. *It's Time to Talk* is designed to encourage family business owners to communicate their wishes openly. This campaign was inspired by insights from the Modern Families report, in which members overwhelmingly recommended clear and early communication as a way for families to avoid conflicts. The campaign website, www.step.org/time-to-talk, provides information and resources to guide family businesses in discussing the future and planning for succession. Please share with your clients and communities.

The second, *Red Flags* (launching in late January), will focus on financial and accidental financial abuse—for example, when a POA isn't aware of what they can and cannot do with the grantor's finances or property that they have been entrusted to manage. The campaign will provide examples of abuse and easily digestible information for attorneys for property.

Both campaigns are directed to a global audience. STEP Canada will collaborate with STEP Worldwide by providing resources and media support to amplify the two campaigns domestically. Members are encouraged to promote

the campaigns, support the content, and engage with the campaign on social media. All of these efforts will help to increase STEP's brand visibility and recognition to the public.

More exciting developments are reported by our Education Committee. We have reached a new milestone of over 1,000 practitioners enrolled in the STEP Canada Diploma in Trusts & Estates, and another 161 practitioners enrolled in the Essay Program or the CETA Program. It is wonderful to know that there are so many future leaders in this group who will, in time, guide STEP Canada in supporting trust and estate practitioners in their pursuit of excellence.

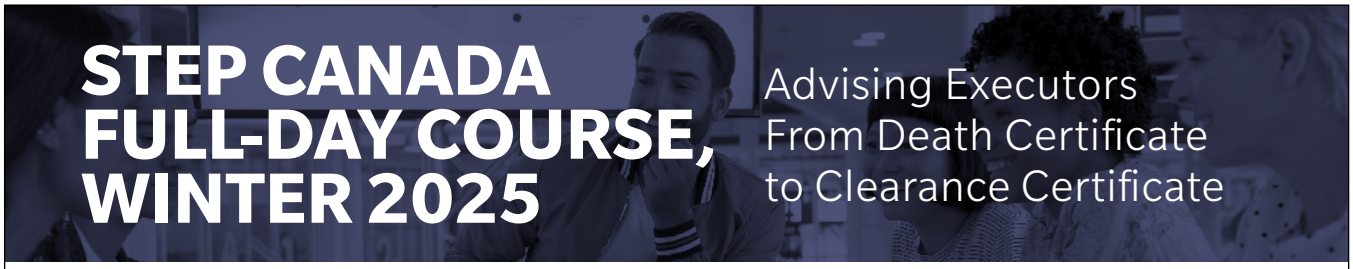
On February 25-26, the 5th STEP Global Congress will occur in Rome, Italy. This event will gather thought leaders, industry experts, policy-makers, and innovators to engage in a dynamic dialogue about the critical issues shaping our industry. Congress will address the challenges and opportunities presented by the next generation of wealth holders, the fight against economic crime, and the debate over implementing a global wealth tax, offering diverse perspectives on potential impact and feasibility. I hope to see many of you there.

In early March, our 2025-26 membership renewal campaign will begin. We anticipate another successful renewal campaign as we continue to add value, support, innovative networking, and education opportunities and resources for our members, with no increase in annual membership fees.

On behalf of the board, I wish to express our sincere thanks for the collaboration and support of the firms that sponsor our events and conferences. They remain essential to STEP Canada's success and ability to provide value to our membership, and they support activities that facilitate our members' professional development and networking.

Mark your calendars for the 27th National Conference, which will take place on June 16-17, 2025. The Program Committee, chaired by Paul Taylor, is focused on launching another excellent program in early January. Watch your emails to take advantage of early-bird registration fees and secure your in-person spot before the conference sells out!

I will end my message with an expression of thanks to the national committee chairs; to the many volunteers who drive our initiatives forward; to the members of the STEP Canada Executive Committee, Richard Niedermayer, Brian Cohen, Aileen Battye, Corina Weigl, and Chris Ireland; and, of course, to our fantastic STEP Canada senior staff, Janis Armstrong, Michael Dodick, and Amanda Tattoli. All of us continue to work closely and effectively to foster an even better and stronger STEP Canada.



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