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STEP members are no doubt aware of the fundamental changes to the rules regarding the taxation of estates and trusts that came into effect on January 1, 2016. These rules are far-reaching: they affect estates, testamentary trusts, life interest trusts, trusts for beneficiaries with disabilities, and charitable donations made by estates and trusts. Their impact on many existing inter vivos and testamentary trusts, estate and trust planning, and charitable giving is of great concern for all of us.

Some of the changes are positive. For example, certain changes to the tax treatment of estate donations to charity should result in greater flexibility in claiming donation tax credits (there are, of course, associated complications arising from issues involving graduated rate estate status). Further changes to eliminate capital gains on donations of private company shares and real estate, which are anticipated to come into force in 2017, may provide even greater flexibility – good news for donors and charities alike.

Other changes are not as positive. The taxation of testamentary trusts, other than graduated rate estates and qualified disability trusts, at the top marginal tax rate instead of graduated tax rates is disappointing. Various arguments can be made to support the opinion that broader exemptions should be provided and that qualified disability trusts should be extended to disabled beneficiaries who do not qualify for the disability tax credit. It would probably be going too far, though, to call this change in tax policy unfair.

However, two changes in particular are decidedly negative. The first involves the taxation of the deemed disposition of a life interest trust’s assets on the death of the income beneficiary in the income beneficiary’s estate (or in the surviving income beneficiary’s estate in the case of a joint partner trust). In addition to other challenges, the shifting of the tax liability produces an inequitable and even absurd result, which will fuel acrimony and litigation as parties fight over who should bear the burden of the tax. The second negative change involves the charitable donation credit. When charitable donations are made by a life interest trust after the death of the life interest beneficiary, the donation credit will go to waste as it cannot be carried back to the income beneficiary’s estate to offset the taxes triggered in the estate as a result of the death.

Most tax and estate practitioners were hopeful that these unwarranted and potentially panic-inducing and litigation-promoting provisions would be revised or repealed. In fact, when this and the other changes were introduced, representations were submitted to the Department of Finance by numerous organizations, including STEP (in a well-reasoned analysis of the practical problems, authored by a committee chaired by Pamela Cross). Unfortunately, legislative amendments have not yet been forthcoming. Continued on next page ...
On November 16, 2015, the Department of Finance did provide a ray of hope in the form of a non-binding letter in which it acknowledged the concerns raised by the tax and trust community. The department indicated that it may be prepared to support an option that will “subject affected trusts and their beneficiaries to an income tax treatment for the 2016 and later taxation years that more closely corresponds to that available to trusts in 2015 and earlier taxation years, by taxing in the trust the income deemed to be recognized on the death of the beneficiary.” With respect to the charitable donation issue, the department may be willing to support a limited carryback, provided that the donation is made in the same calendar year as the death of the life interest beneficiary. Although this solution may offer no assistance when a life interest beneficiary dies near the end of the year, it is generally consistent with the tax treatment of gifts made by similar trusts before 2016.

The November 16 letter is not binding, and there is no guarantee that the suggested changes will be accepted by the department or adopted by Parliament. The current quandary for practitioners is how to advise their clients in light of the uncertain future.

Trust and estate practitioners can no longer wait and simply hope for a desirable resolution. The November 16 letter addresses only two concerns; all other changes come into effect without further discussion. Practitioners must now come to grips with the new rules and their consequences, and take all of the necessary and time-consuming steps to update and revise their planning to ensure that their clients continue to receive the best possible advice. Those practitioners who draft wills or provide legal, tax, accounting, or financial advice must be ready to answer questions and advise their clients about the impact of the new rules on their particular circumstances, and the potential for further legislative changes that may alleviate the most difficult planning concerns.

2016 ushers in a new era for the taxation of trusts and estates; it’s time to embrace what the New Year brings.
The qualified disability trust (QDT) was introduced in the 2014 federal budget as one of two entities that are exempt from the proposed top-rate taxation of testamentary trust income; the other entity is the graduated rate estate (GRE), whose first three years also qualify for this exemption. STEP discussed an exemption for trusts for disabled beneficiaries in its December 2, 2013 submission to the minister of finance concerning the government’s proposals to limit graduated rates for testamentary trusts (at http://www.step.ca/pdf/TTC122013_TestamentaryTrustSubmissionSTEPCANADA.pdf). Section 122 of the draft technical notes to the new legislation, released in August 2014, stated the following:

[D]uring the consultation the Government heard from a number of stakeholders that the existing graduated rate taxation of testamentary trusts for the benefit of disabled individuals was an important tool in preserving access by these individuals to income-tested benefits, in particular provincial social assistance benefits. In response to these submissions, graduated rates will continue to be provided in respect of such trusts having as their beneficiaries individuals who are eligible for the federal Disability Tax Credit.

Qualification as a QDT
To qualify as a QDT, a trust must meet the following requirements:

1. **Arise on and as a consequence of the death of an individual.** Inter vivos trusts for disabled beneficiaries are excluded. A separate insurance trust for a disabled beneficiary arising on the death of a parent, for example, may be a QDT.

2. **Resident in Canada.** The trust must be actually resident in Canada in the taxation year; the deeming provisions in paragraph 94(4)(b) of the Income Tax Act do not apply.

3. **Joint election.** The disabled beneficiary (the “electing beneficiary”) and the trust (presumably the trustees) must file a joint election with the trust’s T3 return in a prescribed form to be a QDT in a taxation year. There appears to be no relief for late-filed elections, which could prove problematic for some individuals with disabilities. Moreover, if the electing beneficiary is mentally incapable, query whether a court-appointed guardian is required to make the election.

4. **Disability tax credit.** The electing beneficiary must qualify for the disability tax credit (DTC), as discussed further below.

5. **One election.** The electing beneficiary can make only one QDT election in a taxation year.

Considerations and Concerns

**Named Beneficiary**
The QDT rules require that the electing beneficiary or beneficiaries be named in the instrument under which the trust is created. Often, however, a testamentary trust refers to the beneficiaries as “my issue” or “my children,” descriptions that appear to be insufficient to meet the QDT definition. A problem might therefore arise if, when a will is created, it is not known whether a child (or a spouse) has or will develop a disability. A Henson trust (a discretionary trust designed to ensure that assets are not considered to be the assets of a beneficiary for the purpose of qualifying for provincial benefits) is commonly created in a will for a specific individual when the condition of the beneficiary is known at the time that the will is created; however, an
individual who is the beneficiary of a testamentary trust may become disabled later in life. Such a beneficiary may not be named in the testamentary trust and would likely not be able to benefit from designating the testamentary trust as a QDT.

**Eligible for DTC**

The electing beneficiary must be eligible for the DTC under section 118.3 of the *Income Tax Act* for his or her taxation year in which the trust year ends. Advisers should be aware that not all recipients of provincial disability benefits qualify for the DTC. For example, if a Henson trust is established in the will of a parent for a disabled child who does not qualify for the DTC, the trust may not be eligible for the graduated rates. If trust income is allocated to the beneficiary, his or her benefits may be at risk.

**Only One QDT**

In addition, an electing beneficiary can make the QDT election for only one trust for each taxation year. If both parents, or a parent and a grandparent or other relative, have each established testamentary Henson trusts for a disabled person, only one trust can be a QDT. If a parent has established a separate trust to hold life insurance proceeds in addition to the Henson trust for a portion of the residue of the estate, only one of these trusts can be a QDT. Whether the insurance proceeds should instead flow into the estate must be considered in light of provincial probate planning, creditor protection, and related issues.

If an individual is or will be the beneficiary of more than one trust, the trustees of the various trusts must decide which trust will make the QDT election in a particular year. Careful consideration is required during the planning stages to ensure that the trustees are able to communicate with each other and make coordinated decisions, which may be complex in the case of divorced parents, for example. If significant income is expected from one of the QDTs (as a result of an insurance policy, for example), practitioners might consider providing the trustees with the authority to structure the trust investments through a corporation to manage the income paid to the QDT and any other trusts for the disabled beneficiary.

**Recovery Tax: Beware!**

The QDT rules include a complex “recovery tax” regime to ensure that a beneficiary who does not qualify for the DTC does not benefit from the graduated rates. The recovery tax applies when:

1. none of the beneficiaries at the end of the year is an electing beneficiary for a preceding year,
2. the trust ceases to be resident in Canada, or
3. a capital distribution is made to a non-electing beneficiary.

**Conclusion**

While the QDT regime will benefit many recipients of the DTC, advisers must be aware that the regime has added significant complexity (and in many cases costs) for families with a disabled child, at both the planning and implementation stages. Clients should be encouraged to review their situation because planning and structures that are currently in place may not adequately address the new legal realities.
Two interesting decisions were rendered recently on the provincial tax residence of a trust. The Supreme Court of Newfoundland and Labrador issued its decision in Discovery Trust v. Canada (National Revenue), 2015 NLTD(G) 86, in June. This case was followed, in August, by the Court of Quebec’s decision in Boettger c. Agence du revenu du Québec, 2015 QCCQ 7517, which has subsequently been appealed to the Quebec Court of Appeal.

Facts
Discovery Trust focuses on a trust settled in 2002 by a Newfoundland resident to hold shares of a holding company for the benefit of his children in Newfoundland; the children were also named as trustees. In 2006, the beneficiaries resigned as trustees, appointed an Alberta trustee, moved the assets of the trust to Alberta, and changed the laws governing the trust from those of Newfoundland and Labrador to those of Alberta.

In 2008, the shares of the operating company were sold, the holding company distributed the proceeds of the sale to the trust, and the trust reported the tax consequences in its tax return as an Alberta resident. The capital was thereafter distributed to the beneficiaries. The minister of national revenue reassessed the trust on the basis that it was a resident of Newfoundland. The Supreme Court of Newfoundland and Labrador disagreed, finding that the trust was resident in Alberta.

The court in Boettger reviewed a trust settled in 2002 by a Quebec resident to hold shares of an operating company and promissory notes for the benefit of his Quebec-resident spouse. An Alberta resident was named as trustee in the trust deed. A series of transactions was undertaken, resulting in the payment of a deemed dividend to the trust, which the trust reported in its tax returns as an Alberta resident. Revenue Québec assessed the trust in respect of the deemed dividend, applying penalties and interest, on the basis that the trust was resident in Quebec.

Analysis
Until the Supreme Court of Canada’s decision in Fundy Settlement v. Canada, 2012 SCC 14, a trust was generally considered to be resident in the same jurisdiction as the majority of its trustees. In Fundy Settlement, the Supreme Court expressed the view that a trust is resident where its central management and control is located. While reaching different conclusions on the facts of their respective cases, the courts in Discovery Trust and Boettger both applied this test, thus confirming that the concept of central management and control is relevant to trusts in both domestic and international contexts.

It is difficult to reconcile the different conclusions reached by the courts in Discovery Trust and Boettger. The court in Boettger placed great importance on the amount of planning undertaken by Quebec professionals before the trust was created to ensure that it was resident in Alberta. It often referred to the tax motivations of the parties to the trust. The court noted that the trustee was unknown to both the settlor and the beneficiary before the creation of the trust and was chosen by lawyers for the operating company only because of his Alberta residence.

The court upheld Quebec’s position, finding that the trust was not resident in Alberta.

Following the creation of the trust, the receipt of a deemed dividend, and a distribution of capital to the beneficiary in 2003, the court found that the trust remained essentially dormant. No dividends were declared on the shares that it held, and no assets were invested; the trust’s only actions were receiving payments from the settlor and the operating company to cover its expenses. The court also remarked that the accounting firm that prepared documents on behalf of the trust did not open a separate file for it but rather invoiced the operating company for its services.
The court observed that while the trust deed bestowed broad discretionary powers on the trustee, most of the trustee’s actions (such as paying expenses and determining the amounts to distribute to the beneficiary) appear to have been predetermined in the trust deed, leaving little room for the exercise of discretion. In contrast, the trust deed gave the settlor the right to appoint a protector, who was empowered to remove the trustee and appoint another one. The court viewed this power as evidence of the settlor’s de facto control over the trust.

The court concluded that the Alberta trustee had no real power to administer the assets of the trust. Rather, he was only one factor in a tax plan that was conceived and executed in Quebec, where the central management and control of the trust was located.

By contrast, the court in Discovery Trust made little reference to the planning that would have been necessary to transfer the trust’s residence from Newfoundland and Labrador to Alberta. Rather, it dismissed the importance of the plan’s tax motivations, restating that a taxpayer has the right to arrange its affairs to minimize its taxes. The court emphasized the role that the trustees played following the relocation of the trust to Alberta. It considered a number of transactions in which the Alberta trustee was called on to act. The court underlined that in each case the trustee met its obligations and maintained its independence. The court noted that the trustee consistently demonstrated that it was authorized to act, it had sufficient information to make informed decisions, its decisions were made in the best interest of the beneficiaries, and it properly considered any adverse consequences of its decisions.

While the trustees often acted on recommendations made directly or indirectly by the beneficiaries, the court highlighted that the trustees were willing to act contrary to the wishes of the beneficiaries if such actions were warranted. Moreover, the court underlined that the trustee took care not to delegate its duties to third parties, to consult with specialists, and to require changes or corrections in appropriate circumstances.

Discovery Trust and Boettger both underline the importance of ensuring that the central management and control of a trust resides, in both substance and form, in the tax jurisdiction in which the trust is settled. ■
Minor Beneficiaries and Not-So-Minor Consequences: A Case Study

SUZANNE MICHAUD, TEP
Royal Bank of Canada
Member, STEP Toronto

GLENN DAVIS, TEP
MD Financial Management Ltd
Member, STEP Toronto

Facts

Joan, who was recently widowed at the age of 65, wants to review her estate plan. She lives in a province outside Quebec and has three children: Peter, Paul, and Mary, all of whom are in their mid-to-late thirties; they live in Canada and are financially comfortable. Peter is married with three children (aged 14, 12, and 10); Paul lives in a common-law relationship with his partner and new baby; and Mary is single with no children.

Joan currently owns a home worth $800,000, a non-insurance registered retirement income fund (RRIF) worth $500,000, and a $200,000 whole life insurance policy. She has no debt. She currently has a will in which she bequeaths $25,000 to each of her grandchildren. Her children are both her executors and the beneficiaries of the residue.

Without telling her children, Joan has decided that she would like to make her grandchildren the major beneficiaries of her estate. After hearing a radio show about saving probate fees, she arranges with her financial adviser to sign new designations, replacing her children with her four grandchildren as the named beneficiaries of both her RRIF and her life insurance policy. Joan believes that her estate is worth $1.5 million. Allowing for $100,000 to cover various expenses, she expects that each of her children and her grandchildren will receive $200,000 of the remaining $1.4 million. Because her children are financially secure, Joan is pleased with her plan to make equal gifts to her children and grandchildren.

Alternative 1: Joan Dies Suddenly Before Receiving Planning Advice

While grieving their mother’s unexpected death, Joan’s children are about to encounter other unpleasant surprises. Since the introduction of the tax-free savings account (TFSA), the financial industry has witnessed a surprising number of designations of minor beneficiaries. It seems that many grandparents are designating grandchildren in their TFSA and other registered plans, rather than including or updating gifts to their grandchildren in their wills. They have good intentions, but do not understand the difficulties caused by the direct designations of minors. Joan’s designations will frustrate her children (particularly Mary) as estate representatives and beneficiaries; they will also frustrate Peter and Paul as parents.

The first problem is that since none of Joan’s grandchildren is financially dependent on her, there is no tax advantage in designating them as beneficiaries or to give a valid discharge to the issuer. The proceeds do not form part of an estate and are not subject to the control of its executors. In most provinces, property distributable directly to a minor must be paid into Court instead. Unless a minor beneficiary resides in Quebec or New Brunswick, there is likely no legal guardian, trustee, or other personal representative appointed to receive the funds and give the discharge. Under the Civil Code of Québec, parents are generally automatically entitled to

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represent their children in all matters, including financial ones. Similarly, under New Brunswick’s Guardianship of Children Act, the parents of a child are the child’s joint guardians and “shall exercise care and management” of all of the child’s property, subject to certain exceptions. However, Joan’s grandchildren live outside Quebec and New Brunswick.

Lastly, even if the grandchildren were financially dependent on Joan, because no one has authority to instruct that the proceeds of a registered plan be paid out or sent to an insurance company, Joan’s grandchildren cannot benefit from the tax savings that might be otherwise available when these proceeds are used to buy an annuity under which the minor is an annuitant until he or she reaches the age of 18.

What can be done to secure the proceeds of the RRIF and the insurance policy?

**Court-Appointed Guardian of the Property**

Peter and Paul (and their partners) can apply under provincial law to be appointed by the court as the guardians or trustees of the grandchildren’s property, with the power to call for the proceeds on the grandchildren’s behalf and provide the financial institutions with a release. Because each grandchild is receiving $200,000, Peter and Paul might consider this option, with its attendant legal fees. As each grandchild reaches the age of majority, he or she will receive either $200,000 plus the accumulated growth or perhaps $175,000, if the $25,000 gift in the will is subject to a trust until the grandchild is older.

**Payment into Court**

If the RRIF is created as a trust, a trustee may choose to pay the proceeds into court. The trustee is then discharged of liability in respect to the monies paid, although this process does not relieve the trustee against any existing claim for negligence or breach of trust. The funds are invested by the court, and fees are usually payable for the management of the property. The funds and accrued net income are paid out to the minor grandchildren when they reach the age of majority. The parents of the grandchildren have a personal obligation to support their child. However, if there are unaffordable needs, a parent can apply to the court for a payment out of the funds. The issuer of the insurance policy has a similar ability to pay funds into court under some provincial and territorial insurance acts.
Payment to a Parent
When a minor beneficiary resides in one of five provinces or any of the territories and will receive a smaller amount of money than Joan’s grandchildren will receive, funds may be released to a parent with whom the minor lives or to a person with lawful custody of the minor on the completion of certain documentation. The relevant jurisdictions and amounts are summarized in the accompanying table.

<table>
<thead>
<tr>
<th>Province</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alberta</td>
<td>$10,000</td>
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<tr>
<td>British Columbia</td>
<td>$10,000</td>
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<tr>
<td>Ontario</td>
<td>$10,000</td>
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<tr>
<td>Nova Scotia</td>
<td>$10,000</td>
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<tr>
<td>(in payments of $2,000 per year)</td>
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<tr>
<td>Newfoundland and Labrador</td>
<td>$5,000</td>
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<td>(in payments of $2,000 per year)</td>
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<tr>
<td>Yukon</td>
<td>$5,000</td>
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<tr>
<td>(in payments of $2,000 per year)</td>
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<tr>
<td>Northwest Territories</td>
<td>$5,000</td>
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<td>(in payments of $2,000 per year)</td>
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<tr>
<td>Nunavut</td>
<td>$5,000</td>
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<tr>
<td>(in payments of $2,000 per year)</td>
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</tbody>
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Payment to the Public Guardian and Trustee
In Alberta, Saskatchewan, Nova Scotia, and certain territories, the public guardian and trustee (PGT) has the authority to receive and administer RRIF proceeds and provide a release to a financial institution. Generally, a PGT acts only if the amount is too high to be released to the child’s parent or custodian (in accordance with the accompanying table) and no guardian or trustee has been appointed by a court. Because the obligation or power to pay insurance proceeds to a PGT is commonly provided under various insurance statutes, the RRIF proceeds and the insurance proceeds may follow different paths into the hands of the grandchildren.

Result
Peter and Paul are faced with the prospect of a court proceeding to be appointed as a legal representative of their children, the payment of funds into court, or the appointment of a PGT. In each of these cases, the funds will be paid to each grandchild as he or she reaches the age of majority, and the estate will bear the tax burden on the RRIF proceeds that are paid tax-free to the grandchildren. The accompanying table demonstrates the financial impact.

<table>
<thead>
<tr>
<th>Estate assets</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>House</td>
<td>$800,000</td>
</tr>
</tbody>
</table>

Estate expenses
Probate fee/tax ................. $8,000
Funeral .......................... $12,000
Legal fees (probate and advice) ........... $10,000
Taxes (assuming Joan’s final return includes a $500,000 RRIF plus other income of $50,000 received before her death) .................. $255,000
Real estate commission ...... $40,000
Other expenses (excluding executor compensation) .................. $10,000
Total expenses .................. $335,000

Net estate assets
Net assets ...................... $465,000
Less legacies for grandchildren ................. $100,000
Residue ................................ $365,000
Amount received by each child ...................... $122,000
Amount received by each grandchild (including legacy) .......... $200,000

How will family dynamics be affected by the fact that Peter’s family receives $722,000, Paul’s family receives $322,000, and Mary receives $122,000?

Alternative 2: Joan Obtains Planning Advice
When property is distributable or made payable directly to a minor beneficiary, a court or PGT may provide the safest repository for the minor’s money by protecting it from other family members. Leaving small amounts in the care of a court or PGT also eliminates the complication and expense of filing a T3 trust and information return. However, these custodial arrangements end when a child reaches the provincial age of majority, and many people, including Joan, believe that an 18- or 19-year-old is too young to receive $200,000 plus accumulated interest outright.

A well-crafted will contains provisions for minors to inherit funds and for age trusts, which run past the age of majority. Joan must decide whether the probate costs of paying her insurance and RRIF proceeds into her estate outweigh the advantages produced by the sound administration of the after-tax proceeds. Beneficiary designations are blunt instruments; a will can better address the many possible contingencies, such as the death of a beneficiary. An insurance trust, including a beneficiary designation to a trustee, can easily be created within a will or as a free-standing document, and the provisions of age trusts, including discretionary trusts, and administrative powers can be incorporated by reference into the insurance trust.

Clients tend to abhor the expense of the probate process, and insurance advisers have been trained for years to talk about the probate-avoidance benefits of direct designation. They may advise parents, particularly young parents who have no will, to appoint an insurance trustee to receive insurance proceeds on
Beneficiary designations are blunt instruments; a will can better address the many possible contingencies, such as the death of a beneficiary. An insurance trust, including a beneficiary designation to a trustee, can easily be created within a will or as a free-standing document, and the provisions of age trusts, including discretionary trusts, and administrative powers can be incorporated by reference into the insurance trust.

The appointment of a trustee is frequently recommended in the fine print, where a space is provided for a name and address. The fine print often contains a provision discharging the insurance company from further responsibility once it obtains a receipt from the trustee. Sadly, what is often missing are any terms of the trust that is created when the insured person dies.

Some ill-informed advisers tell their clients that this means that there are no restrictions on what the trustee can do with the money. In fact, the opposite is true. Wills and trust deeds are usually crafted to counter the many legal restrictions imposed on trustees and to broaden the trustee’s discretion. A designation form that confers no additional powers creates a “bare bones trust.” The trustee has no power to use the trust funds for the benefit of the beneficiary. In addition, the trust terminates when the beneficiary reaches the age of majority. A well-crafted insurance trust, however, is as long the country; they may, for example, be over $60,000 lower in Nunavut than in New Brunswick. On average, taxes and other expenses that are confined to the estate would likely reduce the shares of Peter, Paul, and Mary to roughly 60 percent of a grandchild’s share; this in turn might invite family disharmony and its attendant legal costs.

The costs of legal and tax advice to discuss and implement a well-understood plan, which might or might not include simply paying some probate fees, will bring Joan peace of mind. She will know that after her death she will be able to financially enhance her grandchildren’s lives while preserving family harmony. Joan would be wise to discuss her plan with her children to ensure that they understand her intentions.

**Conclusion**

In the absence of planning, Joan has not achieved her goal of benefitting all of her children and grandchildren equally. Income taxes can vary across the country; they may, for example, be over $60,000 lower in Nunavut than in New Brunswick. On average, taxes and other expenses that are confined to the estate would likely reduce the shares of Peter, Paul, and Mary to roughly 60 percent of a grandchild’s share; this in turn might invite family disharmony and its attendant legal costs.

The opinions expressed in this article do not necessarily reflect those of the employers of the authors, the Royal Bank of Canada (Suzanne) and MD Financial Management Ltd. (Glenn), or their respective employees, officers, and directors, and no liability is assumed for any use made or reliance placed on any part of this article. The views expressed and the comments made herein are offered for consideration only and are not intended to be acted on without independent consideration of individual circumstances and competent professional legal advice.
GOOD NEWS IN BRITISH COLUMBIA FOR PEOPLE ON DISABILITY ASSISTANCE

ANDREA E. FRISBY
Associate, Legacy Tax + Trust Lawyers; Student Member, STEP Vancouver

KATE S. MARPLES, TEP
Principal, Legacy Tax + Trust Lawyers; Member, STEP Vancouver

As of December 1, 2015, individuals with a “persons with disabilities (PWD)” designation can hold up to $100,000 in assets without affecting their eligibility for benefits. Couples can hold up to $200,000 in assets if both members of the couple have a PWD designation.

In addition to qualifying as a person with a disability, persons who qualify for benefits under British Columbia’s Employment and Assistance for Persons with Disabilities Act must meet both an asset and an income test in order to be designated as a PWD and receive the associated benefits. This new asset limit, set out in the Employment and Assistance for Persons with Disabilities Regulation (the “Regulation”), marks a significant departure from the former provisions of the Regulation, which limited non-exempt assets to $5,000 for a PWD individual and $10,000 for a PWD couple.

In addition, the regulation has been amended to permit PWDs to receive cash gifts and inheritances without affecting their income eligibility. An individual’s benefit entitlement is therefore not automatically reduced for the month in which he or she reports the receipt of the gift or inheritance to the Ministry of Social Development and Social Innovation (the “Ministry”), as was formerly the case.

Before the amendments, when a PWD received an inheritance directly, he or she was required to report to the Ministry and the inheritance was considered to be income for the month in which it was received. As a consequence, the individual was not eligible to receive PWD benefits for that month. In the following month, the inheritance was considered as an asset of the individual unless the individual took one of the following steps: (1) purchased exempt assets (as defined in the legislation); (2) relied on section 12.1 of the regulation, which provides an exemption period of three months during which the PWD can create a trust or establish a registered disability savings plan (RDSP) to hold any asset valued at more than $5,000; or (3) the individual chose to forfeit benefits until the value of the individual’s ownership interest fell below the prescribed asset limit (formerly $5,000.).

In the case of modest inheritances, the costs of creating and maintaining a trust frequently outweighed the benefits: the PWD was often faced with the prospect of either spending the inheritance quickly or paying legal and accounting fees that exceeded the inheritance’s value. Additionally, the creation of a trust necessarily involved a loss of some control over the assets contributed; the PWD was prohibited, for example, from acting as his or her own sole trustee.
The new asset limits greatly improve the situation for PWDs who receive modest inheritances. If an inheritance is less than $100,000, a PWD is no longer required to settle a trust or contribute the funds to an RDSP to preserve his or her disability benefit entitlement (assuming that the individual’s total asset value is below the prescribed limit). The new limits are significantly more cost-efficient and allow PWDs to enjoy autonomy, retain control of their assets, and use their assets over an extended period of time.

PWDs who receive an inheritance that exceeds $100,000 or that push their assets above the prescribed limit can still rely on section 12.1 of the regulation, settling a trust or using an RDSP to preserve the assets while remaining eligible for disability benefits. In these situations, the benefits of the trust are obvious, and the costs and inconvenience associated with the relatively complex trust planning are justified.

In summary, the amendments offer a significant improvement for many PWDs who do not or have not received inheritances through a protective structure. Additionally, the amendments open planning opportunities for family and friends, who may now choose to benefit a PWD directly with a modest inheritance (less than $100,000) when the individual has the ability to receive, hold, and manage his or her own financial affairs, while still electing to leave a larger inheritance in trust. However, for many PWDs and their families, significant reasons continue to exist for structuring inheritances through a testamentary discretionary trust. Such a trust, if correctly created, can enjoy the preferential income tax rates that are applicable to qualified disability trusts after January 1, 2016.

CASE COMMENT
ROUND TWO OF THE ESTATE FIGHT: COSTS

NANCY L. GOLDING, TEP
Partner, Borden Ladner Gervais LLP
Member, STEP Calgary; Member, STEP Worldwide Council

There have been three noteworthy cases from the Alberta Court of Queen’s Bench in the last several months that deal with costs in estate litigation. When taken together, these cases provide a thorough review for estate practitioners and a cautionary tale for those who embark on estate litigation.

Warren Estate (Re), 2015 ABQB 575, was a costs case that followed litigation for the removal of a personal representative by one set of beneficiaries, and the interpretation of a will and a challenge based on the testator’s intention and mistake by another beneficiary. Branson v. Branson, 2015 ABQB 602, was a case in which one son, who was the personal representative of his father’s estate, sought to have another party undergo DNA testing to prove that he was the deceased’s son; the other party sought a declaration that he was a 50 percent beneficiary of the estate. In Lafleur Estate (Re), 2015 ABQB 644, a spouse brought a dependant’s relief claim against an estate.

Considered together, these three cases provide the following information about costs in estate litigation.

1. Under rule 10 of the Rules of Court,
a. a court has discretion in awarding costs;
b. a successful party is entitled to have costs awarded against an unsuccessful party;
c. a court can order a variety of costs (reasonable and proper costs, indemnity costs, party-and-party costs, lump-sum costs, and a multiple of schedule C costs);
d. the factors, in summary, that a court may consider are the following:
i. the result of the action and the degree of success;
ii. the importance of the issues and the complexity of the action;
iii. the apportionment of liability;
iv. the conduct of a party that tended to shorten the action, the conduct of a party who unnecessarily lengthened or delayed the litigation, and misconduct by a party; and
v. whether any part of the action was unnecessary, improper, or a mistake.
5. It is relevant whether the litigation benefits the estate.
6. Courts consider who is the party who ultimately pays the costs. If the successful party is the residuary beneficiary, courts are unlikely to order that the costs be paid out of the residue of the estate because such a payment would penalize the successful party. In general, an estate is not to be diminished as a result of a meritless claim.
7. Many parties seek costs on a full indemnity or solicitor-and-his-own-client basis. These types of costs are awarded only in exceptional circumstances that reveal some form of misconduct, unreasonable conduct, or mala fides. In Warren Estate (Re), this type of conduct was described as “arbitrary conduct, bad faith, delay, withholding evidence, pursuing futile arguments, and any other conduct that indicates the litigation was for a collateral or malicious purpose” (at paragraph 36). In estate cases, the relevant misconduct occurs during the action and is not the behaviour that may have given rise to the action. Often parties have long lists of the transgressions of other family members that go back many years.

Historically, it was common for courts to order an estate to pay the costs of all parties; the more contemporary approach is to “restrict unwarranted litigation and protect estates from being depleted by such litigation”
A personal representative is not immune from costs and is not guaranteed to receive his or her fees. In *Warren Estate (Re)*, the court found that it was “unseemly and inappropriate” for the personal representative to have made arguments in favour of one of the competing interpretations of the will, and it ordered her to bear her own costs for that portion of the litigation.

A cautionary tale indeed.

**GIFTS AND SUPPORT ORDERS**

JOAN E. JUNG, TEP
Mindem Gross LLP
Member, STEP Toronto

The Ontario guidelines for child support are the same as the Federal Child Support Guidelines. In Ontario, an order for child support can be made under the *Family Law Act* if the parents are separated or were never married. Such an order can also be made under the federal *Divorce Act*. In either case, the same guidelines apply. The courts have also applied the same principles for the purpose of calculating spousal support.

A spouse’s income is based on line 150 (“Total Income”) of his or her T1 general return. However, under section 19 of the Federal Child Support Guidelines, a court may impute income to the spouse “as it considers appropriate in the circumstances.” Nine circumstances are listed in which income imputation may be appropriate. Because these circumstances are intended merely as examples, the court retains discretion to impute income in other circumstances as well. One listed circumstance involves a situation in which a spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust. The case of a gift is not included among the nine listed circumstances.

Recent Ontario cases have confirmed the court’s discretion to include gifts in the calculation of income for support purposes. Such an inclusion of gifts derives from the 2007 Ontario Court of Appeal’s decision in *Bak v. Dobell*, 2007 ONCA 304. The court enumerated the following factors that are to be considered in determining whether it is appropriate to include gifts in income: (1) the regularity of the gifts, (2) the duration of their receipt, (3) whether the gifts were part of the family’s income during cohabitation that entrenched a particular lifestyle, (4) any circumstances that mark the gifts as being unusual, (5) whether the gifts did more than provide a basic standard of living, (6) the income generated by the gifts in proportion to the payer’s income, (7) whether the gifts were made to support an adult child through a period of crisis, (8) whether the gifts are likely to continue, and (9) the true nature and purpose of the gifts.

*Horowitz v. Nightingale*, 2015 ONSC 190, was a motion for temporary child support in which *Bak v. Dobell* was applied. The amount of $50,000 was imputed to a husband’s income for the purpose of calculating child and spousal support. The husband had been receiving a gift in this amount from his parents in each of the preceding eight years. The court concluded that the funds were treated as part of the family’s income and supported the family’s lifestyle. The annual gift amounted to approximately 25 percent of the husband’s business income for the year. The court simply stated that it was “safe to conclude” that the gifts would continue without further elaboration.

*Bak v. Dobell* was also applied by the Ontario Court of Appeal in *Korman v. Korman*, 2015 ONCA 578. An amount was imputed to the husband’s income on the basis of “neither irregular nor infrequent” gifts received from his parents. The court found that there was a settled pattern of parental gifts to finance private school tuition or camp expenses for the children, to assist the husband in maintaining the family’s lifestyle, or to underwrite the husband’s various business ventures. The amount of the gifts appeared to approximate the husband’s annual employment income in each of the three years preceding trial. Although the husband had objected to the imputation on the basis that it shifted the onus of providing support to his mother (who had no legal obligation to provide support to either the wife or the children), the Court of Appeal rejected this argument. It held that the trial judge had made a finding about the husband’s likely source of revenues and noted that the husband could apply for an adjustment to any support order if the situation changed in the future.

In Ontario, estate planning is sometimes focused on a gift after marriage because such a gift and the income that flows from it is excluded from net
family property under section 4(2) of the Family Law Act. As a result, the gift is not subject to equalization in the event of a marital breakdown. A parent implementing an estate freeze might take steps to ensure that the common shares of a corporation (in a corporate estate freeze) or the growth units of a partnership (in a partnership estate freeze) pass to a married child by way of gift. While this may protect the property from an equalization claim, parents should also be advised that monetary gifts to a married child may ultimately factor into a support claim in the event of a marital breakdown.

In Séguin, the testator executed a notarial will in March 2007. In it, she named one of her four sisters (Nicole) as her liquidator and provided for a distribution of her assets to Nicole, Nicole’s husband, her mother, and her nieces and nephews. Nicole died in October 2007, following which the testator prepared a handwritten document, in which, among other changes to her notarial will, she replaced the names of Nicole and Nicole’s husband with that of her sister Carole.

In September 2008, April 2010, and December, 2010, the testator prepared handwritten documents noting changes to her notarial will. In August 2010, she made handwritten revisions and notations on her copy of the notarial will. In November 2011, the testator made handwritten revisions to the December 2010 document. She died in early 2012.

The court reviewed the validity of each document produced by the testator after the notarial will. It determined that the documents written in October 2007, April 2010, and December 2010 were valid holograph wills pursuant to article 705. The court determined that this document was not a valid will because it did not express the testator’s actual intention but rather constituted instructions to the notary to amend the notarial will.

In reviewing the testator’s August 2010 markup of her notarial will, the court noted that the testator had initialled each change she made to the document, had signed the document, and had dated several changes. The court held that these notations indicated the testator’s express and actual intention to modify the notarial will. They did not represent draft notes for future amendments to the will.

The court then considered whether the document was valid, given that it did not meet the requirements of any of the three forms of will set out in the CCQ. It reviewed the August 2010 document in the context of article 714, which is a relieving provision that serves to validate holograph wills or wills made before witnesses that do not meet all of the formal requirements of the CCQ. Article 714 can apply under two conditions: (1) the essential requirements of the form of will are met, and (2) the document unquestionably and unequivocally contains the last wishes of the testator.

Under the CCQ, there are three forms of valid wills in Quebec. The first, a notarial will (article 716 et seq.), is made before a notary, en minute, in the presence of one or two witnesses. The second, a holograph will (article 726), must be handwritten by the testator in its entirety and signed by him or her without the use of any mechanical process. The third, a will made in the presence of witnesses of full age (article 727), may be written by the testator or a third person. The testator must declare that the document is his or her will in the presence of the witnesses before they sign it.

On reviewing the August 2010 annotated notarial will and the evidence surrounding it, the court concluded that it met the conditions of article 714 and was therefore a valid will.

The December 2010 document was
found to be a valid holograph will. It was modified by the testator’s hand in November 2011, but the amendments were neither initialled nor signed. The court concluded that the November 2011 amendments did not constitute a valid will or codicil. However, their presence in the December 2010 document did not invalidate the earlier document. The court determined that the December 2010 document was the testator’s last will and testament, thereby tacitly revoking all previous inconsistent dispositions pursuant to article 786.

The Trial Division of the Supreme Court of Newfoundland and Labrador recently considered the law relating to a trust’s residence for tax purposes. The case, Discovery Trust v. Canada (National Revenue), 2015 NLTD(G) 86, demonstrates that beneficiaries can be interested and involved in decisions relating to a trust without necessarily managing and controlling it.

Although Royal Trust was acting as the trustee in Alberta, the Minister maintained that the management and control of the trust rested in Newfoundland, with the Dobbin family, and not in Alberta, with Royal Trust’s Calgary office, where the assets were held. The Minister claimed that Royal Trust was merely carrying out instructions from the Dobbin family or its advisers, and performed only administrative tasks as instructed by the Dobbin family.

The court closely reviewed the concept of central management and control as the determining factor of trust residence in accordance with the judgment of the Supreme Court of Canada in Fundy Settlement v. Canada, 2012 SCC 14. It noted from paragraph 15 of that decision that “[a]s with corporations, residence of a trust should be determined by the principle that a trust resides for the purposes of the Act where ‘its real business is carried on.’” The residence of the trustee will also be the residence of the trust where the trustee carries out the central management and control of the trust, and these duties are performed where the trustee is resident.”
The court reviewed key transactions that occurred within the trust after the change of residence from Newfoundland to Alberta. It also examined Royal Trust’s role as trustee in relation to its involvement in each of the key decisions. There were certain corporate transactions that required shareholder approval (the shareholders were members of the Dobbin family), and the court found that in each case Royal Trust requested detailed information regarding the transaction, reviewed the trust terms to ensure that the proposed approval of the transaction was within its authority, and then considered any negative consequences for the beneficiaries before approving the transactions. With respect to the post mortem tax planning that was proposed by tax advisers of the Dobbin family, the court found that Royal Trust had its tax department review the proposed transactions and conclude, before proceeding, that the trust would suffer no adverse consequences and the beneficiaries’ best interests would be served.

After careful analysis, the court found that Royal Trust had in fact carried out its independent function as a trustee in relation to the corporate transactions; at one point, it had actually turned down a request from a beneficiary to guarantee a loan, which highlighted the fact that Royal Trust was not simply acting at the direction of the beneficiaries. The court held that the evidence did not support the contention that management and control of the trust rested directly or indirectly with the beneficiaries. The residence of the trust was in fact Alberta, the residence of choice.
TIMOTHY GRIEVE

Happy New Year! I hope that you all enjoyed a wonderful break over the holidays with family and friends, and I wish you a healthy, happy, and prosperous 2016.

Our board, national committees, and staff have been focused on the three initiatives that I announced at the September board meeting: expanding the reach of our educational programs, increasing our brand awareness, and examining the national secretariat. I’m pleased to highlight some of the progress we’ve made so far.

As for our educational programs, the board will be contributing substantial resources to the development of a series of courses for full trust and estate practitioner (TEP) members. We have conducted a survey to ensure that the subject matter and format of our educational offerings meet the needs of our varied and diverse membership. For an effective survey, we chose 25 percent of our TEP members as participants; these people reflect the demographics of our entire membership, and we listened carefully to what they told us. The first of the exciting new courses that we have devised as a result of the survey will begin in the fall of 2016. Watch for announcements.

In addition to attending industry events across the country last fall, STEP has undertaken other projects to increase our brand awareness. We published a full-colour board appointment notice in the September 30 issue of the Globe and Mail, and our information technology manager reported a noteworthy increase in visits to our website in the following days. Fully designated STEP members are encouraged to include, where allowable, their TEP designation on all public-facing products, such as business cards, online biographies, and electronic signatures.

With a view to examining the national secretariat, on October 25 five past chairs of STEP Canada (Michael Cadesky, Paul LeBreux, Grace Chow, Mary Anne Bueschkens, and Ian Worland), met with me, Nancy Golding (a STEP Worldwide Council member), Michael Dodick, and Janis Armstrong in Toronto. Kim Moody was unable to attend. The meeting was very productive; our discussions resulted in revised terms of reference for the Past Chairs Committee, generated ideas for public policy initiatives, and for new activities and products that complement our strategic plan. I’m very grateful for everyone’s participation and contributions at this meeting.

As you can see, much progress has been made on our three principal initiatives in a relatively short time. Thanks to all of you who have contributed your efforts.

In November, 234 STEP Canada diploma students wrote examinations in 18 designated exam locations; or, in the case of the certificate in estate and trust administration (CETA) program, online. I am pleased to see that the STEP Canada educational programs continue to attract so many new people; these students will become the future leaders of STEP Canada.

Thank you to the many volunteers who have contributed to STEP Canada’s eight regional branches and three regional chapters, which collectively have scheduled more than 70 events during this season. As our membership grows, we are seeing increased attendance and sponsorship support at these regional events.

The Canadian board of directors held its most recent meeting on December 8 in London, England, where we also attended the STEP Worldwide Leaders’ Forum. The forum provided excellent opportunities to meet STEP leaders from around the globe, deepen our relationships with them, and learn from their ideas. The forum was focused on member services in a changing world. In various discussions, we addressed the STEP 2021 business plan and explored our commitment to supporting members’ lifelong learning, professional development, and career objectives.

As you know, STEP Canada has been communicating with our members to ensure they are aware of the fundamental changes to the rules regarding the taxation of estates and trusts that came into effect on January 1, 2016. On November 10, STEP Canada asked the new minister of finance to delay the implementation of these proposals for a year to permit continued dialogue on the issues. No such reprieve was granted, but on November 16, 2015 the Department of Finance provided us with a ray
of hope in the form of a non-binding letter. Although the letter does not have the effect of a legislative amendment, the department has acknowledged the concerns raised by STEP and other industry groups. Our gratitude goes to Pamela Cross and the members of the Tax Technical Committee for keeping abreast of this issue for the past 18 months, working collaboratively with the Conference for Advanced Life Underwriting and the Joint Committee, and communicating so effectively with the Department of Finance.

During the December board meeting, we decided that it would be beneficial to develop a public policy committee. The committee would consist of a representative of the Past Chair’s Committee, the current chairs of the Tax Technical Committee and the Trust and Estate Technical Committee; a representative from our STEP Canada Worldwide Council members; possibly an academic who is well known in policy areas; and ad hoc members whose expertise on specific issues is useful from time to time. The committee would ensure that government submissions and consultations represent our constituency. Draft terms of reference for the committee will be proposed and discussed at the February 29, 2016 board meeting.

Also during the December board meeting, branch and chapter chairs had the opportunity to discuss their projects and concerns as reflected in the “top five member service priorities” survey, including increasing membership, engaging the participation of members, enriching student support and mentoring programs, expanding educational offerings, enhancing branches and chapters, and obtaining sponsorship. The discussion was lively and proved to be an excellent opportunity for the chairs to learn best practices from each other and to shape the assistance that the national office provides to our regional leadership teams. The group will reconvene in a conference call in the new year to complete its discussions about regional executive committee development and succession.

Congratulations to the recipients of the 2015 STEP Worldwide founder’s awards. These awards are given to members who have made an exceptional long-term contribution to the society in their branches or elsewhere. I am very pleased to report that during the STEP Worldwide Leaders’ Forum Robin MacKnight and William Fowlis were named as the 2015 Canadian recipients. This recognition of the contributions made by Robin and Bill during STEP’s early years, as well as their continuing dedication, is well placed and well deserved.

A quick look forward to June 9-10, 2016 shows that planning for our 18th national conference is well underway. This year’s Program Committee is co-chaired by Brian Cohen and Christine Van Cauwenbergh. The committee is working hard to ensure that we will have two days of unique, invaluable, practical, and timely technical material for practitioners in our industry. Even before the first meeting of the Program Committee took place, we had already received verbal commitments from many returning sponsors; this affirmation of support has allowed STEP to become the leading professional association and educator in the trust and estate industry in Canada. I encourage you all to consider attending this extraordinary event.

On behalf of myself, the other members of the Executive Committee (two deputy chairs, Ruth March and Pamela Cross; treasurer, Chris Ireland; and secretary, Rachel Blumenfeld), and our dedicated team at the national office led by Janis Armstrong and Michael Dodick, we thank you for your continuing enthusiasm and support. We also look forward to the coming months, during which we will implement our exciting projects and increase the value of your membership and the brand recognition of the TEP designation.