



April 2017- Vol. 4 No. 6

## Message from the Chair, STEP Toronto



Welcome to our April 2017 edition of CONNECTION.

It is supposed to be spring, but as I am writing this, I am watching snow fall at Bay and King. Luckily our events are indoors with plenty of opportunity for warmth and comfort. The 2016/2017 continuing education sessions are slowly coming to a finish. I would like to thank all of our speakers and moderators to date for providing outstanding material for our membership!! Our next session will be **Estate Planning for Global Families** on April 12, 2017. Be sure to attend (live or via webcast – but in person is always better) to hear Jeff Halpern moderate what I am sure will be an interesting presentation by two STEP leaders, Michael Cadesky and Margaret O’Sullivan. Please keep in mind our complimentary “Bring a Guest” initiative. You can bring a non-member guest to our STEP Toronto educational sessions. Details are in this newsletter, but please remember to pre-register your guest electronically. As always, a complete list of our 2016/2017 programming can be found at [step.ca](http://step.ca).

While on the topic of continuing education, be sure to sign up for the National Conference if you have not already done so. The conference committee has worked very hard this year to create a line-up of sessions that will hopefully be of interest to all. If you have not been to the National Conference before, you don’t know what you are missing – it is an excellent opportunity to hear the latest in the estate planning world and provides networking options that are not available anywhere else!!

Our STEPPing Out sessions continue the first Wednesday of every month (summers excluded) and we continue to get great feedback from the attendees as to both the content and the interaction the sessions provide. Watch your emails for more information and be sure to book as space is limited and webcast is not an option.

As I have noted in previous CONNECTION Newsletters – it is up to all of us to make STEP the best it can be. We are currently in the process of putting together a slate for next year’s executive to be elected at the Toronto Branch ABM on May 17, 2017. In addition to the executive, opportunities exist to volunteer on one of our many committees, including sponsorship, newsletter and programming. Please contact me or one of your other Toronto executive if you would like to help. We would love to hear from you. Of course, we continue to invite your contributions to “CONNECTION”. Only with your participation can we make STEP Toronto the best it can be.

Brian Cohen, Chair STEP Toronto

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## STEP Toronto Executive

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## STEP Toronto Presents...

### APRIL 12, 2017 – Estate Planning for Global Families



Summary: Margaret O'Sullivan and Michael Cadesky, two of Canada's most seasoned global estate and tax planning advisors, will draw upon their years of experience advising global families, to provide a high level commentary on the practical insights and implications of fact patterns arising in the context of global planning, including:

- The multi-jurisdictional estate planning process: know your client
- Impact of matrimonial regime, testamentary freedom vs. forced heirship, recognition of trusts
- Probate planning and uses of multiple and separate situs Wills
- Incapacity planning across borders
- Foreign inheritance planning: inbound and outbound
- Global asset ownership considerations
- Domestic versus foreign law implications
- Case study examples

Moderator: **Jeff Halpern**, CPA, CA, TEP: TD Wealth

Speakers: **Michael Cadesky**, FCPA, FCA, FTIHK, CTA, TEP: Cadesky Tax  
**Margaret O'Sullivan**, LLB, TEP: O'Sullivan Estate Lawyers

Registration: 2:30 pm

Seminar: 3:00 pm – 5:00 pm

Venue: Osgoode Hall, Donald Lamont Learning Centre  
130 Queen Street West, Toronto

Remote Site: Manulife Financial (Learn Room)  
600 Weber Street North  
Kitchener-Waterloo

Please note that at the remote site (group webcast viewing), space is limited to room capacity.

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## STEP Toronto Upcoming Events, 2016-17

April 12, 2017 Estate Planning for Global Families

May 17, 2017 Challenges of Probate Planning

Note: Annual Branch meeting will immediately precede the May 17, 2017 session.

You can register online for the STEP Toronto educational sessions at the following link [www.step.ca](http://www.step.ca)

## London & Southwestern Ontario Chapter Events

May 3, 2017 Estate Planning for Blended Families

This session will cover a wide variety of issues, including how to divide an estate between a new spouse and children from a previous relationship (considering estate law, family law and tax law), as well as some other wrinkles, including taxation of RRSPs, segregated funds, RESPs, and much more.

Speaker: Christine Van Cauwenberghe, BComm (Hons), LLB, TEP, CFP, RRC, Vice-President, Tax & Estate Planning, Advanced Financial Planning, Investors Group

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## STEP Toronto Announces

### “BRING A GUEST”

Following the successful implementation of our new “bring a guest” initiative last year, STEP Toronto is pleased to announce it will continue for a second trial year on a limited basis. Here is how it works:

A Passport holder may invite up to two guests per season to attend on a complimentary basis. The guests must not be current nor past members of STEP Canada and may attend only one session on this basis. In advance of the meeting, the member shall provide the guest’s name and contact information to [MemberServices@step.ca](mailto:MemberServices@step.ca) and there will be a name tag ready at the meeting for the guest. The purpose of this initiative is to permit potential future members to experience the outstanding educational programs and networking opportunities enjoyed by members of STEP Toronto. Please let us know if you have any questions.



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In case you missed it...

## Life Insurance in Action – Tax and Planning Issues and Solutions



On February 15, 2017, **Florence Marino** of Manulife Financial and **Angela Ross** of PwC, along with moderator **Ted Polci** of First York, examined the tax and planning issues surrounding life insurance.

Ted began the seminar by giving some background information on the differences between Term Life, Whole Life and Universal Life Insurance. Florence then continued with a discussion of the generally tax-free nature of life insurance death benefits and explained some of the recent tax-related adjustments to life insurance and the capital dividend account.

Angela and Florence presented several case studies using life insurance planning to fund taxes that can arise on death as well as a case study regarding the sale of a business and the concept of trapped proceeds in a corporation that will trigger tax either when the proceeds are extracted from the company or upon death.

Next, Angela and Florence discussed what might happen regarding life insurance if there is a change in capital gains rates. They discussed the use of life insurance as a tool for wealth and estate equalization within a family and included the examples of having a family business where some children are involved in the business and others are not, families with children with special needs and families with non-resident beneficiaries. A discussion on the usefulness of life insurance where there are non-resident beneficiaries in a family can be listened to in the archived webcast link below:

 Video Link: [Non-resident beneficiaries](#)

The seminar ended with a question and answer session.

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## Article: Independent Legal Advice & Decisional Capacity



**By: Kimberly A. Whaley, CS, TEP, LLM, WEL Partners**

While giving independent legal advice (ILA) is an important service provided by lawyers, it is not performed without risks. In an ILA retainer, legal services may be limited in scope however, the duties and responsibilities of the lawyer must be met. There appears to be a heightened level of professionalism required when the ILA client is elderly, suffering from cognitive impairment, or is vulnerable and susceptible to undue influence.

A common scenario involving ILA and the older adult involves “reverse mortgages” which are loans designed specifically for homeowners 55 years of age and older. The reverse mortgage allows homeowner to obtain cash, without having to sell the home. Unlike ordinary mortgages there are no regular or lump sum payments. When the house is sold, the loan is repaid with interest. While this loan vehicle may have its advantages when used appropriately, it may not be in the best interest of those older adults with diminished capacity who may be unduly influenced or pressured into accessing equity in their home at the hands of unscrupulous predators intent on financial exploitation and gain. ILA is required by the financial institution offering the reverse mortgage. Yet, what is the quality of the ILA where capacity and undue influence are at issue?

### Standard of Care

The standard of care for providing ILA in general has been discussed in a number of court decisions, including the oft-cited cases of *Goodman v. Geffen*<sup>1</sup>, *Tulick v. Ostapowich*<sup>2</sup> and *Inche Noriah v. Shaik Allie Bin Omar*<sup>3</sup>. In *Inche*, Lord Hailsham noted:

....Nor are their lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon further than to say it must be given with a **full knowledge of all relevant circumstances and must be such that a competent and honest advisor would give if acting solely in the interests of the donor.** [emphasis added]<sup>4</sup>

The Supreme Court of Canada has observed that ILA addresses two primary concerns, namely that a person *understands* a transaction and that a person enters into a transaction *freely and voluntarily*. In *Gold v. Rosenberg*<sup>5</sup>, the Court noted that:

Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to

- 1 *Goodman v. Geffen*, [1989] 6 WWR 625 (Alta.C.A.)
- 2 *Tulick v. Ostapowich* (1988), 62 Alta. L.R. (2d) 384 (Alta. Q.B.)
- 3 *Inche Noriah v. Shaik Allie Bin Omar*, [1929] AC 127 (PC) (“*Inche Noriah*”)
- 4 *Inche Noriah* at p.614
- 5 *Gold v. Rosenberg*, [1997] 3 SCR 767 (“*Gold*”)



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decide according to their own will. **The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence.** [emphasis added]<sup>6</sup>

To meet the standard of a reasonably competent lawyer providing ILA, a lawyer ought to be in a position to give advice with the full knowledge of all relevant circumstances, determine whether the ILA client has the requisite decisional capacity to enter into the transaction for which the ILA is being provided, and confirm there has been no undue influence exerted. This opportunity must be present in order for the ILA to stand and for all parties relying on it to be protected. That capacity is presumed is trite law, yet in an era of aging demographics to dismiss the need for such considerations may well be foolhardy.

### Decisional Capacity Concerns

The ILA lawyer has the obligation to interview the client for the purpose of determining the requisite legal or decisional capacity applicable to the task undertaken by the client. If the lawyer is confident that the client meets the requisite standard for capacity, it should be clearly indicated in the file notes. Solicitor notes should be thorough as well as carefully recorded and preserved.

As ILA is usually sought for entering into a contract or transaction such as a mortgage, guarantee or transfer of title, the ILA lawyer should arguably be aware of the required standard or factors to determine requisite decisional capacity to contract.

While there are no statutory criteria for determining the requisite capacity to contract, a cogent approach was set out in the Prince Edward Island, Supreme Court decision of *Bank of Nova Scotia v. Kelly*<sup>7</sup>. Capacity to enter into a contract (including real estate transactions) is defined by the following:

- a) the ability to understand the nature of the contract; and
- b) the ability to understand the contract's specific effect in the circumstances.<sup>8</sup>

In undertaking an analysis of the requisite capacity to contract, the determining factor is the person's ability to understand the nature and consequences of the contract at hand. A person capable of entering into a contract has the ability not only to understand the nature of the contract but also the impact on the interests at play.

If an ILA lawyer has been asked to provide ILA with respect to a transaction that involves an *inter vivos* gift, the lawyer should be confident that the requisite capacity to gift is also met. In general, the criteria to be applied are the same as that applied to determine the capacity to enter into a contract. However, the determination of the requisite capacity to give a gift changes if the gift is significant in value, in relation to the total value of the donor's assets. In such cases, the applicable capacity criteria applied shifts to that required for capacity to make a Will that is, testamentary capacity.

6 *Gold* at para.85

7 *Bank of Nova Scotia v. Kelly* (1973), 41 DLR (3d) 273 (PEI SC)

8 *Ibid.*

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The legal factors for determining requisite decisional capacity to make a Will are established at common law. The legal criteria for determining the requisite capacity to make a Will were established in the 1800's in the English decision of *Banks v. Goodfellow*<sup>9</sup>. Testamentary capacity is defined as the:

ability to understand the nature and effect of making a will;

ability to understand the extent of the property in question; and

the ability to understand the claims of persons who would normally expect to benefit under a will of the testator.<sup>10</sup>

A testator (or giftor) need not have a detailed understanding of the legal principle. Rather, the testator should have a "disposing mind and memory" which is defined as a mind that is "able to comprehend, of its own initiative and volition, the essential elements of will making, property, objects, just claims to consideration, revocation of existing dispositions, and the like."<sup>11</sup>

### ***Tulick Estate v. Ostapowich*,<sup>12</sup>**

In this decision, an elderly man whose capacity was at issue, made an *inter vivos* gift to a long-time friend and neglected to provide for his daughter who had special needs. Mr. Tulick had suffered a stroke and according to medical notes, showed signs of confusion, agitation and partial paralysis plus an earlier history of epilepsy. His doctor noted that he displayed marked emotional instability. Mr. Tulick was confused at times but did have lucid periods where he would give the impression that he was competent and able to function normally. It was the doctor's opinion that he would not have had the mental capacity to understand the nature and significance of making a substantial gift of property, or that he had capacity to appoint someone to look after his financial affairs. The Public Guardian & Trustee was appointed as his guardian of property and challenged the gift.

The Court referred to *Inche Noriah* and noted that "[o]ne of the key tests laid down in the *Inche Noriah* decision is to be satisfied that the adviser has ascertained all of the relevant background and facts before giving the advice".<sup>13</sup>

The ILA lawyer in this case satisfied himself that Mr. Tulick wanted to make the gift, that he "knew exactly what he was doing and that he had been thinking about this course of action before he had come to [the lawyer's] office". The lawyer's evidence was that Mr. Tulick was questioned as to whether anyone was exerting any pressure upon him to transfer the property and was satisfied with the answers that no one, and in particular, not his nephew, was pressuring him. However, notably, the lawyer made no known attempt to find out the nature and extent of any assets Mr. Tulick owned, what percentage of his assets he was gifting away, and what effect such a gift might have on his ability to cope with future unexpected contingencies. He also made no attempt to determine how Mr. Tulick's daughter might be affected.

9 *Banks v. Goodfellow* (1870) L.R. 5 Q.B. 549 ("*Banks*")

10 *Banks* at p.566-7, *Leger et al. v. Poirier*, [1944] S.C.R. 152 at page 153 ("*Leger*")

11 *Leger* at page 153

12 1988 CanLII 3537 (AB QB) ("*Tulick*")

13 *Tulick* at para. 29



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The Court could not find that the lawyer “met the required tests of an independent adviser in that he did not make a full and complete inquiry into all of the relevant facts”. The Court did “not consider that [the lawyer’s] conduct of the matter amounted to negligence in his role of a solicitor but . . . Tulick did not receive independent advice from [the lawyer]”.<sup>14</sup>

With respect to the issue of capacity, the Court noted that the doctor could not state from personal observation or from the use of hospital records that Mr. Tulick was not capable to gift on the day he entered into the transaction. What the Court had was evidence in the testimony of the lawyer and the nephew as to his capacity to gift that day.<sup>15</sup> While the lawyer had not provided proper ILA, the Court concluded that Mr. Tulick had the requisite capacity to make the gift.

## Undue Influence

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions, where through exertion of the influence of the mind of the donor, the mind falls short of being wholly independent. Lawyers, including ILA lawyers, when taking instructions, must be satisfied that clients are able to freely apply their minds to make decisions about related transactions.

Undue influence in the *inter vivos* gift context is usually divided into two classes: 1) direct or actual undue influence, and 2) presumed undue influence or undue influence by relationship.<sup>16</sup>

It has been held, in the context of gifts, where the potential for domination exists in the relationship, a presumption of undue influence is found and the onus shifts to the recipient of the gift to rebut the presumption with evidence of intention: that the transaction was made as a result of the donor’s “*full, free and informed thought*.”<sup>17</sup> Whether ILA has been received is one factor in determining whether the presumption of undue influence has been rebutted.

### ***Cowper-Smith v. Morgan***<sup>18</sup>

Elizabeth Cowper-Smith had three children and before her death she transferred her major assets (her house and investments) into joint names with her daughter. Her two sons alleged (among other things) that the transfer of the property and investments into joint names was the result of undue influence by the daughter.

The drafting lawyer met with both the mother and the daughter regarding the transfer, with the daughter present “for much of the meeting”. Subsequently, the daughter called the drafting lawyer with revised instructions from the mother. The drafting lawyer then met with the mother alone, where the mother advised that she wanted everything to go to her daughter. While the drafting lawyer was

14 *Tulick* at para. 29

15 *Tulick* at para. 40

16 *Allcard v. Skinner* (1887), 36 Ch. D. 145 at 171. Note also that there is a distinction between presumption of undue influence and doctrine of undue influence. Presumption is an evidentiary tool. Doctrine is a substantive challenge originating in courts of equity.

17 *Fountain Estate v Dorland*, 2012 CarswellBC 1180, 2012 BCSC 615 at para 64 citing in part *Goodman Estate v Geffen*, [1991] 2 SCR 353 (SCC) at para 45.

18 2015 BCSC 1170, varied 2016 BCCA 200 (“*Cowper-Smith*”)

satisfied that the instructions and wishes were the mother's and not the daughter's, she arranged to have the mother meet with another lawyer for ILA. The ILA lawyer did not recall meeting with the mother but gave evidence on his usual practice, stating that if he had been concerned that the mother was being unduly influenced he would not have signed the documents. However, the ILA lawyer did not ask about the mother's assets or if she understood the financial implications of the transfers.

The Court found that the relationship between the mother and daughter "was one in which there was a potential for domination" and one which gave rise to a presumption of undue influence.

The daughter argued that the presumption could be rebutted as her mother had ILA. However the evidence did not satisfy the Court on a balance of probability that the transfer of the property and investments into joint names was the result of the mother's "full, free and informed thought". The ILA lawyer was not aware of the extent of the mother's assets and did not discuss the financial implication of placing all of her assets jointly with her daughter. Furthermore, the ILA lawyer did not ask the mother about other family members who might have benefited if the transaction did not take place and the ILA lawyer did not discuss with the mother the wisdom of the proposed transaction or other options where she could achieve her objective with less risk.

The Court concluded that the transfers completed were as a result of undue influence and were ordered to be set aside.<sup>19</sup>

On appeal to the British Columbia Court of Appeal, in upholding the lower Court's finding that the presumption of undue influence was not rebutted by the ILA provided (or otherwise), the Court of Appeal noted that:

Assessing the adequacy of the legal advice given is a fact-specific inquiry. It does not reduce to any precise test. In some circumstances, it may require advice on only the nature and consequences of the transaction. **However, where concerns or allegations of undue influence arise, generally there will be a need to give "informed advice" on the merits of the transaction.** See Cope at paras. 213–215, citing *J.B. v. L.B.*, 1989 ABCA 241 at paras. 22–23, *Coomber v. Coomber*, [1911] 1 Ch. [723] and *Wright v. Carter* (1902), [1903] 1 Ch. 27 (C.A.) at 57–58.<sup>20</sup> [emphasis added]

The Court agreed that the ILA lawyer in this case did not give the type of "informed advice" that is required when there is a concern about undue influence, namely that "[the mother] should have carefully considered proceeding with this course of action, which in the absence of any rationale reasons, might be found after her death not to be just and fair to the respondents".<sup>21</sup>

Despite the Court of Appeal agreeing with the trial judge with respect to the undue influence ruling, the appeal was allowed in part with respect to a claim for proprietary estoppel.

## Conclusion

In providing ILA a lawyer must meet the standard of a competent lawyer and ensure that the client understands the nature and effect of the transaction and its consequences, and is entering the transaction freely of their own volition. Providing ILA is not without significant potential risk in any client matter but is even more difficult where there is an older adult. The Law Society of Upper Canada have provided some guidance in Ontario about ILA and capacity issues which lawyers ought to be familiar with in such circumstances. Meeting the client alone, having full knowledge of all of the relevant circumstances, taking thorough notes, and being cognizant of any capacity or undue influence concerns will go a long way in showing that the ILA lawyer was satisfied, or took appropriate steps to determine, that the client had the capacity to enter into the transaction in question and was doing so free of any undue influence.

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19 *Cowper-Smith* 2015 BCSC 1170 at para. 105

20 *Cowper-Smith* 2016 BCCA 200 at para. 53

21 *Cowper-Smith* 2016 BCCA 200 at para. 65

## About Connection

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STEP Toronto publishes 'Connection' for our membership 6-7 times per year between September and May. We welcome your feedback and contributions. Please send any comments or inquiries to Joan Jung [jjung@mindengross.com](mailto:jjung@mindengross.com).

## Letters, announcements, opinions, comments from members

If you have an article or an idea that would be of interest to other members of STEP, please send them to [paul.keul@scpllp.com](mailto:paul.keul@scpllp.com) for inclusion in our next edition of the STEP Toronto Connection.

STEP continues to grow and we welcome membership inquiries. As a reminder, there are three routes to full membership; one based on experience (Experienced Practitioner) and two education routes (essay or exam). If you know anyone who would be a good candidate for STEP membership, please direct them to the [STEP Canada website](#) for information.

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