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STEP Inside

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

Estate Planning After Incapacity: A Case For Expanded Enduring Powers Of Attorney *page 8*

An Overview of the Overlooked: Life Insurance Trusts and Registered Plans Trusts *page 14*

STEP Inside

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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Editorial

This issue of *STEP Inside* takes a look at various aspects of probate planning. Probate fees (estate administration tax in Ontario) range from a small flat fee to about 1.5 percent of the value of assets passing through the estate. A desire to avoid such fees is one reason clients seek to avoid probate, but there can also be many other valid reasons, including a desire to avoid the delays entailed by the probate process (and the associated legal costs) and to protect clients' privacy. Nonetheless, as the current environment surrounding estates continues to get more complex, there are real perils in some of the solutions that individuals are putting in place. Setting aside the potential tax filings arising from a bare trust relationship (shelved for the 2023 taxation year at the last minute, but at the time of writing still very much alive for 2024), there are numerous considerations to keep in mind.

We often think about probate planning from the perspective of the client implementing the planning, but in some circumstances such planning will be desirable after a client loses capacity. Helen Low and Alison Oxtoby make the case that certain types of planning should be permitted after an individual loses capacity, provided that the planning is in the best interests of the incapable individual. Practitioners will have to balance the interests of the incapable individual with the wishes of the attorneys (who, in many cases, are also interested parties as potential beneficiaries of an estate), but their well-reasoned article makes some excellent points as to how this balance can be achieved.

While beneficiary designations are a common tool in probate planning (which, when employed properly, should not be particularly problematic), there are numerous circumstances where a standard beneficiary cannot be appropriately used, such as when a beneficiary is a minor or otherwise should not be receiving the funds outright. To this point, Katy Basi has prepared an excellent primer on how and when life insurance trusts and registered plan trusts can be implemented. As with all planning, care must be taken when putting these trusts in place, and it is best to have all of the individual's advisers on board so that financial institutions and insurance companies can be appropriately notified. Nonetheless, these types of trusts can be very useful where a client has high-value insurance and/or registered plans and potential beneficiaries who should not receive the proceeds outright.

Our cross-country In The Headlines checkup carries on the probate theme, for the most part.

In British Columbia, Kate Marples and Jennifer Eshleman review *Dickinson-Starkey Estate (Re)*, where constant changes by a testator to his template-based will before his death led the court to find that it was not a fixed and final expression of his testamentary intention. As this case shows, where individuals make use of "self-help" tools, even British Columbia's generous curative legislation may not save their planning.

In Alberta, Shannon James reminds us that there are numerous reasons to consider probate planning, even where there are little or no probate fees at stake. She takes us through *Harder Estate (Re)*, an interesting case about the need for appropriate documentation in estate planning and the potential pitfalls of using joint accounts.

In Saskatchewan, Amanda Doucette examines a trilogy of cases dealing with joint ownership and resulting trusts under the Torrens system of land registration. Her article is an excellent reminder of the limits of the presumption of resulting trust and the dangers of making assumptions when planning.

In Manitoba, Alex Bainov studies the perils of an attorney for property acting inappropriately through the prism of four cases. His article highlights some of the concerns that can arise when incapable individuals are involved, and is an excellent companion to the article by Low and Oxtoby.

In Ontario, Darren Lund takes us through the saga of *Sipidias v. Sipidias* and the pitfalls of failing to appropriately document gifts and inter vivos transfers. As he shows, there can be a high cost to low-cost planning.

In Québec, Troy McEachren departs from our theme to document the important changes coming to the treatment of "de facto unions" (known elsewhere as common-law relationships) where children are involved. Québec's new legislation represents a more just and compassionate approach to family law.

Finally, in the Atlantic provinces, Sarah Almon and Matthew Klohn review the dangers to testators of using self-help planning measures like a holographic will through the lens of the interesting case of *Estate of Perley McAvoy*.

We hope you enjoy this edition of *STEP Inside*, and we look forward to seeing you at the STEP National Conference in Toronto on June 3 and 4.

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In January 2024, we unveiled our new **Taxation of Trusts & Estates** course, carefully designed to offer comprehensive coverage while removing knowledge barriers for individuals without prior tax knowledge. This update is part of our ongoing commitment to evolve and adapt our diploma program to meet the changing needs of students, ensuring that they receive the highest quality education and support on their journey to the TEP.

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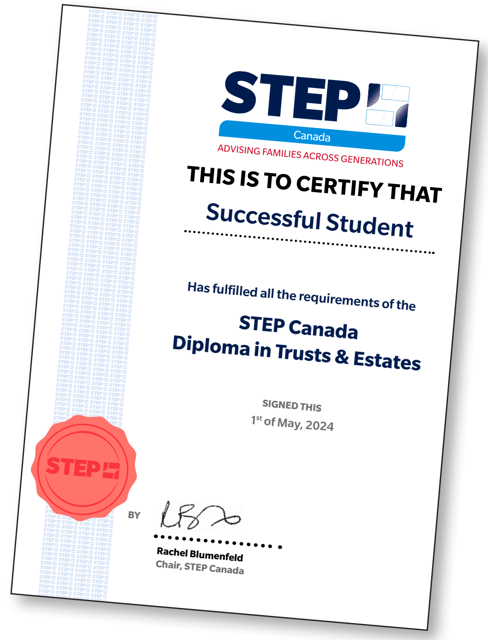

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1 Note that the CETA program is not an educational pathway to the TEP.

Award Winners 2023

Gerald W. Owen Book Prize (STEP Canada)

Vincent X. Ouyang

With a bachelor's degree in science and engineering from Tsinghua University, one of China's top institutions, and an LLB degree from the University of British Columbia obtained in 2007, Vincent has built a strong foundation in both technical and legal fields. Since being called to the BC bar in 2018, he has been an integral part of The Cao Law Corporation, a respected boutique firm located in Vancouver, serving the diverse needs of the local community. Fluent in both English and Mandarin, Vincent has been dedicated to providing comprehensive legal services, specializing in commercial transactions, real estate, and estate planning. This bilingual proficiency has allowed him to effectively communicate with a wide range of clients and navigate cross-cultural legal matters with ease. Vincent's unique background blends technical expertise with legal acumen, enabling him to offer innovative solutions to complex legal issues. As he continues to stay abreast of legal developments and market trends, he remains committed to delivering exceptional service and contributing to the success of both his clients and his firm.

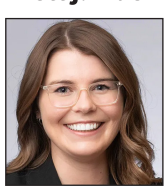
The STEP Canada Scholars Award for Best Essay

Cecile Ko Brock

Cecile is a trusts and estates lawyer at McCarthy Tétrault LLP in Toronto. She designs and implements estate plans and guides clients through the administration of trusts and estates. Cecile has specialized exclusively in the area of trusts and estates since she was admitted to the practice of law, and is a frequent speaker and writer on these topics. She has written articles in the *Estates, Trusts and Pensions Journal*, *Estates and Trusts Reports* (Carswell), and *Your Guide to Charitable Giving & Estate Planning*, and co-authored a chapter in *International Succession* (Oxford University Press). She has presented at continuing professional development programs on trust and estate topics at the Law Society of Ontario and the Ontario Bar Association. Cecile is recognized by Best Lawyers in Canada as an up-and-coming lawyer to watch in trusts and estates. She is the recipient of two academic achievement awards from STEP Canada for attaining the highest grade in the essay program in both 2020 and 2023.

Award for Academic Excellence—Law of Trusts

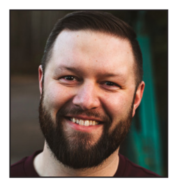
Brett J. Maerz



Brett is a practising lawyer in Vancouver with a focus in trust law, estate and incapacity planning, and estate administration. Rooted in her desire to support people through often emotionally charged areas of the law, Brett finds great fulfillment in the human connections made throughout her files. From deathbed planning to helping executors untangle the affairs of a deceased loved one, Brett values the chance to apply her legal skills and knowledge for the betterment of her clients. In her estates practice, she has had the opportunity to assist clients across Canada, the United States, and Asia to accomplish their estate needs in British Columbia. Brett also maintains a general business law practice and a real estate practice where she assists both corporate and private clients.

Award for Academic Excellence—Taxation of Trusts & Estates

Michael F. Sims



Michael graduated from the University of Alberta with a bachelor of commerce, and from the University of Saskatchewan with a master of professional accounting. He subsequently earned his chartered professional accountant (CPA) designation while working in public practice at an international accounting firm. Today, he is a senior rulings officer with the Income Tax Rulings Directorate of the Canada Revenue Agency, where he focuses on resource taxation. He is also a facilitator in the CPA Canada In-Depth Tax Program. Outside work, Michael enjoys adventuring with his wife and young son.

Award for Academic Excellence—Wills, Trust & Estate Administration

Jennifer Lewis

Jennifer is an associate in the Private Client Services Group at Torkin Manes in Toronto. Jennifer's practice encompasses all matters of estate planning and estate administration. She works with a range of clients, including high net worth individuals, professionals, and business owners to implement thoughtful and effective estate plans that reflect their personal and financial goals. She also advises on cross-border estate matters for dual citizens. Jennifer's estate administration practice ranges from assisting with probate applications to advising on the roles and responsibilities of executors and trustees during the administration of an estate. Jennifer's background in psychology assists her in navigating challenging situations and sensitive family dynamics. Her experience allows her to relate to and empathize with clients, while providing sound and comprehensive estate-planning advice. Jennifer graduated from the University of Toronto Faculty of Law in 2019, where she received the Warren Lefton Prize in Estate Planning.

Award for Academic Excellence—Trust & Estate Planning

Matthew P. Sharp

Matt is a tax partner with Structure Chartered Professional Accountants in Calgary. His practice is focused on estate planning and compliance, trusts, holding corporations, complex corporate groups, and high net worth individuals. He has a particular interest in assisting clients' external wealth management teams with tax-efficient transactions and asset structuring. Matt has presented on tax matters to the Legal Education Society of Alberta, the Estate Planning Council of Calgary, and several wealth management teams and trust companies. Matt has completed many CPA In-Depth courses, including Tax Issues for Owner-Managed Business (2019), Corporation Reorganizations (2018), and In-Depth Tax (2017). He recently earned his TEP with STEP Canada.

CETA Program Award

Scott Bates

Scott graduated from the University of Saskatchewan in 1996 and subsequently owned and operated a chain of video stores for several years. As the video rental industry began to decline, he pursued his chartered accountant designation, which he obtained in 2015. He currently serves as a partner at Sigma Accounting Group LLP in Edmonton. In recent years, there has been a surge in requests for assistance with accounting and filing aspects of estates from both law firms and individual trustees. The CETA program has proven invaluable in enhancing his understanding of the processes and pitfalls associated with estate administration and planning.

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Estate Planning After Incapacity: A Case For Expanded Enduring Powers Of Attorney

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Introduction

As Canadians live longer and mental capacity issues become more common, the question of whether someone should be able to effect an estate plan for an incapable person becomes more significant. Many Canadians now plan for their own future incapacity by making enduring, continuing, or springing powers of attorney. However, the scope of the legal authority for the appointed attorney to undertake estate planning for an incapable donor (the grantor of the power) is still not fully clear.

A review of the key decisions of Canadian courts on this issue confirms that making a will for an incapable donor is generally prohibited. However, there are circumstances in which an attorney is able to implement an estate plan for an incapable donor - for example, by settling an *inter vivos* trust - where to do so is in the best interests of the donor. It is arguable that this should hold true even if the donor did not expressly contemplate estate planning in the power of attorney document and where the estate plan deviates from the testamentary plans that were in place at the time the donor lost capacity.

It will be interesting to observe whether the courts move in the direction of permitting an attorney to carry out more estate planning. They will need to weigh the benefits of allowing an estate plan that is in the best interests of a donor after a loss of capacity against the mischief that an attorney may do to thwart a donor's testamentary intentions. Any expansion of the rights of an attorney to engage in post-death planning will likely be carefully reviewed and monitored under the court's inherent supervisory powers over fiduciaries.

The Nature of Enduring Powers of Attorney

In our discussion of the ability of an attorney to engage in estate planning, we assume that there are no other issues with the attorney's appointment; in other words, we assume that the power of attorney document meets the requirements for formal validity of execution and substantive validity, in terms of capacity and free will. Further, we assume that the instrument itself does not contain any express language either limiting or authorizing estate planning by the attorney. In other words, we are addressing instruments that confer a general power on the appointed attorney "to do all that the donor is able to do at law."

What does that phrase include? Although the attorney generally may do everything that the donor can do, after the donor's incapacity the attorney is clearly a fiduciary and must act in the donor's best interests. Interestingly, there is no requirement for a capable adult to act in their own best interests, and they are free to take steps to act in another's best interests. It is widely assumed that an attorney would not normally be permitted do this without express authority, either in the instrument or under legislation. But are there circumstances in which it may be in the donor's "best interests" to act in the interests of another?

After incapacity, the attorney must act for the donor's benefit; may not allow the attorney's personal interests to conflict with those of the donor;[1] must not commingle the donor's assets with another's; and must act honestly, in good faith, and in the donor's best interests. The following considerations may further constrain estate planning for the donor:

1. Is estate planning for the donor something that is in the best interests of the donor, even though it does not deal with the donor's assets during the donor's lifetime?
2. Can the attorney deal with the donor's post-death planning where the attorney may be an executor/trustee or a beneficiary under the plan?
3. What if the planning involves some depletion (gifting) of the donor's assets during the donor's lifetime? Is any reduction acceptable? For example, in *Sommerville v. Sommerville*, the court allowed an attorney to "continue to provide for a spouse or family member if

1 *Nichol Estate, Re*, 1996 CanLII 18310 (MBQB).

there is clear and convincing evidence of an intention to do so, and it can be done without compromising the donor's interests."[2]

Legislative Limits on an Attorney's Ability to Engage in Estate Planning

In every province and territory save New Brunswick, an attorney is prohibited by statute from making, amending, or revoking a will made by a donor.[3] However, the legislation is not so clear for other mechanisms used to effect the post-death distribution of assets, including settling an *inter vivos* trust, transferring assets into joint tenancy, or making beneficiary designations in respect of the donor's assets, although different statutes address to varying degrees the powers of an attorney to carry out such actions.

Where the legislation is silent, attorneys and legal professionals must turn to the common law on the validity of actions undertaken by an attorney for a donor to deal with the donor's estate after death. That then brings to the fore the common-law test regarding the "best interests" of the donor and whether the attorney's actions can be justified on that basis. Is it ever in the donor's best interests to depart from the donor's intentions and known estate planning prior to the donor's incapacity? If yes, who is to decide that? Is that decision wholly within the authority of the attorney, or must it be made under the supervision of the court?

Authority to Create *Inter Vivos* Trusts

An *inter vivos* trust is often the mechanism used by an attorney engaged in estate planning for an incapable donor. Most commonly, it is an alter ego or joint spousal trust. The plan generally involves gifting the donor's assets to the trust during the donor's lifetime. If the donor is the only beneficiary of the *inter vivos* trust, then, in practical terms, there should be no detriment to the donor's interests. Legal title may move from the donor to the trustee, but the beneficial interest would not change.

However, the real concern is the use of trust provisions that distribute the remaining trust property after the death of the donor. Those provisions are tantamount to testamentary dispositions, although they arise through an *inter vivos* document rather than a testamentary will. How far can those post-death provisions depart from the donor's existing testamentary wishes (such as a will) or testamentary distribution scheme (such as an intestacy, if the donor made no will before incapacity)?

Case Law Involving Attorneys Creating Inter Vivos *Trusts*

A number of Canadian cases have addressed the validity of an *inter vivos* trust made under an enduring power of attorney for an incapable donor. These cases require scrutiny of the trust terms, and especially the post-death terms, to determine whether they match prior estate planning, and, if they do not, whether the terms are in the donor's best interests. All of the cases require, at minimum, that trustees hold the trust assets for the donor's sole benefit during the donor's lifetime.

The Ontario case of *Banton v. Banton*[4] involved an enduring power of attorney granted by a father to his sons, who, prior to their father's "troubling" marriage to his caregiver,

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2 *Sommerville v. Sommerville*, 2014 BCSC 1848, at paragraph 45.

3 The following statutes prohibit an attorney from making, amending, or revoking a will: *Power of Attorney Act*, RSBC 1996, c. 370; *Powers of Attorney Act, 2002*, SS 2002, c. P-20.3; *Powers of Attorney Act*, SNWT 2001, c. 15; *Powers of Attorney Act*, SNu 2005, c. 9. The following statutes are silent on the issue, but the making of a will is likely non-delegable such that an attorney cannot do so: *Powers of Attorney Act*, RSA 2000, c. P-20; *The Powers of Attorney Act*, CCSM c. P97; *Powers of Attorney Act*, RSO 1990, c. P. 20; *Powers of Attorney Act*, RSNS 1989, c. 352; *Powers of Attorney Act*, RSPEI 1988, c. P-16; *Enduring Powers of Attorney Act*, RSNL 1990, c. E-11; *Enduring Power of Attorney Act*, RSY 2002, c. 73.

4 *Banton v. Banton*, 1998 CanLII 14926 (ONSC) ("*Banton SC*"); aff'd *Banton v. CIBC Trust Corporation*, 2001 CanLII 24014 (ONCA). Mr. Banton's wife appealed only the return of the proceeds of the *inter vivos* trust.

transferred the father's assets to an irrevocable trust. The trust provided that only the father would have the benefit of the assets during his lifetime, and that after his death the assets would be distributed in accordance with his existing will (made prior to the marriage), which left the residue of the estate to the sons and their issue. After Mr. Banton's marriage, he purported to make a number of other wills and powers of attorney benefiting his new wife.

The court held that an enduring power of attorney could settle an *inter vivos* trust following the donor's incapacity, on the basis that the general powers conferred were sufficiently broad under section 2 of the Ontario *Powers of Attorney Act*. However, the attorney must exercise that power in the best interests of the donor, in keeping with the attorney's fiduciary responsibilities.

In *Banton*, the court set aside the planning undertaken by the attorneys because the father had the capacity to marry (but not to make a new will), and his marriage revoked the earlier existing will. The intestacy scheme would thus apply at his death, and the post-death trust provisions did not adhere to that intestate scheme of distribution. The court held that if the remainder trust interest had been payable to the donor's estate, the trust would have been valid.

In the case of *Easingwood v. Cockroft,*[5] the British Columbia Court of Appeal upheld the right of an attorney to make an alter ego trust for an incapable donor, with the knowledge and consent of the donor's capable spouse. Notably, the revocable trust did not diverge from the donor's known intentions as reflected in both his will and his marriage agreement.

The *Easingwood* decision is significant because the court found that the creation of an *inter vivos* trust was not a testamentary act that would be tantamount to revoking or making a will. As the court stated, "The key question is in which direction the best interests of the principal lie."[6] In *Easingwood*, the making of a trust was found to be in the best interests of the donor because it provided for continuity in the management of the donor's affairs (in the event that one of the attorneys, who was ill, died), and it accorded with the donor's expressed intentions to benefit his spouse and other family members. The BC Court of Appeal reinforced the need to match the donor's wishes as set out in the donor's existing will, as the BC Supreme Court had found in *Galloway v. Barski*.[7]

In *Hollander v. Mooney*,[8] the BC Supreme Court went even further. An *inter vivos* trust was proposed as part of a settlement agreement, where the donor's children were competing to manage their father's finances during his incapacity. The proposed trust provided that all of the assets would be used for their father's benefit during his lifetime and that, upon his death, the remaining assets would be divided equally among the families of his three children. The contemplated post-death distribution scheme differed from that set out in the father's last will. The father died before the trust was established, and it was known that his estate, and the planning he had done during his lifetime, would be in dispute.

The court in *Hollander* did not limit the attorneys to including post-death terms in the trust that were the "mirror image of a previous testamentary plan," because it found that the proposed provisions were in the donor's best interests. The new provisions would end the litigation within the family and the significant legal costs that might be otherwise payable from the donor's estate. All parties with an interest in the estate effectively agreed to this change in the post-death distribution, and the court approved it.

The "Donor's Best Interests"

Although the case law has not yet settled on a standard test for determining the donor's best interests in the context of post-death planning for the donor, this is likely to be a factual, case-by-case assessment based on the specific circumstances of each situation.

In *Banton*, the court found that the trust was not in the donor's best interests in part because his spouse would be deprived of her succession and family law claims.[9] However, the court in *Easingwood* found that any interference with the spouse's wills variation rights through the settlement of the

5 *Easingwood v. Cockroft*, 2013 BCCA 182.
6 *Ibid.*, at paragraph 77.
7 *Galloway v. Barski*, 2016 BCSC 1588.
8 *Hollander v. Mooney*, 2012 BCSC 1972. Justice Leask addressed whether the trust was in Mr. Mooney's best interests in a separate hearing: *Hollander v. Mooney*, 2016 BCSC 25. Two appeals concerning the enforceability and approval of the settlement agreement were abandoned in August 2015: *Hollander v. Mooney*, 2013 BCCA 439; and *Hollander v. Nelson*, 2013 BCCA 83. An appeal and a cross-appeal concerning costs were dismissed in part: *Hollander v. Mooney*, 2017 BCCA 238.
9 *Banton SC*, *supra* note 4, at paragraph 191.

trust did not, in and of itself, provide a basis to set aside the trust.[10] In *Hollander*, the court found that family harmony and the preservation of the estate's value for future beneficiaries were in the donor's best interests. Courts have also found estate freezes and other tax-planning measures to be in a donor's best interests, even though they confer no benefit on the donor during the donor's lifetime and benefit only the estate.[11]

It is not difficult to envisage other scenarios in which changes to a donor's estate plan might be in the donor's best interests even where they do not, strictly speaking, benefit the donor financially. For example, if a child of a donor were to develop an addiction after the donor's loss of capacity, it may well be in the donor's best interests to alter the estate plan to provide for a discretionary trust for the child. One would think this would be the result that most parents would want in such a situation.

A more controversial example would be an adult child of a donor who suffers a traumatic injury after the donor's loss of capacity, leaving the child in need of costly care. Could it be argued in some cases that the donor would have wanted to vary their estate planning to provide more for that child, and that the donor would consider such a variation to be in their own best interests?

The question, concisely, is whether there are situations in which an attorney, acting on what the attorney believes would be the donor's wishes in a particular situation, could be acting in the donor's best interests even if the outcome does not directly benefit the donor.

The Future of Estate Planning for Incapable Adults in Canada

Obviously, having attorneys make estate plans for donors and then having those plans challenged *ex post facto* by aggrieved parties is not an ideal way for the law in this area to develop.

There are at least two options that Canadian legislatures and courts could consider and adopt if there is a desire to allow attorneys to engage in estate planning for a donor under the appropriate circumstances. Each option has its challenges and benefits, but both can operate in the best interests of the incapable person and both have the potential to reduce post-death litigation.

Statutory Wills

A statutory will is a testamentary document made pursuant to legislation for a mentally incapable person who has lost testamentary capacity.

The United Kingdom, Australia, and New Zealand permit the use of statutory wills. In England and Wales, the specifically established Court of Protection hears applications from individuals to make, modify, or revoke a statutory or existing will for an individual who is under the court's protection and lacks testamentary capacity.[12] In assessing an application, the court considers what is in the individual's best interests from an objective perspective.[13] While the individual's expressed wishes are given significant weight in the analysis, they are not determinative.[14] It is not a question of what the individual would have done if they had been capable.[15]

The Australian model differs considerably from that of England and Wales. In Australia, statutory will applications are heard in the state's superior court of general jurisdiction under succession legislation, rather than mental health legislation. The individual must lack testamentary capacity, but need not be incapable of managing their affairs.[16] Courts will generally make an order if "the proposed will, alteration or revocation would accurately reflect the likely intentions of the person if he or she had testamentary capacity."[17] The test thus adopts the concept of "substituted judgment," which involves having the court consider the facts from the point of view of the incapacitated individual rather than from an external point of view, thus effectively relinquishing its position of judicial objectivity and entering the incapacitated individual's mind. Substituted judgment does not require the court to assess the individual's best interests or apply an objective standard.[18] New

10 *Easingwood, supra* note 5, at paragraph 67.
11 See, for example, *Easingwood*, ibid., at paragraph 55; and *O'Hagan v. O'Hagan*, 2000 BCCA 79, at paragraphs 9-10.
12 *Mental Capacity Act 2005* (UK), c. 9, section 45 ("UK *Mental Capacity Act*").
13 *VAC v. JAD & Ors*, [2010] EWHC 2159 (Ct. of Protection), at paragraph 63.
14 *Ibid.; and P, Re*, [2009] EWHC 163 (Ch.), at paragraph 43.
15 *VAC v. JAD & Ors, supra* note 14, at paragraph 40.
16 *P v. NSW Trustee and Guardian*, [2015] NSWSC 579.
17 *Wills Act 1936* (SA), section 7(3)(b) (Aus.).
18 See Rosalind F. Croucher, " 'An Interventionist, Paternalistic Jurisdiction'? The Place of Statutory Wills in Australian Succession Law" (2009) 32: 3 UNSW Law Journal 674-98, at 681-89 for a review of the leading Australian cases. The substituted judgment concept has its roots in England and Wales from the seminal case of *Re D (J)*, [1982] 1 Ch. 237 (Ct. of Protection). However, the subjective test was replaced with an objective "best interests" standard in 2007

Zealand's statute does not specify the applicable standard,[19] but its courts have also adopted the subjective substituted judgment test.[20]

New Brunswick is the only Canadian jurisdiction to implement aspects of a statutory wills regime. Previously, the *Infirm Persons Act* permitted the court to "make, amend or revoke a will in the name of and on behalf of a mentally incompetent person."[21] Approval was given when the court concluded that, absent approval, a result would occur that the incompetent person, if competent, would not have wanted.[22]

On January 1, 2024, the *Supported Decision-Making and Representation Act*[23] came into force, replacing the *Infirm Persons Act*. The new legislation shifts the originating responsibility to make a statutory will for a person with disability from the court to the person who is appointed by the court to be the "decision-making supporter" or "representative" for the individual. That appointed person may make, amend or revoke a will for the supported person[24]; however, court approval of that decision is required for validity[25]. If the decision-making supporter or representative is directly affected by a gift in the supported person's will, the court must consider the intentions of the supported person and the circumstances of the gift in making any order.[26]

The New Brunswick court now occupies a supervisory and confirmatory role, as opposed to a free-standing initiating power, in the making, amending, or revoking of wills. No reported cases have yet issued under the *Supported Decision-Making and Representation Act* to provide insight as to the considerations that the court may take into account in its exercise of its approval power.

Building upon the experiences of the United Kingdom, Australia, and New Zealand, the implementation of a statutory wills regime, such as exists in New Brunswick, offers a compelling solution to grant attorneys the authority to engage in estate planning for incapable donors, while ensuring that the best interests of the donor is protected, thereby reducing the likelihood of post-death litigation about the donor's estate.

The advantages of allowing an attorney to undertake planning for a donor following incapacity outweigh the many challenges presented by the conferral of this power.

Court Approval for Momentous Decisions

It may be that there is a common-law inherent jurisdiction for the court to supervise the making of an estate plan (but not a will, unless the prohibitive legislation changes) under its general supervisory jurisdiction over trusts and trustees, of which the attorney is arguably one by nature of their fiduciary responsibilities.

There is Canadian authority for a trustee obtaining prior court approval of a decision that would have significant consequences: the BC case of *Toigo Estate (Re)*,[27] which relied on the concept as developed in England and Wales.[28] Essentially, the trustee of an estate sought the court's "blessing" of a resolution that would make a significant capital distribution to the surviving spouse, who was the beneficiary of a testamentary trust. The trustee sought to use the funds to change the estate plan of the deceased in respect of her post-death distribution.

The court relied on both the statutory provisions in the provincial *Trustee Act* and its own inherent jurisdiction to approve the encroachment decision,[29] on the basis that it was "a momentous decision" by a trustee.[30] The factors to consider in determining whether a decision is "momentous" are not

with the introduction of the UK *Mental Capacity* Act, *supra* note 12, section 45.

19 *Protection of Personal and Property Rights Act 1988*, 1988, No. 4, section 55.

20 *Public Trust v. [DF]*, [2017] NZFC 7531, at paragraphs 14-16, adopting the English test in *Re D (J), supra* note 18.

21 *Infirm Persons Act*, RSNB 1973, c. I-8, sections 3(4), 11.1(1).

22 *Ibid*, section 11.1(1). See e.g. *M. Estate, Re*, 1998 CanLII 28616 (NBQB); *Bates v. Beers et al.*, 2005 NBQB 17.

23 SNB 2022, c. 60.

24 *Ibid*, section 24(4)(a) (decision-making supporters); section 41(4)(a) (representatives).

25 *Ibid*, sections 33(3)–(4) (decision-making supporters); sections 50(3)–(4) (representatives).

26 *Ibid*, sections 34(1)–(2) (decision-making supporters); sections 51(1)–(2) (representatives).

27 *Toigo Estate (Re)*, 2018 BCSC 936.

28 *Ibid.*, at paragraph 25.

29 *Ibid.*, at paragraphs 13-15; *Trustee Act*, RSBC 1996, c. 464.

30 *Toigo*, *supra* note 28, at paragraph 22.

entirely clear in Canada, but principles have been further developed in England and Wales.[31]

The court in *Toigo* considered four questions to determine whether the trustee had exercised its powers properly:

a. Does the trustee have the power under the trust instrument and the relevant law to make the "momentous decision"?
b. Has the trustee formed the opinion to do so in good faith, and is it desirable and proper to do so?
c. Is the opinion formed by the trustee one that a reasonable trustee in its position, properly instructed, could have arrived at?
d. Is the Court certain that the decision has not been vitiated by any actual or potential conflicts of interest?[32]

This test and approach for engaging the court's power can be applicable to the approval of estate-planning decisions of an attorney if the court agrees to extend that approval jurisdiction to this type of situation. Justice Shergill concluded that the encroachment in favour of Ms. Toigo was done in good faith by the trustee and that it was "desirable and proper" for Ms. Toigo to seek encroachment.[33] The approval jurisdiction is "not an exercise of the Court's discretion, but a recognition that the trustee's exercise of power was lawful, made in good faith, and reasonable with regard to the factual circumstances presented."[34]

At least two subsequent cases have accepted the "momentous decision" framework. In *Watt v. Health Sciences Association of British Columbia*, the court applied this framework and reviewed the following questions to determine whether the trustees had properly exercised their power:

a. Is it lawful for the Trustees to enter into the Proposed Settlement?
b. Is to do so consistent with their fiduciary duties?
c. Is it in the best interests of the Beneficiaries ... ?[35]

This application of the court's inherent jurisdiction could afford an opportunity for an attorney acting under an enduring power of attorney to secure court approval for post-death planning where the attorney's plan could be characterized as a "momentous decision" for the incapable adult.

Conclusion

At present, an individual acting under an enduring power of attorney in Canada may be able to undertake some amount of estate planning for an incapable donor. Most courts have confirmed this authority when the attorney's proposal mirrors a distribution scheme set out in the donor's will. However, courts have been less consistent in defining the scope of attorneys' powers when the proposal deviates from the donor's existing testamentary plan. As is apparent from the survey of case law above, there are a number of issues that must be resolved, including the effect of statutory restrictions on gifting; limitations on an attorney's powers to create *inter vivos* trusts, which may arise from fiduciary duties; the appropriate test and perspective for approving an attorney's proposal; and the relevance and weight of other parties' interests in an analysis of the donor's best interests.

Legislative developments and judicial interpretations both in Canada and abroad suggest that there is a trend toward granting third parties greater powers to conduct estate planning on behalf of incapacitated persons. We believe that this trend will—and should—continue. In our view, the courts should continue to allow attorneys acting under enduring powers of attorney to settle assets into *inter vivos* trusts where it can be shown that such settlements are in a donor's best interests. Solutions such as statutory wills and greater reliance on the court's inherent powers, including the approval of "momentous decisions," would also be welcome additions to the estate-planning landscape in Canada. As the scope of attorneys' powers broadens, the increased monitoring of attorneys is wholly appropriate.

The advantages of allowing an attorney to undertake planning for a donor following incapacity outweigh the many challenges presented by the conferral of this power. It will be for the courts and the legislatures to develop clear, consistent, and rational guidelines to assist attorneys in the task and to provide guidance when a plan is scrutinized. We can look forward to interesting developments in the law to come.

The authors gratefully acknowledge the assistance of Laura Abrioux, articled student, of Fasken LLP, Vancouver.

31 *Ibid.*, at paragraphs 23 and 31.
32 *Ibid.*, at paragraph 29, citing *In the Matter of the Trusts (Guernsey) Law, 2007,* and *In the Matter of an Application by the Trustee of the LKM Discretionary Trust*, [34/2016], at paragraph 19.
33 *Toigo, supra* note 28 at paragraph 33.
34 *Ibid.*, at paragraph 36.
35 *Watt v. Health Sciences Association of British Columbia*, 2020 BCSC 280, at paragraph 98.

An Overview of the Overlooked: Life Insurance Trusts and Registered Plans Trusts

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Registered plans such as registered retirement savings plans (RRSPs), registered retirement income funds (RRIFs) and tax-free savings accounts (TFSAs), as well as personally owned life insurance, are common and, for many clients, critically important components of an estate plan. A relatively basic probate-avoidance strategy for these types of assets in common-law provinces is to name a beneficiary and hope, in the case of an individual beneficiary, that the beneficiary survives the owner. When that occurs, the named beneficiary receives the asset in question by virtue of the beneficiary designation, and the asset does not fall into the will of the deceased. Because the asset does not fall into the will, no probate tax (known as estate administration tax in Ontario) is payable on the asset, and probate of the will is not required in order for the named beneficiary to receive the asset. While this planning is appropriate in circumstances where an outright inheritance is intended, it is a simple strategy that can have unintended distributional consequences. For example:

- If a minor beneficiary is named who does not have a guardian for property at law (which is the usual situation for any minor in Ontario, for example, who has at least one parent alive), the funds will be paid into court or to a government entity such as the public guardian or children's lawyer. The funds will usually be quite inaccessible until the minor attains the age of majority, at which time the minor will receive the funds outright and unconditionally (trust planning is not typically available).
- If the asset is an RRSP or RRIF, income tax will not be withheld from the payment made to the beneficiary. Tax will still be payable if the beneficiary is not a spouse of the owner of the RRSP/RRIF, but the estate of the owner will bear the tax liability. (The beneficiary has joint liability, which may be relevant if the estate does not have sufficient assets to pay the tax.) If the beneficiary of the estate is not the same as the named beneficiary of the RRSP/RRIF, a mismatch will occur.
- If multiple beneficiaries are named, and one named beneficiary dies before the owner, the surviving named beneficiaries will often split the funds in equal shares. This may be contrary to the intentions of the owner, who may have a different "gift-over" set out in their will (for example, to the deceased beneficiary's children) for assets falling into the will. A "hotchpot" or equalization clause in the will can ameliorate this inequity in certain cases, but on occasion the assets falling into the will are insufficient to allow full equalization.

One potential solution is to designate a testamentary trust (or, more accurately, the person indicated as the trustee of the trust) to receive these types of assets for the ultimate benefit of others, such as the spouse or descendants of the deceased. This solution allows for probate avoidance and more elaborate planning for the funds than would be available with a simple, "non-trust" beneficiary designation. The testamentary trust is created by way of a document, which may be a will or a stand-alone deed. This type of trust is "executory," meaning that it is fully drafted, signed, and dated but does not technically exist until the death of the owner, because until that moment the trust has no assets. Upon the owner's death, the trust is automatically funded through the beneficiary designation. Because there is a living designated beneficiary (being the trustee), there is no probate, and the trustee is directed in the management and disbursement of the funds by the terms of the trust document.

This type of trust may be referred to as a "life insurance trust" (LIT) when the asset in question is life insurance, or as a "registered plan trust" (RPT) when the asset is a registered plan. Currently, neither type of trust is particularly well known as a planning tool, but LITs are more recognized than RPTs. For this reason, LITs are discussed first, and that review is then used as a springboard to discuss RPTs.

It should be noted that, in the context of LITs, this article does not address establishing a living trust as the owner of a life insurance policy. This type of planning can be appropriate under particular circumstances, but the tax implications of a living trust may be significantly more complex than those of an LIT. In addition, a living trust legally exists upon acquisition of ownership of the life insurance policy (or upon its being "settled" in any manner), and hence generally entails more years of ongoing cost (in the form of annual tax returns and other annual maintenance) than an LIT.

LITs: Pros and Cons

The LIT may be viewed as an "eat your cake and have it too" planning tool, because it allows for the avoidance of probate (and therefore probate tax) on the life insurance proceeds, while also permitting elaborate instructions to be given to the trustee concerning the use of the proceeds. In a situation where each member of a spousal couple personally owns a life insurance policy on his or her own life, the LIT of the first-to-die spouse can also result in income tax savings under certain circumstances. The probate tax benefit is generally more recognized in the LIT literature than the "first death" income tax benefit.

The "first death" income tax benefit that an LIT can provide relates to the taxation of the income generated by the life insurance proceeds. (For the purposes of this article, it is assumed that the proceeds themselves are received on a tax-free basis.) If a surviving spouse would use all of the first-death life insurance proceeds to pay down a mortgage, or otherwise use the proceeds in a manner that does not generate income, there is little point in having an LIT be the first death beneficiary (unless the policy owner is concerned about how the surviving spouse would spend the proceeds, or otherwise wants to limit the surviving spouse's access to the funds).

If, however, the surviving spouse would invest part or all of the life insurance proceeds, and has children or other low-tax-rate dependants, having an LIT may produce income tax savings. Where the first-to-die spouse would have been comfortable with the surviving spouse being the direct beneficiary of the life insurance in the absence of an LIT, the LIT would usually be drafted with the surviving spouse as the initial sole trustee, and the surviving spouse and his or her issue (and potentially other dependants such as parents) as the discretionary beneficiaries. The trustee is then given the power, through the trust document, to allocate the income and capital of the LIT among the beneficiaries as the trustee sees fit. As with a discretionary living family trust, generally the trustee would choose to pay for disbursements for low-tax-rate beneficiaries from the income generated by the LIT, and allocate this income to the recipient beneficiaries for income tax purposes, thereby using the beneficiaries' low tax rates for this income. This structure saves the surviving spouse from having to include all of the income generated by the life insurance proceeds in his or her own tax return (as would have happened if the spouse had been the direct "non-trustee" beneficiary of the life insurance).

Attribution of the income is not applicable in this case, because the deceased spouse was the owner of the policy in question, and attribution ceases upon death. However, it is possible that tax on split income (TOSI) could apply, depending on the factual circumstances. Hence, it may be preferable to invest the LIT in publicly listed securities in order to minimize the need for a TOSI analysis.

Upon the death of the surviving spouse, the LIT of the first-to-die spouse would usually be drafted to require the balance of the LIT to be split among the "second death" beneficiaries in the same manner as in the will of the first-to-die spouse. Therefore, when both spouses are deceased, the remaining proceeds can fall into trusts for the owner's children, for example, again without probate or probate tax.

For the second-to-die spouse, the LIT allows the life insurance proceeds that flow on death to be used to pay tax or other estate expenses (subject to any concerns about tainting the graduated rate estate (GRE)). The balance can then be distributed in whatever manner the spouse wishes, including to trusts for minor beneficiaries, income-sprinkling trusts for adult beneficiaries, support trusts for parents, Henson trusts for differently abled beneficiaries, and so on, without probate or probate tax.

> A relatively basic probate-avoidance strategy for these types of assets in common-law provinces is to name a beneficiary and hope… that the beneficiary survives the owner.

Another benefit of LIT planning, as compared with allowing life insurance to fall into the estate, is that the proceeds cannot be claimed by a creditor of the policy owner, since the policy has a living beneficiary. If the ultimate beneficiaries of the LIT are in the protected class of the policy owner (which includes the spouse, children, grandchildren, and parents), the policy itself is also creditor-protected during the lifetime of the owner.

In this regard, it is helpful to review some of the provisions of Ontario's *Insurance Act*[1] that clearly contemplate LITs:

> 193(1) An insured may in a contract or by a declaration appoint a trustee for a beneficiary and may alter or revoke the appointment by a declaration.
>
> (2) A payment made by an insurer to a trustee for a beneficiary discharges the insurer to the extent of the payment.

As pointed out by Barry Corbin,[2] in the context of life insurance, the appointment of a trustee is separate from the designation of a beneficiary (the latter occurring pursuant to section 190(1) of the *Insurance Act*). The creditor protection afforded to insurance is based on the existence and identity of the beneficiary (not, one presumes, the trustee).

One potential drawback to LIT planning is that the graduated rates of tax enjoyed by a GRE would not be applicable to income earned by the LIT on the life insurance proceeds. In addition, LIT planning can result in two or three trusts for each beneficiary—one created under the will, and one or two others created under the LIT(s). However, if the terms of all of the trusts are identical, it may be possible to "commingle" the trusts, provided that the will and the LIT documents each contain the power to commingle. (The trusts may be viewed for tax purposes as being one trust in any event, pursuant to subsection 104(2) of the federal *Income Tax Act*.[3])

LITs: Planning and Drafting Considerations

There are a couple of documentation options with respect to LITs. One option is to include the LIT in the will of the policy owner. This may not be the safest method, given the risk that the life insurance proceeds may be considered to be part of the owner's estate, as in the case of *Carlisle Estate*.[4]

Alternatively, a stand-alone "insurance declaration and deed of trust" (IDDT) may be drafted. The IDDT would revoke any prior beneficiary designation for the policy, appoint the trustee (and alternate trustees) to receive the life insurance proceeds, indicate who the ultimate beneficiaries are, and specify in detail how the trustees will deal with the proceeds. Many practitioners have an IDDT signed in the same manner as the will of the insured—that is, with two witnesses. While this may not be legally necessary,[5] since an LIT is testamentary in nature, some practitioners may rest easier by implementing the same execution procedure as with a will.

Ideally, the IDDT would be filed with the life insurance company in order to put the company on notice that any previous beneficiary designation has been revoked (otherwise, the life insurance company is permitted by law to pay the beneficiary named in the last designation/declaration filed with it). From a practical perspective, filing the IDDT may also smooth the payout of the proceeds. In theory, the IDDT could be signed on September 1, 2024, for example, and on September 10, 2024 a beneficiary designation form could be filed with the life insurance company referencing "Siobhan Roy if she survives me, failing which Roman Roy if he survives me, to receive the proceeds as trustee further to a declaration and deed of trust dated the 1st day of September, 2024 for the beneficiaries designated therein". However, there is a school of thought that this form revokes the beneficiary designation in the IDDT, without successfully "pulling forward" the IDDT designation and terms. Hence, the recommendation is usually to ensure that the insurance company lists "estate" as the beneficiary on file, and to subsequently sign the IDDT and file it with the life insurance company (and retain proof of filing, of course).

It is critically important for the estate planner to verify the ownership of the life insurance policies being addressed by an LIT.

It is critically important for the estate planner to verify the ownership of the life insurance policies being addressed by an LIT. First, a client with a corporation may be unaware that a

1 *Insurance Act*, RSO 1990, c. I.8.

2 Barry S. Corbin, "The Separate RRSP Trust?" Practice Note (2003) 22:4 *Estates Trusts & Pensions Journal* 360-68, at note 3.

3 *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), as amended.

4 *Carlisle Estate (Re)*, 2007 SKQB 435. For a discussion of some implications of this decision, see Blair Botsford, "Insurance Trusts Redux" (2019) 8:1 *Estate Planning Journal* at 14-39.

5 According to James Kessler and Fiona Hunter, *Drafting Trusts and Will Trusts in Canada*, 5th ed. (Toronto: LexisNexis, 2020), at 375.

policy is owned by the corporation—for corporate-owned policies, the corporation should be the named beneficiary for tax reasons, and an LIT would not be appropriate or relevant. Second, for personally owned policies, it is important to verify whether the client is the sole owner or a joint owner with, for example, a spouse.

For a jointly owned policy, the LIT must be signed by both owners (and therefore cannot be documented as part of a will). In addition, the estate planner needs to understand whose death triggers the flow of funds. Many jointly owned life insurance policies are also "joint last to die" policies, meaning that funds flow only on the second death. An LIT for this type of policy would clearly not provide the "first death" income-splitting tax benefit referred to above, but it could be used to instruct life insurance proceeds to be used to assist in paying estate liabilities such as tax (being cautious about tainting any GRE), with the balance being paid into trusts for the second-death beneficiaries, all while avoiding probate. The first-to-die spouse would be morally relying on the second-to-die spouse to keep the LIT structure in place. (The second-to-die spouse, as the outright owner of the policy on the death of the first spouse, would be legally permitted to change this planning, barring a domestic contract providing otherwise.)

Some jointly owned policies flow funds on the death of each spouse. If an LIT is used on the death of the first spouse, care must be taken to avoid attribution. If the surviving spouse is the trustee of the LIT and allocates LIT income to a minor child, it could be argued that attribution applies, since the surviving spouse is the continuing owner of the policy, and income earned from proceeds of the policy has been allocated to a related minor child.

In addition, it is important to verify that no irrevocable beneficiary has been named on the policy, and that contracts into which the insured may have entered (such as a separation agreement or a shareholders' agreement) do not limit the insured's ability to have an LIT. (As a side note, an LIT can be a very useful mechanism for a separating couple to ensure that life insurance is used solely to cover their continuing obligations under a separation agreement. An LIT keeps the policy out of the estate, where it would be subject to probate and could be seized by other creditors, while also avoiding the conferral of a windfall on the ex-spouse (a windfall occurs when the ex-spouse is named as the beneficiary, and the insured dies with remaining obligations that are less than the death benefit).)

RPTs

RPTs are conceptually similar to LITs, except that an RPT would generally not be used if the spouse is intended to have unimpeded access to the registered plans. If the spouse is the outright beneficiary of RRSPs/RRIFs, refund of premiums/designated benefit taxation is available, essentially meaning that the estate of the first-to-die spouse will not be liable for income tax on the RRSPs/RRIFs. Instead, the surviving spouse will be taxable on these funds, and may stream out the taxation of the funds over a number of years, provided that (i) the funds are directly transferred from the deceased spouse's RRSPs/RRIFs into their own qualifying plan, such as an RRSP/RRIF, or (ii) the surviving spouse is the successor annuitant of the deceased spouse's RRIFs. Similarly, if the surviving spouse is the successor holder of the TFSAs of the deceased spouse, the surviving spouse "steps into the shoes" of the deceased spouse, and can earn tax-free income on twice the usual contribution limit.

The tax deferral (for RRSPs/RRIFs) and outright tax savings (for TFSAs) generally mean that RPT planning is implemented only when the second spouse dies. At that time, an RPT can save probate and probate tax on the registered plans, while allowing for a complex distribution—for example, to one or more testamentary trusts—or for planning for beneficiaries who are in receipt of governmental disability benefits or who require assistance in managing their assets.[6]

At the current time, there seems to be a divide in practitioner opinion, at least in Ontario, concerning whether an RPT can work in the same manner as an LIT, owing to a distinction in the statutory provisions relating to life insurance and registered plans. The relevant provisions of Ontario's *Insurance Act* are set out above. Ontario's *Succession Law Reform Act*[7] (SLRA) is differently worded. It provides:

> 51(1) A participant may designate a person to receive a benefit payable under a plan on the participant's death,
>
> a. by an instrument signed by him or her or signed on his or her behalf by another person in his or her presence and by his or her direction; or
> b. by will,
>
> and may revoke the designation by either of those methods.

6 See Kessler and Hunter, ibid., at 281-384, for a review of potential planning options for this category of beneficiary.
7 *Succession Law Reform Act*, RSO 1990, c. S.26.

Some Ontario practitioners (and financial institutions) are of the view that since SLRA section 51(1) does not refer to the possibility of a trustee being appointed, and does not specifically discharge the financial institution when paying a trustee, the legislature intended not to allow RPT planning, or at least not to discharge the financial institution when it pays a trustee. Other practitioners point out that the SLRA does not forbid RPT planning; it only requires a "person" to be designated, and a trustee is by necessity a person. As for the liability question, the financial institution could take the position that this situation would be analogous to releasing funds to anyone acting in the capacity of trustee.

Some financial institutions have included clauses in the declarations of trust for their registered plans addressing this potential liability issue. For example, the CIBC Investor Services Inc. self-directed retirement savings plan declaration of trust states at paragraph 18:[8]

> If You designate trustee(s) as or for the Beneficiary of the Plan, You are directing Us to pay the Plan Proceeds to the trustee(s) ("RRSP Benefit Trustee") to hold and distribute in accordance with the governing trust provisions contained in the Instrument [defined as "a will or a written instrument in a form acceptable to Us"]. You understand that:
>
> a. payment of the Plan Proceeds to the RRSP Benefit Trustee discharges Us and We have no duty or responsibility to see to the application of the Plan Proceeds in accordance with any trust provisions in the Instrument or otherwise at law;
> b. We recommend that You obtain independent legal advice in respect of the validity and effect of designating the RRSP Benefit Trustee as or for the Beneficiary; and
> c. You indemnify and save harmless, release and discharge Us and the Agent for and from, any claims, expenses and losses which may arise or be incurred as a result of You designating the RRSP Benefit Trustee.

Other financial institutions have similar provisions in their declarations of trust. Over the years the number of financial institutions accepting RPT planning in Ontario has increased, perhaps owing in part to concerns about the competitive advantage that may be lost by not being able to provide similar probate-planning options as their competitors. In practice, it may be logical for practitioners to limit RPT planning to registered plans at financial institutions that know about and accept this planning. Otherwise, it will be difficult to have the financial institution accept the trust document, as well as the beneficiary designation contained therein.

A cautious practitioner may provide an additional layer of protection to this planning in certain jurisdictions (such as Ontario) by drafting probate and non-probate wills for their RPT clients who are not fee-sensitive. In this case, the non-probate will is drafted to apply to all assets that do not require a grant of probate in order for the executor to receive and deal with the assets. Therefore, if a subsequent court case determines that the beneficiary designation in the trust document is ineffective at law and thus null and void, probate tax would still not be payable on the registered plans because of the existence of the dual wills. (Since the "RPT-accepting" financial institution would pay the plans over without requiring probate, the plans would fall into the non-probate will and not be subject to probate tax.)

For a financial institution that does not accept RPT planning, a "secret trust" may be an option. Corbin[9] suggests that the trustees could sign a trust declaration with all of the various trust provisions, and be named on the beneficiary designation form filed with the financial institution, but include no indication on the form that they are named in the capacity of trustees. Having the trust declaration signed by the trustees would clearly abrogate some of the private nature of the estate plan, but this may be a helpful option for some clients.

Ontario practitioners may look enviously upon British Columbia, which revised its registered plans legislation in 2014 so that section 92 of the *Wills, Estates and Succession Act*[10] tracks section 193(1) of Ontario's *Insurance Act*, referenced above, in regard to naming a trustee. As a result, RPTs are accepted by an increasing number of plan administrators in British Columbia,[11] and while it may not be a legislative priority in Ontario to revise the SLRA in this respect, estate planners can always dream.

8 I am grateful to Ann Elise Alexander for this reference.
9 Supra note 2.
10 *Wills, Estates and Succession Act*, SBC 2009, c. 13, as amended.
11 See Kessler and Hunter, supra note 5 at 383 (footnote 23).

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THE PERILS OF PERFECTING A WILL: THE LESSONS OF THE DICKSON-STARKEY ESTATE

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Before the *Wills, Estates and Succession Act*[1] (WESA) came into force in 2014, British Columbia was a jurisdiction of "strict compliance" in relation to wills. A will-maker had to comply with the traditional requirements for making, signing, and witnessing a will for it to be valid. Those formal requirements are set out in WESA section 37, but section 58 gives the court broad power to cure records that do not meet the formal requirements and thus to render them fully effective, regardless of their deficiencies. Section 58 may give those who are inclined to "do it yourself" a boost of confidence that they do not need professional help to create a will. However, one of the dangers of doing it yourself is that you may create an inconsistent document that the court cannot recognize as your fixed and final testamentary intention, thereby causing the court not to honour any of the intentions set out in your document.

Dickinson-Starkey Estate (Re)[2] highlights both the dangers of perpetually perfecting a record and the benefit of retaining professionals to avoid litigation after death. In this case, the Supreme Court of British Columbia considered the purported will of Peter James Francis Dickinson-Starkey, deceased ("Peter"), who was survived by siblings, nieces, and nephews. Peter prepared his purported will on six pages from at least one will template, but likely more. He completed portions of the pages with typed information. He also made numerous handwritten additions, deletions, and changes, apparently over the course of years as his intentions changed. The court accepted that the handwritten additions, deletions, and changes were made by Peter, and members of Peter's family gave evidence that they recalled Peter speaking about his purported will. He appears to have placed great importance upon it.

However, Peter's purported will did not meet the formal requirements set out in WESA section 37 because it was not signed at its end by Peter in the presence of two witnesses at the same time who also signed.

Peter's purported will contained many indications that it was a record of his testamentary intentions. It was written on the pages from at least one will template, was clearly stated to be Peter's last will, and was kept in a folder labelled "Will." Further, it revoked former wills and codicils, appointed executors, dealt with all of the property of Peter's estate, and addressed

1 *Wills, Estates and Succession Act*, SBC 2009, c. 13.
2 *Dickinson-Starkey Estate (Re)*, 2022 BCSC 93.

the disposition of his remains. It also contained Peter's initials in various locations, including once at the end. With these factors as support, members of Peter's family who were listed as beneficiaries in his purported will sought an order to cure the deficiencies pursuant to WESA section 58.

The court was tasked with determining whether Peter's purported will was a record of his testamentary intentions. The court noted that

> testamentary intention means much more than the expression of how a person would like his or her property to be disposed of after death. The key question is whether the document records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death.[3]

The court considered that the number of handwritten notations and changes in Peter's purported will gave the impression of a work in progress, and it noted that Peter did not take any steps over many years to formalize or produce a clean copy of his purported will. In fact, Peter attended a law office and received a draft will that was prepared by that office, but there is no record of further contact after his receipt of that document. Peter also dated his purported will, but after the latest date on his purported will, he wrote to his brother that he was still in the process of preparing his will. Each of these factors indicated that Peter's intentions as set out in his purported will were not fixed and final, but the most important indication that the purported will did not represent Peter's final intention was that it was internally inconsistent.

Peter's purported will included a handwritten addition stating that his house, which was the largest asset of his estate, should be distributed to one of his nephews, but he did not cross out the printed paragraph from the will template giving his executors power to sell that property. In the opinion of the court, that fact alone precluded a finding that Peter's purported will represented his deliberate or fixed and final intention as to the disposal of his property on death. This inconsistency was magnified by the fact that Peter's estate was not large enough to make the cash gifts set out in his purported will without the sale of his house.

Because Peter appeared to be considering and weighing his options, the court ultimately found that the deficiencies in Peter's purported will could not be cured under WESA section 58. As a result, despite the years he spent contemplating the disposal of his property on his death, Peter died intestate.

PROBATE PLANNING: THE ALBERTA PERSPECTIVE

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Alberta's probate fees are among the lowest in the country, ranging from $35 for estates with a net value of $10,000 or less, to a maximum of $525 for estates with a net value in excess of $250,000. With such minimal probate fees, even for the largest estates, many of the concerns that would be present in higher probate fee jurisdictions, such as Ontario and British Columbia, are not present in Alberta.

Another major concern underpinning probate planning is time and delay. While it is true that historically (and until relatively recently) the probate process in Alberta was document-intensive and often slow, the introduction of the Surrogate Digital Service, an online portal for filing many applications for a grant of probate or administration, has drastically reduced the time between the preparing and the issuance of a grant.

> Alberta's probate fees are among the lowest in the country...

Nevertheless, for many people, a fear of probate still persists, often stemming from horror stories about lengthy delays, high costs, and red tape. To mitigate these concerns, many advisers and their clients have implemented strategies to avoid probate. These strategies include designating beneficiaries for life insurance or registered assets (such as TFSAs, RRSPs, and RRIFs), establishing joint tenancies for real estate or joint ownership of bank accounts (hopefully with proper documentation of intentions and beneficial ownership as well as a complete understanding of bare trust T3 reporting under the new trust reporting rules), settling inter vivos trusts, or making inter vivos gifts. However, without proper advice and planning, these strategies can backfire, resulting in confusion, expense, and, sometimes, defeat of the testator's intentions.

In *Harder Estate (Re)*, 2023 ABKB 496, the Alberta Court of King's Bench was called on to determine the ownership of certain funds in a joint bank account established by the testator. The surviving account holder was the

3 Ibid., at paragraph 55, quoting from *Estate of Young*, 2015 BCSC 182, at paragraph 35.

deceased's adult daughter. According to the daughter, the joint account was set up so that, on her mother's death, she would receive the funds in the account to apply to educational and charitable purposes of importance to her mother. In the alternative, the daughter argued that she was to receive the funds in the joint account in her own right by way of survivorship, subject to a "moral (but not legal) obligation" to apply the funds to her mother's educational and charitable purposes.

The deceased's son—the brother of the surviving account holder—argued that the account was made joint only because the mother wanted assistance from her daughter in managing her banking and ensuring oversight to prevent the mother from being victimized by financial scams. The son argued that the daughter had no entitlement of any kind to the funds—as trustee, as beneficiary, or otherwise—and that the funds in the joint account belonged to the mother's estate and were to be distributed according to the mother's will.

The daughter gave evidence as to the genesis of the arrangement, stating (at paragraph 5):

> Mother told me she wanted me to make sure her great-grandchildren had [the] opportunity to have Christian education. And she also wanted me to continue to give money to her church charities [—] Adventist World Radio, It Is Written Canada, and missions (3rd world countries).
>
> I want the court to turn the bank account over to me so I can keep my mother's wishes. Mother did not see any need to include this in her will because the Bank Lady told her that it would automatically be turned over to me when she passed.

Having noted that the daughter was not asserting a gift of the funds in the joint account, the court considered how to characterize the nature of the daughter's claim to the funds.

As a starting point for the analysis, the court determined that the presumption of resulting trust applied to the funds in the joint account. Justice Lema remarked that, because the daughter maintained that the funds were to be "managed" by her to underwrite the "Christian education" of the deceased's descendants and to support various charities, the daughter was effectively asserting a trust.

The court accepted that a transferee can rebut the presumption of resulting trust by asserting, and proving, a trust in favour of others, but it noted that the daughter had failed to do so, in part owing to a lack of corroborating evidence of her mother's intentions. Further, the court noted that no valid trust had been created, largely owing to uncertainty as to the allocation of amounts as between the charitable and non-charitable purposes of the alleged trust.

Accordingly, the court declared the joint account balance to form part of the mother's estate.

Although *Hunter Estate* was not explicitly about probate planning, the result in the case clearly evidences the need for careful planning and structuring of any strategies designed to transfer wealth outside the usual probate process. With appropriate advice and proper documentation, the deceased's true aims—whatever they may have been—could have been achieved, without the need for costly litigation.

PROBATE PLANNING: THE CONTINUING SAGA OF TRANSFERRING LAND INTO JOINT NAMES IN SASKATCHEWAN

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There are significant risks in Saskatchewan associated with the use of joint tenancy as an estate- or probate-planning tool. The courts have held that, given the Torrens land registry system in the province, the presumption of resulting trust does not apply to gratuitous transfers of land in Saskatchewan. As a result, once land has been transferred, there is no way to "undo" the transfer without the consent of all title owners. If the transfer is being completed solely for the purposes of estate and/or probate planning, the courts have been clear that contemporaneous documentation must be completed at the time of transfer to clarify the positions of the parties. Even with contemporaneous documentation, the courts may still determine that it is not possible to "undo" the transfer without the consent of all parties.

Dunnison Estate

In 2017, the Saskatchewan Court of Appeal released *Dunnison Estate v. Dunnison*, 2017 SKCA 40, a seminal decision on the applicability of the presumption of resulting trust as it relates to land transfers in Saskatchewan. In *Dunnison Estate*, the testator had transferred a cottage property into joint tenancy with herself and her two sons. Following a dispute between the testator and one of the sons, she wrote the impugned son out of her will. After the death of the testator, her estate brought an action seeking to clarify whether the transfer had been a gift or a resulting trust, in order to clarify what interest each of the two sons had in the cottage.

The Court of Appeal found that the presumption of resulting trust was not consistent with the Torrens land registry system in Saskatchewan for the following reasons:

- *The Land Titles Act* of 1978, RSS 1978, c. L-5 (since repealed and replaced by *The Land Titles Act, 2000*, SS 2000, c. L-5) (LTA) provides that a transfer is an absolute transfer of all rights and interests without limitation unless a contrary intention is expressed or words of limitation are used. This is in contrast to the presumption of resulting trust, which presumes a limited transfer where the transferor retains a beneficial interest in the land.
- In addition, the LTA states that a certificate of title is conclusive evidence of ownership. As a result, the court found that the legislation must prevail and the presumption of resulting trust had been abolished by statute with respect to gratuitous transfers of land.

The court ultimately found that the testator, by adding her two sons to the title, had intended to give the right of survivorship to both sons. There was donative intent, and the transfer had been intended as a gift.

Stubbings v. Stubbings

Stubbings v. Stubbings, 2018 SKQB 8 (decided a year after *Dunnison Estate*), was an example of a testator's desire to change joint tenancy while the testator was still alive. In *Stubbings*, a father transferred title to his condo into joint names with his son, with the intention of avoiding probate fees on death. The father claimed that he originally intended for the son to receive the property on his death, provided that two conditions were met: (1) that the son maintained a good relationship with the father; and (2) that the father maintained the right to sell the condo in the meantime.

Unfortunately, the father had a falling out with his son, and he decided he no longer wanted the son's name on title. The court held that pursuant to section 156 of the LTA, a transferor cannot unilaterally take back jointly-held land. The father attempted to partition the land, but the court ordered a sale in lieu of partition and required the father to pay into court a sum of money equal to one-half of the value of the condo (payable to the son).

Reaney v. Fradette

In the recent decision in *Reaney v. Fradette*, 2023 SKKB 60, the Court of King's Bench was asked to consider whether parents transferred both registered and beneficial ownership of a quarter section of land to their son prior to his death. The parents claimed that they transferred the quarter section as a "loan" of property to assist him in obtaining financing so that he could acquire two additional quarters of land, and that he had agreed to return the property to them once the land was obtained. The common-law spouse of the deceased claimed that the quarter section was a gift and formed part of the deceased's estate.

In its analysis, the court reviewed both the decision in *Dunnison Estate* and the decision in *Schramm v. Schramm*, 2017 SKQB 212. In *Schramm*, the court had directed the registrar of land titles to transfer back title to five quarters of land (despite the existence of the Torrens registration system in Saskatchewan) because there was a clear trust deed that was entered into at the time of the original transfer. The deed stated that the transfer was for estate-planning purposes and was not intended to confer any immediate benefit. The trust deed also showed that the son, who had been added on title, acknowledged that his mother was the sole beneficial owner of the land and that he held the ownership interest in trust for her during her lifetime.

The court distinguished the facts in *Reaney v. Fradette* on the basis that there was no trust declaration drafted by a lawyer, with clear and unequivocal terms. Instead, there was a "loan agreement" that appeared to have been drafted without legal advice, and without any clarity on the terms of the transfer. As a result, the court determined that summary judgment could not be granted, and that the parties would need to conduct a full trial on the matter.

Closing Thoughts

In Saskatchewan, there is no way to distinguish between registered and beneficial ownership on a title. Further, the Torrens system of registration confirms that a certificate of title is clear and conclusive evidence of ownership and that a transfer is an absolute transfer of all rights and interests, without limitation, unless a contrary intention is expressed or words of limitation are used. Therefore, extreme caution should be exercised when transferring land into joint names. At minimum, clear written documentation should be prepared contemporaneously with the transfer, and appropriate legal advice should be obtained to confirm the terms of the transfer.

ACTING INAPPROPRIATELY UNDER A POWER OF ATTORNEY: THE MANITOBA PERSPECTIVE

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Governing Legislation

In Manitoba, *The Powers of Attorney Act*, CCSM c. P97 ("the POA Act"), governs the execution and validity of a power of attorney (POA) and the person signing the POA ("donor"). *J.L. v. S.L.L. et al.*, 2006 MBQB 170, and other cases have recognized that an attorney acting under a POA is also a trustee and has the obligations and duties of a trustee. It is important that the attorney understand these duties and obligations so that they can avoid issues in carrying out their duties and avoid personal liability relating to the donor's estate.

Effective Date of the POA

The POA Act allows the donor to make the POA effective as of the date it is signed or, per section 6(1), on the occurrence of a specific event specified in the POA. Section 6(2) allows the donor to name a declarant from whom the attorney may request a written declaration that the specified event has occurred. Section 19(1) imposes a positive obligation on the attorney to act where the attorney knows or ought reasonably to know that the donor is mentally incompetent and the attorney previously acted under the POA or has indicated acceptance of the position. Unlike some other jurisdictions (such as British Columbia), Manitoba does not require an attorney to formally acknowledge the appointment under the POA at the time of execution. Consequently, whether the attorney indicated acceptance may turn on the facts.

Attorney's Duties

An attorney under a POA is a fiduciary, a role that requires the highest commitment of good faith, loyalty, and trust. *Krawchuk v. Krawchuk*, 2017 MBQB 47 (at paragraph 18), confirms that an attorney has an obligation to act in the best interests of the donor and cannot permit the attorney's personal interests to conflict with that obligation. An attorney must keep proper accounts of the donor's property, clearly showing the details and providing receipts related to all monies and assets received or disbursed.

Avoiding Self-Benefit

In *Krawchuk*, after a mother moved into a care facility, the son moved into her home with his family, lived in the home without paying rent, and carried out renovations, all of which appeared to have been done without his mother's specific permission. Throughout his tenure, the son failed to keep proper accounts of expenses. As the sole remaining child, he wrongly presumed that the mother would never recover and never be able to manage her own affairs or need her assets, and that he would be entitled to his mother's estate upon her passing. Although the son attempted to argue that his various expenditures (including the renovations) were approved by the mother, he also took the position that he was managing his mother's affairs because she was incapable. The court noted (at paragraph 22) that the son could not argue that he was acting with the approval and permission of the mother while at the same time arguing that she was incapable. The court had no trouble finding that the son breached his duties as attorney and took advantage of the position for his and his family's benefit instead of his mother's.

Avoiding Conflict of Interest

In *J.L. v. S.L.L. et al.*, two acting attorneys sold a property to one of the attorneys personally at approximately $60,000 less than the property's appraised value. The attorneys also failed to investigate the reasonableness of a transaction completed by the donor himself with the spouse of one of the attorneys when it was known that the donor was incompetent. The court noted (at paragraph 16) that an attorney must ensure that the donor's property is sold at or near fair market value and for the benefit of the donor. The sale of property to the attorney was declared to be void, and the court ordered the public trustee to investigate the reasonableness of the other transaction, to confirm whether it was at least close to fair market value.

In the more recent case of *McDonald Estate v. McDonald*, 2023 MBKB 31, an attorney transferred a property from the donor to himself and his spouse at a value considerably lower than the estimated market value. After the transfer, cheques totalling nearly the same amount paid to the donor for the transfer were issued from the donor's bank account, which essentially resulted in the gift of the property to the attorney. The donor's POA contained a clause allowing the making of gifts consistent with the donor's gifting practices in the three years prior to the attorney began acting on the donor's behalf. While there was evidence that the donor previously made substantial gifts of $100,000 to her children and grandchildren, the context of the gifts was examined by the court. Just prior to making the gifts, the donor sold land for about $2,000,000. The "gift" carried out by the attorney did not fit the "previous pattern of giving" because no transaction or windfall occurred when the attorney completed the transfer to himself and his spouse. The court criticized the attorney's actions, noting (at paragraph 78) that the attorney placed himself in a position of self-benefit and in a direct conflict of interest by accepting a substantial gift from the donor.

An Attorney Must Act with Care

An attorney must exercise the degree of care, diligence, and skill that a person of ordinary prudence would exercise in the conduct of a person's own affairs. The attorney, however, will be held to a higher or stricter standard if the attorney takes compensation for acting, which means (per section 19(3) of the POA Act) that the attorney must instead exercise the degree of care, diligence, and skill that would be expected of a person in the business of managing the property of others. An attorney who does not meet the applicable standard of care can be held personally liable for damages.

In *The Estate of William Alfred Kirkup*, 2021 MBQB 184, the attorney failed to invest or reinvest the donor's funds as the existing investments matured. The court determined (at paragraph 22) that the attorney did not act as a reasonably prudent attorney when he allowed the investments to lapse without any consideration of the value of reinvestment. Even if an attorney is not compensated, such actions were not reasonable and caused a loss of interest to the estate. The attorney was ordered to pay $31,000 to compensate for the loss.

The Attorney Must Keep Accurate Accounting and Receipts

An attorney for property is obligated to keep accurate accounts with supporting records and receipts. The attorney should be able to account for every penny received or disbursed on the donor's behalf. If challenged, the attorney has the burden of proving that they have accounted for all of the donor's property through each transaction, and they can be held personally liable if they fail to do so.

In *Kirkup*, on the passing of accounts, the attorney was criticized for failing to maintain the records as he was required to do. In the absence of the supporting receipts and documents, the attorney was ordered to repay approximately $51,000 to the estate. In *Krawchuk* (at paragraph 42), the court was similarly critical of the attorney for making claims that he was unable to substantiate and ultimately ordered the attorney to repay a total of almost $64,000.

THE HIGH COST OF "GRATUITOUS" TRANSFERS: SIPIDIAS V. SIPIDIAS

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Ontario is one of the Canadian jurisdictions that require comparatively high fees to obtain a grant of probate. In addition, depending on where a person lives in Ontario, the processing time for a probate application can vary widely, from a few weeks to more than six months. It is not surprising, then, that holding property as joint tenants, or making inter vivos transfers of property, continues to be popular, both as a means of providing faster access to property and as a way of reducing probate fees.

The complexities and nuances of joint ownership and inter vivos gifts between parents and adult children are broadly understood among estate practitioners, but there continues to be much misunderstanding among the general public. The recent decision of the Ontario Superior Court of Justice in *Sipidias v. Sipidias*, 2024 ONSC 1000, is yet another reminder of what can go wrong when there are gratuitous transfers of property and the transferor's intentions are not documented.

Basile Sipidias died on September 6, 2011. He was predeceased by his wife, who died in 2005. Basile's will provided for the residue of his estate to be divided equally among his five children—Ted, Vangie, Irena, Dan, and George—all of whom survived Basile. George's share was to be held in a Henson-style trust for him. Vangie and Dan were appointed as the executors of Basile's estate. Unfortunately, 13 years of litigation ensued.

Prior to Basile's death, title to his home, which was his most significant asset, was transferred from his name to Irena for no consideration. Irena took the position that the transfer of the property to her was a gift and, accordingly, the home did not form part of the estate. Not surprisingly, the other children argued that the presumption of resulting trust applied and had not been rebutted, such that Irena held the home on resulting trust for the estate. In a separate proceeding that went to trial in November 2015, Judge Bird held that the transfer was not a gift and that Irena held the home for the estate. She was ordered to pay the estate costs of about $107,000, which was set off against her share of the estate (which did not fully satisfy the costs order).

Following the initial trial, Ted brought an application in 2017 under the *Trustee Act* against the executors, Vangie and Dan. The executors had sold the home that was at issue in the first trial and used a portion of the proceeds of sale to acquire a substitute property, title to which was taken in their names personally. Dan lived in the substitute property with George, who is under a legal disability. After an unsuccessful private mediation, the matter proceeded to judicial mediation, which resulted in minutes of settlement. The minutes dealt with most of the issues related to the administration of the balance of the estate, which was approximately $570,000.

from which Basile's intention might be inferred" (at paragraph 72). In any event, the matter was initially agreed on and settled as part of the minutes of settlement, partly, it seems, on the basis of the evidence of the bank letter.

However, following mediation, Dan made further inquiries with the bank.

> Ontario is one of the Canadian jurisdictions that require comparatively high fees to obtain a grant of probate. In addition, depending on where a person lives in Ontario, the processing time for a probate application can vary widely, from a few weeks to more than six months.

The issues to be decided at the hearing concerned the enforceability of the minutes of settlement, and the ownership of a joint bank account with a balance at the date of death of approximately $30,000. The joint account was registered in the name of Basile and Vangie. The same dynamic that was observed with the home was repeated with the joint account, although with much less value at stake. Vangie argued that Basile intended the joint account to be a gift, whereas the other children argued that the account was part of the estate by way of resulting trust.

The status of the joint account had been discussed and settled at the judicial mediation on the basis that it was a gift to Vangie. In support of her position, Vangie had produced a letter from the bank stating that Basile and Vangie had opened the joint account together about three years before Basile's death. In the Superior Court of Justice, Judge Charney noted that the bank letter would not have been determinative of the issue of resulting trust and that it was, "at best, circumstantial evidence

The bank later confirmed that the information in its original letter was incorrect, and that the account was originally only in Basile's name, rather than a joint account in Basile's and Vangie's names from the outset. Dan argued at the Superior Court of Justice that he would never have agreed to exclude the joint account from the estate assets if he had had the correct information, and asked for rescission of the minutes of settlement.

The court determined that the misrepresentation by Vangie was unintentional, and took note of the comparatively small amount that Dan would recover if the joint account was treated as an estate asset. Judge Charney stated the issue as follows (at paragraph 84):

> In arriving at this conclusion, I must ask myself whether the game is worth the candle. Does this innocent misrepresentation merit setting aside the settlement agreement and sending the parties off to litigate this dispute, recognizing that the cost of litigation will greatly exceed the $5,000 to $6,000 at stake and likely leave each beneficiary with less than the amount agreed to in the settlement?

The court concluded that the answer to the question was no, and that "[t]hirteen years of litigation is enough" (at paragraph 85).

Basile's estate faced many difficulties, and the issues arising from the gratuitous transfer of the home and joint ownership of the bank account were not the only drivers of the litigation. They did, however, play a significant role, and one wonders how things would have turned out if Basile's intentions in transferring title to the home and the joint account had been formally documented.

Much remains to be done to educate the general public about the potential pitfalls of informally using joint ownership and inter vivos transfers as a means of achieving probate fee savings and administrative convenience.

QUEBEC TAKES A PROGRESSIVE STEP IN FAMILY LAW REFORM

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Family law is a complex and sensitive area that profoundly affects individuals' lives. In response to evolving societal norms and changing family structures, legislators often find themselves adapting legal frameworks to meet contemporary needs. Quebec has never recognized any special status for unmarried couples, unlike the other provinces and territories, outside of certain limited exceptions. On March 27, 2024, Quebec's

National Assembly introduced a bill that, if adopted, would have a significant impact on de facto spouses who have children together. Bill 56, *An Act respecting family law reform and establishing the parental union regime*, stands as a notable example of Quebec's efforts to adapt to contemporary needs of Quebec society.

According to recent data, the prevalence of de facto unions in Canada is the highest among G7 countries, mostly because of the popularity of de facto unions in Quebec. Unlike Canada as a whole, de facto couples in Quebec are more likely to have children than their married counterparts (49 percent compared with 45 percent), as has been the case since 2011. Bill 56 emerged as a response to the growing recognition of diverse family arrangements and the need to provide equitable legal frameworks for de facto unions with children. Recognizing this reality, the Quebec legislature is seeking to introduce into the law of Quebec a regime to accommodate the complexities of contemporary familial structures.

The changes that Bill 56 intends to introduce are the following:

- **Parental union regime:** One of the central components of Bill 56 is the establishment of the parental union regime, which is formed upon de facto spouses becoming parents of the same child. Two individuals are considered to be de facto spouses when they share a community of life and who present themselves publicly as a couple. This regime acknowledges the rights and responsibilities of parents in non-marital unions in ways that are similar to those of married couples or couples in a civil union. For example, the family residence of the parental union is afforded the same protections as the family residence of married couples or couples in a civil union.
- **Parental union patrimony:** At present, de facto spouses have no claim against each other's property when the relationship ends other than by an onerous claim of unjust enrichment. Bill 56 contemplates the creation of a parental union patrimony consisting of family residences, the furnishing of such residences, and motor vehicles used by the family. Upon the termination of the parental union, the value of the assets composing the parental union patrimony is divided between the spouses. In many respects, the partition of the parental union patrimony resembles the partition of the family patrimony for married couple or couples in a civil union. The spouses may, during the union, withdraw from the parental union patrimony by notarial act, which entails the partition of the existing parental union patrimony at the time of withdrawal.
- **Spousal support:** Bill 56 creates the right of a spouse in a parental union to claim compensation for that spouse's contribution, in terms of property or services, that enriched the other spouse. The claim can also be made against the succession of the deceased spouse. Under the current law, no such right exists.
- **Ab intestate rights**: At present, only married spouses or spouses in a civil union are considered heirs in the case of an intestacy. Bill 56 treats a spouse in a parental union who had been sharing a community of life with the deceased for more than one year prior to death as a spouse for the purposes of intestacy.

Bill 56 represents a significant milestone in the ongoing evolution of family law in Quebec, reflecting a more inclusive and progressive approach to addressing the diverse needs of modern families. By recognizing and accommodating various family structures, prioritizing the best interests of children, and enhancing support and protection mechanisms, the legislation seeks to foster healthier familial relationships and to mitigate the adverse effects of family breakdowns. By embracing diversity, promoting equity, and prioritizing the well-being of all family members, the legislation paves the way for a more just and compassionate approach to family law in the 21st century.

TESTATOR SELF-HELP AND THE RISK OF A HOLOGRAPHIC WILL IN ESTATE OF PERLEY MCEVOY

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The New Brunswick case of *Estate of Perley McEvoy*, 2020 NBQB 11, illustrates the risk to testators in relying on self-help estate-planning measures like a holographic will to set out their testamentary intentions.

Perley McEvoy, late of Renous, New Brunswick, died in August 2017, following which his two children, Joseph McEvoy and Daniel McEvoy, were granted letters of administration for his estate. As part of their application to the New Brunswick Probate Court, both sons asserted that they had "made a careful search and inquiry for a will or other testamentary

> The New Brunswick case of *Estate of Perley McEvoy*…illustrates the risk to testators in relying on self-help estate-planning measures like a holographic will to set out their testamentary intentions.

instrument paper and no original copy could be found" (at paragraph 1). Their assertion relied on the advice, given by two different lawyers, that a one-page handwritten document left by Perley McEvoy, dated August 22, 2017, which made several gifts from his property but which did not name an executor, did not constitute a valid will.

Wayne McEvoy, a surviving brother of Perley McEvoy, applied to the Probate Court to have the holographic will recognized as a valid will, to have the letters of administration issued to Joseph and Daniel McEvoy revoked, and to have letters of administration with the holographic will annexed issued to him instead. Among other gifts, the holographic will bequeathed Perley McEvoy's homestead property to his brother Simon McEvoy, who had lived on the property for most of his life. If the court found that the holographic will was not valid, all of Perley's property would devolve to his children instead by reason of intestacy.

However, Justice Walsh of the Probate Court of New Brunswick was ultimately satisfied on a balance of probabilities that the handwritten document was in fact a valid holographic will. He described the holographic will as follows (at paragraphs 5-6):

> [5] As mentioned, the document is one page. It is all in original black-ink writing on a lined three-holed punched page of paper. It is headed "Aug 22, 2017 Will of Perley McEvoy." It purports to make certain clear bequests. The first one is the property in Renous to his brother Simon, along with a specified bank account at the Credit Union in Blackville, N.B. His brother Simon was also directed to erect a headstone on his grave and to use the money to be received from CPP (presumably the death benefit) to pay for it. Of the other two dispositions set out in the document, one was the property in White Rapids to his ex common law spouse (which apparently was a redundant disposition since it was either in her own name or held jointly with the testator) and the other was his 2007 automobile to his ex common law spouse's son. I pause to note that there are no provisions for an executor or executrix or for the beneficiary of any residue. As to the latter, there does not appear to be a residue of the estate in any event.
>
> [6] The document is signed at the end of those dispositions "Perley McEvoy." Directly under that signature is the signature "Monty Hetherington" opposite the written word "Witness."

In New Brunswick, section 6 of the *Wills Act*, RSNB 1973, c W-9, provides that "[a] testator may make a valid will wholly by his own handwriting and signature, without formality, and without the presence, attestation or signature of a witness." Justice Walsh determined that the direct evidence before him supported a finding that the will was entirely in the handwriting of Perley McEvoy, and the indirect evidence available to him also supported a finding that the holographic will represented Perley's testamentary intent. Justice Walsh therefore held (at paragraph 21):

> On the totality of the evidence the Court is satisfied on a balance of probabilities that the document dated August 22, 2017 is a valid holograph Will. Alternatively, even if I had not found the document to be holograph in nature, I would find that the document is the embodiment of the testamentary intent of the testator and that I would apply Section 35.1 of the *Wills Act* to cure the formal defects related to the witnessing of that document, so as to give effect to the testator's wishes.

Although on the evidence before the court the holographic will was ultimately held to be a valid holographic will, Perley McEvoy's reliance on the holographic will nearly resulted in substantially different treatment for his estate assets than he intended. This case is thus a useful reminder not only of the risks to testators in relying on self-help estate-planning measures like a holographic will, but also of the importance of making the court aware of non-standard testamentary instruments at the application stage.

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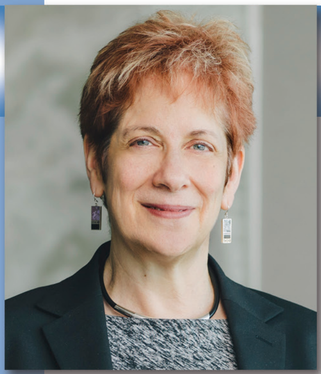

CHAIR'S MESSAGE

RACHEL BLUMENFELD, TEP

Welcome to the May issue of *STEP Inside*. This issue arrives with longer daylight hours, more sunshine, and warmer temperatures!

To begin with, I would like to congratulate and thank the panellists of the two recent national branch bundle seminars. The January seminar, "Better Breadcrumbs: Assisting Clients in Preparing a Clear, All-Inclusive, and Tax-Efficient Road Map for Their Fiduciaries and Families," was excellent, as was the February seminar, "What to Do When Things Go Off the Rails—A Cross-Provincial Examination of Capacity Disputes." Both sessions were thought-provoking and of interest to all members.

At the time of writing, our 2024-25 STEP Canada membership renewal campaign is in full swing! Please remind all the STEP members in your network to renew so that they can continue to receive the valuable benefits that come with STEP membership. In addition to our educational programs, we are proud to present robust branch and chapter seminars, the national conferences and webcasts, and the biannual full-day courses. You make what we do possible, and you are the reason we do it.

All branches and chapters will be planning for their upcoming ABMs and ACMs this spring. I hope that you will attend these events and put your hand up to join a local committee. New volunteers are always welcome.

In early June, the hallmark event of the trust and estate industry will attract more than 720 delegates to Toronto for the 26th National Conference, with another 300+ waiting for the online session replays. This year's program committee, chaired by Paul Taylor, has done an exceptional job of putting together a fantastic line-up of topics and sessions. I look forward to seeing many of you there on June 3-4. Thanks in advance to the sponsors who have renewed their support of the conference, many of whom you will get to learn more about in the exhibit hall. And thanks also to those of you who have already secured your spots at the soon-to-be-sold-out event.

This year, the conference's traditional social event is getting overhauled to increase networking opportunities in a more casual setting of strolling entertainers, artists, and performers with a variety of delicious food and beverage stations to be enjoyed by all!

Planning continues for the STEP Canada and STEP USA 1½-day in-person stand-alone conference in Chicago on October 6-8, 2024. The conference will provide a tremendous potential to grow, educate, and nurture a network of practitioners who focus on the complicated issues that arise between the two countries. The program and most speakers have been identified and invitations will go out shortly. Watch your email for registration information and sponsorship opportunities.

In late February, the Public Policy Committee prepared a comprehensive government submission regarding Bill C-42. The submission addressed critical aspects of the bill and articulated our organization's stance. On behalf of STEP, I express our gratitude to Daniel Frajman for his work in preparing the original draft, and to Henry Shew and Ian Lebane for their insights and support during the editing process. The submission, which has been shared widely among practitioners and media outlets, can be found on step.ca.

Our Tax Technical Committee was quick to send an eNews release to members on March 28 with the news that bare trusts are exempt from 2023 trust reporting requirements, a long-awaited announcement from the CRA.

Our formal education programs continue to be updated in both content and delivery format, courtesy of our education committee, chaired by Robbie Brown. For those of you enrolled in any of the programs, you will be experiencing these exceptional enhancements; and for those of you who have colleagues who have been considering enrolling in the programs, now is a great time to do so!

Many of you are associated with the firms that sponsor our events and conferences. Please know that you remain an essential part of STEP Canada's success and ability to provide value to our membership. We are thankful for your collaboration and support, and we continue to develop additional and creative ways for even more robust connections with our membership.

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 to our steadfast 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.