STEP Canada
ADVISING FAMILIES ACROSS GENERATIONS

Connection
Toronto Branch Newsletter

October 2020 - Vol. 8 No. 2

Message from the Deputy Chair, STEP Toronto

Hello everyone,

I've been asked to "step-in" – no pun intended – for Elaine Blades with this edition's "Message from the Chair".

As we continue to feel the chill in the fall air to watch the leaves turn from deep shades of red and orange to mellow shades of yellow and brown, I am reminded of all the STEP related activities a "normal" year would have held in store for our members over the coming months. From the September Social, to a Student event, to great monthly programing, ultimately culminating in the annual Blue Monday event. With the generous assistance of various sponsors, those events always present fantastic opportunities to connect with fellow STEP members. As the Toronto board continues to work on developing a roster of excellent programs, we are also thinking of potentially creative ways to bring back some form of "networking" for our members, in addition to the TEP Talks, which have proven to be quite popular. Not an easy thing to do in today's virtual world but with a little ingenuity, who knows, we may be "stepping into" a whole new form of networking!

In terms of an update on national events, the National Conference Speakers' Series is now well underway. Overall 750+ have registered for the full Speakers' Series, with both actual on-line attendance and participation in the live-chat room being consistently robust. This level of support is more than STEP could have asked for given the last minute shift in delivery. It is, no doubt, a testament to the quality of speakers. To learn more and/or register, please visit: http://www.cvent.com/events/step-2020-speakers-series.

With the success of this on-line foray into the delivery of the National Conference, both STEP and the Toronto board have working evidence that on-line delivery can be a great substitute form of delivery, pending our ability to get back to meeting in-person. We hope all of our members keep supporting the Toronto branch as it continues to work with STEP Canada to design and provide quality programming in 2021.

Thanks for reading. Be safe and well and I hope to "see" all of you soon.

Corina Weigl, TEP
Toronto Branch Vice-Chair

In this Newsletter

STEP Toronto Executive

STEP Presents...

This year, our "STEP Toronto presents..." summary is going to look a little different as we highlight the upcoming programs available from both STEP Toronto and STEP Canada.

October 27, 2020 – Incapacity at Home and Abroad: Jurisdictional Challenges

Summary: What happens when clients are on the move, transnationally and internationally, and own assets in foreign jurisdictions? Join us for a discussion of the many legal issues that can arise, including powers of attorney, protection mandates, and statutory protection regimes such as guardianship and tutorship. Our panel will explore the challenges arising in both civil law jurisdictions (for example, France, Portugal and Mexico) and common-law jurisdictions, with particular focus on the following issues:

- Do clients with foreign connections have the protective instruments that they need?
- Do statutory conflict-of-laws provisions exist in the relevant jurisdictions, and how do they work? What special considerations exist when using multiple or situs powers of attorney or similar instruments?
- What are the advantages and disadvantages of parallel planning options for clients with complex assets?

Moderator: **Litza Anderson**, LLB, TEP, Vancouver: Scotiatrust; Director-at-large, STEP Canada

Speakers: **Margaret O'Sullivan**, LLB, TEP, Toronto: O'Sullivan Estate Lawyers LLP
Marilyn Piccini Roy, Ad.E., PhD, LLB, BCL, TEP, Montreal: Robinson Sheppard Shapiro SENCR/LLP
Farha Salim, LLB, BCL, TEP, Calgary: Field LLP

Registration: http://www.cvent.com/events/step-2020-speakers-series

Time: 12:00 PM – 1:15 PM

Venue: Webcast only

This program is part of the STEP Canada 2020 Speakers' Series. The live broadcast will air on the date above. Archived recordings of each broadcast are available with registration.

November 3, 2020 – From STAR Trusts to UK Domestic Trusts: Is Foreign Personal Planning Still an Option for Canadians?

Summary: Is foreign personal planning still feasible? Or have amendments to the non-resident trust rules and the elimination of the 5-year immigration trusts eliminated any benefits? Our panel will examine advantageous plans and pitfalls that may exist in the UK, Cayman and Canada for taxpayers – especially where international connections are becoming more and more prevalent in our work. In particular, this seminar will look at:

- STAR Trusts and Cayman Foundation Companies
- Non-CCPC planning
- On-going trust administration issues
- Granny Trust planning
- UK beneficiaries and foreign personal planning

Moderator: **Brian Cohen**, LLB, TEP, Toronto: Gowling WLG (Canada) LLP; Treasurer, STEP Canada

Speakers: **Nick Holland**, LLB, TEP, London, UK: McDermott Will & Emery
Anthony Partridge, LLB, TEP, Cayman Islands: Ogier
Ian Worland, LLB, TEP, Vancouver: Legacy Tax + Trust Lawyers

Registration: http://www.cvent.com/events/step-2020-speakers-series

Time: 12:00 PM – 1:15 PM

Venue: Webcast only

This program is part of the STEP Canada 2020 Speakers' Series. The live broadcast will air on the date above. Archived recordings of each broadcast are available with registration.

November 18, 2020 – TEP Talk (formerly STEPping out to Lunch)

Summary: Join your TEP colleagues over Zoom to discuss hot topics, current cases and irksome situations while having lunch (at a distance). The meeting is virtual but the connections are real!

Registration: https://web.cvent.com/event/2d615786-2fae-4eb9-98d9-599da0852d8e/

Event: 12:00 PM – 1:00 PM

Venue: Online or dial-in only via Zoom

Upcoming Events

TEP Talks

Wednesday , November 18, 2020
12:00 PM - 1:00 PM ET

Wednesday, December 16, 2020
12:00 PM - 1:00 PM ET

STEP Speakers' Series

Thursday, October 29, 2020
Incapacité au pays et à l'étranger: défis liés aux compétence juridictionnelle
Modérateur : **Troy McEachren**, BCL, LLB, TEP, Montréal : Miller Thomson S.E.N.C.R.L., s.r.l.

Tuesday, November 3, 2020
From STAR Trusts to UK Domestic Trusts: Is Foreign Personal Planning Still an Option for Canadians?
Moderator: **Brian Cohen**, LLB, TEP, Toronto: Gowling WLG (Canada) LLP; Treasurer, STEP Canada

Thursday, November 5, 2020
Is Climate Change Thawing the Estate Freeze?
Moderator: **Angela Ross**, LLB, TEP, Toronto: PwC LLP

Tuesday, November 10, 2020
Demystifying the Investing Process for Trusts and Estates
Moderator/Speaker: **Thomas Grozinger**, LLB, TEP, Ottawa: RBC Wealth Management

Thursday, November 12, 2020
Estate Mediation and Settlements: Tax Issues
Moderator: **Alexandra (Ali) Spinner**, CPA, CA, TEP, Toronto: Crowe Soberman LLP

Tuesday, November 17, 2020
Life Insurance Transitions: How to Deal with Corporate, Charitable or Multi Life Transitions
Moderator: **Susan St. Amand**, CFP, CLU, FEA, ICD.D, TEP, Ottawa: Sirius Financial Services

Thursday, November 19, 2020
Update on Cross-Border Tax Planning
Moderator: **Rachel Blumenfeld**, LLB, TEP, Toronto: Aird & Berlis LLP; Deputy Chair, STEP Canada

Tuesday, November 24, 2020
The New ABCs of Philanthropy: Alternative Charitable Gifts, B-Corps, and Charities' Investment Policies
Moderator: **Robbie Brown**, CPA, CA, CFP, TEP, Halifax: BMO Private Wealth

Thursday, November 26, 2020
STEP Canada-Canada Revenue Agency Round Table
Moderator: **Christine Van Cauwenberghe**, LLB, CFP, RRC, TEP, Winnipeg: IG Wealth Management

Article: A Presumptive Peril: The Law of Beneficiary Designations is Now in Flux

By: Demetre Vasilounis, JD, Fasken LLP

Calmusky v. Calmusky, 2020 ONSC 1506, is a 2020 decision of the Ontario Superior Court of Justice that is ruffling some feathers among banks, financial advisors and estate planning lawyers in Ontario. In this case, the court applied the principles surrounding the presumption of resulting trust, established by the Supreme Court of Canada in **Pecore v. Pecore**, [2007] 1 S.C.R. 795, to two different issues related to a single estate. One application was entirely in line with previous decisions, while the other is much more controversial and is the subject of our discussion today.

First it is important to understand what the *Pecore* principle at play here is. *Pecore* established that where there is a **gratuitous transfer** (i.e. a transfer for no consideration) of assets from a parent to an adult child, there is a **presumption of resulting trust**, that is, a presumption that the transferee holds the assets as trustee for the transferor (usually for the benefit of that transferor or that transferor's estate). Prior to *Pecore*, in such transfers between parents and adult children, a **presumption of advancement** used to apply; in other words, that a parent, in making such a transfer, was merely "advancing" to their adult child what their adult child was going to get anyway upon their death, and therefore not creating any trust relationship. However, the Supreme Court of Canada in *Pecore* ruled that this was an outdated manner of thinking with respect to adult children, and thus that the presumption of advancement is no longer applicable to them (but note that it is still applicable to minor children). Instead, it is the presumption of resulting trust that applies with respect to adult children, and courts often apply this presumption in situations where a party is alleging that the adult child of a deceased parent is holding property that said child owned jointly with said parent in trust for said parent's estate (rather than as beneficial owner).

Such is the case in *Calmusky*, at least on the surface. Initially, the court applied the *Pecore* principle to an issue surrounding the joint ownership of a bank account between Gary Calmusky, and his deceased father Henry. Henry had gone to the bank with Gary to arrange to become joint account owners of his then-solely-owned accounts a few years prior to his death. When Henry died, Gary's twin brother Randy claimed that the accounts should be distributed through the estate, and not passed on to Gary alone. Contrastingly, Gary argued that he is the sole beneficial owner of the accounts, as Henry had intended to give Gary survivorship rights to the accounts.

Under *Pecore*, in order to be successful, Gary had to show on a balance of probabilities that Henry intended to gift the remainder of the accounts to him upon his death. In the absence of such evidence, Gary would have been (and in fact, was) found as holding the remainder of the accounts in trust for Henry's estate. Note that the facts in Calmusky were somewhat complicated; Randy had a failed business in which Gary and his late mother (Henry's wife) invested and eventually lost money, and there was an argument that Henry sought to "remedy" that. Henry also had a will which the parties did not dispute, but the will made no mention of Henry's joint ownership of his accounts with Gary (or his RIF, which is discussed below).

That being said, to support his argument, Gary did have documents from the bank that indicated that Gary had "survivorship" rights to the joint accounts, as well as testimony from bank employees who were present when Henry had made the joint account arrangements. Ultimately, however, the court was not satisfied with the evidence that Gary had presented, and found that he did not rebut the presumption of resulting trust. The court felt that the bank documents were not specific enough in showing that Henry actually intended a gift, and that the testimony from the employees was not enough to demonstrate that Henry understood that Gary was to receive beneficial ownership of the joint accounts.

The problem with *Calmusky*, however, is that the court applied the above analysis not only to Henry's joint accounts, but also to an RIF of which Henry designated Gary as a beneficiary. The court actually applied the presumption of resulting trust from Pecore to the RIF, and found that Gary also did not rebut this presumption. This represents a relatively novel application of Pecore, and one in which has garnered concern from financial and legal professionals in this area.

A primary reason for this concern is that an RIF is an asset where its beneficiary (or beneficiaries), upon the RIF owner's death, can be designated separately and explicitly (and such designation specifically operates outside of the owner's estate for tax purposes). There is usually no need to determine "intent" behind this designation, as this kind of beneficiary designation is supported by legislation, including in Part III of the *Succession Law Reform Act* (the "*SLRA*"). Subsection 51(1) of the *SLRA* states that an individual may designate a beneficiary of a "plan" (including an RIF, pursuant to subsection 54.1(1) of the *SLRA*) either through "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 in his or her will. Section 53 of the *SLRA* mandates that an institution administering the "plan" must pay it out in accordance with a subsection 51(1) beneficiary designation upon the plan-owner's death.

In *Calmusky*, it is clear that the Henry signed an "instrument" designating Gary as the beneficiary of the RIF, yet the court makes no reference to the *SLRA* in applying the Pecore principles to RIFs. Instead, in arriving to its application of the Pecore principles to RIFs, the court cited two cases: the 2009 Ontario Superior Court of Justice decision in *McConomy-Wood v. McConomy*, 46 E.T.R. (3d) 259, and the Manitoba Court of Appeal decision *Dreger (Litigation guardian of) v. Dreger* (1994), Man. R. (2d) 39 (notably decided before *Pecore*).

Very briefly, in *McConomy-Wood*, the court found that an adult child of a deceased parent, although designated as a beneficiary of the parent's RIF, held the RIF in trust for the parent's estate, as the residual beneficiaries of the estate were the child and their two siblings and there was "abundant" evidence that the deceased intended to treat her children "equally".[1] The court did not apply the *Pecore* principles because of this "abundant" evidence, however it did say that if it had to do so, it would have applied Pecore and thus would have found the presumption of resulting trust as applicable to the RIF. The court in *Calmusky* cited this obiter in arriving to its conclusion.

Now, one might argue that the *SLRA* and the principles in *McConomy-Wood* and *Calmusky* are not necessarily incompatible with one another. One could interpret the cases to mean that while beneficiary designations for RIFs may be made pursuant to subsection 51(1) of the *SLRA*, and while financial institutions administering RIFs must pay out such RIFs pursuant to such designations under section 53 of the *SLRA*, there is nothing in the *SLRA* precluding a court from finding that such designations and such payments were made or are to be made, respectively, in trust. The difference between the cases is that in *McConomy-Wood*, the court found that there was "overwhelming" evidence suggesting a trust obligation, and there was no need to find a rebuttable presumption of resulting trust. Yet, in *Calmusky*, while there was no evidence positively confirming a trust obligation, the court took the analysis a step further and did, in fact, find that a presumption of resulting trust existed (and that Gary did not have evidence to rebut the presumption).

Similarly to *McConomy-Wood*, in *Dreger* (although not binding on the Ontario Superior Court of Justice as it is a Manitoba decision), the Mantioba Court of Appeal found evidence that a mother's naming of her adult child as the beneficiary of her RRSP annuity contracts and life insurance policies did so intending for the child to hold those assets in trust for her estate, and that there was sufficient evidence to demonstrate that. As the case was pre-*Pecore*, the law at the time was the presumption of advancement, and the evidence rebutted that presumption. Note that Part III of the *SLRA* which applies to RIFs, also applies to RRSPs. The *Ontario Insurance Act* also allows for similar designations with respect to life insurance. Thus, it seems that the court in *Calmusky* referred to *Dreger* to demonstrate that resulting trust principles can apply to these similar types of assets.

Ultimately, the court readily accepted the presumption of a resulting trust as applicable to Henry's RIF beneficiary designation, and did not differentiate between joint accounts and RIFs. In fact, in the court's words, there is "no principled basis for applying the presumption of resulting trust to the gratuitous transfer of bank accounts into joint names but not applying the same presumption to the RIF beneficiary designation".[2]

At the outset, however, it seems that there are several principled bases for differentiating between the two. Primarily, can one really say that a parent adding an adult child as an owner of his or her bank account, while alive, is really the same type of "gratuitous transfer" as an RIF beneficiary designation? In the former, the ownership is shared while the parent is alive (and there may be reasons for doing this, such as assistance with day-to-day financial affairs for aging or ailing parents), but in the latter, the ownership of the RIF only transfers upon death. By the court's logic in *Calmusky*, one might assume that every transfer of a parent's property to their adult child upon the parent's death is a gratuitous transfer to which the *Pecore* principles apply.

1 *McConomy-Wood* at paras 55-58.
2 *Calmusky* at para 56.

That is, unless, the court is suggesting that it is only property transferred outside of a will that is subject to a presumption of resulting trust, in which case the law as we understand it with respect to beneficiary designations would totally be in flux, potentially rendering hundreds of thousands of beneficiary designations for RIFs, RRSPs, and TFSAs with banks, as well as life insurance policy designations with financial institutions or even employers, as ineffective. This is particularly in light of the fact that the court in *Calmusky* seemed unsatisfied with the "half-page" RIF beneficiary form that Henry had signed.

It is also important to note that the presumption of resulting trust with respect to adult children evolved from the formerly-recognized presumption of advancement, a sometimes-erroneous assumption that a parent who arranges for joint ownership of an asset with their adult child is merely "advancing" the asset to such adult child as such adult child will eventually be entitled to such asset upon such parent's death. While this presumption may very well be erroneous to many jointly-owned assets, the whole point of a beneficiary designation is to specifically dictate what is to happen to an asset upon death. From a practical perspective, it seems uncontroversial that a regular person who is not well-versed in the law in this area would assume that, when they go to fill out forms with their bank or their employer, naming a beneficiary pursuant to an asset's "beneficiary designation" form would mean providing an outright distribution of that asset to that beneficiary, and not in trust to that beneficiary on behalf of their estate. In the same vein, the court in *Calmusky* also does not address the possibility that one can designate their estate itself as beneficiary of a RIF (or RRSP or life insurance policy), whereas a deceased person's traditional bank account is usually captured by their will's residue provisions (unless it is specifically dealt with otherwise). As that possibility exists, why would a parent use such a beneficiary designation to name their child as trustee for their estate, when designating the estate itself would achieve the same effect in a clearer manner? Thus, it would be heavily problematic to render ineffective the existing principles surrounding beneficiary designations.

All of the above being said, people make beneficiary designations all the time, and it is probably true that not all beneficiary designation forms are robust enough to explain the law in this area (even pre-*Calmusky)*. Does this mean a person always needs to consult with a lawyer when making a beneficiary designation? The result in *Calmusky* would seem to lead to such a cumbersome outcome. Again, arrangements for joint ownership of assets, on one hand, and beneficiary designations, on the other, seem like such fundamentally different (and differently-understood) gratuitous transfers of property that it feels rather unnecessary for the court in *Calmusky* to have applied the presumption of resulting trusts to the latter.

In conclusion, it will be interesting to see if a future court decision addresses these issues. Without an in-depth analysis of the considerations described above, or even how the presumption of resulting trust interacts with the relevant sections of the *SLRA*, the decision in *Calmusky* leaves a great deal of uncertainty, and both lawyers and financial professionals alike will have to be wary of this case when advising their clients with respect to assets that can be designated pursuant to formal beneficiary designations.

Thank you for reading, and thank you to Emily Papsin, Student-at-Law at Fasken, for helping me write this post.

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Article: A Trap for the Unwary: ONCA Finds a Partner Responsible for Spousal Support Despite Maintaining Separate Residences & the Impact on Estate Planning

By: Tamar Silverbrook, JD, Associate & Corina Weigl, LLB, TEP, Partner at Fasken LLP

The recent Ontario Court of Appeal ("ONCA") decision *Climans v Latner*[1] ("*Latner*") highlights a trap for the unwary. For the purposes of awarding spousal support, clients may be found to be common law "spouses" despite maintaining separate residences. The resulting implications extend beyond Ontario's family law regime to wills and estates law. On death, while the concept of spousal support does not exist, surviving spouses may bring a dependant support claim if clients' estate plans do not provide them with appropriate support. A "spouse" for purposes of determining dependent support under the *Succession Law Reform Act*[2] is the same definition of "spouse" for determining spousal support under the *Family Law Act*[3] ("*FLA*"). Thus, in light of *Latner*, it is imperative for drafting solicitors to understand the overall character of their clients' relationships. Drafting solicitors may discuss with clients that relationships which intuitively may not appear as establishing common law "spouses" may in fact do so, thereby making clients' estates vulnerable to possible dependant support claims if "spouses" are not appropriately supported.

<u>The Distinction Between Property Law & Spousal Support Regimes & The Trap for the Unwary</u>

Common law spouses who have cohabited for three years or more may seek spousal support in the event of separation under the *FLA*. Latner is a decision respecting cohabiting spouses in the context of spousal support. This context is distinct from that of property division. While beyond the scope of this blog post, there is a line of Supreme Court decisions standing for the principle that cohabiting spouses are not considered the same as married spouses for the purposes of property sharing. Thus, while cohabiting spouses are excluded from rights respecting property division, they are included in Ontario's spousal support regime.

This distinction stems from the definition of "spouse" in the *FLA*. The definition of "spouse" applicable in Part I of the *FLA*, which governs family property, is different than that applicable in Part III, which governs spousal support. Specifically, s. 1(1) of the *FLA* (which applies to Part I of the *FLA*) provides,

> *"spouse" means either of two persons who,*
>
> *(a) are married to each other; or*
>
> *(b) have entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.*

Whereas, s. 29 provides that in Part III of the *FLA*,

> *"spouse" means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have* ***<u>cohabited</u>****,*

1 2020 ONCA 554.
2 R.S.O. 1990, c. S.26.
3 R.S.O. 1990, c F3.

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence, if they are the parents of a child as set out in section 4 of the Children's Law Reform Act. [Emphasis added]

"Cohabit" is defined in s. 1(1) of the *FLA* as meaning "to **live together** in a conjugal relationship, whether within or outside marriage" [Emphasis added].

Based on these definitions, often clients correctly understand that, to be common law spouses and thereby possibly assume financial responsibilities, they have to be cohabiting, meaning living together, with their partners. A trap for the unwary arises if clients assume that "living together" means maintaining the same primary residence because based on *Latner*, maintaining separate residences does not preclude a finding of spousal support.

Climans v Latner

In *Latner*, Ms. Climans sought spousal support following a breakdown of her 14 year relationship with Mr. Latner. The facts, as the ONCA stated, included,

Both had children from previous marriages. Mr. Latner was very wealthy. Early in their relationship, Mr. Latner told Ms. Climans that he would not marry her or live with her unless she first signed a domestic contract. At times, he prepared draft contracts and presented them to her but no such contract was ever signed.[4]

Mr. Latner argued that the parties never lived together and thus were not spouses under s. 29 of the *FLA*. Supporting this position, Mr. Latner explained that "... Ms. Climans did not sleep over at his home with anything like the frequency that characterizes the cases relied on by the trial judge in which cohabitation was found... ."[5]

Despite always maintaining separate residences and while Mr. Latner proposed several times, the ONCA affirmed the trial judge's findings[6] that the parties were spouses for the purpose of spousal support. The ONCA stated, "Lack of a shared residence is not determinative of the issue of cohabitation."[7] The ONCA found that the trial judge correctly assessed "... all of the *Molodowich* factors [which] must be considered in conjunction with one another when determining whether the parties cohabited... [and that] "there needs to be some element of living together under the same roof"."[8] The trial judge's assessment was as follows:

They were in a long term committed relationship. Mr. Latner treated Ms. Climans as his wife. Their relationship was sexual in nature. They held themselves out as a committed couple and were perceived as a couple by their family and friends. Ms. Climans was considered family by the extended Latner family. The parties participated in social activities as a couple. Mr. Latner supported Ms. Climans financially. They travelled extensively together. They lived together at the cottage each summer.[9]

In addition, the trial judge correctly assessed whether the parties had "lived together" despite maintaining separate homes. Such assessment focused on four factors, more specifically:

4 *Supra* note 1 at para. 5.
5 *Ibid* at para. 53.
6 *Climans v Latner*, 2019 ONSC 1311.
7 *Supra* note 1 at para. 58.
8 *Ibid* at para. 59.
9 The factors were established in Molodowich v. Penttinen (1980), 1980 CanLII 1537 (ON SC), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.); Ibid at para. 31.

- Committed relationship: The parties were in a committed long-term relationship. They supported each other and demonstrated acts of commitment such as commitment rings and anniversary celebrations;
- Financial arrangements: Ms. Climans had been financially dependent on Mr. Latner since early on in their relationship (despite never sharing bank accounts);
- Extended family and social perception: The parties presented a clear image of being in a committed long-term relationship to family and friends. For example, they referred to each other as spouses and Ms. Climans walked down the aisle with Mr. Latner at his daughter's wedding; and
- Living together: The parties lived together at Mr. Latner's cottage each summer for almost the entirety of their relationship. The parties also lived together in Mr. Latner's Florida property regularly during the winter months. In addition, at least at the beginning of their relationship, the parties resided at Mr. Latner's home on a "regular basis" (which "regularity" the court impliedly assessed as every other weekend) and were "in the process of building a home together."[10]

Despite their analysis of these four factors, the overall character of the parties' relationship was paramount in the trial judge's reasoning. As the trial judge stated, "Had these been the only factors, I would not have concluded that they were spouses. However, when taken into account along with all the other dynamics in this relationship (summarized above [including the *Molodowich* factors]), I conclude that they were common law spouses." Based on this reasoning, the ONCA dismissed Mr. Latner's ground of appeal relating to the issue of whether the parties were "spouses" under s. 29 of the *FLA*.

Implications

In the context of estate planning, *Latner* is important to consider when discussing with clients their spousal obligations. Clients may think that because they are not legally married or because they are not cohabiting year-round with their partners they do not have support obligations. To avoid such a trap, lawyers and advisors may wish to engage a key principle in estate planning – getting to know your client. Lawyers and advisors may wish to discuss assessing the character of clients' romantic relationships, taking into consideration all of the factors considered in *Latner*.

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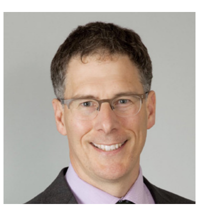
10 *Ibid* at para. 35.

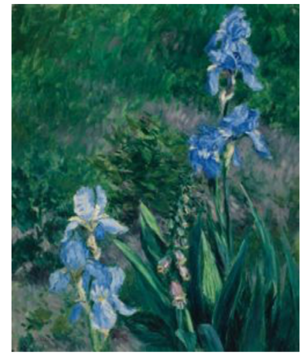
Article: Cultural Property Tangle: Export v. Donation



By: Malcolm Burrows, MA, Head, Philanthropic Services, Scotia Wealth Management

How can an export permit affect charitable giving? Quite easily if you are dealing with a foreign art work deemed "cultural property" under Canada's *Cultural Property Export and Import Act* (*CPEIA*). A June 12 Federal Court of Canada decision on the export of French impressionist paintings has reportedly frozen donations of "foreign" art to Canadian museums. It makes no public policy sense.

A bit of background is in order. In November 2016, Heffel Fine Art Auction House sold a 1892 oil painting by Gustave Caillebotte featuring irises in his garden in near Argenteuil on the Seine. The buyer was British; the seller, a Toronto collector who had owned the piece for 35 years. The sale price of *Iris bleus, jardin du Petit Gennevilliers* was $678,500.



The auction house, however, had a problem. CCPERB, the Canadian Cultural Property Export and Review Board, blocked the export of the work. Heffel went to court to appeal and won. As someone who is generally supportive of more liberal art export rules, I was pleased by the decision until I realized the implications. It helps the export of art, but will prevent art donations to institutions across the country.

CCPERB, quoting the *CPEIA*, told the court that the painting was of "outstanding significance" and "national importance". The Board argued that national importance "is a quantitative assessment that is focused on degrees of quality, significance or rarity" and it was entitled to make these qualitative judgements.

Justice Michael Manson ruled that this interpretation of national importance was "unreasonable". Citing s. 11 of the *CPEIA*, the object must be "of such a degree of national importance that its loss to Canada would significantly diminish the national heritage." *Iris bleus* didn't hit this mark.

Justice Manson also said "most objects in the Control List require a direct connection to Canada, such as having been recovered in Canada, made in Canada, made by a person who once resided in Canada, or otherwise having some relation to Canadian history or a Canadian theme or subject." This Canada-first view applies not just to exports, but also for the donation of foreign art to Canadian institutions.

Over the summer the controversy raged in the art world. Ottawa appealed. Heritage Canada posted. Eight museum leaders wrote an open letter. Prominent art dealers blogged. A number of donors and galleries I have spoken to said that CCPERB is not designating works that originated outside Canada as cultural property. Without the designation donors are being denied additional tax benefits, namely the elimination of capital gains and 100% contribution limit for up to six years.

Applying this uber-nationalist vision to donations to Canadian institutions is incoherent. Conflating – tangling – the export and the donation rules in *CPEIA* does not serve the important public policy aim of enriching the collections of Canadian public galleries and museums. And donors, both in life and through their estate plans, are facing uncertainty that will, ironically, lead to more sales and exports internationally. We need a rethink.

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Letters, announcements, opinions, comments from members

If you have an article or an idea that would be of interest to other members of STEP, please send them to Andreea Muth amuth@pallettvalo.com for consideration for inclusion in our next edition.

STEP continues to grow and we welcome membership inquiries. As a reminder, there are three routes to full membership; one based on experience (Assessment by Expertise) and two education routes (Assessment by Essay, Assessment by Exam).

If you know anyone who would be a good candidate for STEP membership, please direct them to the STEP Canada website for information.

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