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# Connection

## Toronto Branch Newsletter



September 2019 - Vol. 7 No. 1

### Message from the Chair, STEP Toronto



Welcome to our first newsletter for 2019-20. On behalf of your STEP Toronto Executive, I'd like to welcome you to another great year of education, networking and socializing events for trust and estate professionals. The Toronto CONNECTION Branch Newsletter is just one of the ways we work to inform and connect our members.

Our key priorities for this year include continuing to grow our membership via both the experienced practitioner and student routes, and increasing attendance at our education sessions.

The STEP Value Passport provides access to all seven sessions at a cost of \$452.00 for Full Members and \$226.00 for Student (Affiliate/Associate) Members. Sessions may also be purchased individually (\$124.30 for Full Members; \$62.15 for Students – Affiliates/Associates). You have the option of attending the sessions in person at the Ivey Donald K. Johnson Centre, at the satellite locations in Markham or Mississauga or viewing by live or archived webcast. The first session for this year - Case Law and Legal Update - will be held on Wednesday, September 11th.

Passport holders are encouraged to invite up to two guests throughout the season to attend any seminar on a complimentary basis. Guests can be members or non-members who would be attending a STEP program for the first time. We encourage you take advantage of this opportunity to grow your network and to help us spread the word and increase attendance at these highly regarded sessions.

The informal STEPping out to Lunch sessions also return this month and provide a great opportunity to share information and best practices while networking with fellow STEP members. The sessions begin anew on September 9th. Thanks to Fasken (Toronto) for continuing to host.

Our first social event of the year will be held on Monday, September 16th. The event is once again co-sponsored by Stonegate Private Counsel and the Toronto Foundation. Please remember to register. We look forward to seeing you there.

The STEP Toronto Executive/Board for 2019-2020 is listed on the right. I want to welcome new members Eric Hoffstein, Maureen Berry, Hemal Balsara, Heela Donsky Walker and Lisa Lue and returning members Ted Polci, Corina Weigl, Ian Lebane, Harris Jones, Joan Jung, Jeff Halpern, Paul Keul and Gillian Musk. The board works hard to organize and deliver the newsletters, education sessions, and social events. My thanks to everyone in advance for what I know will be another great year!

To learn more about the education sessions and social events, including registration details, please visit: [step.ca](http://step.ca).

Elaine Blades, J.D., TEP, Toronto Branch Chair

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Paul Keul, *Newsletter Committee*

Gillian Musk, *Education Committee*

Lisa Lue, *Student Liaison*

## STEP Toronto Presents...

### September 11, 2019 – Case Law and Legal Update

Summary: Summer vacation may be over, but trusts and estates law keeps going! Join us for our first session of the season to learn about legislative updates and cases of interest to all trusts and estates practitioners.



Moderator: **Eric Hoffstein**, LLB, TEP: Fogler Rubinoff LLP

Speakers: **Tom Grozinger**, CS, LLB, TEP: RBC Royal Trust

**Mary Wahbi**, JD, TEP: Fogler Rubinoff LLP

**Kim Whaley**, CS, LLM, TEP: WEL Partners

Registration: 2:30 PM

Event: 3:00 PM – 5:00 PM (Seminar)

Venues: ***Live presentation:***

Ivey Donald K. Johnson Centre, Exchange Tower, Ground Floor,  
130 King Street West, Toronto ([map](#))

***Satellite locations:***

S+C Partners LLP, 6465 Millcreek Drive, Unit 204, Mississauga ([map](#))

Wilson Vukelich LLP, 60 Columbia Way, Markham ([map](#))

***Online via webcast***

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## STEP Toronto Upcoming Events

Wednesday, September 11, 2019 3:00 PM - 5:00 PM	Case Law and Legal Update	Moderator: Eric Hoffstein, LLB, TEP: Fogler Rubino LLP Tom Grozinger, CS, LLB, TEP: RBC Royal Trust Mary Wahbi, JD, TEP: Fogler Rubino LLP Kim Whaley, CS, LLM, TEP: WEL Partners
Monday, September 16, 2019 5:00 PM - 7:00 PM	September Barbeque	Venue: Stonegate Private Counsel, Rooftop, 15 York Street, Toronto
Wednesday, October 16, 2019 3:00 PM - 5:00 PM	Private Corporation Tax Planning and Inbound Structuring	Moderator: Joan Jung, LLB, TEP: Minden Gross LLP Natasha Miklaucic, LLB, TEP: Borden Ladner Gervais LLP Aaron Schechter, CPA, CA, TEP: Crowe Soberman LLP Rahul Sharma, LLB: Miller Thomson LLP
Wednesday, November 13, 2019 3:00 PM - 5:00 PM	Common Estate Planning Slips – Identifying the Common Mistakes and What Should Be Done	Moderator: Katy Basi, LLB, TEP: Basi Law Professional Corporation David Lobl, LLB, TEP: Gowling WLG LLP Christine Van Cauwenberghe, CFP, LLB, TEP: IG Private Wealth Management Craig Vander Zee, LLB, TEP: Torkin Manes LLP
Wednesday, January 15, 2020 3:00 PM - 5:00 PM	Life Insurance and Complex Estate Plans – Where the Rubber Meets the Road	Moderator: Harris Jones, CPA, CA, CFP, CLU, CHFC, TEP: Harris Jones Advisory Inc. Jim Kraft, CPA, CA, CFP, FEA, TEP: BMO Financial Group Kevin Wark, LLB, CLU, TEP: Integrated Estate Solutions
Wednesday, February 19, 2020 3:00 PM - 5:00 PM	The Modern Family	Moderator: Ian Lebane, LLM, TEP: TD Wealth Sara Cohen, LLB: Fertility Law Canada Elena Hoffstein, LLB, TEP: Fasken LLP Brittany Sud, JD, TEP: Fasken LLP
Wednesday, April 22, 2020 3:00 PM - 5:00 PM	Planning, Drafting and Administration Challenges for Unique Assets	Moderator: Gillian Musk, MTI, TEP: BMO Private Banking Jordan Atin, LLB, TEP: Hull & Hull LLP Stella Craveiro, MTI, TEP: Scotiabank Sharon Hartung, PMP, CD: Your Digital Undertaker
Wednesday, May 20, 2020 3:00 PM - 5:00 PM	Family Enterprise Succession Planning - Coaching Families to Avoid Disasters & Annual Branch Meeting	Moderator/Speaker: Jeff Halpern, CPA, CA, TEP: TD Wealth Robin Dodokin, LLB, LLM: Dodokin Law and Conflict Resolution Michael Goldberg, LLB, TEP: Minden Gross LLP Howard Johnson, DBA, FCPA, FCA, FCMA, FCBV, CPA, CFA, ASA, CF: Duff & Phelps
Wednesday, May 20, 2020 5:30 PM - 7:30 PM	Year End Reception	Venue: WeirFoulds LLP, 66 Wellington Street, Suite 4100, Toronto

Program and event registration at [step.ca](http://step.ca)

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## In case you missed it... May 22, 2019 “Choosing the Right Fiduciaries”

Elaine Blades, Deputy Chair STEP Toronto, ran a smooth and quick Annual General Meeting, and introduced Bryan Gilmartin, a student at WEL Partners, who reviewed the Supreme Court of Canada decision in *Moore vs. Sweet* about whether a beneficiary of life insurance was unjustly enriched. Elaine then moved on to moderate a very full panel discussion consisting of Donna Graham of RBC Royal Trust, Corina Weigl of Fasken LLP, and Justin de Vries of deVries Litigation. The panellists drew on their cumulative experience as corporate trustees, solicitors doing advanced private client work, and litigators. They offered the STEP audience their expert analysis and advice on issues surrounding the identification and choice of suitable candidates to fill fiduciary roles such as Power(s) of Attorney, Executor, and Trustee (both testamentary and inter vivos). An extensive ppt deck contains 61 slides of useful tips and cautionary advice. Of particular interest to STEP legal professionals was the extensive analysis of the regulatory requirements of the Law Society of Ontario pertaining to lawyers acting as fiduciaries. The rules incorporate what would be sound practices for every profession.



In our day-to-day lives, a business-like approach to hiring an employee would surely include defining or at least understanding the work to be done (and problems that might arise) and then methodically looking for a candidate with the right credentials to fill the job. Pay and vacation would be discussed right at the outset. References would be checked. Aptitude tests might be administered. Remarkably, the same approach does not seem to be very common when clients go about selecting fiduciaries.

Clients may misunderstand the role to be performed, have no familiarity with it, or be uncritical or naïve about the capability of relatives, friends and advisors to fulfil a role. By way of example, Corina pointed out that ‘discretion’ given to a trustee is not really understood by clients, Justin discussed his ‘Top Ten’ list of things he sees leading to litigation, and Donna touched on the pros and cons of multiple fiduciaries being appointed together.

 [Corina video link](#)

 [Justin video link](#)

 [Donna video link](#)

Issues of compensation may not even be mentioned, nor risks of remedies and risk management for things going wrong. Unaccustomed power and ‘unfettered discretion’ with little oversight, coupled with a perception that easy money is to be made, may sometimes have its reported tendency to embolden, if not corrupt, a fiduciary. Needless to say, understanding what can be done to prevent, or redress, errors or misbehavior by a fiduciary is an important aspect of planning the work to be done for a client. No one individual or institution is likely to be the perfect candidate, so sometimes a combination of fiduciaries is likely to provide a better fit. The many factors that ought to be considered require a nuanced review and explanation to clients, to enable them to make an informed choice. By analogy, it doesn’t matter how big and powerful the bus is; if the bus driver is incompetent, over-confident, ill-informed, or careless, any bus can still wind up in the ditch. Successful execution of any plan is dependent on who is chosen to execute it, and this fiduciary selection part of the planning requires extensive thoughtful advice.

True wealth planning is more than generating returns and saving taxes.

It’s addressing the soft issues, sustaining the relationships that matter most, and giving purpose and meaning to family wealth. As with life, it’s an evolving journey.

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## Article: In Trust Accounts: The good, the bad and the ugly



**By: Sandra Abley and Mollie Clark, Harper Grey LLP**

When clients decide to invest for their children or grandchildren's futures, they are faced with a variety of investment options. One such option is an "in trust account," also known as an ITF account or an "in trust for" account. These accounts have gained popularity as an easy and inexpensive way to set up a trust for one's children or grandchildren while also enjoying tax benefits. These accounts may sound appealing, but are they worth it?

### **What is an in trust account?**

An in trust account is an investment account or a bank account. In theory, these accounts should be set up with a contributor or settlor (typically the parent or grandparent who opens the account), a named trustee (usually the contributor or settlor) and a beneficiary who is the ultimate owner of everything invested (typically a minor child). While the account is open, the contributor makes contributions of cash or assets. The trustee makes investment decisions and can make withdrawals from the fund, while under a legal responsibility to do so prudently and in the best interests of the beneficiary. Once the beneficiary reaches the age of majority in his or her province, he or she becomes legally entitled to the same degree of control over the account as the trustee, generally with the intention that the trustee will eventually transfer all control over the account to the beneficiary entirely. The beneficiary is the sole person entitled to receive the proceeds of any withdrawal or transfer.

In British Columbia, minors do not have legal capacity to enter into contracts. An in trust account therefore allows a parent or grandparent to do those things on a minor's behalf and make investment decisions with those funds.

### **In trust accounts are different from formal trusts**

At this point, you might be thinking: "wait a second, this sounds familiar... isn't that how a trust works?" And you'd be right. An in trust account is often referred to as an "informal" trust. The intention behind opening these accounts is to create a trust but without the formal trust documentation required to create a formal trust. That means your client gets to skip paying a lawyer's fees to set it up, and instead simply note the trust relationship they intend to establish in the investment contract through an "in trust account" designation. Sounds pretty good, doesn't it?

What these accounts are lacking however, is certainty – and that can have serious consequences.

In order to create a legal trust, there must be three identifiable certainties; there must be certainty of the intention to create a trust; certainty as to what property makes up the trust; and certainty as to who the beneficiary or beneficiaries are. A formal trust is typically evidenced by a document called a Deed of Trust or a Deed of Settlement, so there is no question as to whether or not those certainties exist.

In trust accounts are seen as 'easy' to set up because they don't require formal documentation or other supporting documents. Instead, the bank's account opening documents are relied on to create the trust. Every



bank will have different documentation and every account manager will have different levels of understanding regarding the three required certainties.

Enter the risk of uncertainty inherent in opening these accounts.

These account opening forms may lack adequate documentation with respect to who the contributor is, who the trustee is and who the beneficiaries are. They are also commonly set up with one individual acting as contributor and trustee. Without formal documentation of intention – as well as definition around key issues such as how the funds should be managed, how long the trust will continue and how assets can be distributed to the beneficiary – things can get messy.

When someone opens an in trust account, in the eyes of the Canada Revenue Agency (CRA) a trust may or may not have been created – it will depend on whether those three certainties can be established. The account might be construed as having established more of an agency relationship between the contributor and the beneficiary for investment purposes. Depending on what decision the CRA makes, the account holder might want a Court to consider the issues. So much for skipping those lawyer fees.

### **How are they taxed?**

Speaking of the CRA, let's go over how these accounts are taxed.

Contributions made to an in trust account are not tax deductible. However, the contributor to the account can divide some of the taxable income with the beneficiary. Typically, all interest and dividend income is taxable in the hands of the contributor, and all capital gains are taxable in the hands of the beneficiary.

There are some exceptions:

First, if the contributor is also the trustee or if the account has been otherwise set up so that the assets can only be disposed of by direction of the contributor, then all of the income may be taxable in the contributor's hands under section 75(2) the *Income Tax (Canada) Act*.

Second, if the funds in the in trust account are solely derived from Canada Child Tax Benefit payments – or an inheritance – all of the income is taxable in the hands of the child.

Lastly, secondary income (income earned on the income already generated by the original investment) is again taxable entirely in the hands of the child.

Once the child reaches the age of majority, all of the income is taxed in his or her hands. Note that the trustee is responsible for filing annual T3 trust returns to report income.

If upon a review, the CRA decides that the account in question is actually not a trust, it may attribute all income to the contributor from the inception of the account, including capital gains. This could result in back taxes and penalties.

### **Avoiding audit risk**

To avoid the risk that the CRA will not interpret one of these accounts as a trust, it would be prudent to create some sort of written document that clearly sets out the intention to permanently transfer assets and funds to this account for the benefit of the named beneficiary.

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It would also be prudent to keep meticulous records regarding where the funds of the account are coming from for tax purposes. Account holders should consider keeping certain funds (such as secondary income) from different sources in different accounts in order to maximize the tax benefits with absolute clarity.

### **How does an unexpected death factor in?**

Since in trust accounts are informal and lack legal documentation, when one of the three individuals dies, control over the funds may disappear.

If the contributor dies before the beneficiary reaches the age of majority then, going forward, all future income earned from the funds in the account will be taxed in the child's hands.

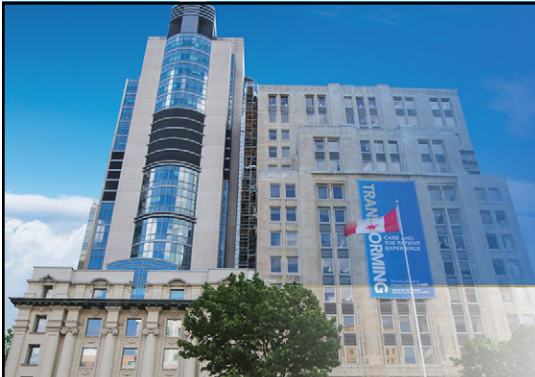
If the trustee dies before the beneficiary reaches the age of majority, then the trustee's Will should be consulted to determine if an alternate trustee is named. If not, the trustee's authority over the account will remain with the trustee's estate until the beneficiary reaches the age of majority (at which time the beneficiary is granted authority over the account). Of course, the contributor may not have chosen the executor of the trustee's estate. When that person gains control over the account, a risk emerges that there may be differing views between the executor and the original contributor as to how to manage the funds.

If the beneficiary dies before reaching the age of majority, the funds will fall into the child's estate. In British Columbia, a minor child cannot legally execute a Will. The account will therefore be distributed according to the law of intestacy, which in British Columbia means the funds will go to the child's parents first, in equal shares. If the contributor opened the account for a minor who is not his or her child, the contributor will lose total control over where the funds go if the child passes away.

### **What are some other pitfalls?**

Besides the risk that an in trust account won't be recognized as a trust for tax purposes, the following are some other pitfalls associated with opening these kinds of accounts:

1. There are no guidelines with respect to how these accounts should be managed. This places a heavy burden on the trustee to ensure they are managing the account prudently. If the beneficiary feels the funds are not being managed properly, the trustee faces the risk of the beneficiary bringing legal action against them.
2. If the in trust account is construed as a legal and valid trust, any contribution is an irrevocable gift. Once the contributor transfers funds or an asset to the beneficiary, the beneficiary becomes the owner of that asset and the contributor can no longer take it back for personal use, for the use of another child, or to contribute to a Registered Education Savings Plan (RESP).
3. If the contributor chooses to close the account despite the fact that it is an irrevocable gift, there may be serious consequences, including back taxes and penalties as mentioned. In addition, the beneficiary may take the contributor to Court and make a claim for the amount of funds invested and earned since the inception of the account plus interest (*Koons v Quibell*, [1998] 164 Sask. R. 149 (SKQB)).
4. The contributor will lose control over the funds once the minor beneficiary reaches the age of majority, at which time the beneficiary should receive full access to and control over the funds. Contrast that with a formal trust, which may have longer age restrictions as to when the beneficiary may be granted that access and control.




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## What are the benefits of opening an ITF?

So why, you ask, would anyone open an in trust account given the risks and pitfalls discussed? Here are some benefits of opening an in trust account to consider:

1. There is no restriction on how much you may contribute to one of these accounts. Contrast this with an RESP, which has a lifetime maximum contribution limit of \$50,000.
2. The funds can be used for anything that would benefit the child or grandchild. This would be a great benefit if the beneficiary does not end up pursuing formal education once he or she reached the age of majority. Others may view this as a pitfall because the contributor has no control over what the beneficiary spends the funds on.
3. Along the same lines, the funds will be easy for the beneficiary to access when he or she reaches the age of majority. Again, this could be a benefit or a pitfall depending on how much control the contributor wants to assert over the beneficiary's access and spending. Keep in mind, the beneficiary is entitled to take legal action if the trustee declines to give him or her access at the age of majority.
4. If the funds are derived solely from the Canada Child Tax Benefit payments or from an inheritance, all of the income is taxed in the hands of the child.
5. These accounts might be appropriate for smaller amounts of money that the contributor is comfortable with the minor receiving at the age of majority.

## What are some alternatives?

Before opening an in trust account for a client, consider discussing these alternatives:

1. Open an RESP for the child or grandchild. This will give the contributor (known as a 'subscriber' in the context of an RESP account) increased control over spending of the funds once the minor reaches the age of majority, and the subscriber will receive the added benefits of the Canadian Education Savings Grant.

*Tip: set up your RESP with joint subscribers to reduce administrative burdens that may arise upon the death of one subscriber. A grandparent should open an RESP as a joint subscriber with one of the child's parents.*

2. Help to pay for your children and grandchildren's expenses while you are still alive. This could consist of helping out with payments for ballet or soccer lessons, or even something as large and meaningful as helping with the purchase of their first home.
3. Set up a formal trust that benefits the children or grandchildren and lend money into the trust at a prescribed rate of interest. This arrangement allows for income splitting without the risks associated with an informal trust while creating greater certainty.
4. Take out a life insurance policy that benefits the children or grandchildren, with the proceeds to go into a formal life insurance trust or designate a trustee in the insurance forms. Note that designating a trustee on a simple form may result in similar issues associated with in trust accounts, such as the beneficiary gaining full access and control to the funds at the age of majority, as well as a lack of control over the funds.
5. Contribute to your children or grandchildren's Tax Free Savings accounts once they reach the age of majority.

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## Article: Planning and Estate Planning for the Disposition of Real Estate



**By: Steven Frye**

I am in the middle of a very difficult Canada Revenue Agency audit of a taxpayer's claim for the principal residence exemption. It now appears the property in question, built by my client some 25 years ago may not qualify for the full exemption due to the fact that the taxpayer may have held other properties, which he also built, in the intervening periods which may or not have been sold at loss and if they were not sold at a loss, no capital gain was reported.

In addition to dealing with all the technicalities related to the above, the main issue is that the taxpayer unwittingly did not keep good track of his costs which is causing everyone involved in the file quite a bit of angst. This has lengthened the period of the audit from weeks into months.

Several years ago, I wrote about this issue in the context of estate planning for the sale of the cottage. I thought I would re-purpose the blog here.

Whether it is in the context of a future disposition from an estate or during one's lifetime (to document a gain or loss) or minimizing exposure in the event of a challenge to the principal residence exemption (which is becoming more frequent than ever) all eligible costs (i.e. build up the tax cost base of the property) should be captured and proper documentation maintained (invoices, proofs of payment) for these costs.

If the property was bought outright, the purchase price should be documented along with land transfer taxes, real estate commissions, inspections, legal, survey fees, and title insurance, etc.

If you built the property like my client did, all costs of land acquisition including some of the items noted above, all costs of construction, landscaping, new and renewed services to the cottage, etc. should be fully documented with invoices, proofs of payment, etc.

If you inherited the property or received it as gift, try to keep evidence of value at the time of the gift or inheritance.

If the property was held before 1971 and/or an election was made in 1994 to take advantage of a capital gains exemption, check with your professionals to get the required documentation for valuation.

What about improvements or renovations since acquisition of the property: Are they eligible costs?

It is a difficult task sometimes to determine whether repairs, maintenance and renovation costs are eligible costs (i.e. additions to the tax cost base) or just an expense. Generally, the test is whether the structure has been improved or just brought back to a previous condition of repair during your period of ownership. A good example is a new roof. If the roof was in good shape when it was acquired, then simply replacing the shingles after several years of use is probably an expense. However if a higher quality of roof shingle or new kind of roof has been installed, then it might be an eligible cost.

Other examples of improvements (instead of simple repair) might be the installation of new doors and windows (with a higher insulation factor or other new features), new flooring and paneling (wood vs tiling) and upgraded fixtures. No matter what, please remember to keep all of your documents to support the cost.

For the do-it-yourself types – you can't include your own imputed cost of labor as an eligible cost but the cost of materials and 3rd party labor can certainly be included.



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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](mailto: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).

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