MAY 2016 ■ VOLUME 15 NO. 2

STEP Inside

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

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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ISSN: 14960737

STEP Worldwide Council News

This is a report about the activities of Kathleen Cunningham, Nancy Golding, and John Poyser from the STEP Worldwide Council meetings in December 2015. On behalf of Canada, Kathleen attended the branch development committee meeting on December 7; she also met with the working party on council membership. The STEP Worldwide Board of Directors reviewed the working party's report and recommendations in early March 2016.

Kathleen and Nancy each attended and chaired one session as the Canadian representatives from the STEP Worldwide Council at the leaders forum on December 9. The purpose of this forum, which was attended by approximately 80 STEP representatives, was to discuss priorities at both the branch and national levels. The forum proved to be very engaging and invigorating. Most striking was the level of consensus among participants from such a wide range of jurisdictions on so many issues, ideas, and priorities. The STEP Worldwide report identified three emerging priorities.

1. Creating a branded profession of trusted advisors to families
2. Supporting every STEP branch to adopt an education plan
3. Advocating trusts and their uses to the public

Kathleen, Nancy, and John will take comments from the forum about the priorities back to Canada and work to achieve the goals and implement the service priorities that were identified.

Kathleen, Nancy, and John all attended the council meeting on December 8, where the objectives of the leaders forum were considered. Because there will be a number of vacancies on the STEP Worldwide Board of Directors in 2016, the role of council and board members was reviewed, as was the induction process for new council members. Consultants who were retained by STEP Worldwide provided information about their analysis of this process. In addition, with the completion of the pilot project in January 2016, the employer partnership program was reviewed in detail. A presentation was made to the STEP Canada Board of Directors the following day, and Kathleen, Nancy, and John will be encouraging further discussions with Canadian employers over the coming year.

Kathleen, Nancy and John all attended Council meetings on April 14 and 15, 2016 which will be reported on in the next edition of STEP Inside.

If you have any questions or concerns, please do not hesitate to contact any of us: Kathleen at kcunningham@bcli.org , Nancy at ngolding@blg.com, and John at jpoyser@traditionlaw.com.

2015 Student Award Winners

Each year, STEP Canada recognizes the four students who achieve the highest marks in each of the STEP Canada diploma courses, the student who achieves the highest mark in a qualified practitioner essay, and the student who receives the Gerald W. Owen Book Prize. Awards are presented to these students during our national conference in June. Please join us in congratulating them on their accomplishments in 2015.

2015 Highest Mark, Law of Trusts Course

Sharon Mendonca, CA, CPA: Shrigley Battrick, Toronto

Sharon is a tax manager at Shrigley Battrick, a small accounting and tax firm that assists wealthy family groups and other individuals and businesses in managing their complex needs. Sharon specializes in all trust and estate issues, from planning to compliance and administration. In addition, she provides services to executives and self-employed individuals, finding solutions that are tailored to the various challenges that they face.

2015 Highest Mark, Taxation of Trusts and Estates Course

Denika Heaton, JD: Moodys Gartner Tax Law LLP, Calgary

Denika is quintessentially a business person. Her keen interest in property development led her to the business world, where she discovered how fundamental effective tax planning is in creating successful business and wealth structures. Combining her love of business with her tax planning and tax law experience, Denika works closely with a dynamic team to provide her clients with strategic advice that optimizes their tax situation and strengthens their financial future.

2015 Highest Mark, Wills, Trusts, and Estate Administration Course

Joanne Golden, JD: Golden Estate Law, Toronto

Joanne founded Golden Estate Law after years of practicing in the area of tax and estate planning at large law firms. Golden Estate Law is a boutique Toronto law firm that specializes in private client services, such as estate, trust, and personal tax planning. Joanne has significant experience in advising high net worth clients, entrepreneurs, professionals, and private companies on various estate-planning, trust, and personal tax issues.

2015 Highest Mark, Trust and Estate-Planning Course

Andrea Payne, MTI, TEP: TD Wealth Private Client Group, London

Andrea is a trust officer with TD Wealth Private Trust. She has worked in the financial services industry since 1999. Andrea holds an MTI (member, Trust Institute) designation from the Canadian Securities Institute and was awarded the TEP (trust and estate practitioner) designation in the fall of 2015. Andrea is an active and award-winning volunteer in her local community, most recently raising funds for veterans' care at Parkwood Institute and for Habitat for Humanity Heartland Ontario.

2015 Highest Mark, Qualified Practitioner Essay: *Estate Planning for Blended Families*

Daniel Watts, LLB, TEP: Aikins, MacAulay & Thorvaldson LLP, Winnipeg

Daniel focuses his practice on estate planning, estate administration, and estate litigation. He is often consulted by those who are dealing with unique estate issues, and he specializes in developing creative strategies to solve his clients' concerns. Daniel is a member of the branch executive of STEP Winnipeg and the past president of the Estate Planning Council of Winnipeg.

Gerald W. Owen Book Prize, Sponsored by the Bank of Nova Scotia Trust Company:
The Gerald W. Owen Book Prize is awarded to the STEP Canada student who achieves the highest overall average in all four diploma courses.
Justin Hoffman, CA, CFP, TEP: Davis Martindale LLP, London

Justin joined Davis Martindale in 2012 after working for several years as a senior tax analyst for an international public accounting firm. He specializes in Canadian and American tax and estate planning. Justin received his CFP (certified financial planner) designation in 2013 and his TEP designation in 2015. He teaches Canadian income tax at Kings University in London, Ontario, and was the recipient of other STEP Canada student awards in 2013 and 2014.

Congratulations to our 2015 graduates! With your knowledge and desire to learn, you bring enormous value to your clients and your workplaces.

We are here to help you achieve your maximum potential, and we encourage you to take full advantage of your membership by getting involved in STEP Canada. Branch programs and our annual conference provide excellent continuing education and networking opportunities, and our new one-day courses provide a perfect chance to polish your skills in particular areas of interest. Consider volunteering on one of our many committees. Your perspective is critical to our success. This is your STEP, and we welcome you.

Peter Weissman, TEP Chair,
STEP Canada Education Committee
Partner, Cadesky and Associates LLP
Member, STEP Toronto

2015 GRADUATES

Please join us in congratulating the following graduates for 2015:

Brad Armes, TEP, Vancouver Branch
Clayton Bolton, TEP, Vancouver Branch
Genevieve Boyer de la Giroday, TEP, Toronto Branch
Navdeep Brar, TEP, Calgary Branch
Maurice Brine, Atlantic Branch
Dianne Bruce, TEP, Vancouver Branch
Andrea Buncic, TEP, Toronto Branch
Brendan Burns, TEP, Vancouver Branch
Corey Button, TEP, Atlantic Branch
Jenna Carvalho, TEP, Edmonton Branch
Maria Cheung, TEP, Calgary Branch
Lois Chopin, TEP, Vancouver Branch
Fay Chrisohou, TEP, Calgary Branch
Craig Dale, TEP, Vancouver Branch
Cory Daly, TEP, Saskatchewan Chapter
Bryan Doull, TEP, London Southwestern Ontario Chapter
Elisabeth Evans-Olders, TEP, Montreal Branch
Chris George, TEP, Vancouver Branch
Audley Gilpin, TEP, Toronto Branch
Maureen Glenn, TEP, Toronto Branch
Andrée Godbout, TEP, Atlantic Branch
Christine Hakim, TEP, Ottawa Branch
Nadia Harasymowycz, TEP, Toronto Branch
Victoria Hockley, TEP, Calgary Branch
Justin Hoffman, TEP, London Southwestern Ontario Chapter
Kris Hsieh, TEP, Vancouver Branch
Jingchan Hu, TEP, Toronto Branch
John Humphrey, TEP, London Southwestern Ontario Chapter
Amreen Jamal, TEP, Calgary Branch
Jeffrey Justin, Toronto Branch
Lisa Kayaga, TEP, Calgary Branch
Gary Kaye, TEP, Toronto Branch
Daniel Keogh, TEP, Vancouver Branch
Michael Kirkpatrick, TEP, Ottawa Branch
Ryan Knight, TEP, Toronto Branch
Philip Kohnen, TEP, Ottawa Branch
Rock Lapalme, TEP, Toronto Branch
Michael Larocque, TEP, Toronto Branch
Melodie Lind, TEP, Okanagan Chapter
Peter Meitanis, TEP, Toronto Branch
Spencer Mellace, TEP, Calgary Branch
Ryan Minor, TEP, Toronto Branch
Jennifer Morrison, TEP, London Southwestern Ontario Chapter
Jennifer Muscroft, TEP, Edmonton Branch
Oluwashayo (Joel) Oretan, TEP, London Southwestern Ontario Chapter
Andrea Payne, TEP, London Southwestern Ontario Chapter
Valerie Pearson, Vancouver Branch
Ron Poizner, TEP, Toronto Branch
Jamie Purves, TEP, Toronto Branch
Donna Rai, TEP, Toronto Branch
Cheryl Rajan, TEP, Edmonton Branch
Natalie Rouse, TEP, Toronto Branch
Jay Sandhu, TEP, Calgary Branch
Christy Sandles, TEP, Atlantic Branch
Nigel Seth, TEP, Edmonton Branch
Patrick Smith, TEP, Vancouver Branch
Shelley Spring, TEP, Vancouver Branch
Tracy Thompson, TEP, Calgary Branch
Scott Tywoniuk, Edmonton Branch
Marino Vereecke, Toronto Branch
Roger Wan, TEP, Toronto Branch
Xi (Aurora) Wang, Toronto Branch
Daniel Watts, TEP, Winnipeg Branch
Heela Walker, TEP, Toronto Branch
Tammy Willerth, TEP, Calgary Branch
Jody Wong, TEP, Toronto Branch
Jackie Wong, TEP, Toronto Branch
Hadielia Yassiri, TEP, Toronto Branch
Winnie Yu Wong, TEP, Toronto Branch
Nicolas Yvon, TEP, Montreal Branch
Theresa Zavitz, TEP, London Southwestern Ontario Chapter

Life Interest Trusts and Charitable Donations: Recent Amendments to the Income Tax Act

GENEVIEVE BOYER DE LA GIRODAY, TEP
Principal, Giroday Law
Member, STEP Toronto

On January 15, 2016, the Department of Finance released *Legislative Proposals on the Tax Rules for Certain Trusts and Their Beneficiaries* (herein referred to as "the amendments"). The amendments proposed adjustments to the new regime that affect estates and trusts. The new regime was introduced through Bill C-43, which received royal assent on December 16, 2014 and came into force on January 1, 2016. The amendments resolve the most contentious issue in the January 1, 2016 regime relating to the taxation of spousal, alter ego, and joint partner trusts. They also enhance the new rules regarding charitable donations.

Life Interest Trusts

Before the amendments, paragraph 104(13.4)(b) of the *Income Tax Act* assigned the tax liability for the income in a trust, including deemed and actual capital gains, to the life interest beneficiary. The death of the life interest beneficiary created a deemed year-end in the trust, with the income taxable to the life interest beneficiary and reported in his or her T1 terminal return. The fundamental concern with this arrangement was that the life interest beneficiary's estate became liable for taxes on property that it might never receive.

Subsection 160(1.4) provided for the joint and several liability of the life interest beneficiary's estate and the trust. The Canada Revenue Agency's (CRA's) explanatory notes of October 2014 expressed the view that the subsection was intended to enforce the primary tax liability against the trust. It was uncertain, however, whether the CRA would or could rely on subsection 160(1.4) as an enforcement provision.

A further complexity related to the fact that even if the CRA managed to enforce the tax liability against the trust, the manner in which the liability would be calculated was unclear because the T1 terminal tax liability would take into account the marginal rates, tax credits, loss carryforwards, and loss carrybacks of the life interest beneficiary.

The introduction of subparagraph 104(13.4)(b)(i) effectively cures these issues. The subparagraph limits the applicability of paragraph 104(13.4)(b) to circumstances in which the taxpayer dies before December 31, 2017, leaving a post-1971 spousal trust by will, and a life interest beneficiary who is resident in Canada immediately before his or her death. If these conditions are met, the trustees of both the trust and the life interest beneficiary's estate are eligible to jointly elect that the tax liability be borne by the life interest beneficiary's estate. The amendments may create a planning opportunity when the life interest beneficiary dies before the end of 2017 with unused losses, and the trustees of both trusts cooperate to take to advantage of this situation.

Charitable Donations

The January 1, 2016 regime enhances the availability of charitable donation tax credits for estates and trusts. It provides that donations to a qualified donee by a graduate rate estate (GRE)

produce a donation credit that is available for broader use than other types of trusts. The credit can be claimed in the deceased taxpayer's T1 Terminal Return, or T1 for the year prior to death against up to 100 percent of the GRE's net income, and eligible donations include those made by beneficiary designation.

> The amendments also addressed a concern regarding life interest trusts with capital encroachment provisions, in which the remainder was to be donated to a charity on the death of the life interest beneficiary. In these circumstances, the donation credit was available only to the trust, in the year of the donation or the five subsequent taxation years.

The donation credit can also be claimed in the GRE for the taxation year of the donation, or a previous taxation year of the GRE against up to 75 percent of the GRE's net income.

If the estate is not designated as a GRE at the time of the donation, the use of the donation credit is much more restrictive. It is limited to the taxation year of the donation for the estate, or the five subsequent taxation years for the trust.

While the January 1, 2016 regime was generally more flexible, there were concerns that the time during which the GRE was entitled to make donations was limited to 36 months. This period might be insufficient for estates whose assets are unavailable as a result of litigation or post mortem tax planning involving private corporate shares. The amendments address these problems by extending the donation period to 60 months after the deceased taxpayer's death. This extended timeframe is conditional on the estate having been designated as a GRE and having maintained GRE status (apart from the 36-month requirement).

The amendments also addressed a concern regarding life interest trusts with capital encroachment provisions, in which the remainder was to be donated to a charity on the death of the life interest beneficiary. In these circumstances, the donation credit was available only to the trust, in the year of the donation or the five subsequent taxation years. Before the January 2016 amendments, this may have resulted in the tax credit becoming stranded in the trust, while the tax liability was borne by the life interest beneficiary's estate. The addition of subparagraph 104(13.4)(b)(i) corrects this issue.

The 2016 amendments also enhance the January 1, 2016 regime by clarifying that the exemption for capital gains tax payable on the deemed disposition of public securities and cultural and ecological property also applies to these types of donations when they are made by estates.

Private company shares are not given the same preferential tax treatment. The amendments have not addressed the challenges that currently exist with the donation of private corporate shares. Before January 1, 2016, the donation by will of private corporate shares was deemed to have been made by the testator before his or her death. For tax purposes, the deceased donor was an arm's-length person with the donee. The January 1, 2016 regime now deems the estate to be the donor. However, as a trust, an estate does not act at arm's length with its beneficiaries, and therefore the donation constitutes non-qualifying securities, unless the donee sells the private corporate shares within 60 months.

An important practical concern remains. Under the January 1, 2016 regime, the donation had to be made within 30 days for the donation credit to be available to the trust for the year in which the life interest beneficiary died. The amendments extended this deadline to 90 days of the calendar year in which the death occurred. If an estate plans to offset the taxes arising from the deemed income in the trust on the death of the life interest beneficiary, it is imperative that the donation credit be available in the year of the death. Although the 90 days fixed under the amendments are an improvement on the 30 days formerly allowed, this timeframe continues to be challenging when completing donations in complicated estates. ■

Surviving Spouse Inherits Tax Debt Through RRSP Designation

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Subsection 160(1) of the *Income Tax Act* (herein referred to as "the Act") is a powerful section that operates to prevent a taxpayer who owes income tax from transferring his or her assets to minors and certain non-arm's-length parties. The Canada Revenue Agency often uses section 160 to assist in the collection of outstanding tax from transferees who receive assets from a tax debtor for no consideration or for consideration that is less than fair market value by issuing a derivative assessment to the transferees when the tax debtor has insufficient assets to satisfy the tax debt. A section 160 assessment can be issued to any person under 18 years of age regardless of his or her relationship with the tax debtor, a person with whom the tax debtor was not dealing at arm's length, or the tax debtor's spouse or common-law partner or someone who has since become the tax debtor's spouse or common-law partner.

In *Kuchta v. R*, 2015 TCC 289, the taxpayer was married to the late Mr. Juba, who died in 2007. Mr. Juba had a tax debt of approximately $56,000 from his 2006 taxation year, which his estate did not pay. As the sole designated beneficiary of two registered retirement savings plans (RRSPs) held by Mr. Juba at the time of his death, the taxpayer received over $300,000 from the plans. The minister assessed the taxpayer under section 160 for Mr. Juba's tax debt. (Graham J rendered the decision on the basis of transcripts and supplemental oral submissions, another judge having originally heard the appeal.)

As stated in *Livingston v. R*, 2008 FCA 89, four conditions must be met for section 160 to apply:

1. The transferor must be liable to pay tax under the Act at the time of transfer.
2. There must be a transfer of property, directly or indirectly, by means of a trust or otherwise.
3. The transferee must be the transferor's spouse or common-law partner at the time of transfer, a person under 18 years of age, or a person with whom the taxpayer was not dealing at arm's length.
4. The fair market value of the transferred property must exceed the fair market value of the consideration given by the transferee.

The taxpayer conceded that conditions 1, 2, and 4 were met. She asserted that the third condition was not satisfied because she no longer had a spouse

once Mr. Juba died; therefore, when the RRSPs were transferred to her immediately after Mr. Juba's death, she was not a spouse. Although the third condition in *Livingston* incorporates the words "at the time of transfer," Graham J agreed with the minister that the wording of the third condition was not necessary to the decision in *Livingston* and was therefore obiter dicta.

In *Kiperchuk v. The Queen*, 2013 TCC 60, the court dealt with the same issue as in *Kuchta* and reached the conclusion that section 160 did not apply to the taxpayer because she had no husband when the RRSPs were transferred to her after her husband's death. Lamarre J cited *Kindl Estate, Re*, 1982 CarswellOnt 340 (SC), as support for the proposition that marriage is ended by death or by a decree absolute of divorce. Furthermore, Lamarre J found that the spousal relationship was to be determined when the transfer was made and not when the taxpayer was designated as a beneficiary of the RRSP, as the minister had argued. In *Kuchta*, Graham J agreed with this conclusion; however, he ruled that section 160 applied to the taxpayer on the basis that the word "spouse" included a person who was her spouse immediately before the tax debtor's death, essentially overruling *Kiperchuk* by considering an issue that was not dealt with in that case.

"Spouse" is not defined in the Act; therefore, Graham J conducted a textual, contextual, and purposive analysis of the word. In the course of the textual analysis, he reviewed the dictionary meaning of "spouse," which contemplates the relationship between two living people; he also considered the colloquial use of the word, which can include a person whose spouse has died.

In the course of the contextual analysis, Graham J reviewed how the word "spouse" is used in different sections of the Act. In the context of subsection 160(1), he concluded that the word can support both the dictionary meaning (requiring two living spouses) and the colloquial meaning (including a deceased spouse). On a further review, he found that in certain sections of the Act a person can be considered to have a spouse after the spouse's death, whereas in other sections a spouse does not include a person whose spouse is dead. Accordingly, the Act allows for two possible interpretations of the word "spouse."

> ...any person under 18 years of age regardless of his or her relationship with the tax debtor, a person with whom the tax debtor was not dealing at arm's length, or the tax debtor's spouse or common-law partner or someone who has since become the tax debtor's spouse or common-law partner.

Finally, Graham J conducted a purposive analysis of subsection 160(1). He found that the purpose of the subsection is to capture all transfers to minors and certain non-arm's-length persons. Since subsection 160(1) would have applied to transfers from Mr. Juba to his spouse (the taxpayer) during his lifetime, there is no reason why it should not apply to transfers of property to the taxpayer after his death. Nothing in the Act indicates that Parliament intended to provide a surviving spouse with relief from a deceased spouse's tax debt. Similarly, nothing in the Act indicates that Parliament intended to provide relief to dependants from the application of subsection 160(1). Graham J noted that subsection 160(1) would have applied to the taxpayer if the transfer had been made under a will because the taxpayer would not have dealt at arm's length with the estate of the tax debtor. The result should not be different, he reasoned, if the transfer were made by way of an RRSP.

Because the two possible meanings of "spouse" gives rise to ambiguity, Graham J concluded that it was appropriate to give weight to the purposive analysis. Accordingly, he found that "spouse" in subsection 160(1) should be interpreted to include a person whose spouse is deceased.

Graham J emphasized that the judge's role is not to interpret otherwise unambiguous legislation in order to ensure that Parliament's goals are fulfilled. The result in *Kuchta* is correct because it prevents the possibility of mischief through planning for transfers after death through RRSPs or other vehicles that are outside an estate to circumvent the application of subsection 160(1); however, it is not entirely clear that the definition of "spouse" contained in subsection 160(1) is ambiguous if *Kindl* is authority for the proposition that a person no longer has a spouse after the spouse has died. ■

Renouncing US Citizenship or Turning in a Green Card: Beware of a Possible 40 Percent Inheritance Tax

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KEVIN KIRKPATRICK
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Renouncing US citizenship or giving up a long-held green card does not necessarily mean severing all ties with the United States. Many former Americans, especially those in Canada and Mexico, have family and friends who are still US residents or US citizens to whom they eventually want to give or bequeath assets. Under section 2801 of the *Internal Revenue Code*, US citizens or residents who receive a gift or inheritance from "covered expatriates" (as defined in section 877 of the Code) are subject to an inheritance tax of 40 percent of the value of the gift or inheritance. Regulations recently proposed by the US Treasury, which clarify how and when this tax is imposed, underscore the importance of carefully planning renunciations, gifts, and bequests.

The law behind the proposed regulations is not new. Congress created the requirement that recipients pay tax on gifts from covered expatriates in the 2008 *HEART Act*. However, the provision has not yet been enforced because, until September 2015, the Treasury Department had not yet issued any implementing regulations. What is perhaps most striking about sections 28.2801-0 and following of the proposed treasury regulations is their creation of a rebuttable presumption. The onus is on the recipient of the gift or inheritance to demonstrate to the Internal Revenue Service (IRS) that the gift or inheritance did not come from former Americans who are deemed to be covered expatriates under one of the three tests in section 877 of the Code. A recipient who is unable to discharge this burden is required to pay the 40 percent tax.

Both gifts (made while the donor is

living) and bequests (made through a will) will be subject to this proposed regime if the regulations are finalized. Whether or not the rules apply is to be determined when the gift is received by a US citizen, resident, or green card holder, and not when the former American expatriates. Additionally, the determination does not take into consideration if he or she acquired the property before or after turning in his or her US passport or green card. The recipient is permitted to file a "protective return" to start the relevant statute of limitations running, but the regulations indicate that this new protective return will require the recipient to provide essentially the same amount of information as the donor is required to provide. There are exceptions for transfers between spouses, to charities, and for certain qualified disclaimers.

If the regulations become final, the new rules will create particular hardship for families in which one member has renounced US citizenship and other family members are still US citizens. Consider, for example, a dual-citizen mother who opens a registered education savings plan (RESP) for her child and later decides to renounce her US citizenship. If the child is not old enough to renounce his citizenship or wants to keep dual citizenship so that he may eventually have the option of working in the United States, gifts to the child will be subject to the reporting requirement. Under IRS revenue procedure 2014-55, these gifts will likely include distributions from an RESP, and therefore the child will have the burden of demonstrating to the IRS why contributions made by his mother to his RESP were not made by a covered expatriate.

Alternatively, imagine a situation in which one spouse is born and raised in the United States, marries a Canadian, lives most of her adult life in Canada, and builds a successful business here. If she eventually decides to renounce her US citizenship and wants to transfer some of her wealth to family members in the United States, the US recipients of her property will need to demonstrate to the IRS that her gifts did not come from a covered expatriate. If the property were passed by will, it could become factually impossible to untangle the former American's affairs to determine whether she expatriated properly.

> Regulations recently proposed by the US Treasury, which clarify how and when this tax is imposed, underscore the importance of carefully planning renunciations, gifts, and bequests.

These rules are proposed regulations only. It is possible that they will change as a result of public comments in January. The IRS did not provide an effective date when it promulgated its proposals, and many regulations have languished in a sort of proposal purgatory for decades. Further, taxpayers are not required to abide by proposed regulations until the date that they are finalized and adopted, and the IRS is not proposing that taxpayers must apply these rules retroactively: the proposed regulations state that "taxpayers *may* rely upon the final rules of this part for the period beginning June 17, 2008" (emphasis added).

Nevertheless, the fact that the Treasury Department has finally issued the proposed regulations and taken them through the procedures of notice and comment may indicate that the IRS is serious about adopting them and attempting to ensure that they are followed. These regulations are interpretative rather than legislative because there is no specific delegation of rule-making authority from Congress to Treasury in section 2801. Under the US *Administrative Procedure Act*, interpretive regulations do not technically require public notice and comment before they can be adopted. But interpretative regulations that do undergo notice and comment are generally afforded greater deference by the courts, especially after *Mayo Foundation for Medical Education & Research v. United States*, 131 S. Ct. 704 (2011). Therefore, by sending these regulations through the public notice and comment procedures, rather than by simply adopting or issuing them in temporary form, the IRS may be demonstrating its intention to make the regulations into binding law.

Those who have given up their US citizenship or relinquished their long-held green card, or who are considering doing so, must be aware of these proposed rules and their consequences. The detail of these rules, the manner in which they have been introduced, and the presumptions that they create, all signal the continued importance of careful planning to avoid unintended consequences. Giving indeed may be better than receiving, but former Americans who are thinking about cross-border wealth transfers will likely need to be increasingly careful to ensure that their gifts are not accompanied by unexpected tax bills. ■

IN THE HEADLINES

EXEMPTION FROM PROHIBITION AGAINST PHYSICIAN-ASSISTED DEATH: BRITISH COLUMBIA PETITION PROCEDURE

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

On January 15, 2016, the Supreme Court of Canada released its extension judgment in *Carter v. Canada (Attorney General)*, 2016 SCC 4, in which five of the nine justices granted an extraordinary four-month extension (until June 6, 2016) to the federal government to rewrite the legislation relating to physician-assisted death. The Supreme Court's extension judgment follows its unanimous ruling in *Carter v. Canada (Attorney General)*, 2015 SCC 5, in which the court struck down the ban on physician-assisted death in sections 241 and 14 of the *Criminal Code* as invalid. The effect of the *Carter* judgment was delayed by 12 months to provide legislatures with the time in which to develop legislation and policies. However, in the extension judgment the majority of the court confirmed that exemptions to the prohibition can be sought from provincial courts pending the enactment of the new legislation; furthermore, it allowed an exemption for Quebec, which brought its assisted dying law into force in December 2015. On April 14, 2016, the federal government introduced Bill C-14, *An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying)*, for first reading.

The BC Supreme Court has responded to the *Carter* extension judgment by issuing a notice of procedure for BC lawyers who represent clients who seek a personal exemption while the federal legislation is being finalized.

The chief justice of the BC Supreme Court released British Columbia's notice regarding applications for exemption from the prohibition on February 25, 2016. The notice will remain in place until June 6, 2016, and sets out how applications can be made in British Columbia. The notice is located at http://www.courts.gov.bc.ca/supreme_court/documents/Notice_Regarding_Exemption_Applications-Physician_Assisted_Death.pdf.

An application for exemption must be brought by way of a petition that is supported by affidavits and a draft order outlining the relief sought. The required supporting materials include (1) an affidavit about the petitioner that includes, among other things, information about the petitioner's illness, pain and distress, details about the petitioner's capacity, and information about the plan for the proposed assistance; (2) affidavits from two medical physicians, the petitioner's attending physician and a second physician, both of whom attest to the petitioner's condition, pain and suffering, and mental capacity; and (3) an affidavit of the physician who will assist the petitioner in dying, which sets out the manner, means, and timing proposed for the petitioner's death.

Counsel bringing the exemption application must also file a request to appear before the chief justice (or another judge designated by the chief justice) to set a time for the hearing of the application and for further directions as necessary. The chief justice will review the request to appear, as well as the petition and supporting materials and convene a prehearing conference or provide written instructions for the process to be followed and the date of the hearing. The chief justice may give directions in relation to notice, service, filing of responses and related matters, and keeping the materials private and confidential.

Unless specific service directions are made by the chief justice at the prehearing conference, the petitioner must serve the petition, the supporting affidavits, and the draft order on the following persons: (1) the attorney general of British Columbia; (2) the petitioner's spouse, if the spouse and the petitioner are cohabiting when the petition is brought; and (3) any person named as the petitioner's attorney if a power of attorney is effective when the petition is made.

The BC procedure is similar to the practice advisory adopted by the Ontario Superior Court of Justice on January 29, 2016, which is available at http://www.ontariocourts.ca/scj/practice/application-judicial-authorization-carter/. At the time of writing, the advisory has already resulted in two cases: (1) *A.B. v. Canada (Attorney General)*, 2016 ONSC 1571 (anonymity order), and 2016 ONSC 1912 (right to physician-assisted death order); and (2) *C.D. v. Canada (Attorney General)*, 2016 ONSC 2431. In *A.B.*, an 81-year-old Toronto man with terminal lymphoma was granted the right to physician-assisted death. A preliminary anonymity order was made in the earlier hearing; it protected the applicant, his family, and the health care professional from exposure and allowed the applicant to proceed privately. In *C.D.*, the applicant was ravaged by stage 4 metastatic breast cancer and was granted the right to physician-assisted death; the applicant's privacy was again protected.

Alberta and Manitoba have also introduced procedures, and first cases have recently been decided. *H.S. (Re)*, 2016 ABQB 121, the first Alberta decision, is structurally similar to Ontario's *A.B.* decisions and emphasizes the privacy, dignity, and autonomy of the applicant and the privacy of the health care providers. That hearing was held in camera, and a publication ban was issued. Martin J granted a written legal exemption, and the applicant chose to end her life in Vancouver with the help of two BC physicians. Notice of the application was given to the attorneys general of Canada, Alberta, and British Columbia, but in the particular circumstances, the court ordered that no notice was required to be given to the applicant's family. Manitoba's first decision, *Patient v. Attorney General of Canada et al.*, 2016 MBQB 63, was made under a publication ban and involved an applicant suffering from the final stages of two terminal diseases that caused "enduring unbearable pain."

The first BC case, *A.A. (Re)*, 2016 BCSC 570, was decided on April 1, 2016. It involved an anonymous woman (A.A.) who suffered from multiple sclerosis and who sought (1) to have her case kept in camera in a preliminary hearing *(A.A. (Re)*, 2016 BCSC 511); and (2) permission to end "enduring and intolerable pain." Hinkson CJ declined to order that the proceedings be held in camera but granted an order that all documents filed in the registry be sealed, with the exception of the court's reasons for judgment. All names and facts that would identify the applicant, her family, and the physicians, except for the assisting doctor who did not seek anonymity, were placed under a publication ban. Hinkson CJ relied on the capacity requirement set out in Manitoba's *Patient* case at paragraph 65 when determining that A.A. had the requisite capacity to proceed: the common-law definition of capacity in the context of making health care decisions involves "being able to understand the nature, the purpose and consequences of proposed treatment," and "treatment" includes administering medication to hasten death.

In summary, until June 6, 2016 (or sooner, if Bill C-14 is fast-tracked) the BC notice, though lacking legislative force, allows BC practitioners to seek court approval for an applicant's personal exemption and to craft a sensitive process in relation to notice, privacy, evidence, and the timing of the relief that is appropriate for the applicant's needs.

ONE OF THESE THINGS IS NOT LIKE THE OTHERS (OR MAYBE IT IS) – THE APPLICATION OF *PECORE* TO BENEFICIARY DESIGNATIONS

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Pecore v. Pecore, 2007 SCC 17, which was decided by the Supreme Court of Canada in 2007, changed most people's ideas about joint accounts and other jointly held assets. As a result of the decision, joint ownership did not automatically mean that a jointly held asset belonged to one of its joint holders when the other holder died. The intention of the person who created the jointly held asset needed to be determined. If the asset was jointly held with an independent adult child, the presumption of resulting trust applied. This meant that the child held the asset on behalf of the estate and did not receive it as the surviving joint holder, unless the child could prove that a gift was intended.

The recent Alberta decision of *Morrison Estate (Re)*, 2015 ABQB 769, may have extended the reach of *Pecore* even farther than was originally thought. Mr. Morrison executed his will in March 2002, essentially bequeathing his assets equally among his children if his spouse predeceased him, except for a deduction of $11,000 to be made against one son's share as a result of an outstanding loan. The $11,000 was to be divided equally among Mr. Morrison's grandchildren. The will named Douglas and Heather, two of Mr. Morrison's children, as joint alternate personal representatives. Shortly after the will was made, Mrs. Morrison died; her registered retirement income fund (RRIF) was transferred to Mr. Morrison, and Douglas was designated as the beneficiary of the RRIF.

When Mr. Morrison died, the RRIF was transferred to Douglas. After the taxes were paid on the RRIF by the estate, there were insufficient funds to divide the estate and to provide the $11,000 gift to the grandchildren. One son, Cameron, was dissatisfied with this result.

Cameron brought an application to have the court determine that Douglas held the proceeds of the RRIF in trust for the estate, arguing that the onus was on Douglas to show that Mr. Morrison intended that Douglas take the RRIF as a gift. In other words, he argued that the presumption of resulting trust in *Pecore* applied to beneficiary designations.

Conceptually, there is a difference between a jointly held account and a beneficiary designation: a joint account gives the account holders a present property interest, whereas a beneficiary designation more closely resembles a testamentary transaction, in which no interest arises until a death occurs. A beneficiary designation therefore differs from a gratuitous transfer of an asset into joint names, which according to *Pecore* gives rise to the presumption of a resulting trust.

In *Morrison*, Graesser J understood the consequences in finding that *Pecore* applies to beneficiary designations:

> In my view, *Pecore* and *Kerr v Baranow* should not be applied to beneficiary designations for RRIFs (and by inference RRSPs and life insurance policies). To apply *Kerr v Baranow* and *Pecore v Pecore* to RRSP, RRIF or life insurance beneficiary designations would, in my view, create untold uncertainties in what are likely hundreds of thousands if not millions of beneficiary designations in Canada.

Graesser J noted that a decision with respect to beneficiary designations and the presumption of resulting trusts should be left to another case because *Morrison* could be resolved without considering the issue.

Notwithstanding this determination, the reasoning in *Morrison* appears to apply a *Pecore*-like analysis. The court looked at the facts of the case to ascertain the intention of the deceased, and it determined that Douglas was required to establish that the RRIF was intended to be a gift. If Douglas could not establish this intention, the court stated that the RRIF was held in trust by Douglas for the estate. Clearly, the door has been left open for the presumption of resulting trust to be argued in a beneficiary designation situation.

The court's analysis in *Morrison* raises issues for financial institutions that accept beneficiary designations. How much proof of the intention of the person who makes the designation do they need? Are the "hundreds of thousands if not millions of beneficiary designations" currently in their possession valid in their present form? Can they be relied on to transfer an asset to a designated beneficiary on death?

Personal representatives who administer estates in which an asset is gifted pursuant to a beneficiary designation are also faced with several dilemmas. Must they determine whether such an asset exists and

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advise the estate beneficiaries of its existence? Must they enquire into the circumstances to determine whether the deceased intended to make a gift of the asset outside the will to the named beneficiary?

An additional matter arising from the *Morrison* decision involves Graesser J's comment on the use of the *Judicature Act* or the rectification sections in the *Wills and Succession Act* to determine where the liability for the income tax payable on the RRIF should lie. In *Morrison*, the court relied on the *Judicature Act* to determine that the tax liability should follow the proceeds of the RRIF and should therefore be borne by Douglas. This is a welcome decision for many estates in the same circumstances because the holding in *Morrison* is a departure from current thinking on the matter.

Although Graesser J determined that he was not required to determine the applicability of *Pecore*, he may have opened a Pandora's box for practitioners and financial institutions alike.

IS IT IN YOU TO GIVE? CHANGING ORGAN AND TISSUE DONATION IN SASKATCHEWAN

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In 2011, a campaign was started in Saskatchewan to encourage and promote organ donation. This year, *The Human Tissue Gift Act, 2015* (Saskatchewan) is expected to come into force. The new Act permits the minister to coordinate, develop, implement, evaluate and promote provincial policies in respect of the donation and use of tissue for transplant. It also permits the promotion, development, and support of organ procurement organizations. Further, the changes in the Act clarify some of the uncertainties in the soon-to-be-former legislation.

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Persons Who Can Consent on Behalf of Another

One of the uncertainties in the earlier legislation involved whether a common-law partner could consent to the use of his or her partner's body or part thereof after death for the purpose of a transplant, medical education or scientific research. It was clear that a "spouse" could consent, but the Act did not define what was meant by that term. The new Act provides that a legally married spouse or a person with whom a potential donor cohabits (and has cohabited as a spouse in a relationship of some permanence) can consent to tissue or organ donations, provided that immediately before the death or injury, the couple was not living separate and apart.

The new Act also provides additional clarity concerning the priority of persons who can give consent. Section 10 provides that if a potential organ donor has not consented because he or she is a minor, the decision of the legal custodian of the donor is preferred over the decision of a non-custodial parent. Additionally, the decisions of relatives of whole blood are preferred over those of half-blood, and the decisions of the elder or eldest of two or more relatives (listed in the same order as in section 10(1)) are preferred over the decisions of younger relatives. When family members have differing views, the predetermination of priority on the basis of legislated criteria may help to alleviate potential conflict.

Both the former and the new Act prohibit consenting to donation on behalf of a donor who would have objected to the donation.

Even when the donor provides consent, as a matter of practice in Saskatchewan the donor's family is also required to provide consent in order for the donation to proceed. Accordingly, part of the promotional campaign undertaken in Saskatchewan in recent years was geared toward encouraging people to talk about tissue donation with their families.

Persons Who Can Consent on Their Own Behalf

Any person who is of the age of majority, has the capacity to consent, and is able to make voluntary and informed decisions can consent in writing to an *inter vivos* transplant of a specified tissue or to the use of his or her body or part thereof after death.

A minor cannot validly consent to *inter vivos* or post mortem tissue donation. However, if the person acting on the consent is not aware that the donor is a minor or if the donation is a post mortem tissue donation, the donation can proceed if the donor's nearest relative provides consent.

Revocation of Consent

The new Act specifically contemplates that a person who has consented to a post mortem donation can withdraw his or her consent in a number of ways, including the following: orally in the presence of a witness, in a written document signed by the donor, by destroying a written consent, by giving a new consent, or in a manner prescribed in the regulations. This flexibility may provide comfort to potential donors who are uncertain about whether they wish to donate their tissue or body after their death; however, it may also lead to disputes and assertions by family members that consent was withdrawn before death.

Determination of Death

For the purposes of a post mortem transplant, the former Act requires that death must be determined by at least two physicians. The new Act appears to relax the standard (except in the case of an organ transplant) by requiring that death be determined in "accordance with accepted health care provider practice." Interestingly, the provisions in the Act relating to the determination of death and restrictions on physicians do not apply to the removal of a deceased's eyes for cornea transplants.

Penalties

The penalties for contravention of the new Act have changed. The former Act provides that a person who is guilty of contravening the Act is liable to a fine of not more than $1,000 and imprisonment for a term of not more than six months or both. The new Act raises the potential fine to $100,000.

FAMILY BUSINESS SUCCESSION AND AN ADVISER'S CONFLICT OF INTEREST

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Family business succession is generally known to be rife with income tax issues, but the recent Ontario Court of Appeal decision in *Roth Estate v. Juschka and Brock*, 2016 ONCA 92, is a reminder that an adviser must beware of becoming involved in conflict-of-interest situations.

A lawyer, Mr. Brock, acted on the transfer of shares from Mr. and Mrs. Roth to Mr. and Mrs. Juschka, their daughter and son-in-law. Mr. Roth had many years of experience in the grocery business. He had worked his way up to an executive position in a major grocery chain, where he was responsible for expansion and finding new stores. He was also involved in the sale of stores that the grocery chain wanted to dispose of. As a result, Mr. Roth became aware of a store in Corunna that was for sale. At the time, his son-in-law was working part-time in a grocery store, and Mr. Roth thought that the Corunna store would provide an opportunity for both families. Mr. Roth and Mr. Juschka had a close relationship, and Mr. Roth thought that he could pass on his experience and knowledge of the grocery business to his son-in-law. The two families moved to Corunna. Both Mr. Roth and Mr. Juschka contributed $10,000 in equity, and Mr. Roth advanced an additional $40,000 to fund the purchase of the Corunna store. Roth-Juschka Holding Ltd. was incorporated, with Mr. Roth holding 51 percent of the shares, and Mr. and Mrs. Juschka holding 49 percent.

The store was successful. Profits were split between the two families on a 51:49 percentage basis. Seven years later, Mr. Roth was diagnosed with cancer. The diagnosis caused him to consider succession planning for the store and to calculate the income that he and his wife would need for the rest of their lives.

Mr. Brock had acted for the Roths and the Juschkas on separate residential purchase transactions. He had acted on the incorporation of Roth-Juschka Holding Ltd., the acquisition of the store, and the subsequent incorporation of holding corporations for both the Roths and Juschkas. Mr. Roth spoke with Mr. Brock about amending his will to leave his shares to the Juschkas. Mr. Roth had a second daughter with whom he had a difficult relationship, and Mrs. Roth had a difficult relationship with Mrs. Juschka. Mr. Roth also sought advice from his accountants, and at least one meeting was attended by the accountants, the lawyer, Mr. Roth, and Mr. Juschka. Ultimately, Mr. Brock was instructed to prepare the documents under which Mr. Roth sold his shares to the Juschkas for a $408,000 promissory note, payable on demand 40 years hence and bearing interest at a commercial interest rate. Mr. Roth had discretion to waive or reduce the interest. The note expressly provided that it was due and payable on demand in the event of the sale of the Corunna store or in the event that Mrs. Juschka became the holder of less than 50 percent of the voting shares.

In addition, consulting agreements were entered into with both Mr. and Mrs. Roth; the agreements provided for consulting fees to be paid to each of them, calculated on the basis of 50 percent of the profits of the Corunna store, with some reduction over time. The term of each agreement was essentially the lifetime of Mr. or Mrs. Roth. The agreements were personally guaranteed by the Juschkas. By this time, neither Mr. nor Mrs. Roth was working in the business. Apparently, the understanding was that the promissory note would be forgiven by Mr. and Mrs. Roth in their wills, and their wills were so amended shortly thereafter.

For 10 years after these transactions, consulting fees were paid to Mr. and Mrs. Roth as agreed. The Corunna store then encountered financial difficulties. There had been a store expansion, financed in part by Sobeys. The consulting fees were reduced. Mr. Roth was unhappy and threatened to demand payment of the note. The Juschkas sought advice from Mr. Brock, and he advised that they were obliged to make the payments under the consulting agreements. Family relationships became strained. A few years later, the Juschkas faced the choice of bankruptcy or selling the store to Sobeys. They chose to sell. Mr. Roth died, and Mrs. Roth demanded payment of the note in light of the sale of the Corunna store.

The matter went to litigation, and the Juschkas made a third-party claim against Mr. Brock.

The trial court held that the Juschkas were liable on the promissory note. It rejected their assertion that the consulting fees, as paid over time, were intended to reduce the principal amount of the note. These findings were upheld on appeal.

While the trial court dismissed the third-party claim against the lawyer, the Court of Appeal held that Mr. Brock had failed to warn the Juschkas of the risks of the transaction. Although all parties were amicable when the shares were transferred, there was nevertheless a significant potential for a conflict of interest between the Roths and the Juschkas, and Mr. Brock was acting for both parties. The Court of Appeal concluded that Mr. Brock was clearly in a conflict-of-interest situation and could not discharge his fiduciary duty to act in the best interests of the Juschkas. The court determined that the Juschkas should have been told to seek independent legal advice; if they had done so, they would have been warned that the structure left them liable not only for the promissory note (which was apparently the fair market value of the 51 percent interest at the time of the share transfer) but also for the payment of an ongoing consulting fee payment, which in time could exceed the principal amount of the note.

The case serves as a reminder that lawyers who act both for a family business and for the family business owners can easily find themselves in a conflict-of-interest situation when the business passes from one generation to the next.

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FILIATION BY BLOOD OF CHILD BORN LONG AFTER FATHER'S DEATH

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In *Dr. LK. v. AK (Deceased)*, 2015 QCCS 6030, the Superior Court of Quebec recently considered the concept of filiation by blood in the *Civil Code of Québec* (CCQ). The court was asked to revoke a judgment that found filiation by blood of a father (AK) and a child who was born more than 300 days after AK' s death.

AK and the child's mother were married in the Democratic Republic of Congo in 2004 and immigrated to Canada in 2007. In 2011, AK consented to contribute sperm to be preserved for use in the fertility treatments in which he and his wife were engaged. AK died in 2012. An embryo from the couple's fertility treatment was successfully implanted in AK's widow nine months later.

Following the child's birth, the registrar of civil status refused to register AK as the child's father because, pursuant to article 114 CCQ, AK had not signed the child's act of birth. AK's widow brought a successful motion to recognize AK as the child's father, and the child's act of birth was amended.

However, on learning of the judgment, AK's siblings (the applicants) in the Democratic Republic of Congo brought a motion to revoke the court's decision to recognize AK's paternity. The applicants sought to challenge the judgment, arguing that Quebec law did not recognize paternity post mortem, unless the child was born within 300 days of the father's death. They also argued that since the father had died before the embryo was implanted, there could be no possession of status between the father and the child.

quebec

The court rejected the applicants' arguments. Articles 523 to 529 CCQ address the concept of proof of filiation. Article 523 provides that filiation is proved by the act of birth. In the absence of an act of birth, uninterrupted possession of status is sufficient. Article 525 provides that if a child is born within 300 days of the dissolution of a marriage, the spouse of the child's mother is presumed to be the father. This presumption is rebutted if the child is born more than 300 days after the dissolution of the marriage. Articles 526 to 529 CCQ address voluntary acknowledgment of parental filiation.

Articles 530 and following CCQ deal with actions relating to filiation. Article 530(2) provides that no person may contest the status of a person whose possession of status is consistent with his or her act of birth. The court highlighted this article as evidence that the legislator has sought to prioritize family stability over all other factors, even biological reality.

> This article provides that a child may seek to prove filiation by any mode of proof, even in the absence of filiation assigned by an act of birth, uninterrupted possession of status, presumption of paternity, or voluntary acknowledgment.

The court then turned to article 532 CCQ, which provides that a child may seek to claim or contest before the court the filiation of either a father or a mother that is not established by an act of birth and possession of status. Article 532 also provides that a father or mother may seek to claim or contest his or her own status (but may not claim or contest the filiation of the other parent) in respect of a child when filiation is not established by an act of birth and possession of status. Because AK had died and filiation was not established by an act of birth and possession of status, only the child could initiate a claim of filiation with AK.

While the applicants had argued that the CCQ provided no means for the child to establish paternal filiation, even in the presence of his positive DNA test, the court pointed to article 533 CCQ. This article provides that a child may seek to prove filiation by any mode of proof, even in the absence of filiation assigned by an act of birth, uninterrupted possession of status, presumption of paternity, or voluntary acknowledgment.

Although the applicants argued that in death, AK could not exercise his parental authority over the child, and therefore filiation could not be established, the court disagreed. It stated that filiation is established by law and does not spring from a parent's willingness or capacity to accept his or her parental obligations and to care for the child.

The applicants did not dispute the evidence that AK had participated in the fertility treatments willingly and that the DNA test results were conclusive that AK was the biological father of the child. In light of the application of the facts to the relevant provisions of the CCQ, the court rejected the applicants' motion to revoke the judgment in recognition of paternal filiation.

NEWFOUNDLAND COURT SAYS YES TO KITCHEN CODICIL

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In *King Estate v. Hiscock*, 2015 NLTD(G) 173, the Supreme Court of Newfoundland and Labrador Trial Division recently considered the validity of a codicil handwritten by Cynthia King. The defendants argued that the codicil did not conform with the requirements of the *Wills Act* and was not intended to have a dispositive effect. Letters probate had already been granted with respect to the will and the codicil.

Ms. King died on June 21, 2012. She had prepared a valid holograph will, dated November 27, 2002, which divided her estate among the defendants, including her brother.

After Ms. King's death, her sister-in-law discovered a handwritten codicil, entitled "Cynthia's will," on a ledge in the kitchen of Ms. King's apartment. In contrast to the holograph will, it left the entire estate to Ms. King's brother. The document mentioned one witness (whose name was misspelled), and it was not signed at the bottom, although Ms. King's name appeared throughout the document, notably in the phrase "Cynthia J. King says 'Yes' to what I have written here." No reference was made to the original will.

The court considered whether the handwritten codicil was a valid testamentary document. The parties disagreed about two matters: (1) whether the purported codicil was intended to have disposing effect (noting that it was found in an unsecure place and did not refer to the original will, and (2) whether it met the requirements of the *Wills Act*, given that there was no signature at the end of the document and the named witness did not sign it.

First, the court discussed the requirement that a holograph will be "testamentary in its nature and character." It was necessary to determine whether the codicil contained "a deliberate or fixed and final expression of intention" regarding the disposition of Ms. King's property on death.

Further, the court stated that a holograph will requires a signature to authenticate its contents and confirm the testator's intention to be bound. However, and importantly in this case, the court noted that the signature need not appear at the end of the document for a holograph instrument to be valid.

However, the court also remarked that even if the codicil were properly executed, its probate should be revoked if it was only "deliberative or initiatory."

Applying these principles to the case at hand, the court found that the location of the codicil had no bearing on whether it was intended to have a disposing effect. Although the codicil was not placed in a secure location, the original will itself had been stored in a plastic grocery bag. Further, the court found it irrelevant that Ms. King did not actually obtain the witness's signature since it is not required for a holograph codicil.

The contents of the codicil led the court to conclude that the codicil was intended to have a disposing effect. It clearly contained dispositive words, such as "I say for my Estate to do the following" and "the balance is to be left."

The court also considered the codicil's failure to mention or revoke the original will. It held that if a codicil is only partially inconsistent with the original will, then both documents should be probated together, with the codicil revoking only the inconsistent portions of the original will.

Having determined that Ms. King intended the codicil to have a disposing effect, the court then considered whether the codicil was validly signed. Under the *Wills Act*, a valid will must be in the handwriting of and signed by the testator. There was no dispute that Ms. King wrote the codicil. However, it contained no standalone signature.

The court found that the signing requirement was satisfied because Ms. King wrote her name, in the same cursive form as her signature, at least five times throughout the codicil. Therefore, she made several attempts to authenticate and confirm the codicil. Moreover, the middle sentence "Cynthia J. King says 'Yes' to what I have written here" was a resounding confirmation and authentication of the codicil. The court found that a matter of form should not stand in the way if the essential elements of execution have been fulfilled, and that it would be unjust to defeat the clear intentions of Ms. King simply because none of her signatures stood alone or because it was impossible to know which signature was ascribed last on the codicil.

In summary, whether a codicil contains dispositive words is an issue of interpretation. The facts and context of each case are paramount. A codicil is not invalidated because it fails to refer to the original will; instead, it revokes only the inconsistent parts of the original will. In addition, in exceptional cases a signature may appear in the text of a holograph will instead of at the bottom of the document. ■

> The contents of the codicil led the court to conclude that the codicil was intended to have a disposing effect. It clearly contained dispositive words, such as "I say for my Estate to do the following" and "the balance is to be left."

CHAIR'S MESSAGE

TIMOTHY GRIEVE

It seems like only yesterday that we were celebrating our 15th anniversary at the Royal Ontario Museum. But wait – we did that in 2013! It's even harder to believe that in just two years we will be planning for our 20th anniversary.

The latest board meeting in London was extremely productive, and many projects and ideas have been put into motion. My thanks go to every board member, every national committee chair, every committee member, and every staff person at STEP for your continuing dedication. Our productivity and many accomplishments are the direct result of your talent and ingenuity.

The STEP Worldwide Council's leaders forum in December presented many opportunities to meet STEP leaders from around the globe, and I believe that Canada's participation was beneficial for our organization as a whole. We also benefitted from the insight of our international colleagues, which will help us to enhance some of our processes and policies at home. We accomplished what we set out to do: build our global relationships and learn from each other.

On January 1, 2016, Bill C-43 came into force, and we all know that this means changes to the rules regarding the taxation of estates and trusts. The Department of Finance invited interested parties to comment on draft legislation to modify the income tax treatment of certain trusts and their beneficiaries. STEP Canada sent a letter to the department on February 12. This letter, which was supported by the Joint Committee on Taxation and the Conference for Advanced Life Underwriting (CALU), recommended that the proposals be amended to provide for a carryback of the charitable tax credit to any prior year of an estate or graduated rate estate. Thanks go to Pamela Cross and the members of the tax technical committee for staying on top of this issue for the past 23 months, working collaboratively with CALU and the joint committee, and communicating so effectively with the Department of Finance.

Pam and her committee are also taking part in the T3 evaluation process for the Canada Revenue Agency's (CRA's) Management Audit and Evaluation Committee. One of CRA's main objectives is to assess the awareness, understanding, and confidence of STEP practitioners in complying with the T3 trust rules and regulations.

A complimentary 75-minute interactive webcast on the federal budget was broadcast by our distinguished panel to all interested members on Thursday, March 31. Thanks go to Pam Cross, Maureen Berry, Ian Lebane, and David Stevens for agreeing to tackle this project, which proved to be enormously valuable for our members. Thanks also go to Stonegate Private Counsel for offering a complimentary broadcast venue.

Our board, national committees, and staff have stayed focused on the initiatives that I announced in September: expanding our educational programs, increasing our brand awareness, and examining the national secretariat. I'm pleased to provide an update on the progress that we've made in each of these areas since my January report.

Expanding our educational programs. The results of our educational survey clearly support the development of one-day courses. The four topics that are most in demand are (1) taxation at death and post mortem estate planning, (2) the taxation of estates and trusts, (3) cross-border issues in Canada-US tax and estate planning, and (4) succession that involves family businesses. In the fall of 2016, watch for our first one-day course, which is entitled "Canada-US Tax and Estate Planning: Cross-Border Issues."

Increasing our brand awareness. We have budgeted funds for a board announcement to be published in the Globe and Mail in June after our new directors have been elected (the announcement will be similar to the one published in September). Our progress in obtaining endorsements and forging partnerships with organizations such as Advocis, the Institute of Advanced Financial Planners, the Canadian Tax Foundation, and the Financial Planning Standards Council will allow our branding to reach a huge audience of Canadian practitioners.

Examining the national secretariat. We are examining the possibility of drafting a discussion document that incorporates the activities of the two technical committees and defines our policy on submission criteria for proactive and reactive issues, lobbying requirements, the need for an academic representative, and advocacy. The chairs of the regional branches and chapters are meeting more regularly in an effort to exchange their valuable ideas and information.

In May, Michael Segal, the chair of STEP Ottawa, and Pierre Kirouac, the chair of STEP Montreal, are concluding their executive terms. My sincere thanks go to both Michael and Pierre for their leadership and contributions to their branches and to the STEP Canada National Board of Directors for the past two years. Hélène Marquis's term is also winding down. Hélène has served on the national board for the past four years, the first two years as chair of STEP Montreal, and the last two as director at large. Heartfelt thanks go to Hélène for her energy and dedication.

The final program for our marquee event on June 9-10, 2016 was released on March 16. Thanks to this year's program committee, co-chaired by Brian Cohen and Christine Van Cauwenberghe, for developing such a unique array of invaluable, practical, and timely technical material for practitioners in our industry.

Three members of the STEP Canada Executive Committee and two senior staff are planning to attend the STEP Global Congress 2016 in Amsterdam on June 30 to July 1. I also note that two of our three Canadian STEP Worldwide council members have been asked to speak at the event. Kathleen Cunningham is on a panel entitled "Vulnerable Adults," and Nancy Golding is on a panel entitled "Patchwork Families: Defining the Modern Family." Congratulations, Nancy and Kathleen. I know you'll do an excellent job.

In closing, I'm happy to report the successful relocation of the STEP Canada National Office to an uptown Toronto space, where we have room to grow and serve our members better. If you find yourselves near Yonge and Sheppard, drop in. The staff would welcome your visit. Thanks to Michael Dodick, our chief operating officer, for coordinating the move and making it as painless as possible for the staff: Janis Armstrong, Allison Breininger, Michelle Wilkinson, Megan Smith, Jessica Pang-Parks, Dragan Loncar, and Anna Tcymbal.

On behalf of the STEP Canada Executive Committee (Deputy Chairs Ruth March and Pamela Cross, Treasurer Chris Ireland, Secretary Rachel Blumenfeld, and myself), I thank each of you for your contributions, and I look forward to seeing many of you in June. ■