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STEP Inside

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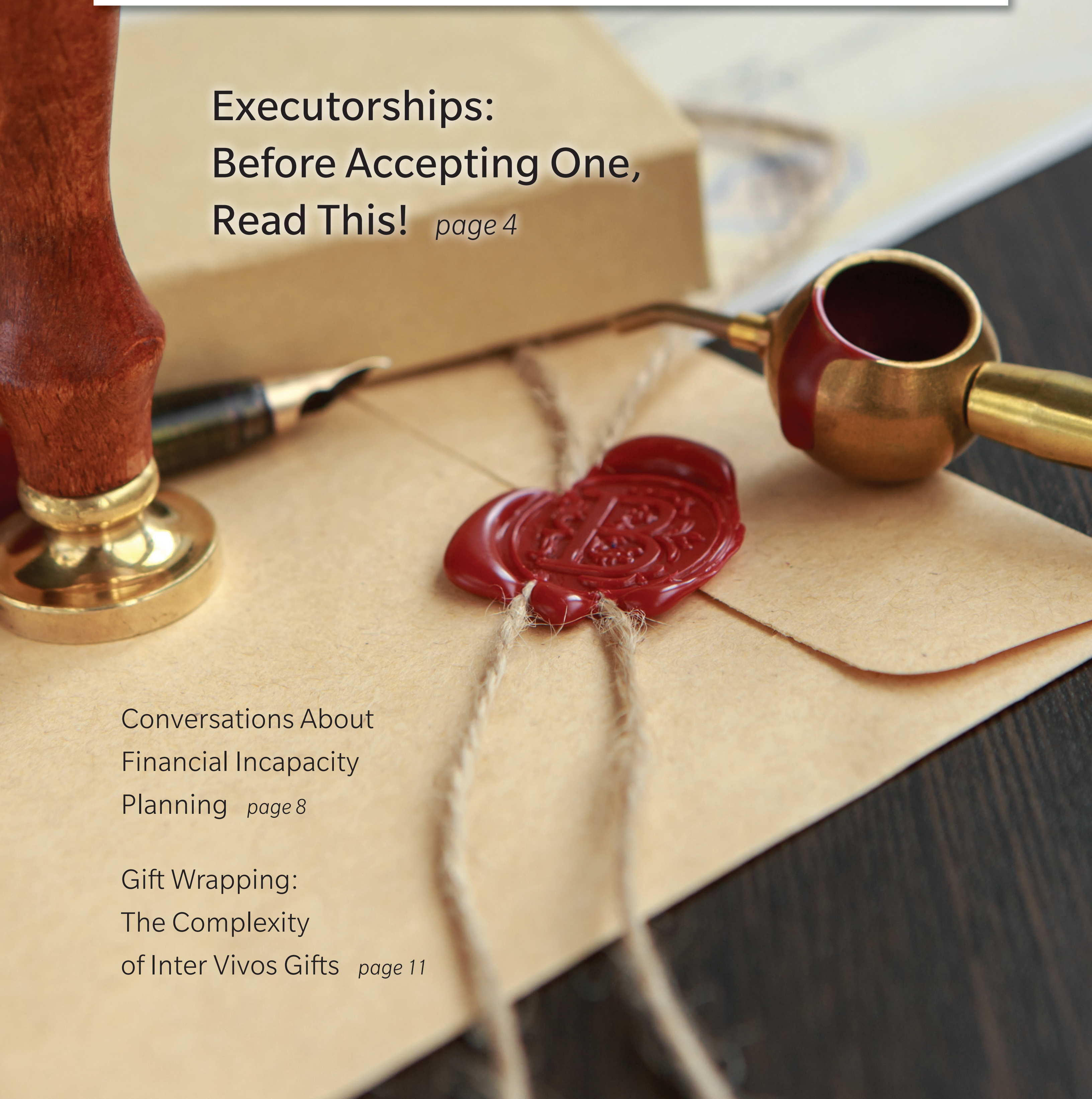

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![STEP Inside]

STEP Inside is published three times a year by the Society of Trust and Estate Practitioners (Canada), an organization of individuals from the legal, accounting, corporate trust and related professions who are involved, at a specialist level, with the planning, creation, management of and accounting for trusts and estates, executorship administration and related taxes. STEP Canada has branches in the Atlantic region, Montreal, Ottawa, Toronto, Winnipeg, Edmonton, Calgary, and Vancouver; and three chapters in London and Southwestern Ontario, the Okanagan Valley, and Saskatchewan.

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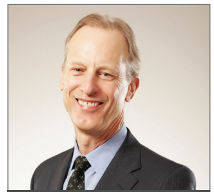

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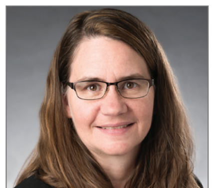

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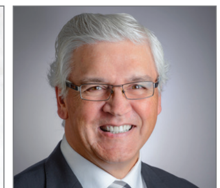

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2021 National Conference

What a record-breaking year! In June, STEP Canada's 23rd Annual National Conference was virtually attended by 940 delegates. Although we all missed seeing each other in person, it was wonderful to connect online with our fellow delegates throughout the country in such a beautifully choreographed event.

The organizers put together 13 outstanding sessions which addressed issues that are vital to Canadian trust and estate practitioners. To accommodate the virtual setting, the usual format of the conference was changed, allowing delegates to attend all of the excellent presentations given by our expert speakers and moderators. Thank you to all presenters and moderators for your hard work and dedication in providing delegates with such interesting and informative sessions. Each of us has learned something new and useful as a result of attending the conference this year.

Warm congratulations to the 2021 National Conference Program Committee, including its chair, Corina Weigl, TEP, and her co-chairs, Paul Taylor, TEP, and Brian Cohen, TEP. A very big thank you to Janis Armstrong and other members of the STEP Canada staff. Together with the committee, the staff worked tirelessly in organizing and creating a unique conference experience during these challenging times (they even mailed STEP swag to our homes).

As usual, the quality of the conference was greatly enhanced by the generosity of our 36 sponsors. Without their loyal support, it could not have been so successful. A big thank you to all of our sponsors, including our platinum sponsor, RBC Wealth Management–Royal Trust.

During the virtual social hour and in the chat rooms, delegates were able to network, allowing them to reconnect with their peers across Canada, in the United States, and overseas. As usual, the ever-popular STEP Canada-Canada Revenue Agency round table did not disappoint, even though it was a "question of fact."

In keeping with tradition, awards were presented for the best 2020 presentation and written article. A round of applause is well deserved by Chris Ireland, TEP, the new chair of STEP Canada, who received the 2021 Michael Cadeskey Volunteer of the Year Award for his magnanimous contributions to STEP Canada.

Thank you to all of the 2020 branch and chapter Volunteer of the Year Award recipients for their extraordinary contributions, and congratulations to the recipients of the 2020 academic awards, including Kathryn Balter, TEP, who won the 2020 Gerald W. Owen Book Prize for obtaining the highest combined mark in the STEP Canada Diploma Program. A warm welcome to all of our new TEP members!

Heartfelt congratulations to Rachel Blumenfeld, TEP, and Richard Niedermayer, TEP, who received the 2020 STEP Founder's Award for their exceptional and outstanding long-term contributions to our organization.

A full list of award winners can be found at https://step.ca/awards.php.

The engaging sessions presented at the conference are highlighted in the articles included in this issue of *STEP Inside*. The article entitled "Executorships: Before Accepting One, Read This!" is based on the session presented by Mark Biderman, TEP; Janet Michelin, TEP; and John Poyser, TEP. The session was moderated by Corina Weigl, TEP, and reminded us of the many and various responsibilities and risks involved in the thankless job of being an executor.

The article entitled "Conversations About Financial Incapacity Planning" is based on a session presented by Tanya Butler, TEP; Carol Lynde, TEP; and Laura West, TEP. Marilyn Piccini Roy moderated the discussion, which focused on various capacity issues that arise when dealing with parents and clients.

Finally, the article entitled "Gift Wrapping: The Complexity of Inter Vivos Gifts" is based on a session presented by Amanda Doucette, TEP, and Richard Niedermayer, TEP, and moderated by Rhonda Johnson, TEP. The topic is one that clients are always eager to discuss as a part of their estate-planning process.

In every edition of *STEP Inside*, eminent practitioners from across the country contribute to "In the Headlines," a section that provides readers with the opportunity to catch up on the most significant developments over the past few months.

Until next year's STEP Canada 24th Annual National Conference, which will provide options for both in-person and virtual participation, stay connected with STEP Canada by reading STEP Inside and by keeping in touch with your local STEP branch or chapter.

Executorships: Before Accepting One, Read This!

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STEP members strive to provide valuable service and advice to their clients, and, from time to time, this goal can prompt an adviser to quickly accept a client's request to act as an executor or liquidator. Although it may be flattering when clients make such a request, it is prudent for advisers to consider their options in light of the difficulties that an executorship can present.

This article is divided into three parts. In part 1, John Poyser considers useful strategies at the outset of an executorship. In part 2, Janet Michelin addresses the legal obligations imposed on executors and liquidators. Finally, in part 3, Mark Biderman provides an overview of an executor's primary functions.

Part 1: Outset of an Executorship

The steps taken at the outset of an executorship shape its outcome. A brief discussion of useful initial strategies is provided below.

Obtaining Payment for Service

Unless an executor acts for a friend or family member, it is first necessary to determine how and when payment for services is to be provided. Check the remuneration clause in the will as soon as possible. Under such a clause, payment may be based on an hourly rate or a percentage of the value of transactions engaged in by an executor. In the absence of a remuneration clause, compensation is based on the relevant law, which varies from jurisdiction to jurisdiction.

Do not wait until the end of the administration to investigate the details of compensation. Executors who are not themselves estate lawyers need to consult a legal specialist. It is necessary to understand from the outset how the executor's fee will be calculated, who must approve it, and when payment will be made. If the will is silent on these issues, an estate lawyer will be able to explain how remuneration will be handled.

It is possible to choose not to serve as an executor if the fee arrangements prove to be unsatisfactory, but it is necessary to make this decision before beginning work on the estate and thereby "intermeddling" in it. Communicate the fee structure to the beneficiaries of the estate as soon as possible so that any objections can be expressed at the outset.

Get Appropriate Advice

It is generally necessary to assemble a team that includes a lawyer, an accountant, and possibly a financial adviser. An executor should be wary of taking on any of these roles herself. Legal fees are reduced in some jurisdictions when the same person serves as both lawyer and executor. Many financial services firms have rules prohibiting a dual role for a financial adviser.

Start keeping time records detailing all actions taken as an executor. Executors who are lawyers should be careful to record executorial work separately from legal work. An executor who is another type of professional and intends to be paid for her professional services should ensure that she can hire herself and be paid for both roles.

Communicate Often

Beneficiaries generally have the power to challenge an executor's actions and fees. While beneficiaries do not run the show, ignoring them is risky. Regular communications are welcomed by beneficiaries and may provide an antidote to a fight later. It is important to share information equally with all beneficiaries and to keep secrets from none of them. If the beneficiary pool is large, consider having a designated person who can periodically approve all actions.

Part 2: Know the Obligations of Liquidators and Executors and the Standard by Which They Are Judged

The *Civil Code of Québec* (CCQ) sets out the obligations of liquidators or executors of an estate. They include (1) acting with prudence and diligence, (2) acting honestly and faithfully in the best interest of the beneficiary, (3) acting impartially, (4) avoiding a conflict of interest, (5) not comingling estate property with their own, and (6) not using estate property for their own benefit or disposing of estate property gratuitously. These obligations are similar in the common-law provinces.

Who Pays the Legal Fees?

An issue that can arise is whether an executor or liquidator must pay legal fees personally, instead of having the estate pay them.

The leading decision in Quebec is *Bell v. Molson*, 2015 QCCA 583, which addresses the liability of trustees (the same rules apply to liquidators) and the legal fees incurred. At trial, the trustees were found to be at fault and required to pay $665,000 in damages. However, the trial judge held that their legal fees of $3.2 million could be paid from the trust assets. The Court of Appeal overturned the decision on the legal fees.

The CCQ provides that the expenses of estate administration are borne by the beneficiary or the trust patrimony. The Court of Appeal concluded that the following criteria apply when determining whether an estate should pay the legal fees:

1. Were the expenses incurred in the objective interest of the beneficiary or the estate as a whole?
2. Did the liquidators act in good faith? Even if the liquidators' position is not accepted by the court, the fees are covered by the estate if their position was reasonable.
3. Were the administrators sued personally or in their capacity as liquidators of the estate?
4. Did the executors commit a fault? If the estate is to pay legal fees, the executors must not have committed a fault, and ideally their actions should have benefited the administration.

This approach would be extended to other expenses incurred by liquidators or executors.

In common-law jurisdictions, the approach to legal fees and other expenses is similar.

Should Liquidators and Executors Make Interim Distributions?

Liquidators and executors have the right, but not the obligation, to make interim distributions. Can they be forced to do so? The answer depends on the circumstances. The actions of an executor must be reasonable and take into consideration the interests of all beneficiaries. Executors must also ensure that the estate can meet its liabilities, known and reasonably anticipated, but need not expose themselves to personal liability.

In *Gaetano c. Gaetano*, 2018 QCCS 79, the Quebec Superior Court considered whether an executor can be forced to make a distribution. Almost three years after his death, Mr. Gaetano's estate had not been settled, and the plaintiff requested an advance on her share.

The court confirmed that liquidators have no duty to provide an advance but cannot be unreasonable in their dealings with beneficiaries. In this case, the liquidator had asked for extremely detailed information about the beneficiary's financial and health needs. The court concluded that the liquidator's requests were unreasonable, and that the beneficiary had an apparent right to obtain the advance against her inheritance. Without it, she would have been unable to afford medication. The estate was manifestly solvent, and the court authorized the requested advance.

When Unsure, Consider Seeking Directions from the Court

When unsure about how to proceed, liquidators and executors can apply to a court for directions. In appropriate circumstances, such an application ensures that they cannot later be criticized for their actions. In *Estate of Tilden*, 2018 QCCS 2971, the corporate liquidator requested a judgment declaring that $665,000 cash in the possession of Mr. Tilden belonged to the estate.

In determining whether a valid inter vivos gift had been made to Mr. Tilden, the court was required to consider the timing of the deceased's death in relation to the timing of Mr. Tilden's taking possession of the cash. The court concluded that there was no gift and the cash belonged to the estate because by the time Mr. Tilden took possession, the deceased was already dead. Had the corporate liquidator not applied for a declaratory judgment, it could well have expected criticism from the beneficiaries.

Part 3: Primary Functions of an Executor

An executor has five broadly defined responsibilities:

1. arranging the funeral;
2. probating the will and locating the beneficiaries;
3. collecting and preserving the estate assets;
4. addressing liabilities and related compliance, including known debts and taxes and potential claims against the estate; and
5. distributing bequests to the beneficiaries and establishing testamentary trusts.

Arranging the Funeral

An executor's first responsibility when administering an estate is arranging for the deceased's funeral. Review the will and any letters stating the deceased's wishes to determine whether funeral arrangements have already been made and whether specific instructions were left by the deceased. Typically, the deceased's family will assist or take the lead in organizing the funeral; however, funeral arrangements remain the responsibility of the executor.

It may be necessary to pay the funeral expenses well before an executor gains access to the deceased's accounts. Executors are entitled to borrow money from a beneficiary of the estate (or from themselves) to pay for estate expenses. However, to preserve the estate's "testamentary trust" status for the purposes of the *Income Tax Act*, it is imperative that the borrowed amount be repaid within 12 months.

An executor may also need to navigate family disputes regarding the funeral, the disposition of the deceased's remains, and cross-border transportation.

Probating the Will and Identifying Beneficiaries

When determining whether to obtain letters probate (or, in Ontario, a certificate of appointment of estate trustee), seek legal advice. This is particularly important in those jurisdictions that impose significant probate tax. If the deceased had drafted multiple wills, an executor must determine which assets fall under which will. While this analysis will be a straightforward in most cases, some wills may be sufficiently unclear so as to necessitate legal advice.

A review of the will should disclose the identity of the beneficiaries, and locating them is not usually a difficult task. However, there is always the potential for complicating circumstances. For example, a beneficiary who is a child of unmarried parents may be difficult to locate. It may be incumbent on the executor to inform the rest of the family of the child's existence, which will involve a difficult discussion for the grieving family.

Additional complications arise when beneficiaries are minors or persons who lack legal capacity. Executors will need to contact the provincial Children's Lawyer (or Official Guardian) or Office of the Public Guardian and Trustee. Non-resident beneficiaries can pose unique problems, including locating and contacting the non-resident and distributing financial assets to a non-resident who lacks a local tax identification number.

Collecting and Preserving Assets

A significant amount of an executor's time and effort is spent in securing the assets of an estate. As in *Tilden*, court proceedings may be necessary.

The most significant estate asset is usually the deceased's house. An executor must take possession of the house and ensure that both it and its contents are secured. This may include changing the locks, confirming that the property insurance is up to date, cleaning out the house, and securing the deceased's personal effects. The best practice is for an executor to maintain a detailed inventory of the house's contents, including photographs. The foregoing applies to any personal use property, including a beach house, cottage, cabin, or chalet, wherever it is located.

When clearing out the house, watch for personal documents and items that will assist with other administrative tasks. Key personal items include old tax returns and T-slips, promissory notes, letters of wishes, passwords, investment statements, keys to automobiles, and keys to safety deposit boxes.

An executor's job may become more complicated when the estate assets include business interests. For example, if the deceased carried on a sole proprietorship, can an executor step into the shoes of the deceased and carry on the business? What sort of responsibilities are involved in running that business? Regardless of the legal structure of the business, an executor should ensure that adequate management is in place. Ideally, the deceased will have implemented a firm succession plan, thus relieving the executor of the responsibility of managing the day-to-day operations of the business. If there is no succession plan in place, an executor should seek to implement one as soon as possible. This may involve promoting someone from within the business, or retaining external or temporary management until the business is either sold or distributed to a beneficiary.

A review of personal papers located in the home and old tax returns should help an executor to find the deceased's accounts. It is imperative that an executor notify banks and other financial institutions about the death, which typically requires the production of a death certificate and a probated will. Digital assets, such as email and social media accounts, should be shut down. Access to these accounts should not be shared with family members or other parties, unless specifically permitted under the will.

Addressing Liabilities

An executor must determine the deceased's liabilities. Known liabilities typically include funeral debts, outstanding taxes, promissory notes, mortgages, amounts owed to caregivers, and employee loans. There may also be contingent liabilities, such as family law claims and dependant relief claims. An executor's failure to pay known liabilities and to address contingent liabilities could result in personal liability.

To avoid this risk, it is advisable to place advertisements to notify potential creditors in the jurisdictions in which the deceased lived or carried on a business. Obtain legal advice with respect to potential liabilities associated with family law or dependant relief claims early in the administration to determine what action is appropriate. Generally, executors can distribute assets to beneficiaries after the advertisements have been published, provided that provincial laws do not impose restrictions pending the expiration of limitation periods for family law and dependant relief claims.

> An executor may also need to navigate family disputes regarding the funeral, the disposition of the deceased's remains, and cross-border transportation.

Executors should seek advice to determine whether any terminal-year tax planning may be implemented. Additional tax factors that need to be considered include the graduated rate estate status, charitable donation strategies, loss-carryback and pipeline planning for corporate interests, and potential exposure arising from earlier tax planning. Getting appropriate advice is a prudent step.

Final Distributions

Some wills prescribe how personal assets (such as jewellery, clothing, art, and cars) are to be distributed among beneficiaries, either by means of specific bequests or by means of an asset division process. However, often a will is silent, relying on the discretion of the executor to act fairly. Under these circumstances, executors must define a process under which the beneficiaries have an equal opportunity to claim the personal assets, whether by lottery or otherwise. Expect to settle personal disputes at this stage.

Typically, a will provides for an equal distribution of the residue of an estate to certain beneficiaries. Although this may be a straightforward exercise, it sometimes requires deeper analysis and negotiation with and among the beneficiaries, particularly when the residue consists of both liquid and illiquid assets. Although each beneficiary will receive equal distributions by value, the division of illiquid assets may lead to tension and disputes that must be managed carefully.

Before making the final distributions, an executor should obtain a section 159(2) tax clearance certificate from the Canada Revenue Agency (and the equivalent from Revenue Québec for Québec resident estates) to ensure that all the estate's tax liabilities have been settled. Failure to obtain the certificate could result in an executor's personal liability for unpaid taxes and other amounts owing under the *Income Tax Act* (or the *Taxation Act of Québec*).

In addition, before making the final distributions, an executor should obtain a final release, either by obtaining a written release from the beneficiaries or by passing accounts before the court. In the case of a written release, consider whether the beneficiaries should obtain independent legal advice.

Conclusion

Although the core responsibilities of every executor or liquidator remain constant for every estate, the facts and circumstances of individual estates always differ. As a result, the key to success as an executor or liquidator is being agile in the face of each estate's unique and complicated circumstances, getting appropriate advice, cultivating equanimity, and perhaps developing a thick skin.

Conversations About Financial Incapacity Planning

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Discussions about substitute decision making and financial incapacity planning can sometimes be difficult, particularly if they occur after medical issues have also become pressing challenges. Conversations about financial incapacity planning that take place long before they are necessary can not only make the outcome of these discussions more fruitful but can also help to prevent problems from arising in the future.

At least five key matters need to be addressed when speaking to parents and clients about financial incapacity planning:

1. the documentation that allows substitute decision makers to manage the property and financial affairs of the incapacitated individual,
2. the choice of substitute decision makers,
3. the time when substitute decision makers will begin to act,
4. the scope of substitute decision makers' powers, and
5. other aspects of the individual's financial affairs that will be affected by incapacity.

Documentation

Is effective documentation in place to allow substitute decision makers to manage an individual's property and financial affairs in the event of his or her incapacity?

The most common and important document for financial incapacity planning is an enduring or continuing power of attorney (or its equivalent). Such a document allows an individual to appoint one or more attorneys to manage his or her property and financial affairs during a period of incapacity. Individuals with property in more than one jurisdiction should consider the advisability of putting in place multiple enduring or continuing powers of attorney (one for each jurisdiction) to ensure that the attorneys' authority will be recognized in every jurisdiction and to allow for the effective management of all of the individual's property in the event of incapacity. If multiple powers of attorney are adopted, care should be taken to ensure that the terms of each document work effectively together, do not inadvertently revoke each other, and are permitted in each of the jurisdictions.

Alter ego and joint partner trusts, established in accordance with the provisions of the *Income Tax Act*, also allow substitute decision makers (the trustees) to manage an individual's property that is transferred to the trust in the event of his or her incapacity. These types of trusts can have a number of positive planning outcomes in addition to incapacity planning, including (1) reducing (or in some cases eliminating) the probate fees payable by an individual's estate; (2) allowing for greater confidentiality and privacy on and after death by avoiding the public disclosure of information that is often required by the probate process; (3) allowing for greater ease and speed in administering assets after death; and (4) potentially avoiding certain claims being made against an individual's estate (for example, will variation claims made by adult independent children pursuant to British Columbia's *Wills, Estates and Succession Act*).

Alter ego and joint partner trusts can be effective incapacity-planning tools as a result of the flexibility available to the individual in crafting the terms of his or her trust. For example, an individual who is 65 years of age or older who transfers most of his or her property to an alter ego trust and who remains the only person entitled to benefit from the trust during his or her lifetime under the terms of the trust has a number of choices regarding the ongoing management of the trust property. He or she can be

- the sole trustee, with the trust terms providing for alternate trustee(s) when the individual is no longer able to act (Article 1275 of the *Civil Code of Quebec* requires at least one trustee that is not a beneficiary);
- the sole trustee with the power to appoint additional trustees if and when the individual needs more assistance in managing the trust property; or
- one of two or more trustees from the outset.

The alter ego or joint partner trust is therefore a tool that allows the individual to manage his or her property with others during his or her lifetime. This can provide a number of benefits, including (1) allowing the other trustees to become familiar with the property before the individual becomes incapable, thereby providing for continuity in management when incapacity occurs; (2) providing checks and balances when property management decisions are made, which may protect the individual from exploitation by unscrupulous third parties in the future; and (3) allowing the individual to continue to participate in decisions about his or her property for as long as possible. The individual can also maintain a degree of autonomy with respect to his or her property, notwithstanding the involvement of other trustees. For example, the trust agreement can provide the individual with certain personal powers that can be exercised without the involvement of the other trustees, such as the power to direct that certain assets be distributed to him or her, the power to appoint and remove trustees, and the power to appoint the trust property among a class of specified person(s) on his or her death.

Incapacity-planning strategies that involve an individual placing property into joint names with other persons might also provide some of the benefits referred to above. However, a transfer of ownership of assets from one individual to another outside a formal trust can sometimes create unintended issues, such as the questions (and corresponding consequences) that can arise with respect to the true ownership of jointly owned assets during the individual's lifetime and on his or her death.

Choice of Substitute Decision Makers

Have the substitute decision makers been chosen carefully, and are they willing to act?

An important part of the incapacity-planning process involves choosing the persons who will act as primary and alternate substitute decision makers and ensuring that they are able and willing to act. These choices warrant thoughtful discussion.

Many factors, including a proposed substitute decision maker's experience and relevant attributes, his or her relationship to the individual and other family members, his or her potential to be placed in a conflict of interest as a result of the decision-making role, and his or her citizenship and residence should be reviewed. An assessment should be undertaken to consider how these factors may affect the proposed substitute decision maker in carrying out his or her duties.

Timing

When will the substitute decision maker begin to act for (or with) an individual in managing his or her personally owned property or the property held in an alter ego or joint partner trust? This is often a delicate question.

Sometimes an individual will feel strongly that no one should act in these roles unless a medical doctor has declared that he or she is incapable of managing his or her property or financial affairs or until one or more trusted individuals have reached that determination after obtaining and reviewing such a medical declaration. Other times, individuals welcome the possibility of having other persons acting with them as trustees or acting for them under powers of attorney when they need assistance, even in the absence of incapacity.

In the case of a power of attorney, an individual will have to decide whether it should be immediately effective (allowing the attorneys to act before incapacity is determined) or whether it should come into effect only after a determination of incapacity and, if so, how such a determination should be made. In the case of an alter ego and joint partner trust, the individual will also have to decide how a determination of incapacity is to be made. It is

important that the trust instrument (or power of attorney) specifies the processes and procedures for doing so. For example, if a trust document simply says that an individual ceases to be a trustee or ceases to have a power when he or she is incapable, a number of questions will arise—for example, what does the individual have to be incapable of doing, and who determines when the individual is incapable?

Scope of Substitute Decision-Making Powers

What powers are to be given to substitute decision makers?

The governing law and the wishes and personal circumstances of the individual will dictate whether certain powers may or may not be granted to attorneys acting under a power of attorney.

For example, for tax planning and other purposes, some individuals might wish to provide attorneys with the power to make gifts to family members or registered charities; to settle trusts; or to enter into corporate reorganizations, including estate freezes under which the growth in private company shares is ultimately enjoyed by persons other than the individual. Other individuals may wish to ensure that their attorneys are restricted from exercising these or other powers.

Similar considerations affect the powers granted to trustees under alter ego and joint partner trusts. However, some constraints on the powers granted to the trustees are necessary to satisfy the requirements of the *Income Tax Act*.

Other Financial Planning Affected by Incapacity

Are there other aspects of an individual's financial planning that will be affected by his or her incapacity, and can planning be implemented to address them?

For example, an individual may have personal rights that may be exercised only while he or she is mentally capable, such as personal powers of appointment granted under testamentary or inter vivos trusts or personal rights granted under unanimous shareholders' agreements. If these powers cease on incapacity, the individual may wish to exercise them in advance (if possible) to ensure that his or her ultimate wishes or intentions are carried out. If it is not possible to exercise these powers in advance, the individual should consider, as part of his or her estate plan, what will happen to these powers in the event of incapacity. Do they cease to exist? Do other decision makers become entitled to exercise them?

Furthermore, the individual may hold offices, such as trustee of a discretionary family trust or director of a private corporation, that will cease on his or her incapacity. Who will succeed the individual in these offices, how will they be appointed, and by whom? These are all questions that must be carefully considered because attorneys appointed under a continuing or enduring power of attorney do not have an automatic right to assume these personal offices on an incapacitated individual's behalf.

It is important that there be consistency in how an individual's incapacity is to be determined in each of these contexts. A careful process might be set out in the individual's power of attorney or alter ego trust agreement. For example, it could require that this determination be made by trusted individuals after obtaining and reviewing a written medical opinion. However, if there is a unanimous shareholders' agreement or discretionary trust instrument that provides that the individual is to be considered incapable only by means of a court order, then this careful planning may be frustrated.

> The most common and important document for financial incapacity planning is an enduring or continuing power of attorney (or its equivalent). Such a document allows an individual to appoint one or more attorneys to manage his or her property and financial affairs during a period of incapacity.

Conclusion

Conversations about financial incapacity planning cannot consist solely of choosing substitute decision makers. Instead, they must involve a consideration of the entirety of an individual's personal circumstances to ensure that a coordinated and efficient administration can take place on his or her behalf in the event of incapacity.

Gift Wrapping: The Complexity of Inter Vivos Gifts

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More than ever, clients are asking Canadian practitioners about effective ways to make gifts during their lifetimes to loved ones. This trend is being fuelled by soaring real estate prices in most jurisdictions, which both augments wealth for owners and creates challenges for would-be buyers; increasing life expectancy coupled with the fear of future incapacity, which promotes the desire to enjoy the benefits of giving now; growing concerns over rising taxes and the protection of wealth from unsavoury people; the changing face of Canadian families and family structures; increasing mobility; and the continued desire of donors to control or influence the use and enjoyment of their gifts.

When advising clients on inter vivos giving, several questions are fundamental:

1. What is the nature of the gift? Will conditions be attached to it? Will it be treated as a gift or will the presumption of resulting trust apply?
2. What are the tax implications of the gift for the donor and the recipient, both income tax and land transfer tax?
3. How is family equalization to be accomplished? The inclusion of a hotchpot in a will is a possibility, but fair is not always equal.
4. What are the probate implications for the donor and recipient of the gift?
5. Can loans become gifts and vice versa?
6. Who is the client: the donor or the recipient?
7. Has there been adequate communication about the terms of the gift with both the recipient and other children or related parties to avoid future disputes?
8. Have the attribution rules in the *Income Tax Act* (ITA) been considered when gifts are made to minors?
9. If the donor or the recipient is a US person, have the US tax implications (such as gift tax for the donor and future estate tax for the recipient) been studied?
10. Has special care been exercised in the case of gifts to disabled, addicted, or spendthrift recipients?

Case Study 1: Family Cabin

Mom and Dad are finding it difficult to maintain the family cabin. They anticipate that they will soon be moving into a retirement home and do not intend to visit the cabin often. They have two children. Child 1 lives in another province and hardly ever uses the cabin. Child 2 lives 20 minutes away from the cabin and takes his family there every weekend in the summer.

Initial considerations include the following:

1. If Mom and Dad want to provide for both Child 1 and Child 2, how does the cabin property fit into the overall estate plan?
2. What if Mom and Dad do not want the cabin sold and prefer it to be available for future generations?
3. Considering the various tax implications, what tax-planning tool is most useful in the circumstances?

A number of planning tools could assist Mom and Dad, including the following:

1. *Co-ownership agreements*. If a gift of the cabin will result in a number of owners, it is prudent to consider setting out the ownership rules in writing. For example, a co-ownership agreement can clarify how expenses are paid; how the property is to be used; how disputes among owners are to be resolved; whether the property can be sold, gifted, assigned, or mortgaged; and what consequences (if any) arise as a result of death, bankruptcy, or divorce. Consider whether each new owner should receive independent legal advice with respect to the agreement.
2. *Deeds of gift*. If Mom and Dad intend to make a gift of both beneficial and legal ownership of the property, consider preparing a formal deed-of-gift document that clarifies the intention of the gift and includes an acknowledgment of acceptance. In addition, it may be helpful to clarify whether the gift constitutes an advance on inheritance, and to state who bears the cost of the transfer. Depending on the nature of the property, the gift may result in tax consequences for the parents.
3. *Agency or bare trust*. If the intent is to transfer only registered title (and to refrain from transferring beneficial ownership until death), consider preparing an agency or bare trust agreement as part of the transfer documents. This agreement should be combined with clear provisions in the will that confirm the gift.
4. *Pre-nuptial or post-nuptial agreements*. It is important to be aware of the legislation in each province regarding the division of gifts, loans, and inheritances on the separation of spouses. It may be prudent to consider a limited form of agreement between spouses that specifically exempts inheritances and gifts from division.
5. *Trust planning or corporate ownership*. Before transferring the cabin property into a trust or a corporation, consider where the funds will come from to maintain the property and pay the expenses. In the corporate context, perhaps a shareholders' agreement should be completed to record the intentions of the parties. In the trust context, consider the new beneficial reporting and transparency disclosure rules and whether there is an intention to wind up the trust before the 21-year deemed disposition date.

Case Study 2: Down Payment

In a situation that is becoming increasingly common in Canada, Child 1 lives in an expensive city and wants to buy a home, while Child 2 is attending university and is not considering home ownership. Mom and Dad have cash on hand and are deciding whether to contribute to Child 1's down payment.

Initial considerations include the following:

1. Will Mom and Dad want to make inter vivos or testamentary equalization gifts to Child 2?
2. How can Mom and Dad protect their financial interest in the home if they assist with the down payment, if one of the recipients is unrelated to them?
3. Would taking security make Mom or Dad's estate subject to probate in the province in which security is taken?
4. What is Mom and Dad's budget, and what is their preferred outcome? Transferring cash requires much less paperwork than transferring title in the home, taking security, or using some of the other tools discussed here.
5. Considering the various tax implications for Mom, Dad, and their children, what tool makes the most tax sense in the circumstances?

Various tools exist to implement Mom and Dad's plan, including the following:

1. *Trust*. A cash distribution from an existing family trust could fund the contribution, but consider whether the children are income or capital beneficiaries of the trust or whether the funds have to pass through Mom and Dad's hands first; whether the tax on split income rules apply; and whether a distribution can be made tax-free pursuant to the ITA if Mom and Dad want to put conditions on the distribution.
2. *Gift*. Gifts should be made in writing to confirm Mom and Dad's intent, typically in the form of a deed of gift. Do Mom and Dad want the down payment to be an advance on Child 1's inheritance? A gift is generally exempt from division in the event of a split between a child and his spouse, except to the extent that it is used for the benefit of both spouses or their children.
3. *Loan*. If a loan is contemplated, will the funds actually be repaid? Consider the applicable provincial limitations periods in respect of future enforceability. A hotchpot clause in a will that takes a loan into account against a child's share, even if the loan is not enforceable as a debt, might assist.
4. *Security*. Will Mom and Dad hold formal security in the property? If

so, does this security make their estates subject to probate in the child's province of residence? Consider what would happen on a later sale or refinancing and what would happen to the debt in the event of divorce.

5. *Pre-nuptial or post-nuptial agreements*. Consider provincial legislation governing matrimonial and marital property and the division of gifts received solely by one spouse. A marital agreement might give Mom and Dad some comfort with respect to their recipient children and the use of the gifts. A child's spouse may be willing to sign an agreement releasing claims to the gifted funds.
6. *Title*. Adding Mom and Dad on title would secure their interest in the real property, but it is important to clarify what exact property interest is owned by the parents as there can be differing interests held as tenants in common. A co-ownership agreement executed by Mom, Dad, Child 1, and their spouse in conjunction with limited powers of attorney might assist. Having non-occupying parents on title may affect access to the principal residence exemption. Finally, consider all registration and ongoing disclosure requirements, such as the Land Owner Transparency Registry in British Columbia.

Case Study 3: Family Business

Mom and Dad built their business from nothing into a thriving enterprise. They have three children. Child 1 has no interest in the business. Child 2 has been working in the business for many years and has worked her way up the ladder. Child 3 has only recently started working in the business and wants to step into a management role. In addition, there is a long-term employee of the business who has been loyal and has ownership potential. Mom and Dad want to be fair about how they treat their children and want to honour any promises made to their long-term employee.

Initial considerations include the following:

1. How does the value of the family business fit into Mom and Dad's overall asset base?
2. Are Mom and Dad ready to relinquish the business completely, or do they want to be involved in it for a period of time?
3. Will any restrictions or conditions be placed on Child 2 or Child 3 in exchange for receiving an interest in the business?
4. Are Mom and Dad reliant on income from the business enterprise for their retirement?

A number of tools can be used to assist Mom and Dad, including the following:

1. *Shareholders' agreements*. If the business is to have multiple owners, it is prudent to consider setting out the rules of ownership in writing to avoid disputes (or at least to provide a mechanism for resolving disputes).
2. *Deeds of gift*. Consideration should be given to the tax consequence of a gift. The ITA deems the proceeds of a gift to a non-arm's-length recipient to be completed at fair market value.
3. *Pre-nuptial or post-nuptial agreements*. Consider the relevant provincial legislation regarding the division of inheritances and gifts on the separation of spouses. It may be advisable to execute a limited form of agreement that specifically contemplates the gift of shares. Examine the interaction between the shareholders' agreement and any interspousal agreement.
4. *Partial sale or partial gift*. Intention must be clearly documented: what portion is gift, and what portion is subject to purchase? Does security need to be taken on amounts left owing, and what happens to the unpaid amount at death? In the case of gifts and other non-arm's-length transactions, the ITA may stipulate that the tax cost is something other than the price of acquisition, which could give rise to an unexpected capital gain.
5. *Reorganization*. Depending on the nature of the business assets, it might be possible to reorganize the business structure (and/or use life insurance), placing non-active assets in a separate holding company that could be gifted to Child 1, who had no interest in the business. Alternatively, consider the types of shares that are available for gifting (voting versus non-voting, preferred versus common). Alternatively, a purchase or transfer may occur over time on the basis of defined and mutually agreeable performance milestones of a business.

Conclusion

These case studies illustrate the complexity of gift giving. It is critical to discuss options in advance, and to ensure that all parties understand both the tax and non-tax consequences of a gift. Open communication and clear documentation of intent will provide peace of mind for the family.

IN THE HEADLINES

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WHAT HAPPENS WHEN AN ANNUITANT DIES BEFORE AN ANNUITY IS PURCHASED?

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Strafford Estate (Re), 2021 ABQB 417, deals with the interesting question of a potential annuitant dying before a personal representative purchases an annuity as directed in a will. In the case of most testamentary gifts, in the absence of special wording, if a beneficiary dies after the deceased but before receiving his or her gift, the gift vests and the beneficiary's estate is entitled to receive it. Is the situation different in the case of annuities?

In *Strafford Estate*, under Dr. Strafford's will all property was given to his trustee to liquidate his assets, pay his debts, and distribute specific gifts and the residue. A portion of the residue was to be split into four equal shares for his children. The will further directed that the share "to be transferred to" his daughter Ms. Strafford-Bliss "be used to purchase an annuity giving her a monthly income of at least $3,500, said amount to be indexed to and increase with the rate of inflation as reported by the Bank of Canada."

Ms. Strafford-Bliss died after her father but before the annuity was purchased. Her estate argued that because she survived for the requisite period of time, the gift vested in her before her death, and the amount that would have been used to purchase the annuity formed part of her estate. The estate of Dr. Strafford argued that the intention of the gift was to provide Ms. Strafford-Bliss with an income during her lifetime and that the gift failed because her death prevented the trustee from carrying out the deceased's wishes. On this basis, the estate of Ms. Strafford-Bliss was not entitled to anything from the estate of Dr. Strafford.

The court reviewed the general interpretation rules:

1. the court must read the entire will,
2. the court should assume that the testator intended the ordinary meaning of words, and
3. the court may use extrinsic evidence to assist in the interpretation.

The court heard from a number of witnesses, including the lawyer who prepared the will, an expert in annuities, and the deceased's sister. It found that Dr. Strafford's concerns regarding Ms. Strafford-Bliss's inability to manage money and the probability that she would dissipate her inheritance "informed his testamentary objective." Evidence was led that Ms. Strafford-Bliss had an addiction to pain medication, which led to her mismanagement of money and her inability to maintain employment or involve herself in volunteer activities on an ongoing basis, all of which was well known to Dr. Strafford.

The court found that it was the intention of Dr. Strafford to treat Ms.

Strafford-Bliss differently from his other children and to limit her access to her share of his estate, providing a minimum monthly income to her for life. He did not intend that Ms. Strafford-Bliss have any control over a lump sum of money. The court found that it was not clear from the evidence what Dr. Strafford intended in the event that Ms. Strafford-Bliss predeceased him. However, because Ms. Strafford-Bliss was not in a relationship and had no children at the time the will was written and because she was struggling to manage her own affairs, Dr. Strafford believed that her estate would pass on intestacy to her siblings. If Ms. Strafford-Bliss pre-deceased him, the court inferred that Dr. Strafford was content that a share of the reside of his estate would pass to her estate even if she had no will.

On the basis of extrinsic evidence of Dr. Strafford's education and background, as well as other general evidence, the court determined that Dr. Strafford, without specific wording in the will, intended "to allocate a one-eight share of the residue to the purchase of a non-commutable, non-assignable annuity for Ms. Strafford-Bliss that would limit what she received to a minimum monthly income for her life."

Counsel for the estate of Ms. Strafford-Bliss cited two cases: *Armstrong v Garnett*, [1955] DLR 521 (SKQB); and *Robbins v Legge*, [1907] 2 Ch 8 (CA), where the courts found that money gifted for the purpose of purchasing an annuity was the same as a gift of a sum certain because "when purchased, the annuitant may immediately sell the annuity." In this case, on the basis of the finding that Dr. Strafford intended that the annuity purchased for Ms. Strafford-Bliss be a non-commutable, non-assignable annuity, and that the trustees had no broad discretion in relation to the purchase of the annuity, the court found that *Armstrong and Robbins* were distinguishable.

The court found that the interest vested in Ms. Strafford-Bliss was "an interest in the income that a non-commutable, non-assignable annuity would provide during her lifetime," and therefore her estate was not entitled to the sum that would have purchased the annuity for her.

In the course of the trial, an argument was advanced that in any event the Strafford-Bliss estate was not entitled to receive anything from the estate of Dr. Strafford on the basis of the doctrine of *ex turpi causa non oritur action* (out of an illegal or immoral consideration, an action cannot arise). Although this argument was unsuccessful, it is interesting to observe the court's consideration of it.

This case serves both as a lesson to drafters of wills that addressing all contingencies is crucial and as a lesson to estate litigators that extrinsic evidence can be very powerful in the event of a failure to address all contingencies.

NEW DISABILITY SUPPORT ACT BRINGS UNCERTAINTY FOR PLANNERS

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After a series of public consultations conducted by the Manitoba government, new legislation is being introduced in Manitoba to replace the employment and income assistance (EIA) disability program.

The *Disability Support Act* (the Act) has the stated purpose of providing financial assistance to Manitobans who live with a severe and prolonged disability and who have insufficient means of supporting themselves. The implementation of a new support program appropriately acknowledges the need for a separate program (that is, one apart from the EIA) that is tailored to address the unique needs of persons with disabilities. Manitoba now follows in the footsteps of other Canadian provinces, including British Columbia with its persons with disabilities program, Alberta with its assured income for the severely handicapped program, Ontario with its Ontario disability support program, and Nova Scotia with its disability support program.

At this stage, it is unclear who will fall into the category of persons with a "severe and prolonged disability" and therefore qualify for support under the new Act. The government advises that the new program will include less stringent reporting requirements. Eligible individuals will no longer have to provide regular documentation to show the ongoing impact of their disability. It is estimated that 10,000 Manitobans will qualify under the new program.

Definition of Financial Resources Expanded

In addition to changing the eligibility structure for disability income, the Act appears to expand the types of assets included in the definition of an applicant's "financial resources."

The new inclusions are set out in section 6(2) and include the value of free shelter received by the applicant, gifts and gratuities received by the applicant, all real and personal property held by the applicant, and all income from any source received by the applicant. Any shelter, gifts, property, or income received by the applicant's spouse, common-law partner, or dependants are also included in an applicant's financial resources.

These extremely broad categories were not previously included when assessing eligibility under the EIA disability program. Their breadth now opens the door for the clawback of benefits or even disqualification from government support.

Exempt Assets Under the Existing Program

Under the existing EIA disability program in Manitoba, applicants may hold up to $4,000 in liquid assets, can own a house in which they reside, and are entitled to receive up to $500 per month in gifts. These assets, among a host of other exemptions including detailed rules related to registered disability savings plans and EIA disability trusts, are explicitly excluded from the applicant's personal resources.

Gifts and occasional support from family members are commonly provided to EIA disability recipients, who are otherwise forced to live solely on their government income. The extras provided by family can often make the uplifting difference between a poverty-ridden life and an enriched one. The concern under the new Act is that persons with disabilities, already a historically impoverished and marginalized group, may now have support from friends and family counted against them, resulting in a clawback or disqualification.

Viability of Existing Trust Strategies To Be Confirmed in Regulations

It remains to be seen how these inclusions will affect an applicant's eligibility for disability payments and shelter payments, and the details of the program will not be known until the regulations under the new Act are released. The hope is that the regulations will not only entrench the existing benefits but expand them in an appropriate manner.

Depending on the content of the regulations, other planning strategies may also be eclipsed. For example, the EIA disability trust is specifically allowed under the Manitoba EIA regulations. This trust allows an inheritance or other funds under $200,000 received by an applicant to be settled into trust and used to fund disability-related expenses. If this strategy is to continue, a similar provision must be incorporated into the new regulations.

The category "income from any source," which remains undefined, also creates a great deal of uncertainty, and there is no way of knowing how far the term will stretch. Across Canada, a common means of preserving wealth for beneficiaries with disabilities is the "Henson trust," a term coined in *Ontario (Director of Income Maintenance, Minister of Community & Social Services) v. Henson*, 1987 CarswellOnt 654 (Div. Ct.). The discretionary trust strategy has also proven effective in an earlier Manitoba case, *Quinn v. Manitoba (Executive Director of Social Services)*, 1981 CarswellMan 105 (CA).

Under a Henson trust, an inheritance is passed to a trustee who has complete discretion regarding distributions from the trust. Since the disabled beneficiary cannot enforce payments from the trust, the trust funds are not considered to be a personal financial resource. Currently in Manitoba, the Henson trust is an effective strategy, but this could change if the regulations include payments from a Henson trust as "income" and therefore a financial resource of an applicant.

Amendments to the General Employment and Income Assistance Program

The general EIA program, which provides income support for people who do not fall within the disability category, is concurrently undergoing the same amendments to broaden the categories of assets that are considered to be the financial resources of applicants. As a result, the impact of these changes will likely reach beyond members of the disabled community. Furthermore, disabled persons who do not qualify as having a "severe and prolonged disability" may struggle to bring themselves within the amended criteria of the general EIA program.

Conclusion

The new legislation is both a welcome opportunity and a cause for concern, depending on the eventual interpretation of the Act and the content of the incoming regulations. While the message to the public is that a better income support program is on its way, the actual details and ramifications of the program are still unknown, and it is still uncertain how benefits will be tailored for those with severe and prolonged disabilities. Anyone interested in the viability of these planning strategies should keep a watchful eye on *The Disability Support Act* and its incoming regulations.

RECENT CHANGES TO ONTARIO ESTATE LAW

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The Ontario government has made several legislative changes to the law of estates. Some of these changes make temporary measures introduced during the Covid-19 state of emergency permanent, while others are new. The changes fall into three categories: validity of wills and powers of attorney (POAs), spousal entitlements on death, and probate procedures for small estates.

Validity of Wills and Powers of Attorney

On April 7, 2020, the Ontario government created emergency regulation O. Reg.129/20 to permit wills and POAs to be witnessed by video conference (as opposed to physical presence) during the state of emergency, and to be executed in counterpart. The *Accelerating Access to Justice Act, 2021* (AAJA), which received royal assent on April 19, 2021, amends the *Ontario Succession Law Reform Act* (SLRA) and *Substitute Decisions Act*,1992 (SDA) to permanently authorize the virtual witnessing of wills and POAs and counterpart execution. The changes do not permit electronic signatures. These amendments came into force on May 20, 2021.

In addition, the AAJA adds new section 21.1 to the SLRA, which brings "substantial compliance" to Ontario for the first time; the section permits the Ontario Superior Court of Justice to validate as a will a document or writing that does not meet the formal requirements of the SLRA if the court is satisfied that the document or writing reflects the deceased's testamentary intentions. Importantly, electronic wills are expressly excluded. This change comes into force on January 1, 2022.

Spousal Entitlements on Death

The AAJA repeals sections 15(a) and 16 of the SLRA, which provide that marriage revokes a will unless the will is made in contemplation of marriage. The amendments come into force on January 1, 2022. Once they are in effect, marriage will no longer revoke a will in Ontario.

Under the current law of Ontario, the fact that two spouses are living separate and apart does not affect the validity of gifts made to each other in their wills, an appointment of the other as executor or trustee, an exercise of a power of appointment in favour of the other, or the right of a spouse to share in the distribution of an estate on an intestacy. Only the termination of a marriage by divorce or annulment revokes these gifts and appointments, subject to a contrary intention, and the will is read as if the former spouse predeceased the deceased spouse and excludes the former spouse from sharing on an intestacy.

The AAJA introduces amendments to extend these rules to spouses who are separated at the time of death within the meaning of the SLRA: a separation of three years or a separation as of the date of a separation agreement, court order, or family arbitration award. New sections 17(3) and (4) of the SLRA provide that if the spouses are separated at the time of death, as defined, the gifts and appointments described above are revoked, subject to a contrary intention, and the will is read as if the separated spouse predeceased the deceased spouse. New section 43.1 of the SLRA excludes the separated spouse from sharing in an intestate distribution. The event causing the separation must occur after the changes come into force. In the event of a separation for three years, the period of separation must begin after the changes come into force. If these requirements are met, the rules apply, even if the will was made before the changes came into force. These changes come into force on January 1, 2022.

In the event of an intestacy, a qualifying spouse is entitled to a "preferential share" of the estate in priority to all other intestate beneficiaries. Ontario regulation 54/95 under the SLRA has been amended to increase the preferential share from $200,000 to $350,000 for deaths on or after March 1, 2021.

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Small Estates

The Smarter and Stronger Justice Act, 2020, which came into effect on April 1, 2021, provides for a simplified procedure for applying for a certificate of appointment in the case of "small estates," which are defined as estates with an aggregate value of not more than $150,000. This procedure is intended to streamline the administration of more modest estates and reduce costs.

Conclusion

Advisers should consult the relevant statutes and regulations for full details of the above changes and the technical requirements.

LAWEN ESTATE AT THE COURT OF APPEAL

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It had appeared that the 2019 Nova Scotia Supreme Court case of *Lawen Estate v. Nova Scotia (Attorney General)*, 2019 NSSC 162, was the first case in Canada to extend constitutional protection to the testamentary decisions of a deceased person. However, a recent Nova Scotia Court of Appeal decision has overturned this decision.

Jack Lawen made a will in 2009 that treated his four adult children differently: he chose to leave $50,000 each to two of his three daughters; nothing to his third daughter; and the rest of his estate to his son, Michael Lawen. After Jack Lawen's death in 2016, his three daughters started an action under Nova Scotia's dependants' relief legislation, the *Testators' Family Maintenance Act* (TFMA), asserting that his will did not make adequate provision for them.

Nova Scotia is one of the few provinces that allows non-dependent adult children to challenge a will; a testator's moral obligation to dependants means that an applicant does not need to show actual dependency on the testator to make a claim under the TFMA, as long as the applicant falls within the legislation's definition of a "dependant." Michael Lawen and the executor of Jack Lawen's estate (Joseph Lawen, a brother of Jack Lawen) were granted public interest standing in order to bring a separate application asserting that certain provisions of the TFMA violated sections 2(a) (freedom of conscience and religion) and section 7 (the right to life, liberty, and the security of the person) of the *Canadian Charter of Rights and Freedoms*.

At issue in the application were two provisions of the TFMA: section 2(b), which defines a "dependant" as "the widow or widower or the child of a testator," and section 3(1), which allows a judge to make an order for adequate maintenance and support if a testator has not "made adequate provision in his will for the proper maintenance and support of the dependant."

The trial judge in the Supreme Court of Nova Scotia, Justice Bodurtha, found that the benefits of allowing claims by non-dependent adult children under the TFMA did not outweigh the infringement on a testator's freedom to dispose of his or her estate without constraint. Justice Bodurtha found at paragraph 8 that a "testamentary decision is a fundamental personal decision that is protected under section 7" on the basis of the testator's liberty interest, and that the violation of section 7 could not be justified under section 1 of the Charter. However, he did not find that the testator's freedom of conscience, protected by section 2(a) of the Charter, had been violated. Justice Bodurtha applied section 52 of *The Constitution Act*, 1982 to read down the definition of "dependant" in the TFMA to exclude the moral claims of non-dependent adult children. The province of Nova Scotia appealed the trial decision.

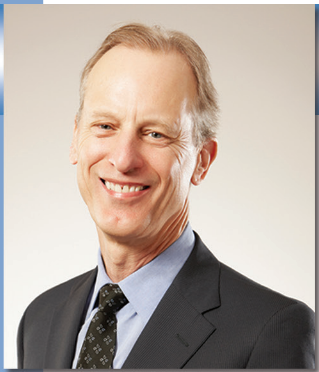
> Nova Scotia is one of the few provinces that allows non-dependent adult children to challenge a will.

The appeal was heard on February 4, 2021, and written reasons were released on May 19, 2021. The Nova Scotia Court of Appeal allowed the appeal by the attorney general of Nova Scotia and upheld the constitutionality of the two TFMA provisions at issue in *Nova Scotia (Attorney General) v. Lawen Estate*, 2021 NSCA 39.

In allowing the appeal, Justice Farrar, writing on behalf of the Court of Appeal, found that sections 2(b) and 3(1) of the TFMA do not infringe the Charter rights protected under sections 7 and 2(a). The court confirmed that claims involving the Charter cannot be decided in a vacuum. No evidence was presented at trial that would have allowed the trial judge to determine whether the testator's liberty interests were engaged, and had they been engaged, whether they accorded with the fundamental principles of justice. Because the respondents inferred that a breach of the testator's liberty interests arose on the basis of the possibility of a variation of the will after death, the Court of Appeal held that there was an insufficient evidentiary basis to support the finding of an infringement of section 7. The court also agreed with the trial judge that there was no infringement of the testator's freedom of conscience under section 2(a). It ordered the costs of the action to be paid personally by the respondents, rather than the estate, after finding no substantial merit in the public interest litigation.

An application for leave to appeal to the Supreme Court of Canada has been filed by Michael Lawen.

atlantic



CHAIR'S MESSAGE

CHRIS IRELAND

Greetings to all members of STEP Canada!

I am pleased to introduce myself as your new chair. My professional career, originally with a major accounting firm and now with PPI Advisory (based in Vancouver), has allowed me to meet many of you through professional and volunteer activities across the country over many years. Being a member of STEP since 2003, I have held numerous local and national offices, including chair of the STEP Vancouver Branch; co-chair of the Tax Technical Committee; and member of the National Executive Committee since 2013, where I have served as treasurer, deputy chair, and now chair.

I took the helm from Pamela Cross at the annual general meeting in June. Pam's term as chair was certainly challenged by the pandemic, but, as many of you know, STEP Canada successfully shifted its activities to virtual platforms with the support of the board and the team at the national office. I congratulate Pam on completing a triumphant term as chair with grace and outstanding leadership.

An enthusiastic thank you to the 23rd National Conference Program Committee, the moderators and speakers, our ever-loyal and supportive sponsors, and the over 940 delegates who made our conference the most highly attended STEP event in the world. After the cancellation of our traditional in-person conference in 2020 (and its evolution into the Fall 2020 Speakers' Series), we weren't sure what to expect, but we laid out the virtual red carpet, welcoming one and all to the pre-eminent trust and estate event in the country, and they came! Skilled experts delivered outstanding presentations in the technical sessions, and participants had plenty of opportunity to jump into the chat rooms to say hello, share news and thoughts about planning, and reacquaint themselves with colleagues from across the country. A fulsome summary of the event can be found elsewhere in this issue.

Planning for our 2022 conference has already begun. Please keep an eye on your email and the step.ca website for announcements of our hybrid plans.

Throughout the last 18 months, our top decision-making priority has been and continues to be the health and safety of our members, our staff, and their families. With this priority in mind, we will cautiously reintroduce in-person events as soon as local authorities deem them safe and local membership regains the desire to attend them.

The 2021-22 branch and chapter education seminars will continue to be delivered through the virtual branch and chapter bundles app. I encourage all of you to visit step.ca to learn about how you can attend your branch or chapter seminars from the comfort and safety of your own home or office. I assure you that every branch and chapter bundles app will be filled with the same high-calibre technical content that STEP has become famous for. You may want to register for your own bundle or, better yet, a bundle-plus, or two! On behalf of the board of directors, I extend a sincere thank you to all the program officers and branch executives who concentrated their efforts to organize seminar topics, speakers, summaries, and sponsors in time for registration. The first seminar was broadcast on September 15.

As well as overseeing the usual operation of STEP Canada over the next two years with the support of the Executive Committee and senior staff, I plan to focus on a few special initiatives, including the following:

- *Membership branding and growth*. Over the last 23 years in Canada (and the last 30 years worldwide), the trust and estate practitioner (TEP) designation has become an industry necessity. With this designation comes distinction, incredible and increasing benefits, and interesting opportunities. If our current rate of growth continues, STEP Canada will likely exceed 3,400 members by the end of 2022. I am grateful for the continued commitment of our members, and in many cases their employers, in supporting STEP's work and in recognizing its value. Beyond our industry, we will continue to use strategic marketing tools to enhance STEP Canada's public profile and to publicize the TEP designation.
- *Collaboration*. We will continue to increase our collaborative role within the STEP organization, including the STEP Worldwide Board and Council, its committees, the secretariat, special interest groups, and STEP USA. Our global organization has many facets. Branches all

over the world are in different stages of development and recovery from the pandemic. We have much to learn from each other for the betterment of STEP as a whole.

In addition, I believe that there are opportunities to continue to build collaborative relationships with other like-minded professional organizations, resulting in the development and preparation of joint sessions, symposia, and industry advancements. One such collaboration resulted in the recent Symposium on Vulnerable Clients, hosted by STEP Canada and the Public Policy Committee in March. This symposium initiated a cross-sector conversation about the abuse and mistreatment of vulnerable people, resulting in strategies and activities that will be pursued to support systemic change across numerous industries.

- *Advocacy and policy work*. As the TEP and STEP branding continues to grow, opportunities to showcase our advocacy and policy work among industry stakeholders, government, and the Canadian public increases. Our Public Policy Committee and Tax Technical Committee will intensify their study of legislation and topical issues to ensure timely and relevant communication, response, and action.

The STEP Canada education programs continue to be our greatest resource for increasing the number of TEPs in Canada. Currently, nearly 1,000 professionals are enrolled. However, recent dialogue at a virtual round table for Canadian employer partners identified a lack of eligible candidates to replace retiring professionals within the industry, specifically within trust companies. STEP Canada will investigate opportunities in post-secondary institutions (and elsewhere) to promote careers in the trust and estate industry, focusing on the profession of trust officer.

The Education Committee continuously reviews its policies and practices and recently added a Diploma Course exemption from the Trust and Estate-Planning Course for professionals who have attained a chartered life underwriter designation (CLU) within five years of enrolment. A list of current exemptions from all courses can be found at step.ca.

Our education manager, Amanda Edwards, continues to improve the online experience for our students, most recently switching examinations to an advanced platform that allows for a streamlined exam experience, and enhanced tutorials are delivered via Zoom with on-demand replay. At the September 13 board meeting, Amanda spoke about her next project: adding on-demand video lectures to our student resources, and aligning our education platform with current online learning standards and expectations.

I will end my first official message with an expression of thanks to the STEP Canada Executive Committee, Rachel Blumenfeld, Richard Niedermayer, Brian Cohen, Aileen Battye, and Pamela Cross, and to STEP Canada's senior staff, Janis Armstrong and Michael Dodick. All of us have worked closely and effectively in various capacities for many years on many projects and committees. I am confident that over the next two years our continued collaboration will foster an even better and stronger STEP Canada.