STEP Canada
ADVISING FAMILIES ACROSS GENERATIONS

Connection
Toronto Branch Newsletter

May 2020 - Vol. 7 No. 7

Message from the Chair, STEP Toronto

Hello everyone and welcome to our May newsletter. Last month many of us were adapting to working from home and the new health and safety protocols. Like me, I expect most of you have settled in to working remotely and physical distancing and the donning of masks has become second nature.

With guidance from STEP Canada, we have decided to defer the start of our education sessions for next year to January. Our plan is to offer five sessions (down from the usual seven), running January to May. We hope to provide additional information including dates, pricing and session descriptions in the fall. While our social event sponsors are keen to continue supporting STEP Toronto, we've agreed to hold off on holding any social events until the new calendar year.

While our education sessions are on hiatus, we plan on offering monthly TEPTalks beginning in September. These will be similar to our STEPping out to Lunch sessions, albeit held virtually. You can expect to receive additional information regarding this initiative over the summer.

This is our final newsletter for this "education year". We'll pick up again in September. In the meantime, here is some information from STEP Canada you may find useful.

New Public-Facing Website: https://advisingfamilies.org/canada/

The new website provides information to help families plan for their futures. Members, please consider sharing this website with your clients, it is a useful tool for providing clarity about these complex issues. Thanks to the members of our Member Services Committee for their work on this beneficial project.

STEP Canada TOSI Guide

STEP Canada is pleased to provide to its valued members a completely updated second edition of the STEP Canada Guide to the Tax on Split Income (TOSI) Rules. The updated guide is effective as of April 30, 2020. For members who prefer to continue referencing the original hard copy, a supplement of all the changes and additions in the new edition is also available. STEP Canada members can access the new edition of this resource and/or the supplement in their My STEP Canada Portal under the Resource Box, after logging on to step.ca.

Annual Membership Renewal Fees

The deadline for annual membership fees and completed declarations has been extended to June 30. Please logon to step.ca to complete your renewal online. If any assistance is required, please email memberservices@step.ca

In this Newsletter

Message From the Chair
Message from STEP Canada Chair Re National Conference
Article: How Companies are Coping with COVID-19
Article: Part II - Insurance trusts - A great estate planning tool
Article: Lessons Learned from Recent Passing of Accounts Cases in Ontario
Article: Bare Trusts and Trusts that are Barely There
Article: Estate Administration Tax Act Updates January 2020
About Connection
Program Sponsors

STEP Toronto Executive

Elaine Blades, *Branch Chair*
Corina Weigl, *Deputy Chair*
Eric Hoffstein, *Secretary*
Ian Lebane, *Treasurer*
Ted Polci, *Past Chair*
Harris Jones, *Member-at-large*
Maureen Berry, *Member-at-large*
Jeff Halpern, *Sponsorship Committee Chair*
Heela Donsky Walker, *Membership Committee Co-Chair*
Hemal Balsara, *Membership Committee Co-Chair*
Joan Jung, *Programming Committee Chair*
Paul Keul, *Newsletter Committee*
Gillian Musk, *Education Committee*
Lisa Lue, *Student Liaison*

Ongoing Assessment

We will continue to monitor the situation, which is rapidly evolving, and assess our plans accordingly. We will provide regular updates to our stakeholders. Once again, the health, safety and wellbeing of our volunteers, members, event delegates, sponsors, employees and their families is and will remain our top priority.

We are very hopeful you all remain well and that we can look forward to seeing you, in some way, at future events.

Thanks for reading.

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

CANCELLED – 22nd STEP Canada National Conference, June 11-12, 2020

Dear STEP members, conference speakers, delegates, and sponsors,

I hope this communication finds you and your families well.

On behalf of the Executive Committee, Board of Directors, and Senior Staff, I write to you today to formally announce the cancellation of the 22nd STEP Canada National Conference. I am sure this will not come as a surprise to you. The health and safety of our speakers, delegates, sponsors, and staff and their families is the primary concern to STEP. We thank you for your patience and continued support.

STEP Canada supports its members and stakeholders

In accordance with our previous announcements, all delegates and sponsors will automatically receive a full refund of fees paid to STEP for the 2020 conference. These refunds will be processed by the end of May.

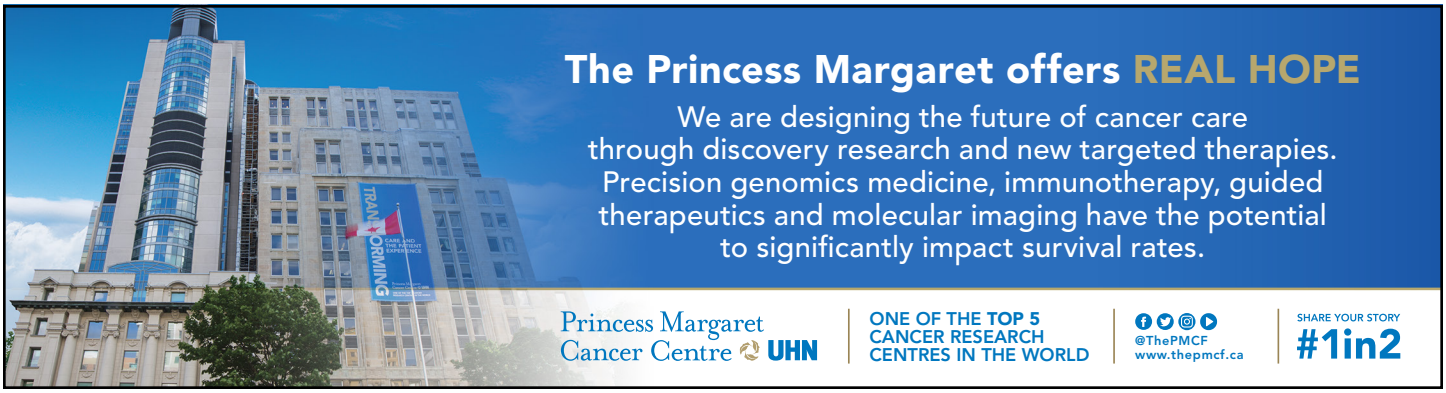
STEP professional development opportunities continue

I am pleased to announce that STEP Canada will remain the leading educational body for professionals in the trust and estate industry with the rollout of the STEP Canada 2020 Speaker Series!

Virtually all speakers who originally agreed to present topics at the 2020 Conference have agreed to participate in the new speaker series. We are extremely grateful to have the support of these talented practitioners willing to share their expertise. Drawing on the excellent program, STEP will be professionally recording the presentations and panelists over the next few months. In the fall, STEP will broadcast sessions each Tuesday and Thursday at 12 noon ET. These sessions will replicate the conference program by providing delegate chat and question functions. During and immediately after each streamed session, delegates can post comments and speakers will be available in the adjoining 'chat room' to take questions.

The 2020 Conference app will be adapted to become the 2020 Speaker Series App. As the sessions are broadcast, an archived copy plus a copy of the chat room discussion and Q&As will be accessible through the app.

Registration details for the STEP Canada 2020 Speaker Series will be available shortly.



Accredited CPD for Delegates

As a further benefit, STEP has already secured accreditation for the conference from many professional associations. We have confirmed the accreditation will carry over to the online speaker series.

To be Announced as We Look Forward

Watch for further communication about:

- Dates for the STEP Canada 2020 Speaker Series
- Delegate registration details and fees
- Sponsorship opportunities

And so much more we don't even know we don't know yet!

A Heartfelt Thank You

Once again, I thank you for your patience and continued support of STEP Canada. I look forward to the times when we can again meet in person, safely.

Stay healthy and be well.

Pamela Cross

Chair, STEP Canada

Article: How Companies are Coping with COVID-19

By: Jillian Meyer, Director of Recruitment Services, Niche Recruitment

With the latest extension of non-essential business closures and the reports that Ontario has hopefully started to peak, I think we are all eager for a gradual return to some sort of normalcy in our lives and businesses. All businesses are having to pivot and adjust on the fly to this new reality. This challenging time is testing all organizations ability to be introspective and flexible. It is showing us where we can be more efficient, what is essential and that working virtually can be just as productive and may be a long-term option as the return to work won't be a straight line. It is also the opportunity to build loyalty and show appreciation to your employees and clients in turn strengthening your culture and does not have to have a price tag attached. After speaking to HR and Management in companies of all sizes and across a variety of industries I have compiled common challenges and best practices to share.

From employee perspective

- The almost unanimous feedback about employees' biggest challenge during this epidemic is, not unexpectedly, working from home but more specifically the perception around what that entails. Right now, working from home is not just working remotely, it is working during a crisis, with young and elderly dependents, home schooling responsibilities, etc.

- Being mindful, flexible and understanding during this time is crucial. It's easy to get caught up in work if you have the ability to be on call, but most of us are juggling a lot, so giving sufficient notice for things like unplanned meetings is important to respecting the current climate and everyone's individual situations.
- Some employees have received mixed messages from different departments causing confusion as to the priorities of the company and what their goals and timelines should be while working from home.

Staying Connected: Virtual is the new reality

- Touching base with your staff on a personal level 2+ times a week, with additional virtual work meetings regularly or on an as needed basis and with some having a group chat set up so people can connect as they need to.
- Clearly communicating all compensation, work-from-home, social distancing and any other policies and changes.
- Having consistent messaging and clear priorities throughout the company with communication and updates coming from the top is vital.
- Providing management with tip sheets and scripts for how to communicate with staff any updates or layoffs.
- The most popular meeting tools are Zoom and Microsoft Teams. To alleviate volume on virtual systems non-essential services are being asked to login after hours and additional shifts are being added to spread out the load.
- Things as simple as making sure everyone is on direct deposit for payroll or that you have an email address for easy communications.
- Providing care packages with office supplies to work from home seamlessly.
- While buildings are closed does anything need to be tended to maintain it? For instance, having someone go in and warm up the building depending on your type of facility.

Payroll & Benefits: Balancing cost and reward

- To avoid layoffs companies are coming up with ways to manage payroll costs from across the board salary decreases to implementing a mandatory vacation day weekly.
- Logistically vacation may be an issue if employees have excess vacation to use in the now reduced work year. To help manage this, employers are encouraging their staff to take a vacation during this stressful time to take care of themselves but to also help manage potential vacation issues later in the year.
- With health being front and center a lot of companies are adding sick days to make sure that employees stay home if they are not feeling well.

Mental Health: Are you going stir crazy yet?

- It is not just about productivity while working from home during this unprecedented time when being expected to hop on calls at any time can be anxiety producing. How much support and who to provide it to is a common question for employers as we all struggle with the isolation and distancing currently

required. Along with promoting whatever Employee Assistance Program (EAP) you may currently have, our friends at Hale Health and Safety have provided a list of free resources for mental health in the workplace:

  - Great West-Life Centre for Mental Health – Workplace Strategies for Mental Health
  - Workplace Strategies for Mental Health – Supporting Employee Success Tool
  - Guarding Minds at Work – A Workplace Guide to Psychological Health & Safety

- Free Apps for Individuals: Headspace, Whil, Moodfit
- Other paid tools for Employers: The Wellness Inventory, Lifeworks, Headspace and Whil.

Return to Work: The new normal

- The hope is at the end of this 28 days business will gradually return to full operations. Regardless of what that process looks like, policies and procedures will have to be created to address employee and customer concerns over safety and social distancing.
- Employers have a duty to take every precaution reasonable based on the circumstances for the protection of staff. Looking at every part of the business to evaluate what will be affected going back with no vaccine likely until next year. Is your lunchroom big enough to support more people staying in and maintaining social distancing? Do you have a client facing environment where you might want to put Plexiglas?
- Engage your staff now to assess their work environment and interactions and brainstorm what adjustments will need to be made.
- It may be a challenge getting people to come back into the office and considering some sort of office rotation schedule may be a good strategy.
- From workstations, common areas, entrances, washrooms, lunchrooms and more the need for space, personal protective equipment (PPE) and sanitizer are top priorities for everyone.
- Restricting business travel, having employees report any personal international travel, any flu-like symptoms or potential exposure of employees along with the privacy and obligation considerations if someone does test positive for COVID-19 are all new considerations.
- In addition to implementing major cleaning protocols, using multiple entrances, adding shifts to be able to stagger coming/going and maintaining distance, leaving shipments of goods to sit for 3 days before being handled, taping off every other washroom stall are some of the ideas.
- If you have employees returning to work off a leave during this time it will become a 2-stage return to work plan likely starting with a work from home option and then returning to the office.

The Future: Redefining, anticipating, and collaborating

- You may find that working virtually can be just as productive and a long-term option with less office space needed which will open up new considerations for technology, management and communication.

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

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

STONEGATE
Private Counsel

For more information, please visit our website at: www.stonegatepc.com.

- How to measure productivity while working from home may be straight forward with a smaller team and well defined job descriptions, but if you had any issues with this pre-crisis it will likely be glaring now and an opportunity to address and define things.
- Supervising virtual teams will likely be a skill that will need to be refined. Implementing a Work From Home policy that outlines expectations around communication, availability and productivity will be important.
- A lot of small-midsize companies are looking for ways they can pivot their services offering complimentary services/products, virtual/phone meetings and curb side pickup.
- With efficiency and budgets at the top of everyone's mind being effective with your existing staff and making sure you can identify and secure needed talent will be key to remaining competitive. Niche Recruitment has launched a Talent Acquisition Process Assessment and Training service to aid small and midsize organizations with optimizing their hiring process.
- Businesses are also looking at ways that they can help each other by setting up referral networks to help drive business.

Additional Resources

- Government of Canada Risk-informed decision-making guidelines for workplaces and business during COVID-19
- Osler Law Firm COVID-19 Employer Reference Guide
- WHO Getting your workplace ready for COVID-19

Article: Part II - Insurance trusts - A great estate planning tool


By: Dianna Flannery, JD, TEP (Manulife Financial), Hemal Balsara, CPA, CA, CFP, TEP (Manulife Financial)

In Part I of this continuing series on insurance trusts, we looked at what insurance trusts are and their benefits, different methods to create these trusts, and their taxation. In Part II we will consider scenarios in which insurance trusts make sense. We will also specifically consider the annuity settlement option.

Scenarios where insurance trusts are useful

When clients are trying to plan for minor children, have blended families, or are concerned about a spendthrift child or disabled child, an insurance trust can offer a great planning solution. An insurance trust is a formal trust that names a trustee, sets out the powers for that trustee and directs the distributions from the trust. This can be done in any manner the client desires and in a way that is best for the beneficiary(ies)' situation.

Minor and spendthrift children

In the case of minor children, clients have three options as it relates to insurance proceeds. They can name

Excellence.
Customized Solutions.
High-Touch Service.

O'SULLIVAN
ESTATE LAWYERS
osullivanlaw.com

the child as a beneficiary on the insurer's beneficiary designation form, they can create an "In Trust For" arrangement, or they can create a formal insurance trust to receive insurance proceeds. Let's examine each option.

When a minor child is named as beneficiary and proceeds become payable to that minor child (in Ontario, age 18), provisions in the *Ontario Insurance Act*[1] direct the insurer to pay proceeds into court.[2] A guardian of property will have to be appointed by the court on behalf of the minor child to have the proceeds paid out of court.[3] The proposed guardian will seek direction from the court as to a plan for the management and administration of those proceeds on behalf of the minor child when making the application to be appointed.

As an alternative to naming a minor as a beneficiary and the challenges such an arrangement presents, many insurers will allow an "In Trust For" arrangement to be made for the benefit of a minor child(ren)[4] on the beneficiary designation form itself. Such an "In Trust For" arrangement will result in the proceeds being paid to the trustee named on the beneficiary designation form. Since there are no formal trust provisions setting out the powers of the trustee, the trustee is simply subject to the duties of a trustee as set out in the *Trustee Act*[5]. The trustee must invest the insurance proceeds exercising the care, skill, diligence and judgment that a prudent investor would exercise in making investments.[6] Should a trustee wish to encroach on capital, distribute income from the trust or seek guidance as to the management of trust property, a trustee may apply to the court for direction.[7] Once the minor child attains the age of majority, the entire proceeds will be paid out to him or her,[8] which may not be a desired outcome, especially if the proceeds are a large sum of money.

While an "In Trust For" arrangement is better than simply naming a minor child as beneficiary it still has issues that must be carefully considered. These issues are why a formal insurance trust provides a better way to plan for insurance proceeds when intended beneficiaries are minors. A formal insurance trust appoints a trustee, and the powers that the trustee will have in administering that trust, including encroaching on capital or distributing income and the timeline for distribution of the proceeds out of the trust. These distributions may be staggered over time so that the child will not receive all the proceeds at the age of majority. This in and of itself makes the formal trust arrangement a much better planning option but the other factors are also compelling and make good sense with an overall estate plan.

In situations where an insured is concerned about having insurance proceeds distributed to an adult child because that child is either unable to manage their finances, or there are other concerns, such as addiction, an insurance trust will allow the settlor/insured to include powers to the trustee for distribution of the proceeds in a way that makes sense as it relates to that particular child's situation.

---

1 R.S.O. 1990, c. I.8 ("the Act").
2 See s. 220(1) of the Act, *ibid*.
3 Under s. 47(1)and(2) of the *Children's Law Reform Act*, R.S.O. 1990, c C.12 by application by a child's parent or by any other person, on notice to the Children's Lawyer, a court may appoint a guardian of the child's property and a guardian of property of a child is responsible for the care and management of the property of the child.
4 See s. 193(1) of the Act, *supra* note 1.
5 R.S.O. 1990, c. T.23 ("Trustee Act").
6 See s. 27(1) of the Trustee Act, *ibid*.
7 See s. 60(1) of the Trustee Act, *supra* note v.
8 The rule would apply from *Saunders v Vautier* (1841), 4 Beav. 115, 49 E.R. 282, affirmed (8141), 1 Cr. & Ph. 240. The rule permits a beneficiary, who has been given an absolutely vested interest under a trust, to terminate the trust once he/she reaches the age of majority. The rule applies where when there is no gift over for failure to survive the date of age of majority.

Build a better business with us at your side.

Visit **www.sunlifeglobalinvestments.com**

Sun Life GLOBAL Investments

Henson Trust

A Henson Trust is a trust that is set up in a discretionary manner to ensure that the beneficiary, who is a person in receipt of provincial disability benefits, is not excluded from receiving those benefits by receiving too much income and therefore failing the required eligibility test. Henson Trusts, named from the Ontario Court of Appeal decision[9] are characterized as an "absolute discretionary trust" as the trust property does not vest in the beneficiary of the trust and all distributions out of the trust are at the trustee's discretion.

If insurance proceeds are settled into a Henson Trust, with all the formal trust terms previously discussed being present, it can be an effective means to benefit the beneficiary without negating their eligibility for provincial disability benefits. Furthermore, the Henson Trust may also be characterized as a qualified disability trust ("QDT") for income tax purposes, which is beneficial because any income retained by the trust is subject to tax at graduated personal tax rates (instead of the top marginal rate to which all other trusts are subject).

There are several criteria that need to be satisfied in order for a trust to qualify as a QDT[10] including having one of the beneficiaries of the trust being eligible for the disability tax credit (the "DTC"). There must be a joint election made by the trustee and the beneficiary to be considered a QDT for the year. The beneficiary is limited to electing one trust to qualify as the QDT. The trust must also be considered a testamentary trust. As discussed in Part I of this series, a life insurance trust can qualify as a testamentary trust where it "arose on and as a consequence of" the death of an individual. Where the trust did not previously exist, the CRA does not consider the trust as having been created until the insurance proceeds are paid to the trust.[11]

An issue to consider is where there is a preexisting inter vivos trust that has already been established for the benefit of a disabled beneficiary. If insurance proceeds are made as a subsequent contribution to the inter vivos trust, it will continue to be considered an inter vivos trust and not qualify as a testamentary trust and therefore not be considered a QDT. Careful planning is obviously required to ensure the most efficient distributions are made to the beneficiary in question.

Family law protections

Family structures are more complex today than ever before. Estate planning may include children from various marriages, and support obligations for prior spouses and equalization of property may also need to be considered. Insurance trusts have a role to play in the family law context.

a) Equalization

An insurance trust can ensure equalization among children from different relationships. Trust provisions can clearly identify all children who will benefit under the trust, how they will benefit under the trust, and the timing of the distribution of proceeds. An insurance trust can also be used to equalize children who are not involved in a family business and who will not receive shares in the business on death of the business owner. The insurance trust works particularly well if there is a mix of minor and adult children, or a staggered distribution scheme is desired to address different needs of the beneficiaries.

---

9 *Minister of Community and Social Services v. Henson* [1987] O.J. No 2093 (Ont. CA).

10 See 112(3) of the *Income Tax Act*, R.S.C. 1985, c.1 (5th Supp.) ("Income Tax Act").

11 See Technical Interpretations #9625975, #9605575 and #2009-0350811E5 for discussion around life insurance trusts qualifying as testamentary trusts.

ALWAYS ON TRACK

The Estates and Trusts team at Borden Ladner Gervais LLP can be relied upon to always find the right path to dispute resolution: litigation, mediation or administration. At BLG, it begins with service.

To learn more about the Estates and Trust Litigation Group or to contact us, please visit: **blg.com/estatesandtrusts**

Calgary | Montréal | Ottawa | Toronto | Vancouver
Lawyers | Patent & Trademark Agents | Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.

BLG
Borden Ladner Gervais
It begins with service

b) Support

An insurance trust is often used by parties negotiating a separation who wish to create a formal trust arrangement for life insurance proceeds to deal with support obligations on death. The challenge may be in determining who best to name as trustee if the former spouse is not to be named.

c) Property claims

Until recently, an interest in an insurance trust has not been the subject of litigation relating to property claims by an ex-spouse. However, the B.C. Court of Appeal case of *H.S.S. v. S.H.D.*[12] considered the potential impact a residual interest in both a spousal trust and a discretionary insurance trust has on the reapportionment of property in a divorce dispute. The issue raised was the value of the interest in the insurance trust, which was contingent on the primary beneficiary dying and any proceeds being left in the trust for the remaining beneficiaries. The court determined that it was too uncertain as to whether the interest in the insurance trust would ever be realized by the contingent beneficiaries, and therefore no value was included for division purposes. This case may open the door to challenges where the interest in the trust is not contingent and/or if the facts may be distinguishable if the trustee power is not discretionary.

Another option to an insurance trust: an annuity

While insurance trusts provide a great estate planning tool, there are situations where clients would prefer not to set up a trust but to have an option to have proceeds invested and distributed out over time. In these cases, an annuity (or "annuity settlement option") may present another tool for consideration.[13] The process to implement this arrangement will vary by insurer but generally forms can be completed to set up the arrangement either at the time the policy is issued, or while the insured is alive.

This option can be set up to automatically transfer the proceeds of an insurance contract or policy (including a guaranteed interest contract (GIC), segregated fund contract, or a life insurance policy) upon death, into an annuity. The resulting annuity will then make gradual income payments to specified beneficiaries. It replaces a lump sum death benefit with smaller, scheduled payments while providing probate and other estate administration fee savings, increased privacy and potential creditor protection.

The benefit in using this option is that payments to beneficiaries can be made for a specified time or guarantees can be added to ensure a minimum number of payments are made. Therefore, there is a degree of control over the distribution of proceeds. Multiple beneficiaries can be named with different options selected for each, giving flexibility as to how and when a beneficiary will receive a payout.

This structured stream of payments with no conditions may fit planning objectives without having the associated costs of setting up a trust and dealing with its ongoing maintenance.

---

12 2018 BCCA 199.

13 Under s. 190(7) of the Act, supra note 1, where a beneficiary becomes entitled to insurance money and all or part of that insurance money remains with the insurer under a settlement option provided for in the contract or permitted by the insurer, that portion of the insurance money remaining with the insurer shall be deemed to be insurance money held under a contract on the life of the beneficiary and, subject to the provisions of the settlement option, the beneficiary has the rights and interests of an insured with respect to the insurance money. Manulife permits this option to be selected and is referenced as a "gradual inheritance".

When you have worked a lifetime to build an estate, you want to ensure you carefully plan for its eventual management and distribution.

Our estate lawyers can assist with all aspects of estate planning and dispute resolution.

WeirFoulds LLP

Contact: Lori Duffy
416.947.5009
lduffy@weirfoulds.com
weirfoulds.com

The payments that result from an annuity settlement option are considered a mix of taxable income and a tax-free return of capital.[14] These annuities are generally considered prescribed annuity contracts[15] and benefit from preferential tax treatment. Generally speaking, the total payments from a prescribed annuity are level for the measuring life of the annuity contract, and the proportion of capital and taxable income remain the same.

If the annuity contract qualifies as a non-prescribed annuity, the income element is taxed as it accrues. This treatment results in the taxable portion generally being higher in the early years of the non-prescribed annuity, with decreases to the taxable portion over the life of the contract as the capital is paid out. Prescribed annuity treatment results in tax-deferral relative to non-prescribed annuities because the taxable portion in the early years of a prescribed annuity can be less when compared to a non-prescribed annuity. In the later years, a non-prescribed annuity generally results in lower income relative to a prescribed annuity contract.

Conclusion

Transferring wealth to subsequent generations through life insurance can be a very beneficial estate planning tool. There are options outside of leaving a lump sum death benefit directly to beneficiaries. An insurance trust can help in situations where there are family law issues or where beneficiaries are minors, spendthrifts or disabled. An annuity settlement option provides another alternative to insurance trusts and creates a structured payment stream to a beneficiary. Regardless of the method selected, these options all can be valuable possibilities in a family's planning with life insurance.

---

14 See 56(1)(d) of the *Income Tax Act*, *supra* note 10, which includes the full annuity payment as income and 60(a) of the *Income Tax Act* which allows the annuitant to deduct the tax-free capital element.
15 See Income Tax Regulations, (C.R.C., c. 945), Regulation 304 for a full list of criteria for qualification for prescribed annuity status.

Article: Lessons Learned from Recent Passing of Accounts Cases in Ontario

By: Kimberly A. Whaley, CS, TEP, LLM, Whaley Estate Litigation Partners

There is no strict legal requirement that a fiduciary, such as an attorney under a power of attorney or an estate trustee, commence an application to pass accounts. Instead, the legal duty is in the maintenance of the fiduciaries' accounts. Nevertheless, disputes over accounts often result in litigation. This article will address some lessons learned from three recent passing of account cases, including information on contempt orders in the passing of accounts context, the test for seeking leave to bring an application for passing of accounts, and the effect of delay in bringing such an application.

Appeal of Contempt Sentence for Failing to Comply with Passing of Accounts Order

In the Ontario Court of Appeal case of *Ross v Ross*, 2019 ONCA 724, the appellant was appealing his sentence of 15 days in jail, to be served on weekends, for contempt of an order relating to the passing of accounts of his aunt's estate. While it does not appear that the underlying contempt decision is reported, the Court of Appeal quoted the sentencing judge, who found that the appellant's non-compliance arose, *"from a failure to understand and appreciate or to ignore the need for, and importance of, complying with the order within*

FIRST YORK ESTATE PLANNING BUSINESS LIFE INSURANCE
CHARTERED LIFE UNDERWRITERS

Experienced, Independent, Professional Advice.

Ted Polci, CLU, TEP
tedp@fyork.com 416-966-9675

the specified time or within any reasonable time." Reviewing this, the Court of Appeal concluded that it was difficult to find that this description of the appellant's behaviour amounted to a "callous disregard for the court's authority" prompting a contempt order.

Further, the appellant had since purged his contempt, was 73 years old, and had no prior convictions or prior findings of contempt. The Court of Appeal suspended and set aside the sentence imposed but ordered the appellant to follow up with diligence any further order imposed by the next scheduled hearing for the passing of accounts.

This case demonstrates the seriousness of a contempt order and the level of willful and deliberate conduct required for a contempt sentence to be imposed. There was no costs order.

Court's Discretion: Test for Leave to Bring Passing of Accounts Application

Lewis v Lewis, 2020 ONCA 56**,** confirmed and clarified the test to be applied when seeking leave of the court to bring a passing of accounts application under section 42 of the *Substitute Decisions Act*, 1992 S.O. 1992 c. 30 ("*SDA"*).

This case involved a dispute between two siblings who had been appointed as their parents' attorneys for property, and four siblings who were not. The four non-attorney siblings sought leave of the court to bring an application for the attorneys to pass their accounts. Leave was required since they were not one of the enumerated persons who have standing to apply under section 42(4) of the *SDA* (which include the grantor's guardian, a dependant of the grantor, Public Guardian and Trustee, etc.).

The uncontested evidence included that the father had remained capable of managing his and his wife's intertwined financial affairs for several years. When the attorneys helped their father, such as paying bills for him, they would keep him apprised of all actions. They also responded to the other siblings' requests for information and copies of documentation leading up to the litigation. Notably, the father, who was represented by counsel, participated fully in the application, gave evidence and expressed that he had no concerns with the attorneys' management of his affairs. Accordingly, the application judge dismissed the non-attorney siblings' application for leave.

On appeal, the parties agreed that the test to determine if someone should be granted leave of the court to bring an application for an order for passing of accounts was as set out in *Ali v Fruci,* 2006 CanLII 8719 (ON SC**)**, which required the court to be convinced that:

1) the person or persons seeking leave have a genuine interest in the grantor's welfare, and,

2) a court hearing the application may order the attorney or guardian to pass his or her accounts.

Notably, however, even if someone has standing to apply for an order to pass accounts, it remains within the discretion of the court to make any such an order.

In this case, the application judge had concluded that, *"the record falls far short and lacks evidentiary stamina to suggest that there is any direct allegation of misfeasance or wrongdoing"* and that there was no reason to believe that a court hearing the application may order a passing of accounts.

On appeal, the appellants argued (among other things) that the application judge had erred because he imposed a *"narrower test requiring proof of misfeasance or wrongdoing."* The Court of Appeal disagreed, noting that the application judge's focus on lack of evidence of misfeasance or wrongdoing was responsive to the appellants' allegations. Moreover, there was no concern over the management of the parents' affairs; in fact, their investment portfolios increased during the time that the respondents were attorneys. The appeal was dismissed. The costs order was hefty.

Delay in Bringing Application

The third case, *Craymer v Hayward et al*, 2019 ONSC 4600, addresses the court's discretion to order a passing of accounts in the context of the historical management of an incapable person's financial affairs starting in 2006 and continuing for over 10 years.

The facts of this case are complex and involve a couple that had been married for over 32 years; a second marriage for the wife, and, a fourth marriage for the husband. Both had children from the previous marriages. In 2006 the husband suffered a stroke, requiring hospitalization. The wife acted as his attorney for property

until her death in 2016. The husband died a few months later in 2017.

The husband's children did not have a relationship with the wife and husband in the 32 years that they were married, nor did they have a relationship with the wife's children, but they re-established contact once advised that they were beneficiaries of their father's estate.

When the husband died, he had in his name approximately $10,000.00 in assets, which paled in comparison to the assets of the wife upon her death, which were over $1 million. Upon learning the value of his father's estate, the husband's son took immediate action and sought (among other things) to compel a passing of accounts in relation to the wife's spending while she was the attorney for the husband, for the 10 years between 2006 and 2016. The son argued that the wife was required to maintain records of her spending and her failure to do so rendered her estate liable for any expenses that could not be explained.

The defendant, the wife's daughter and estate trustee, opposed the motion, arguing that it would be unfair to expect her, on behalf of her mother's estate, to provide an accounting for the 10 years that her mother was the attorney. There was no evidence that records were kept. The daughter argued she was not in a position to provide an accounting.

Justice de Sa confirmed there is no statutory limitation period for the passing of accounts, and that the only bars are the equitable defences of laches and acquiescence. Justice de Sa found that the plaintiff's delay was understandable since he was not aware of any potential issue with his father's assets until he received the documents from the estate. However, ordering a passing of accounts is discretionary, and in Justice de Sa's view, to require an accounting at this point in time would result in a *"clear injustice as between the parties."*

Finally, of further note, it was stated as, *"unclear that the spending was spurious given the nature of the relationship"* between the husband and wife, as the wife would have been spending the money as his wife, as much as his attorney for property. The failure to keep detailed accounts was "hardly suspicious." In the circumstances, Justice de Sa decided not to order a passing of accounts. The costs were not disposed of and there is no further costs decision reported.

Takeaway

While all fiduciaries have an obligation to maintain proper accounts, not all are aware of this duty. Applications for passing of accounts are important to ensure that a vulnerable person's property is protected. Sometimes, bringing an application for a passing of accounts is warranted, while other times the commencement of such an application is used as a tactic in emotional or antagonistic litigation. Accordingly, it appears from these decisions that courts continue to exercise the wide discretion afforded in passing of accounts matters.

Article: Bare Trusts and Trusts that are Barely There

By: Blair L. Botsford[1], BA, LLB, MA, TEP, Partner, Blaney McMurtry LLP

Overview

In Ontario, an estate administration tax ("EAT") is levied on the value of a deceased's estate where probate (or letters of administration) is required. The rate is currently $0 on estate values up to $50,000. Over that amount, the rate is $15 per $1,000 of estate value, or part thereof. While a relatively small charge in many cases, avoidance or minimization of this tax has become a preoccupation with clients and some professionals. Unfortunately, some options for avoiding or reducing it, such as joint ownership or inter vivos gifting, can also carry risks such as loss of control, taxes, and exposure to the creditors of others.

One option to avoid the EAT is an inter vivos trust, provided it will not trigger a substantial deemed disposition and attendant capital gains tax on the transfer of assets. A further limitation is the new rule regarding the principal residence exemption, which no longer applies to principal residences held in a family trust. Another option to reduce the EAT is the use of multiple Wills, but these have limited application such as shares in privately held corporations.

1 Thank you to Brianne Quesnel, articling student at Blaney McMurtry LLP, for her kind assistance with the researching and writing of this article.

Alter ego and joint partner trusts can be used to reduce the EAT and can hold a principal residence, but they are restricted to situations where the settlor (or the settlor's spouse/partner for joint partner trusts) is at least 65. These trusts are a robust planning tool that is arguably underutilized, alone or in conjunction with other forms of trusts, to provide a complete solution for clients.

For many practitioners, the lament with alter ego and joint partner trusts is the age limitation. What has emerged as a common alternative to reduce the EAT is the use of bare trusts as contemplated by section 104(1) of the *Income Tax Act*[2] ("ITA"). Part of the appeal with these trusts is that they are deemed an agency relationship by the ITA and, therefore, do not trigger a disposition on the transfer of assets into the so-called trust.

Part of the agency bare trust solution requires the appointment of a nominee title holder and, to ensure longevity, advisors are recommending a private corporation rather than an individual. This raises several issues:

- How to deal with loss of capacity by the settlor
- How to deal with the reversionary interest on the death of the settlor
- Potential for the corporation to be seen as both the legal and beneficial owner of the assets
- New and existing corporate compliance obligations

Starting from the bottom, there are the usual time and financial costs associated with setting up and maintaining the corporate nominee trustee. However, the new compliance rules requiring corporations to maintain a record of beneficial ownership creates an extra layer of complexity. The federal rules are found at section 21.1 to 21.4 and 182(2.1) of the *Canada Business Corporations Act* ("CBCA")[3]. According to the rules, federal non-distributing corporations must identify individuals with "significant control" over the corporation. An individual with significant control is an individual:

- who is the owner of at least 25% of the voting rights attached to the corporation's voting shares or is the owner of at least 25% of the corporation's outstanding shares measured by fair market value;
- who has in fact control of the corporation; or
- to whom prescribed circumstances apply (not yet determined by regulation).

Two or more individuals with joint ownership of a significant number of the shares are each considered to be an individual with significant control, as well as persons who agree to vote their shares a certain way.

In order to identify individuals with significant control, each corporation is required to maintain a register, sometimes referred to as the ISC register, containing a range of information including: name; date of birth; last known address; and jurisdiction of residence for tax purposes. The ISC must be updated within 15 days of the corporation learning of a change. In addition, the ISC is subject to the *Personal Information Protection and Electronic Documents Act* ("PIPEDA")[4].

As you might expect, there are offences created to motivate compliance with the new rules. Failure to prepare and maintain the ISC register carries a maximum fine of $5,000 or imprisonment for a term not exceeding six (6) months, or both. The same penalty applies for a breach of the use of information rules. The penalty for knowingly authorizing or permitting a contravention of the requirement to maintain the ISC register is stiffer at a fine not exceeding $200,000 or imprisonment for a term not exceeding six (6) months, or both. A shareholder who contravenes the requirement to provide the requested information to the corporation is subject to a fine not exceeding $200,000 or imprisonment for a term not exceeding six (6) months, or both.

For more information about the ISC register, follow the link below to a newsletter published by Blaney McMurtry LLP.[5] Currently, Ontario does not have similar provisions to the federal ones under the CBCA, but it is anticipated by legal commentators that the provinces will be rolling out similar legislation eventually.

---

2 R.S.C. 1985, c. 1 (5th Supp.).
3 RSC 1985, c C-44.
4 SC 2000, c 5.
5 Jonathan Filippone - https://www.blaney.com/articles/reminder-starting-june-13-2019-private-cbca-corporations-will-be-required-to-maintain-a-new-register

Related to the record-keeping discussed above, is the issue of ensuring that there is no appearance that the corporation owns the assets subject to the trust for its own purposes. The starting point of course is a properly drafted trust and agency agreement as well as an ongoing record of the management of assets at the direction of the principal. Without proof of the nature of the relationship, it may be more challenging to resist a review by CRA or others with an interest in claiming the assets belong to the corporation rather than the principal.

Once the settlor has died, the agency relationship is at an end since there is no longer a competent principal to instruct the agent. The three requirements for a valid agency relationship are[6]:

1. Consent of both the principal and the agent;
2. The agent's authority to affect the principal's legal position;
3. The principal's control over the agent's actions.

Consequently, following the death of the settlor, the trustee has limited authority and responsibility and is restricted to preserving the assets for the estate of the settlor and the beneficiaries who will take thereunder. Additionally, the trustee only holds legal title with the settlor's reversionary interest resulting back to his/her estate to be administered by the estate trustee.

Death is the ultimate loss of capacity. However, while the settlor is still alive it is possible that he/she may lose capacity to manage property temporarily or permanently. The current practice is to assume that the settlor's attorney for property will step into the role as principal to instruct the corporate trustee/agent. Although, a further review illustrates an important difference between an attorney for property as agent authorized under the *Substitute Decisions Act*, 1992 ("SDA")[7] and an attorney for property to which the *Powers of Attorney Act*[8] would apply as well as general common law and equitable rules and principles governing powers and contractual agencies.

In the former case, the appointment of the attorney survives incapacity as a result of the operation of section 7 of the SDA. In the latter case, the settlor is the principal in an agency relationship established outside the parameters of the SDA. Therefore, once the settlor loses capacity, the agency relationship is at an end[9]. This suggests it cannot be revived to allow an attorney appointed under a traditional power of attorney for property authorized by the SDA to act as the new principal.

A possible solution to the conundrum is to have the bare trust/agency agreement contain provisions to provide for an attorney to replace the settlor in the case of incapacity, similar to what is found in commercial agreements. However, unlike commercial agreements, the bare trustee/agency agreement would need to state that the SDA shall apply to the agreement.

Given the corporate law compliance obligations and the potential challenges in the event the settlor of a bare trust agency arrangement loses capacity, the question arises as to whether this is the ideal solution. Arguably, a self-benefit trust is the better option because it dispenses with both of these problems and has the added benefit of the full application of trust law.

Self-benefit trusts, other than alter ego trusts, are authorized under section 73(1.02)(b)(ii) of the ITA and have key requirements in order for transfers of assets to take place at the adjusted cost base: there cannot be a change in beneficial ownership on the transfer, and after the transfer there can be no absolute or contingent right of a person (other than the individual which could include a corporation) or partnership as a beneficiary under the trust determined with reference to 104(1.1).

Subsection 104(1.1) states that a person or partnership is deemed not to be a beneficiary under a trust at a particular time if the person or partnership is beneficially interested in the trust at the particular time solely because of:

> (a) a right that may arise as a consequence of the terms of the Will **or other testamentary instrument** of an individual who, at the particular time, is a beneficiary under the trust

6 *Royal Securities Corp. Ltd. v. Montreal Trust Co. et al* [1966] O.J. NO. 1078 at para 53.
7 S.O. 1992, c. 30.
8 R.S.O 1990, c. P.20.
9 M. Jasmine Sweatman, *Powers of Attorney and Capacity – Practice and Procedure*, (Toronto: Canada Law Book, 2014 at 437.

(b) intestacy laws

(c) a right as a shareholder under the terms of shares of the capital stock of a corporation that is a beneficiary under the trust

(d) a right as a member of a partnership under the terms of a partnership agreement where the partnership is a beneficiary under the trust

(e) any combination of the rights described in (a) to (d)

It is possible that true bare trusts are underutilized in part because the disposition of the remainder on the death of the settlor cannot form part of the trust deed. As stated above, the remainder interest results to the estate of the settlor. Therefore, if there is only one Will, the value of the remainder of the trust will be included for probate purposes. The simple answer in Ontario is to do a secondary Will to address the remainder interest and ensure that the primary Will excludes any interest in the bare trust.

This solution potentially opens up again the discussion regarding secondary Wills raised in the *Milne*[10] trial decision regarding basket clauses. As readers will recall, Justice Dunphy took exception to the use of basket clauses as well as the possibility of trustee discretion to "determine" what assets were to be governed by the primary or secondary Wills more generally. I addressed this debate in detail in my STEP Toronto Journal article published in November 2018[11], and many other legal commentators also provided thoughtful reviews of the case.

The divisional court decision in *Milne*[12] upheld the use of basket or allocation clauses, citing materials written by this author, that state "Because a testator often executes their Last Will and Testament several years in advance of death, it is often not practical to provide a definitive list of assets which will require or do not require a Certificate of Appointment to be transferred or realized at the time the Primary and Secondary Wills are executed. To overcome this practical problem, estate planning lawyers often provide estate trustees with the power to determine whether a particular asset requires a Certificate of Appointment upon administering the will. These clauses are often referred to as allocation clauses. The use of allocation clauses is a common estate planning technique."[13] The use of multiple Wills and how assets are described still needs to be handled with care, but this should not pose a problem with the reversionary interest from a bare trust provided proper drafting is deployed.

Up to this point, the discussion has involved bare trusts with a single settlor. The question of whether there can or should be multiple settlors of a joint partner trust is equally applicable here. Section 73(1.01)(c)(iii) deals with trusts created by an "individual" that allow the individual or the individual's spouse/common law partner, in combination with the other, to benefit from a bare trust.[14] Where you have jointly held property with rights of survivorship, this suggests that the joint owners would be joint settlors of the trust. If the property is held as tenants in common for real property or a form of joint ownership with divided interests for personalty, it becomes problematic not for trust law purposes but income tax. In either case, the safer option may be two trusts with each settled by the respective settlor for the benefit of both the settlor and the settlor's spouse/partner.

As with alter ego and joint spousal/partner trusts, section 75(2) of the ITA will apply to attribute income, gains, losses, etc. back to the settlor during the settlor's life.[15] This will result in s.104(4.1) applying. However, since the settlor is the only beneficiary, any distribution of capital to the settlor can still take place at cost base pursuant to s.104(2). Application of s.75(2) ends on death resulting in the deemed disposition taking place at the end of the day on the date of death of the settlor and triggering tax in the trust as per s.104(4)(a.4) of the ITA. It is possible the deemed disposition in the trust can affect post-mortem tax planning, such as use of the loss carry back rules and rollovers to a surviving spouse, which should be investigated before proceeding.

As long as there is any substantial form of EAT, there will be people who try to reduce or avoid it. For those who do, self-help options such as joint ownership are ill-advised. The better solution is to use the appropriate form of trust. Where other types will not work, bare trusts are preferable to trusts that are barely there.

---

10 *Milne Estate (Re)*, 2018 ONSC 4174.
11 STEP Toronto Connection, November 2018 – Vol. 6 No. 3.
12 *Milne Estate (Re)*, 2019 ONSC 579.
13 *Supra* note 12, at Paragraph 22.
14 ITA, *supra* note 2.
15 *Ibid.*

Article: *Estate Administration Tax Act* Updates January 2020

By: Joanne Brigmantas, J.Brigmantas VLA, Virtual Law Clerk and Legal Assistant

In the 2019 Ontario Budget, which was announced on April 11, 2019, the Minister of Finance's overarching plan was to put people first through a series of strategies designed to deliver some financial relief to individuals, families and businesses. Part of that strategy included changes to the *Estate Administration Tax Act*, 1998.

The most significant change with respect to estates which came into effect on January 1, 2020, was the elimination of Estate Administration Tax on the first $50,000 of value of an estate in which a Certificate of Appointment of Estate Trustee is being sought. This means that estates with a value of $50,000 or less, will have no tax payable. For estates valued over $50,000, the Estate Administration Tax would be reduced by $250. *s.2(2)(b) of Estate Administration Tax Act*, 1998.

For those estates which fall into the $50,000 of value or less category, an Estate Trustee will not be required to file an Estate Information Return. Dispensing with this task for low-valued estates may provide some additional relief where there is likely little or no monetary resources to retain professional assistance and advice with respect to compliance with Estate Information Return filing requirements. p.1, General Information, Guide – Estate Information Return

With the Minister's choice of selecting a value of $50,000 or less appearing to point in the direction of making an Estate Trustee's job less onerous, I have to wonder if we will be seeing other changes in the not-too-distant future that will further help Estate Trustees of low-value estates with court applications by possibly implementing other recommendations made in the Law Commission of Ontario's August 2015 report on Simplified Procedures for Small Estates.

The deadline for filing an initial Estate Information Return has been increased from 90 days to 180 days from the date a Certificate of Appointment of Estate Trustee has been issued. s. 3.(1) O.Reg. 310/14, *Estate Administration Tax Act*, 1998.

When an Estate Trustee subsequently becomes aware of incorrect information or discovery of additional taxable assets not previously disclosed in the initial Return, they are required to provide an Amended Information Return containing corrected information together with the reason for updating the information or details of subsequently discovered assets within 60 days of becoming aware that the asset details or information in the initial return was incorrect or incomplete. s. 4.(2), 4(4) and 5., O.Reg. 201/14 *Estate Administration Tax Act*, 1998.

Similarly, there is a deadline of 60 days for filing an Amended Information Return from the date which a full or partial refund of Tax is received or additional Tax paid or from the date which an Undertaking is fulfilled. s. 6 and 7, O.Reg. 201/14 *Estate Administration Tax Act*, 1998.

Please note that the amendments to the Act and Regulation apply to Applications filed, Certificates issued and the resulting Estate Information Returns to be filed after January 1, 2020. For Certificates issued in 2019, an initial Return due date falling in 2019 or 2020, and Amended Return due dates falling in 2020, the timing of the filing of those Returns falls under the legislated timelines pre-January 2020.

QUICK REFERENCE:

Item or task	**As of January 1, 2020**
Estate Administration Tax on estates up to $50,000 in value	Eliminated
Estate Administration Tax on estates over $50,000	Reduced by $250
Estate Information Return for estates up to $50,000 in value	Not required
Estate Information Return for estates over $50,000	Tax calculated on first $50,000 in value = $0 Tax calculated on every $1,000, or part thereof, over $50,000 = $15/$1,000

Deadline for filing initial Estate Information Return	180 days
Deadline for filing an Amended Information Return	60 days from: • When the Estate Trustee became aware that the initial return was incorrect or incomplete; • The date which additional assets were subsequently discovered; • The date a full or partial refund is received by the Estate Trustee; • The date which additional Estate Administration Tax is paid; or • The date which an Undertaking has been fulfilled.

About Connection

Please note that each advertiser is linked to their web page (as are our program sponsors on the last page). Please click through to their web pages to learn more about each of our sponsors and advertisers. STEP Toronto publishes 'Connection' for our membership 6-7 times per year between September and May. We welcome your feedback and contributions. We are also looking for volunteers to assist with this newsletter. Please send any comments or inquiries to Paul Keul paul.keul@scpllp.com.

Letters, announcements, opinions, comments from members

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

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

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

Program Sponsors

DIAMOND SPONSORS

EVENT SPONSORS

GOLD SPONSORS