STEP Canada
ADVISING FAMILIES ACROSS GENERATIONS

Connection
Toronto Branch Newsletter

September 2020 - Vol. 8 No. 1

Message from the Chair, STEP Toronto

Hello everyone and welcome to a new "STEP year". While many things will be different this year, please be assured that STEP Canada and your Toronto board are working hard to ensure we can continue to support our members and provide quality programming and networking opportunities.

The first, and biggest, change is the transformation of the national conference into a Speakers' Series. The team at STEP Canada along with the national conference committee have worked tirelessly to ensure we're able to bring the conference speakers and material to you, our members. The first session was held on September 15th and the series continues through November 26th. To learn more and/or register, please visit: http://www.cvent.com/events/step-2020-speakers-series

At the branch level, we support and connect our members by providing education sessions, networking social events, the TEP Talks series (previously STEPping out to lunch), and producing this newsletter several times a year. For the time being, only the newsletter - providing you with news, information and timely articles - will continue to look the same. Thanks to Paul Keul (Newsletter Committee Chair), Andreea Muth (Deputy Chair) and all committee members for their hard work and dedication to producing a quality product.

TEP Talks has moved online, at least through 2020. Both the June and September sessions "sold out" and garnered great feedback from attendees. These sessions provide an opportunity to let us know what you're up to, share industry news, and perhaps gain some assistance with that file that's keeping you up at night. To learn more, please visit the events page on Step.ca.

Needless to say, in-person social events are "on hold" for now. I sincerely hope we will be able to host a social event early in 2021, but, of course, it's too early to commit to anything right now.

As the Speakers' Series and TEP Talks keep you well-informed and connected with STEP through the balance of 2020, your Toronto board is working with STEP Canada to design and provide quality programming beginning in 2021. We are currently reviewing a range of program options which include: locally-produced, nationally-produced, a mix of both; all in-person, all virtual, a mix of both. Much time and effort is being spent on this initiative with the clear goal of providing what's best for our members. I hope to be in a position to provide more details in next month's newsletter.

I'll leave you with some information from STEP Canada you may find useful!

In this Newsletter

STEP Toronto Executive

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

First released to members in March 2019, an electronic update to this excellent resource is now available through https://step.ca/mystep.

Submission to Ontario's Attorney General

On August 24th, the STEP Canada Executive Committee and STEP Canada Trust and Estate Technical Committee sent a submission to the Ontario Attorney General in response to the Estate Law Consultation. Please follow this link to view the submission.

Thanks for reading and take care.

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

STEP Presents...

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

September 29, 2020 – A New Age of Transparency: Will Anything Be Private?

Summary: The transparency of trusts is becoming increasingly important with the release of documents such as the Paradise Papers and the Panama Papers. Join us to hear the panel discuss the current state of the law, including:

- informing beneficiaries of the existence of a trust,
- providing information regarding estate or trust assets and finances to beneficiaries,
- protecting privilege and confidentiality of trust documents and holdings,
- filing detailed tax returns for trusts in the 2021 tax year and beyond,
- publicly reporting beneficiaries of trusts that hold real estate,
- understanding the implications of the common reporting standard,
- maintaining a register of persons with substantial interests in corporations, and
- protecting clients' privacy before and during CRA audits.

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

Speakers: **Mark Brender,** LLB, BCL, TEP, Montreal: Osler Hoskin & Harcourt LLP
Alison Oxtoby, LLB, TEP, Kelowna: Balmains Law Corporation
Barbara Novek, LLL, TEP, Montreal: Sweibel Novek LLP

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

Time: 12:00PM – 1:15PM

Venue: Webcast only

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

October 1, 2020 – Family Offices

Summary: What is a family office? How does it operate? How can one be set up? And what could it do for our family? If you (or your clients) have questions like these about family offices, join us to hear our panel discuss information practitioners need to decide whether a family office is right for them and their clients.

Moderator: **Corina Weigl**, LLB, TEP, Toronto: Fasken LLP

Speakers: **Elizabeth Cloutier**, CPA, CA, Toronto: Canada Overseas Investments Ltd.
Tom McCullough, MBA, CIM, CIWM, Toronto: Northwood Family Office
Cindy Radu, FCPA, FCA, LLM, ICD.D, TEP, Calgary: Cindy Radu Advisory Ltd.; Director at Large, STEP Canada

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

Time: 12:00PM – 1:15PM

Venue: Webcast only

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

October 21, 2020 – TEP Talk (formerly STEPping out to Lunch)

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

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

Event: 12:00PM – 1:00PM

Venue: Online or dial-in only via Zoom

Article: Are you a "Family Enterprise" or a Family that owns an Enterprise?

By: Jeff Halpern, CPA, CA, TEP, FEA, Business Succession Advisor - TD Wealth

As a professional Family Enterprise Advisor ("FEA"), the first question I must ask business owners is, are you a Family Enterprise?

A family enterprise is much more than a family business. A family enterprise comprises the holistic dimensions of the individuals, together with all aspects of the family wealth, consisting of the operating business, financial assets, real estate, heirloom assets (e.g. cottages, art, etc.), philanthropic interests, deferred assets like life insurance, and human/non-financial assets such as the intellectual, social, and spiritual values of the family.

Family enterprises have a unique family enterprise advantage, often called the "familiness advantage". The familiness advantage comes from the integration of the family, its individual family members, and the business with one another. This combination of valuable attributes brings a competitive advantage that often cannot be copied, benefitting from the interfacing of all the resources together.

When several multi-generational enterprise families were interviewed to help explain why they were so successful in being able to maintain, grow and transition their enterprises for so many generations, the answer most frequently cited was that "we put the family enterprise above ourselves". That means they successfully implemented a transition framework and techniques to enable decisions and actions within the wider family unit for the welfare and best interest of the family enterprise, rather than just for themselves.

The characteristics of a healthy family enterprise include strong open communication, an independent board of directors, transparency and high trust among all interested parties, a formal succession plan, strong leadership with performance measurement, clear boundaries, good corporate governance mechanisms, an alignment of purpose between individual and family, and above all, shared values. One of the many techniques to foster open communication in the family is a family meeting. Effective family meetings typically have an independent moderator, and encompass four cornerstones consisting of 1) family development, 2) family cohesion, 3) family enterprise, and 4) family fun.

If it were easy to be a successful multi-generational family enterprise, frankly more families would have chosen this route, and fewer families would have sold off their valuable businesses. But the truth is, it is not easy to be a successful family enterprise, as it requires collaboration, trust, hard work, and the help of skilled family enterprise advisors to guide the process.

The Family Enterprise xChange offers a specialist program leading to a designation for family enterprise advisors, called FEA. The designation FEA reflects the fact that the advisor has completed the very detailed year long course work, live family case work, and a written and an oral examination to prove their expertise. FEAs are an ideal choice of advisor to assist business families in developing transition strategies to optimize the family enterprise advantage, and working out the issues that may be preventing them from maximizing their potential.

Advisors to families who wish to have a successful family enterprise know there are 3 overlapping interested parties who must be considered in relation to family enterprise planning, including 1) Family Members, 2) Owners, and 3) the Business (i.e. Management), referred to as "the 3 Circle Model". The 3 Circle Model was

developed at the Harvard Business School by Renato Tagiuri and John Davis. The 3 circles overlap, to produce a Venn diagram, with 7 different perspectives to consider when optimizing family enterprise planning.

Issues can arise in all 3 circles and their overlaps, including voice versus vote, vision/goals, rivalry, governance weaknesses, communication and relationship breakdown, the need for formal legal agreements, conflict management, alignment of strategy, performance measurement, unclear policies, need for education, trust and control issues, and nepotism.

A professional Family Enterprise Advisor is trained to treat the family enterprise as a whole system. A system is a network of independent components which work together to try to accomplish the aim of the system. There are 5 principles when taking a systematic approach to family business:

1. the whole is greater than the sum of its parts
2. organizations seek 'homeostasis' (i.e. they like to keep the status quo)
3. patterns of behavior are predictable
4. every action creates a non-linear reaction
5. interfacing lifecycles imply constant change (…and there are many lifecycles to consider for the owners, business, industry, individuals, the family as a unit, etc.)

With all the complexities that can predictably arise, and the tendency for clashes to arise in the absence of careful planning using the expertise of a specialist Family Enterprise Advisor, and the input of a multi-disciplinary team of advisors, there is a tendency for "family business" families to fall into traps which prevent them from being successful "family enterprise" families, and otherwise allowing the enterprise to remain in the family for generations to come.

There are 5 key elements to ensure the continuity of a successful family enterprise, which intertwine to add strength to the enterprise:

- business strategy – clear definition and agreement of where the business is headed under strong leadership;
- wealth integration – to use all the resources of the family enterprise to assure success;
- intrapersonal clarity – roles and responsibilities defined with low risk of dissention;
- ownership alignment – the goals, mindset and benefits of ownership are aligned; and
- governance formalization – clear need for systems to maximize continuity success.

The FEA designation is still quite new in Canada, with fewer than 500 designees across the nation. The expertise of FEAs adds great value to business owner discussions, is a strong supplemental designation to the valuable "TEP", and should play a formidable role as part of the multi-disciplinary team in any business transition strategy.

Jeff Halpern, CPA, CA, TEP, FEA is a 2020 graduate of the FEA program, and works as a Business Succession Advisor at TD Wealth. He has practiced for more than 40 years as a CPA and cross-border tax advisor to business owners around the world, but freely admits that the dimension of his skills was significantly enhanced from the FEA program.

Article: Non-resident Beneficiaries, Pipelines, and Section 212.1


By: Brian Nichols and Kelsey Horning, Goldman Sloan Nash & Haber LLP

Sarah was a resident of Canada and a widow. She was also the sole shareholder of a private Canadian corporation, CanCo, that produces pet care products at a facility in Ontario. Sarah died suddenly and while she had a will, she had not completed comprehensive estate or succession planning. Her executors, Tim and Julie, began to review Sarah's estate (the "**Estate**"). They wanted to ensure that the Estate was handled in an efficient manner that would provide the largest benefit to the beneficiaries. After reading Sarah's will, Tim and Julie identified that the beneficiaries of the Estate were Sarah's sister Rachel and Rachel's two children Chris and Alex. Sarah's brother John and his three children Miriam, Jordan, and Kat were also beneficiaries. They also identified that the CanCo shares were the most significant asset in the Estate.

Tim and Julie contacted the beneficiaries and learned that Jordan and Kat were residing in Germany while the rest of the beneficiaries were residents of Canada. As they began to consult professionals and familiarize themselves with their responsibilities as executors, Tim and Julie became concerned about the tax liability relating to Sarah's death and the administration of the Estate. They decided to consult a tax expert about post-mortem planning and retained Yvette to advise them on their goal of minimizing overall taxation.

Tim and Julie had already recognized that Sarah's gain on her shares of CanCo was subject to tax due to the deemed disposition of Sarah's assets on her death. They told Yvette that the gain on the shares was driven by the increase in value of CanCo's assets such as its facility. They also told her that CanCo still held the assets. Yvette recognized that there was a risk of double taxation without further post-mortem planning. The increase in the value of the CanCo shares had been taxed when Sarah's gain was taxed. However, the beneficiaries would be subject to further tax if they sought to receive value from the company because the paid-up capital was not increased when Sarah's gain was recognized.

Yvette considered several post-mortem planning options. Her initial impression was that a pipeline transaction would be the most advantageous for the Estate. She also knew that section 84.1 of the *Income Tax Act* (**"ITA"**), which she would usually consider when planning a pipeline, only applies to Canadian residents. As the Estate was resident in Canada it appeared that section 84.1 would be the operative provision of the ITA. However, Yvette decided to conduct more research see what impact the non-resident beneficiaries might have on the availability of a pipeline before preparing a recommendation for Tim and Julie.

Yvette quickly identified section 212.1 of the ITA. It addressed non-residents and had many similarities to section 84.1. The basic structure of sections 212.1 and 84.1 involves four criteria: (1) a taxpayer disposes of shares ("subject shares") of a corporation resident in Canada ("subject corporation"); (2) the disposition of the subject shares are to another corporation resident in Canada ("purchaser corporation"); (3) the taxpayer and the purchaser corporation do not deal at arm's-length; and (4) immediately after the disposition, the subject corporation is connected with the purchaser corporation. When the criteria are met, there is a deemed dividend or reduction in paid-up capital. Where that applies it means that the pipeline goal of avoiding double taxation will not be met.

While there were many similarities, Yvette also noticed an important difference. Section 212.1 contains deeming rules for trusts that would apply to the Estate. In fact, the non-resident beneficiaries of the Estate would be deemed to have disposed of their proportionate interest in the shares of CanCo if the Estate disposed of the CanCo shares to a NewCo[1] in accordance with the usual structure of a pipeline. Section 84.1 does not contain this particular deeming rule and Yvette notes that this means that section 212.1 could apply even though the Estate itself is resident in Canada. It also means that the first criteria for the application of section 212.1 would be met.

Yvette also noticed that the Tax Policy Branch of the CRA has issued a comfort letter addressing this provision. It indicates that the application of the rule deeming a non-resident beneficiary to have disposed of shares disposed of by the trust to post-mortem pipelines is not consistent with policy and that they will recommend that the Ministry of Finance amend the law.[2] She is hopeful that this will occur. However, the Minister has not announced proposed legislation. Yvette decides to proceed by assuming this provision will stay as it is and considering if the other portions of section 212.1 apply.

Since the standard structure of a pipeline involves a disposition to a new Canadian corporation, Yvette concludes that the second criteria for the application of section 212.1 would also apply.

Yvette then observes that the final criteria would likely apply as well. Sarah owned all of the shares of CanCo and the Estate would typically transfer all of them to NewCo as part of a pipeline. Yvette sees that NewCo would control CanCo after a transfer because it would own more than 50% of the shares of CanCo.[3] She also sees that this means that the two corporations would be connected.

Yvette turns to consider the third criteria: would the two non-resident beneficiaries be arm's length from NewCo? She knows that under a standard pipeline the non-residents would not own shares of NewCo immediately after the disposition, the Estate would. Jordan and Kat are also uninvolved, and Yvette has no reason to think they would have any special factual connections to NewCo. Yvette notes that, like section 84.1, section 212.1 contains deeming rules for non-arm's length relationships involving control by groups of less than six. She concludes that there is a likely interpretation that the deeming rule applies. In that case, the non-resident beneficiaries would be deemed to be non-arm's length with NewCo as the purchaser corporation, and the third criteria would be met.[4]

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1 Paragraph 212.1(6)(b).

2 2019-12-02C - Finance Comfort Letter, The proposal in the comfort letter involves adding an exclusion for graduated rate estates to the trust provisions in paragrarph 212.1(6)(b). That solution would still result in narrower pipeline options where non-residents are involved as graduated rate estate status is not required where section 84.1 is the provision in question.

3 Subsection 212.1(1) references subsection 186(4) for the meaning of connected. Subsection 186(4) then refers to control.

4 Subsection 212.1(3) First, consider if the non-resident was part of a group of less than six that controlled the subject corporation before the disposition. If so, consider if the non-resident was part of a group of less than six that controlled the purchaser corporation immediately after the disposition and whether each member of that group was also a member of the first group. If both criteria are met, the non-resident is deemed to be non-arm's length from the purchaser corporation. Note that paragraph 212.1(3)(b) deems non-resident beneficiaries to own the shares owned by the trust for the purpose of this test. Subparagraph 212.1(3)(d)(i) also defines a group as "any 2 or more persons each of whom owns shares of the capital stock of the corporation". Jordan and Kat are two persons who would own shares in CanCo and a possible NewCo due to their deemed ownership of the shares held by the Estate. As they are deemed to own "any shares" owned by the trust, it appears they would both be deemed to own all of the shares. Since the Estate owns all of the shares of CanCo, that deemed ownership would be sufficient for the group of Jordan and Kat to exercise control. Under a standard pipeline, they would also be in both relevant groups. Due to subparagraph 212.1(3)(d)(iii), it does not matter if there is another group or person that also controls the corporation.

Having concluded that section 212.1 may apply, Yvette considers the consequences of this. In doing so, she notices another important distinction between sections 212.1 and 84.1. Under paragraphs 84.1(1)(a) and (b) there is a reduction in the paid-up capital of new shares or a deemed dividend respectively, only to the extent that the value of the consideration received in the disposition of the CanCo shares exceeds the greater of (i) the paid-up capital of the CanCo shares and (ii) the "hard ACB" of the CanCo shares.[5] Section 212.1 does not include adjusted cost base in the determination. Subject shares held by an estate, like the shares in CanCo, typically have a high adjusted cost base due to the deemed disposition on death. Accordingly, section 212.1 results in a significant deemed dividend or paid-up capital reduction in situations where section 84.1 would not. This would prevent the goal of a pipeline from being achieved. A deemed dividend would be subject to immediate taxation and a reduction in paid-up capital would further reduce the amount that the beneficiaries could receive from the corporation without additional tax.

If subsection 212.1(1.1) applies, it would trigger a deemed dividend or paid-up capital reduction on the portion of the CanCo shares sold by the Estate allocated to the non-resident beneficiaries under paragraph 212.1(6)(b).[6]

Yvette concludes that under the existing legislation, a pipeline will be only partially effective. It will be effective with respect to the portion of the CanCo shares representing the proportionate interest of the resident beneficiaries of the Estate. It will not be effective with respect to the portion of the CanCo shares representing the proportionate interest of the non-resident beneficiaries in the Estate.

Note: Originally published in Tax Topics (Wolters Kluwer Canada). Republished with permission.

5 See paragraph 84.1(2)(a.1) regarding adjustments to the adjusted cost base to determine "hard ACB".
6 Where there is a reduction in paid-up capital, the paid-up capital reduction would be spread out across all shares in NewCO including those that would be "allocated" to the Canadian resident beneficiaries.

Article: *Kumra v Kumra*: Was the Guardian of Property Bound by Previously Executed Minutes of Settlement?

By: Kimberly A. Whaley, CS, TEP, LLM, WEL Partners

The decision of *Kumra v Kumra* 2020 ONSC 1425, examined the role of a third-party professional guardian of property appointed after the settlement of a guardianship dispute between two brothers, and whether the guardian was bound by the corresponding Minutes of Settlement.

Background and Litigation

There was an acrimonious dispute between two brothers about their 81-year-old mother's property. The mother was incapable of managing her property. Starting in 2006, she had executed successive power of attorney documents, either appointing both sons jointly, or one of the sons solely. Litigation ensued with allegations on both sides of wrongdoing, fraud, and improper dealings. In May 2018, the brothers settled their dispute and personally entered into Minutes of Settlement (the "Minutes").

In September 2018, a judgment was issued by the court appointing a trust company as the mother's guardian of property. The Minutes included a provision that permitted, but did not require, the trust company to bring

claims against the brothers and others in respect of the mother's property. The provision also limited claims to property transferred as of the date of judgment (September 2018) and/or within the year prior.

At issue was whether the trust company was bound by the Minutes and whether the trust company could commence claims on behalf of the mother regarding two transfers that took place outside of the one-year period in the Minutes.

The trust company sought advice and directions on three questions:

1. Was it proper for the trust company to bring the motion for advice and directions?
2. Was the trust company bound by the Minutes?
3. If bound, was the trust company precluded from pursuing a claim respecting the property transfers?

Decision

On the first question, the court confirmed the distinction, that while a guardian cannot seek direction on how it should exercise its discretion, a guardian can seek the court's direction on whether it is *entitled* to exercise its discretion.[1] In this case, the trust company was seeking guidance on whether it *could*, on behalf of the incapable mother, pursue a claim; not, whether it *should* pursue a claim. Therefore, the motion was proper.

In answering the second question, the court noted that the Minutes were executed by the brothers only, and that the Minutes specifically stated that the Minutes were "binding on the parties."[2] The trust company was not a party to the Minutes.

While the representative of the trust company briefly spoke with counsel for the parties over the phone, he was not at the mediation where the dispute settled and had little input, if any, into the Minutes.

Notably, the trust company did not approve the settlement, and the settlement was never reviewed by a lawyer on its behalf. Further, subsequent to the settlement, a court order was obtained providing, among other things, that the trust company was appointed guardian of property and that the *brothers*, "shall abide by the terms of the Minutes of Settlement."

The court did not make an order that *the trust company* abide by the Minutes. The trust company was obliged to act in accordance with its Management Plan, not the Minutes.

Pursuant to S.25(2)(c) of the *Substitute Decisions Act*, 1992, SO 1992, c 30 an order appointing a guardian may include court-imposed conditions on the appointment. The judgment imposed no such conditions on the appointment of the trust company, including any condition that it abide by the Minutes.[3]

The court found that the trust company was not bound by the Minutes, and, therefore, it did not have to answer the third question. However, it remained in the trust company's discretion to decide whether it would be in the incapable person's best interest to pursue any claim on her behalf.

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1 *Kumra v Kumra*, 2020 ONSC 1425 at para 32.
2 *Kumra v Kumra*, 2020 ONSC 1425 at para 35.
3 *Kumra v Kumra*, 2020 ONSC 1425 at para 56.

Takeaway

This case is helpful to provide guidance to fiduciaries on the appropriateness of certain questions raised on an application for advice and directions and the scope of the relief reasonably requested.

Notably, all too often parties embroiled in litigation fail to properly include input from those affected by a mediation in situations like this for various reasons including practical obstacles making it not always agreeable or possible.

However, guidance can be gleaned here by all parties' intent on entering into Minutes of Settlement in litigation, to consider specifically turning focused attention to whether all individuals, or entities that are affected by the Minutes are involved and to ensure that the settlement is drafted so as to reflect such appropriate involvement of all required parties and signatories.

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.

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