



**FROM US  
TO YOU:  
SELECTED  
BLOG POSTS**

**O'SULLIVAN**  

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ESTATE LAWYERS

# O'SULLIVAN

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ESTATE LAWYERS

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## Disclaimer

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## Message: From Us to You

**IN SEPTEMBER 2012**, we welcomed a small group of readers to our inaugural blog post in which we expressed our hope that future posts would provide concise, cogent, creative perspectives on trust and estate matters with a focus on cross-border, multijurisdictional and domestic issues. Our goal for each post was to provide a few “pearls of wisdom” — easy to comprehend, timeless, and when strung together, an attractive, important and valuable collection.

For the past three years we have dealt with a number of topical issues we thought our readers would be interested to learn more about. We have also written on matters we enjoy considering and advising on, including the challenging and emerging issues we all face as the world becomes more global and which did not often make their way through our doorway a mere ten or fifteen years ago, but are now a present everyday reality: a child now married and living in the U.K.; a U.S. couple now living in Canada whether temporarily or permanently; the “mixed marriage” of a Canadian citizen married to a U.S. citizen; or the Canadian family with assets in multiple jurisdictions.

In an increasingly affluent and diverse society, many people have assets in several jurisdictions or may themselves be linked to more than one jurisdiction.

We believe that a trust and estate practice can no longer be effectively — or even safely — practiced in domestic isolation. The variety of intricate situations clients now present given increasing mobility of people and their property involve consideration of many laws and how they interlink (or don't), and how to plan effectively as a result.

We are also particularly interested in raising awareness of discreet but important topics and contributing to their development with new and creative ideas for best practice, as well as some *avant garde*, but well-grounded, approaches to traditional trust and estate matters.

Our readership has grown significantly, as has the number of our blog posts. We would like to thank our readers for joining us on our journey and for being regular passengers. It's been both fun and energizing.

We've strung together a selection of our past posts and compiled them in this book — our gift from us to you. And when you're done perusing, please feel free to pass it on to a colleague or friend and encourage them to embark on the journey at [www.osullivanlaw.com/blog/](http://www.osullivanlaw.com/blog/).

— *O'Sullivan Estate Lawyers*

The page features a minimalist design with a central vertical line. On the left side, there are two large, overlapping, curved lines that create a diamond-like shape. On the right side, there are two large, overlapping, curved lines that create a lens-like shape. The text 'ESTATE & TRUST PLANNING' is centered within the lens-like shape on the right.

**ESTATE &  
TRUST  
PLANNING**

# Trusts — It's Not All About the Tax

by Susannah B. Roth

October 18, 2012

**WHILE THERE ARE SEVERAL TAX REASONS** to consider a trust for current and future planning, sometimes the best reasons to set up a trust now or in a will have nothing to do with tax. Three excellent reasons to use a trust? Matrimonial issues, protecting children and wealth preservation.

- » Trusts can be an effective way to **alleviate the impact of matrimonial rights on assets**. An interest in a trust, especially a discretionary trust, is a different, and almost certainly lesser property right than absolute ownership. A trust can better protect a child's inheritance from matrimonial claims as opposed to an outright gift. Trust assets are segregated from the child's other assets, keeping them from being inadvertently mixed up with jointly-owned or matrimonial assets. Also, a trust can help preserve the exclusion of income and growth on inherited or gifted property from sharing on marriage breakdown or death.
- » When planning for minor children under a will, trusts are the preferred choice since without a trust, property inherited outright by a minor must be paid into court and is paid to the child upon reaching the age of majority (18 in Ontario) unless there is a legal guardian for the child appointed by the court who can hold and manage the funds. A trust under a will can **protect a child's inheritance** until the child is of a financially mature age to receive it, and allow management by trustees who can invest and distribute income and/or capital for the child's benefit. It can also ensure succession of capital on the child's death to his or her own children. Each trust can be tailored to meet a child's specific needs and the aspirations of the person establishing the trust.

- » **Wealth preservation** is another goal that can be met by using a trust. Once one has built up wealth, a trust can allow for the needs of current beneficiaries while preserving capital for future generations. Trusts also help protect against future claims such as for professional and director's liability, as an alternative to direct ownership. Financially astute trustees can help preserve capital for the long-term, maximize income and minimize expenses, adding to everyone's peace of mind.

Trusts are not just tax minimization tools. There are many reasons to consider a trust now or as part of a will on death. A trust can be used to accomplish a variety of wealth preservation and protection goals, in addition to the common tax-motivated ones of income-splitting, probate fee and capital gains and other tax minimization.

## Sometimes it is About the Tax — *Inter-vivos* Trusts and Spousal Loans

by Susannah B. Roth

July 26, 2013

**IN OUR OCTOBER 18, 2012 BLOG** “Trusts — It’s Not All About the Tax”, I discussed a few non-tax reasons to consider in setting up a trust as part of estate and wealth planning. However, sometimes the goal is to minimize tax through income-splitting. Two methods of minimizing tax exposure are using a family trust and a spousal loan.

Under Canadian tax legislation, the income of an *inter-vivos* trust is taxed at the highest marginal rate of tax. However, if an income-producing asset is held by an *inter-vivos* trust, and provided the trust is properly structured from a tax perspective, the trust’s income and capital gains may be flowed-through to the beneficiaries of the trust, and taxed in their hands at their own marginal rates. If the beneficiaries have lower tax rates, tax savings will result. Provided certain rules are followed and certain restrictions are put in place when the trust is created, the trust’s income should not be attributed back to the person who contributed the property to the trust.

If funds are loaned instead of gifted, the trust’s income should not be attributed back as long as interest on the loan is charged at least at the prescribed interest rate and paid each year on or before January 30th. The prescribed rate of interest, currently at a historical low of 1%, is a rate set by the Government of Canada and is relevant to certain tax matters and Canada Revenue Agency calculations, one of these being loans between non-arms’ length parties (such as a person who contributes property to a trust and the trust itself).

Using a loan to fund a trust with minor children or grandchildren beneficiaries who usually have a significantly lower marginal income tax rate than the person loaning the funds to the trust may be advantageous. The trust income can be flowed out to these minor beneficiaries, and used for such expenses as school tuition,

education expenses, and camp fees. Each minor beneficiary will be taxed on the income used for their benefit at their lower marginal tax rate, while the income will not be attributed back to the person who loaned the funds to the trust provided the rules noted above are followed. Effectively, many expenses can be paid using before-tax dollars, not after-tax dollars.

Loans to a spouse at the prescribed interest rate can also be used to split income with a lower-earning spouse (married or common law). As long as the loan is interest-bearing at least at the prescribed interest rate, and interest is paid on the loan on or before January 30th each year, the income including capital gains earned on the loaned funds will be taxed in the hands of the lower-earning spouse, allowing for tax savings based on the difference in marginal tax rates between the spouses. This is a very attractive option to anyone with investment funds earning more than 1% whose spouse is in a lower income tax bracket than themselves.

Peace of mind comes from many places. As part of an overall plan, family trusts and spousal loans, and other available tax planning tools, can work tax-efficiently as part of your estate plan.

## Testamentary Trusts — Is There Still a Place for Them in Your Estate Plan?

by Susannah B. Roth

February 26, 2014

**MANY OF YOU HAVE NO DOUBT READ A SUMMARY** or highlights of the 2014 Federal Budget and noted the proposal to eliminate graduated income tax rates for testamentary trusts. Rather than thinking that testamentary trust planning is dead (no pun intended), in our view there are plenty of reasons to consider using trusts in your Will, including for income tax minimization.

Income tax splitting opportunities will still be available by paying income from a testamentary trust to beneficiaries who are not subject to the top marginal income tax rate. For example, family trusts which allow for the sprinkling of income among several beneficiaries, such as children and grandchildren in lower income tax brackets, can still provide significant tax savings.

While the Federal Budget proposal appears to result in a trust set up under a Will being taxed at the top marginal income tax rate after three years from your death, there are two key exceptions which will still be of value to those looking to minimize taxes in their estates. First, an estate will continue to have access to graduated income tax rates for 36 months after a person's death, which can still provide significant tax savings for the first three years of an estate's existence. Second, graduated income tax rates will still be available for testamentary trusts that have disabled beneficiaries who are eligible for the Federal Disability Tax Credit, which will continue to allow for tax-efficient planning for disabled beneficiaries who qualify. Further, the proposed changes to the taxation of testamentary trusts do not affect the rollover of assets to a spousal trust at their tax cost, so spousal trusts can still postpone capital gains tax on assets while providing all of the other benefits of a trust.

While tax considerations are important, when looking at an estate plan, other considerations may be equally or more important. All of the non-tax reasons for including trusts in an estate plan can be

compelling depending on each individual situation. Succession planning to ensure property passes to future generations, protection of assets from future claims, including matrimonial claims, and probate fee minimization and avoidance of the probate process on subsequent deaths of beneficiaries, can be achieved by the use of a trust. And trusts will still often be the best option to protect certain beneficiaries; not only disabled beneficiaries who qualify for the Disability Tax Credit, but also minors, persons who suffer from a variety of special mental challenges, and others who require assistance in the management of their property and financial protection.

The testamentary trust income tax changes proposed by the Federal Government will, if passed, modify the advice estate planners provide for planning on death. However, with changes to the Ontario Estate Administration Tax on the horizon (see my previous post in December of 2012 "The New Ontario Estate Administration Tax Regime — What You Need to Know"), there will likely be more attention paid to planning to avoid the probate process, which may result in the more prolific use of lifetime trusts, not a decrease in their use.

## Beneficiary Designations: When Less is Not More

by Susannah B. Roth

February 15, 2013

**YOU MAY KNOW** that having a beneficiary designation for your life insurance policies or registered retirement plans (RSPs) is a good idea, including in order to avoid Ontario estate administration tax (previously probate fees) on the value of assets which would otherwise pass through your estate (see our Client Advisory "*Planning to Minimize Estate Taxes Under The Estate Administration Tax Act, 1998 (Ontario)*"), and protect against creditor claims. However, using the simple forms provided by the insurer or financial institution will not be sufficient or optimal in many situations. In contrast, a tailored designation which can be included in your will can allow for the same level of intricacy as the provisions in your will, including trust provisions for minor children and other beneficiaries.

Life insurance policies and RSPs can represent a significant portion of a person's estate, in some cases exceeding the value of their other assets. Many have significant term life insurance to provide for loved ones should they unfortunately pass away while they have dependants, including children and spouses. Many have invested a large portion of their savings in an RSP or other registered investment vehicle in order to maximize current and future tax savings and be comfortable after retirement.

These significant assets are often overlooked when completing an estate plan. Too often, reliance is placed solely on passing these assets by means of a too simplistic beneficiary designation form, which may only allow for the designation of primary beneficiaries, and possibly for alternate beneficiaries and for trustees for minor beneficiaries. More complex terms are simply not possible given the simplicity of the forms. As a result, minor beneficiaries may receive funds they are entitled to upon attaining the age of 18, which is not usually desirable if significant funds are coming to a child. If the trustee designation portion of the form is overlooked,

the institution holding the assets will be required to pay any funds payable to a minor beneficiary into court where the funds will be held until the child is 18, or to a court-appointed guardian, except in limited circumstances. Tax planning opportunities, such as a tax-driven trust to split income between a beneficiary and a testamentary trust funded with insurance or RSP proceeds, will be lost as the institutional forms designate adult beneficiaries outright.

Alternatively, beneficiary designations can be done in a will, which when properly drafted avoid the assets passing through the estate, and being subject to estate administration tax, as well as creditor claims. Unlike institutional forms, designations in a will can be tailored to meet individual circumstances, provide for alternate trustees, direct payment of income to beneficiaries as the person sees fit, and direct payment of capital to one or more beneficiaries at any age. Portions of the assets can be directed to be paid to or held in trust for different individual or charitable organization beneficiaries, and many other flexible arrangements can be made.

Estate planning involves not only planning for assets which pass through a person's estate, but all assets passing on death. The best means of passing assets to beneficiaries should always be considered. Where a person's assets include significant life insurance or RSPs, designations to provide for beneficiaries in an appropriate and customized manner specific to each individual situation should be considered as part of comprehensive estate and will planning.



## Beneficiary Designations — Problems and Pitfalls of Using Financial Institutions' Standard Forms

by Christopher Kostoff

December 10, 2014

**THE CASE OF *KILITZOGLU V. CURE*** highlights the confusion and difficulty sometimes caused when an issuer of a life insurance policy or retirement plan requires a beneficiary designation to conform to its standard form and rules. In that case, the deceased filed a change of beneficiary designation form with TransAmerica which was rejected on the basis that it did not precisely set out each beneficiary's entitlement on a percentage basis.

The designation in this case provided as follows: to "CIBC as there (sic) interest may appear and to [my daughter]". Based on the facts, CIBC's interest was the outstanding amount of a loan to the deceased. A revised designation form was never sent to TransAmerica and the designation form was never returned.

On the death of the deceased, there was confusion as to whether the designation was valid under the *Insurance Act* and, if it were valid, whether the deceased's failure to re-submit a new designation evidenced his intention to leave the beneficiaries as originally designated when he obtained the policy.

The court held that the designation was valid as it complied with the requirements under the *Insurance Act*. The court also held that the deceased's failure to resubmit a new designation form did not evidence an intention to leave the beneficiaries as originally designated.

Under the *Insurance Act*, the only requirement for a valid designation is that it must be in writing. While not explicitly required under the *Insurance Act*, the designation must also identify the beneficiaries and their entitlements with

sufficient clarity. In this regard, it appears that the court was of the view that CIBC's entitlement was sufficiently expressed. If a designation fails to comply with these requirements, the proceeds will be paid to the deceased's estate. Consequently, they will be subject to Estate Administration Tax (probate tax) and claims of the deceased's creditors.

As evidenced by *Kilitzoglou*, an issuer's refusal to accept a valid designation can result in seemingly unnecessary, and costly, litigation. It may also result in a new designation that does not reflect the individual's wishes, which could adversely impact other aspects of the estate plan. For these reasons and given that a significant portion of personal wealth is often invested in retirement plans and insurance policies, it would be of great service to their clients if issuers re-examined their current practices and considered revising their standard forms to provide more flexibility.

With regard to designation forms, individuals should be able to do the following, at a minimum:

- » **Designate multiple beneficiaries** and multiple contingent beneficiaries;
- » **Designate trustees** of a particular trust as the beneficiaries, which is often desirable for U.S. residents who have settled *inter vivos* trusts for probate planning purposes;
- » **Specify upon which death or deaths** a contingent designation is contingent (e.g., if a beneficiary predeceases the deceased, his or her share of the proceeds passes to his or her children, as opposed to being split equally among the other designated beneficiaries);
- » **Designate a person to hold the proceeds** in trust for a minor until a specified age; and
- » **Specify the exact entitlement** of each beneficiary, either as a fixed sum or percentage.

As an alternative, beneficiaries of insurance policies and retirement plans are frequently designated using a will as the written instrument in which to make a designation. Designations by will can be drafted in an extremely flexible manner and allow

for the utilization of additional planning opportunities, such as the establishment of a comprehensive trust to hold proceeds and the ability to use proceeds to fund legacies and pay expenses and liabilities, where appropriate. If properly drafted, designations by will should also avoid probate tax and claims of the deceased's creditors.

Given the often substantial portion of one's net worth that passes using beneficiary designations, it is critical to ensure that beneficiary designations are frequently reviewed and updated and are consistent with one's estate planning objectives.

## Great Family Cottage Memories? Keep Them that Way.

by Susannah B. Roth

May 7, 2013

**IF YOU OWN A FAMILY COTTAGE** or other vacation property, it may not be just a financial asset but an emotional investment for you as well, and therefore proper planning for this special asset is especially important in order to meet all your future goals for it. The financial aspects of estate or succession planning for your vacation property should, of course, be addressed; **for example**, it is important to ensure there are sufficient cash or other liquid assets in your estate to pay the potentially significant tax liability on your death if there is a long-term increase in the value of the property. However, keeping your family vacation property from becoming subject to claims on marriage breakdown, including a child's, or other beneficiary's, can, in some cases, prove even more important.

It is easy to overlook how potential future matrimonial property claims can impact a family cottage. Perhaps this may be because a common assumption is that a couple can have only one "matrimonial home", which will naturally be their primary residence, whereas in Ontario, under the *Family Law Act*, a couple can in fact have more than one, even several, matrimonial homes.

A matrimonial home is any home that married spouses, or one spouse and their children, ordinarily occupy as a family home and in which at least one spouse has an ownership interest. An ownership interest can be direct (the spouse is the owner or a joint owner of the property with one or more other owners) or indirect (the home is owned by a corporation in which the spouse holds shares, or by a trust of which the spouse is a beneficiary, depending on the corporate or trust structure in question). The value of each owner spouse's matrimonial homes is included in the value of their total property when calculating an equalization payment on marriage breakdown,

even if the spouse owned the same matrimonial home before the marriage, or if it was gifted to, or inherited by, the spouse during the marriage. Also, both spouses have possessory rights in every matrimonial home if they have no ownership interest in a property, and each spouse therefore has the right to ask the court to allow them to occupy any matrimonial home for a period of time after marriage breakdown.

When a family cottage is also a matrimonial home, these rules can result in the spouse who owns a cottage making a far greater equalization payment on marriage breakdown. In addition, their ex-spouse could have the right to occupy the family cottage for some time after the marriage breaks down, because of his or her possessory rights as outlined above.

Such undesirable consequences, can, however, be avoided if appropriate planning is put in place. Excluding the family cottage from property equalization on marriage breakdown by means of a marriage contract is potentially the most effective means of doing so, but there are alternative planning techniques which can be used, and which do not require an agreement between the spouses. A parent wanting to transfer a cottage to a child could sell the cottage to him or her and take back a mortgage, thereby reducing the value of the property for equalization purposes. A carefully drawn discretionary trust may keep a spouse from acquiring an ownership interest in the property, thus preventing it from becoming a matrimonial home. A parent can ensure that their children enter into a comprehensive property management agreement, including buy/sell provisions on marriage breakdown, by making such an agreement a precondition to the transfer of the family cottage to their children including under their will or trust.

It is advisable for those looking at planning for their family cottage or other family vacation property to seek professional advice, and consider the impact of the relevant family law legislation before implementing any plan. Emotionally charged legal battles over this asset are unfortunately becoming more and more common, but it is possible to avoid or at least minimize the potential for such conflicts with prudent planning, so that those great family memories can keep on coming.

## Joint Ownership — The Third Outcome

by Christopher Kostoff

March 11, 2014

**JOINT OWNERSHIP OF PROPERTY** is a common estate planning tool. Where property is owned jointly with a right of survivorship (as opposed to, for example, as tenants in common), the property passes in the normal course to the surviving joint owner on the other owner's death. In these circumstances, the property passes outside of the estate of the deceased joint owner. As a result, probate fees are avoided and the succession of the property is simplified. The recent case of *Sawdon Estate v. Sawdon* has expanded the use of this doctrine.

By way of background, in 2007, the Supreme Court of Canada in the case of *Pecore v. Pecore* appeared to have fundamentally altered the legal principles underpinning the law of joint ownership.

Prior to *Pecore*, it was commonly understood that the right to take by survivorship could not be gifted without also gifting joint beneficial ownership, which is the right to use and benefit from the property. In practical terms, on a transfer of money by a father, for example, into a bank account jointly owned with his daughter, with a right of survivorship, one of two possible outcomes could previously result. Either the daughter would become entitled to use the money for her benefit before and after her father's death or she would not become entitled to such and would have to transfer the money to her father's estate on his death. In both cases, the father would continue to be entitled to use the money for his own benefit.

Following *Pecore*, the applicable legal principles appear to have changed, as demonstrated by the decision in *Sawdon Estate*. In that case, a father transferred several bank accounts into joint accounts, with a right of survivorship, to himself and two of his five children. On the father's death, a charity that was a beneficiary of the father's estate argued that the funds formed part of the estate to which the charity was entitled and were not to pass to the children outside of the estate by right of survivorship.

The court concluded that the father had intended to create a trust when he transferred the funds into the joint accounts. Under that trust, the two children held the right to take by survivorship in trust for all of the father's five children. In arriving at that conclusion, the court notably held that the children had no beneficial entitlement to the contents of the bank accounts from the time they were opened, in turn suggesting that it is possible to gift the right to take by survivorship without also gifting present joint beneficial ownership.

The practical implications of *Pecore* and *Sawdon Estate* are that it now appears possible for a person to remain the sole beneficial owner of property transferred into joint ownership and determine the persons who are to receive that property on his or her death, while avoiding probate fees at the same time. Further, according to the court in *Pecore*, the transfer of the property into joint ownership should also not be subject to tax. That issue, though, was not argued before the court nor was it thoroughly considered by the court. As a result, it is possible that a future court could arrive at a different conclusion.

Without proper care and attention, the desired outcome may not always be achieved. The person's intentions at the time of the transfer determine which of the above three outcomes follows. Where they are not clear, certain legal presumptions apply to determine the outcome. As a result, it is important that the person's intentions are clearly expressed and documented, and that he or she acts consistently with those intentions. In ascertaining his or her intentions, courts often consider the control and use of the property and certain documents, such as tax filings and bank documents. As well, in certain circumstances, courts may also consider a declaration in the person's will expressing his or her intentions with respect to jointly-owned property.

While joint ownership appears to have become a more flexible estate planning tool, and the making of a gift of a right of survivorship might be creatively used in certain individual situations, it may be more appropriate and preferable to transfer property into a trust with a written trust agreement, as opposed to joint ownership. A trust adds a further degree of flexibility and certainty and can also result in a passing of property outside of one's estate like in *Sawdon Estate*.

## Letters of Wishes: Personal Care *Matters*

by Christopher Kostoff

September 3, 2014

**ADVANCE CARE PLANNING** is the process of planning for your future care. An important component is documenting your wishes with respect to personal care and discussing them with your attorney for personal care, your family, and your friends, as appropriate.

Wishes can be expressed in your power of attorney for personal care or in a separate letter, often referred to as a "letter of wishes" or a "living will". You may also express your wishes orally, but that approach, while legally binding under Ontario law, may lead to a variety of problems, especially where there is a possibility that family members may challenge decisions made by your attorney. Your wishes may be specific or general, and your most recent wishes prevail over any prior wishes.

Your wishes are important because they guide your attorney for personal care when you are no longer capable of making personal care decisions on your own. If your wishes are unknown, your attorney must act in accordance with your best interests under the *Substitute Decisions Act* (Ontario) if you are subject to Ontario law.

Notwithstanding their critical importance, it seems that letters of wishes tend to be underutilized. Where they are used, they are often limited in scope to deal with end-of-life matters only, and not as often with a variety of non-health care matters. These matters are critical to our everyday lives, and should be considered in the formulation of any advance care plan. The following questions provide some guidance as to matters you may wish to consider and include in your unique letter of wishes:

- » **Do you prefer to remain in your home setting** for as long as reasonably possible, as opposed to institutional care? In order to remain in your home, do you want to receive nursing and medical care in your home, such as may be provided by live-in or live-out caregivers?

- » **Do you have an accustomed lifestyle** that you wish to be adhered to as much as possible?
- » **Under what circumstances** would you want to reside in an institutional setting? Do you have a preference as to which ones? Do you have a geographical preference, such as one in your existing residential area or would you prefer to reside in one closer to your family or friends? What special services should be provided?
- » **Do you require special clothing, footwear or apparel?** Do you have special hygiene or personal grooming requirements or preferences, including as to cost and service providers?
- » **Do you have special transportation requirements or preferences?**
- » **Do you wish to pursue any special activities, including outings?**
- » **Do you have any dietary preferences or restrictions?**

If you have preferences with respect to any of the above matters, it is a good idea to express your wishes in a detailed manner, as opposed to relying on general statements.

Your substitute decision maker is not required to follow your wishes if they are not “applicable in the circumstances”. This may be the case where your circumstances have changed since you expressed your wishes, or where your wishes are vague, unclear, or imprecise.

Take, for example, the following wish expressed by a person while young and healthy: “It is my wish that I remain living in my home until my death”. It is likely this wish would be considered inapplicable if the person were to become totally dependent on others for his or her every need and required medical assistance that could not reasonably be provided in his or her home setting.

Instead of expressing your wishes generally, they can be tailored to your unique personal circumstances and they should contemplate various scenarios. It is important to update them as your circumstances change.

With our increasingly aging society, we can expect more emphasis on personal care issues as a core element of the estate planning process. By putting a comprehensive personal care plan into place, you increase the likelihood that your wishes—and not someone else’s—will be carried out when you are no longer capable of making personal care decisions on your own.

## Current Issues in Planning for Family Members with Disabilities

by Christopher Kostoff

May 27, 2014

**WHEN PLANNING FOR THE FINANCIAL SECURITY** of a family member with a disability, it is important to take into account his or her unique circumstances and needs. Available planning options sometimes place a large emphasis on ensuring that income support under the Ontario Disability Support Program (ODSP) is not jeopardized. Where there are more than adequate financial resources to support a disabled family member, reliance on ODSP with its attendant restrictions may be unnecessary or even undesirable. Common planning options for persons with disabilities include Henson trusts, inheritance trusts, and Registered Disability Savings Plans (RDSP).

### Henson Trusts and Inheritance Trusts

Henson trusts are used to provide additional financial support to persons who rely on ODSP. A properly structured Henson trust should not jeopardize a person's entitlement to income support under the ODSP. A Henson trust is a fully discretionary trust under which the trustees have complete discretion to determine whether to pay any income or capital to a beneficiary. Henson trusts are established for the primary benefit of persons who rely on ODSP, but other family members are often included as beneficiaries as well.

An inheritance trust is a trust established by will for the maintenance of a person with a disability. Its total assets must not exceed \$100,000. Under the ODSP, an inheritance trust is an exempt asset and does not affect a beneficiary's entitlement to income support. In contrast to a Henson trust, an inheritance trust does not have to be fully discretionary.

Even where a person does not rely on ODSP, a trust may still be appropriate. Trusts established by will, including Henson trusts and inheritance trusts, offer attractive tax benefits because they

are treated as separate taxpayers and currently have their own graduated rates of income. As a result, it is possible to split income between the trust and the beneficiary, which should result in an overall tax savings.

However, the government has released draft legislation which will, if enacted, eliminate the above tax benefit starting in 2016, except where the beneficiaries of the trust are eligible for the disability tax credit.

Unfortunately, the narrowness of that exception makes it problematic to use a discretionary trust to accumulate income for persons who face mental and physical challenges, but who do not qualify for the disability tax credit. In those circumstances, trustees are faced with the difficult decision of whether to accumulate the income and be taxed at the highest marginal tax rate or distribute the income to the beneficiary who may be taxed at a lower marginal tax rate, but who should not be put in control of the income; for example, a beneficiary that suffers from substance abuse.

The government has not yet released any further details regarding the parameters of the exception. There is a potential concern that they may be too narrow and may disrupt Henson trust planning if all of the income beneficiaries of the trust must be eligible for the disability tax credit. Under a Henson trust, the trustees may accumulate income for a maximum of 21 years. Income arising after the expiry of that period must be paid out by law. Payment of that income to a beneficiary who relies on ODSP could jeopardize his or her entitlement. To protect against that concern, a Henson trust provides that such income must be paid to other beneficiaries, such as other family members. As a result, it may be necessary to determine from the outset whether to forgo either the tax benefit or income support under the ODSP.

As well, other family members are often included as beneficiaries of Henson trusts and other testamentary trusts because they tend to generate more than adequate income to support the family member with a disability. If other family members cannot be beneficiaries, higher overall tax may be payable since it will no longer be possible to split income of the trust among various beneficiaries that would be taxed on that income at their own marginal tax rates. Instead, most or all of the income of the trust will have to be taxed in the hands of a single taxpayer, the trust.

### Registered Disability Savings Plan

An RDSP is a tax-assisted savings plan. A person eligible for the disability tax credit must be designated as the beneficiary of the RDSP. A maximum of \$200,000 may be contributed to an RDSP and income-tested government assistance may be available to match or enhance contributions to the plan. For purposes of ODSP, RDSPs are exempt assets and payments are considered exempt income.

The above planning tools may not be appropriate or necessary in all circumstances. Each individual situation must be considered in order to formulate a reasonable plan in the best interests of the family member with a disability. For more information on Henson trusts, inheritance trusts, and RDSPs, please see our Advisory titled "Estate Planning to Benefit Family Members With Special Needs".

## Dispute-Proofing Your Estate Plan

by Jenny Hughes

March 26, 2015

**IT'S COMMON KNOWLEDGE** that we are at the leading edge of an avalanche of wealth transfer. Baby boomers in increasing numbers are heading into their retirement years and beyond. The succession of capital that will occur is unprecedented. In the recent past, we've also seen higher average annual divorce rates and lower rates of marriage than say 50 or even 25 years ago. Added to the mix of wealth transfer and blended, non-traditional and sometimes dysfunctional families is another topic we've written on periodically in the past – greater proportions of the population living in diminished states of capacity for extended periods of time, dependant on family and friends to act as their substitute decision makers. In certain families, any combination of these ingredients can be a recipe for a nasty and prolonged estate dispute and general fractiousness.

If you are concerned that a dispute could occur regarding your estate or personal care, you should consider ways to head off or resolve such disputes in your planning. Keep in mind that disagreements may arise not only among your beneficiaries, but also among executors and trustees as well as between the two groups.

Dispute prevention or minimization mechanisms could include naming an objective and independent executor or trustee in your will or trust. If more than two executors or trustees have been named, consider including a "majority rule" clause to break an impasse among them. If multiple executors or trustees are named, appointing people who get along and work well together is also critical – otherwise the administration can be turbulent from the outset.

Other tools that may minimize or prevent disagreements from erupting are ethical wills (a topic we blogged on in our November 25, 2014 post), family meetings, and letters of wishes. The first two tools allow the testator to explain to family members and other beneficiaries his/her reasoning and context for making certain decisions in the will. Letters of wishes can provide guidance to executors and trustees in making potentially contentious decisions.

Having the foresight to include various dispute resolution techniques and processes can be invaluable if a dispute should erupt. While courts can disallow provisions in a will that oust the court's jurisdiction to determine legal issues (such as validity and interpretation issues), as well as certain provisions that essentially threaten beneficiaries with losing their entitlement if they litigate certain legal issues relating to wills and trusts (in *terrorem* clauses) unless they are carefully drafted and meet certain legal requirements, there are other methods to consider.

For example, we often see disputes between siblings or other family members regarding the distribution of personal belongings — often driven not by the monetary value, but by the sentimental value attached to them. These disputes can often be avoided by including a detailed and fair bidding or other selection process. Similar provisions can be used for the purchase or distribution of family cottages and residences.

Umpire clauses enable a neutral party to make a final decision on certain matters in the event of a stalemate between trustees (or beneficiaries). A clause could also be included recommending that should there be a dispute, mediation or arbitration is to be employed as a means of settling it outside of the court process.

While mediation in Ontario is mandatory in estate dispute proceedings started in Toronto, Ottawa and Essex County, clauses in wills and trusts that make arbitration or mediation mandatory are problematic. Unlike arbitration clauses in contracts, in which each party expressly consents to the contract's provisions, beneficiaries of trusts and wills usually do not execute the documents or formally consent to be bound by the document's provisions.

It is interesting to note that in the United States there has been some recent movement towards accepting and enforcing mandatory arbitration clauses in estate planning documents. In 2007, for example, Florida became the first state to pass a law governing the enforcement of mandatory arbitration clauses in wills and trust agreements. This was followed by similar statutes in other states such as Arizona — which authorized a trust agreement to “provide mandatory, exclusive and reasonable procedures to resolve issues between the trustee and interested persons or among interested persons regarding the administration or distribution of the trust”. In 2013, the Texas Supreme Court found a mandatory arbitration clause in an inter vivos trust enforceable against the beneficiaries.

Anticipating conflict and including carefully considered and drafted clauses to effectively head-off or resolve such disputes by non-judicial means are important components of a prudent, efficient and cost-effective estate plan. Dispute-proofing your estate planning is one further matter to consider and receive skilled advice on in the estate planning process.



A vertical line runs down the center of the page. On the right side, there are several curved lines that intersect and create a stylized, abstract shape. The text 'ESTATE & TRUST ADMINISTRATION' is centered within this shape.

**ESTATE &  
TRUST  
ADMINISTRATION**

# New Ontario *Estate Administration Tax Act* Regime Effective January 1, 2015

by Margaret O'Sullivan

January 27, 2015

**ORGANIZING ONE'S ESTATE PLANNING** to minimize estate administration taxes or "probate fees" (the tax collected by the Ontario government on the date of death value of a deceased's estate when an estate representative applies to the court for a certificate of appointment) has been a popular goal for Ontarians given our relatively high rate of tax as compared to other provinces and territories.

A little over two years ago, our blog post "The New Ontario Estate Administration Tax Regime— What You Need to Know" (December 5, 2012), advised of new legislative measures enacted under the *Estate Administration Tax Act* (the "Act") that increased reporting requirements and enforcement procedures. Those measures, which have been looming over our heads since that time, came into force on January 1, 2015 with little warning. What they mean for anyone dealing with probate in Ontario is a more onerous and expensive estate administration process and rethinking current estate planning.

The new reporting regime is triggered by applying for and receiving a certificate of appointment of estate trustee on or after January 1, 2015. In addition to the paperwork an estate representative must complete and file with the court in order to receive a certificate of appointment, estate representatives now must also complete and file an estate information return with the Ministry of Finance within 90 calendar days of the court issuing the certificate of appointment of estate trustee.

Most significantly, the return (which is a prescribed form available from the Ministry) requires the estate representative to detail each estate asset and its fair market date of death value. The estate representative must also be able to corroborate the reported asset values. Certain assets for which fair market

values are trickier to figure out (such as real property (MPAC values are not acceptable), household goods and furniture, business interests and shares of private corporations, etc.) will likely require professional valuations and appraisals in order to ensure that the estate representative does not file a false or misleading return. Penalties include fines and even imprisonment for failing to file a return or where the information filed was false or misleading.

If, after filing a return, an estate representative later discovers the return was incorrect or incomplete (including because additional estate assets are determined), the estate representative must file an amended return within 30 days of the discovery.

The Ministry, in conducting its review of the returns, has broad audit powers, including the assessment of further tax if an estate's date of death value is determined to be greater than the amount on which tax was originally paid. What will likely prove to be frustrating for estate representatives and beneficiaries alike is the four-year period from the date of filing the return in which the Ministry can conduct its review and audit.

It will take some time working under this new regime to see how it will function in practice. We predict, however, that these more onerous and costly requirements will spark renewed interest in tax minimization strategies, such as multiple wills and using a trust as a will substitute, among others.

In light of these recent changes, we have also updated our Client Advisory "Planning to Minimize Estate Taxes Under the Estate Administration Tax Act, 1998 (Ontario)", which sets out a number of strategies that may be considered.

## Fiduciary Accounting — Slicing the Pie Without Causing Indigestion

by Susannah B. Roth

November 4, 2014

### TRANSPARENCY HAS BECOME A POWERFUL DISCUSSION

point in recent years. A lack of corporate financial transparency has arguably been the cause of many modern major financial crises and corporate bankruptcies. Whether you agree with this view or not, transparency is a hot-button issue, both socially and politically. Lack of transparency can create an emotional, almost visceral reaction in those who view it as a deliberate attempt to hide the facts from those who are entitled to them. This reaction can, in turn, be upsetting and frustrating to those who are not attempting to hide anything, but for a variety of reasons legitimately believe that greater transparency is not necessary or appropriate in the circumstances.

This global dynamic can also be seen in situations where a beneficiary of an estate or trust or someone close to an incapable person is seeking greater transparency from an executor, trustee or attorney for property who has not been forthcoming with information or documents. Voluntary and timely sharing of information, good communication and a sound understanding of the law can prevent disputes between beneficiaries and executors or trustees or among family members of an incapable person based on a lack, or perceived lack, of transparency.

Executors, trustees and attorneys for property are three types of fiduciaries. Fiduciaries are entrusted with an important role which provides them authority over the property of other persons. The role of a fiduciary comes with legal obligations, one of which is the duty to account to those with a financial interest in the property the fiduciary has been entrusted with. A beneficiary cannot know if their “slice of the pie” is the size it

should be if they are not given the necessary information, backed-up by written documents, to confirm what they are being told by the fiduciary.

Disputes in estate, trust and attorney accounting can arise from a variety of circumstances, but it seems that lack, or perceived lack, of transparency is a leading factor. There are three common causes: lack of timely and voluntarily disclosed information, lack of good communication and lack of knowledge of the law. Any of these three causes can result in a dispute between the fiduciary and one or more interested parties, leading unfortunately to mistrust, disrupted families, court actions, wasted time and money and relationship breakdown. These consequences are very serious, but often the cause of the problem is not taken seriously by one party or the other until a dispute erupts. Unfortunately, by then it may be too late to do anything but mitigate the damage.

At the outset of their role, it is important for fiduciaries to understand their obligations and to seek legal advice to ensure that they are keeping appropriate records and providing information on a timely basis. Consideration should be given to volunteering information, not just waiting until being asked to do so. It is also important for fiduciaries to make timely communications a priority, particularly when providing updates, advising of unexpected delays or obstacles and answering questions. While legitimate delays are usually understood and accepted by reasonable parties, and some requests for information may be premature or inappropriate, frequent, ongoing lack of transparency often breeds a level of distrust.

The obligations of a fiduciary can be onerous at times. But keeping on top of communications and being transparent with beneficiaries is key to preventing disputes. Showing at each stage that the “slicing of the pie” is being done properly and fairly is always the best approach for the fiduciary charged with this important role.

## Paying for What You Get: General Considerations for Compensating Executors, Trustees and Attorneys

by Susannah B. Roth

August 12, 2014

**ONE ASPECT OF ESTATE PLANNING** which is often not considered is how executors, trustees and attorneys should be compensated. Yet compensation claims are a frequent matter of contention and resentment, create disputes between executors, trustees, attorneys and beneficiaries, and can even result in litigation. Common scenarios include the executor, trustee or attorney claiming more than the beneficiaries believe they deserve, or the executor, trustee, attorney and beneficiaries not understanding what compensation is permissible and/or reasonable. Disputes can be minimized with advice and planning which address how the person who is going to do a very important job will be paid for their time and care.

The *Trustee Act* (Ontario) provides that executors and trustees are entitled to receive “such fair and reasonable allowance” for “the care, pains and trouble, and the time” they expend in administering an estate or trust but does not specify how compensation for executors and trustees is to be calculated and leaves it to the discretion of the Court. The Courts have however developed a “rule of thumb” tariff rate for executors and trustees which usually works out to approximately 5% of the value of the assets of an estate or trust, but which may be increased or decreased depending on circumstances and in accordance with certain developed rules and principles.

The *Substitute Decisions Act*, 1992 (Ontario), sets out compensation for attorneys for property in accordance with a prescribed fee schedule, although an attorney for property may request a higher fee and a Court may adjust the attorney's

compensation “in accordance with the value of the services performed”. However, unlike an attorney for property, an attorney for personal care has no statutory entitlement to compensation. Any right to compensation must be provided by the person giving the power of attorney for personal care, or the attorney for personal care must apply to Court to be compensated in this role.

The rules discussed above for compensating executors, trustees and attorneys may be modified by the Will, trust instrument or power of attorney. Importantly, when appointing an executor, trustee or attorney appropriate compensation for these roles should be considered. A method of calculating compensation different from the rules discussed above can be set out (or in the case of attorneys for personal care, allow for compensation to be paid). Examples of what can be provided include a different percentage amount, an hourly rate or a combination of both, or a fixed amount of compensation for acting as executor and/or an annual amount for acting as trustee or attorney. Fixed amounts can be indexed to ensure the intended value is not eroded over time.

A trust company or professional trustee will require a compensation agreement before agreeing to act. The will, trust instrument or power of attorney can allow for this agreement to be negotiated by the other executors, trustees or attorneys, if any, or by adult beneficiaries or family members. Alternatively, a compensation agreement can be negotiated by the person before executing their will, trust instrument or power of attorney and incorporated by reference.

You may think no compensation is appropriate in respect of certain appointments such as close family members, or major beneficiaries may not need or want compensation. If only one child of several is appointed, it may create resentment if he or she is compensated for being an executor, but on the other hand, he or she may be disadvantaged by not being able to claim compensation for his or her efforts. Each situation is unique and must be carefully thought through, in particular in large estates where the tariff rate may seem overly generous.

There are many factors to be considered in determining compensation to ensure the wishes and values of the person

who is making the Will, setting up the trust or giving the power of attorney are reflected and given effect. Unfortunately, too often issues of compensation are left unaddressed, and one's intentions are unknown and not carried out.

Dealing with compensation is an important part of the estate planning process. Including express provisions regarding compensation can achieve one's wishes and minimize disputes and legal expense that often accompany claims for compensation.

## Stepping Into an Incapable Person's Shoes

by Jenny Hughes

June 12, 2014

**WE ARE UNDOUBTEDLY IN THE EARLY STAGES** of a surge of a substantial segment of the Canadian population reaching ages when capacity issues will start surfacing for some. With advances being made every day in all areas of health care, we will be faced with an aging population living for increased periods of time in potentially varying states of diminished capacity. A corollary of this scenario should mean that in future we will have more people assuming the role of substitute decision maker for individuals with impaired capacity — either acting as an attorney under a power of attorney or as a court-appointed guardian.

In Ontario, two main categories of substitute decisions makers exist: one for property and the other for personal care. This post focuses on attorneys for property acting under a power of attorney document.

Acting as a substitute decision maker is an important role. It ensures that during a particularly vulnerable time in a person's life, his or her financial affairs are actively monitored and managed (income is received and deposited, bills are paid, assets such as homes and cars are insured and maintained, etc.) while his/her welfare and that of his/her spouse and dependants are not jeopardized.

The role of an attorney for property can be a tricky one to properly fulfill however — especially if it is unfamiliar territory for a new attorney. While ownership of the property does not change (it remains with the incapable person), one does essentially step into the incapable person's shoes in the sense of being able to do anything on the incapable person's behalf that he/she could have done with respect to their property except for certain testamentary-type actions like making a will.

Ontario's *Substitute Decisions Act* sets out most of the laws governing attorneys for property. The remainder of this post highlights some duties and rules to keep in mind when acting in this capacity, subject to any explicit instructions contained in the power of attorney document itself:

1. **Always act “diligently, with honesty and integrity and in good faith”** and in the best interest of the incapable person, ensuring that all decisions regarding the property are based on maximizing the incapable person's quality of life.
2. **Do not commingle personal property and finances** with the incapable person's property and finances: keep them separate.
3. **Keep detailed, accurate records and accounts of all transactions** involving the incapable person's property, including debits, credits, investments, liabilities, compensation taken and inventories of original existing assets the incapable person owned as well as after-acquired and after-disposed of assets. Also locate and consult the incapable person's will to ensure that property gifted in it is not disposed of unless absolutely necessary.
4. **Make expenditures required for the reasonable support and care** of the incapable person. If funds remain available after such payments, ensure the reasonable maintenance and education of the incapable person's dependants. If funds still remain after these expenditures, look after the incapable person's other legal obligations.
5. **Discretionary expenditures** such as gifts, loans and charitable donations should only be made if there will be sufficient funds left to satisfy item 4 above and the circumstances permit. For example, gifts or loans can be made to the incapable person's friends or relatives only if “there is reason to believe, based on intentions the person expressed before becoming incapable, that he or she would make them if capable”, unless the power of attorney sets out broader authority. The gift or loan should not be made, however, if the incapable person expresses a contrary wish.

6. **Maintain confidentiality** regarding the incapable person's affairs except in the appropriate circumstances.
7. **Use the investment provisions** in Ontario's *Trustee Act* as guidelines to prudently invest the incapable person's property.
8. If there is a **different substitute decision maker for personal care**, where reasonable, coordinate property and personal care decision-making.
9. **Keep the incapable person involved** in and informed of matters relating to their property to the extent they are able to participate and understand.
10. **Consult** with supportive family members, friends and those providing personal/health care services to the incapable person.

Difficult questions regarding duties or obligations can always arise and it is best practice in those instances to consult a qualified professional advisor.



**CROSS-BORDER AND  
MULTIJURISDICTIONAL  
ESTATE PLANNING  
AND ADMINISTRATION**

## Tax, Tax and More Tax: Probate Fee Planning for Extra-Jurisdictional Assets

by Susannah B. Roth

May 7, 2014

**IF YOU'VE BEEN FOLLOWING THE RECENT FEDERAL BUDGET** changes to testamentary trust taxation, the proposed (but now defeated) Ontario Budget with its increased taxes on higher-income earners, tobacco and airplane fuel, and the recent changes to the Ontario *Estate Administration Tax Act* (see my December, 2012 blog “The New Ontario Estate Administration Tax Regime — What you need to know”), you may be thinking you need to move tax planning further up in priority on your “to do” list. But there is good news: if you have assets outside Ontario, you can effectively plan for the administration of such assets on your death while avoiding the necessity of paying Ontario Estate Administration Tax (also known as probate fees) on the value of such assets.

Estate Administration Tax is currently levied when a primary grant of probate is applied for in Ontario, based on the value of a person's **worldwide** assets which pass through their estate. The current rate of the tax is \$5 per \$1,000 up to \$50,000, and \$15 per \$1,000 on the value of assets over \$50,000. Of the assets which pass through an estate, only real property located outside of Ontario is exempted from the calculation of the value of the estate for the purposes of the Estate Administration Tax. This effectively provides for a 1.5% wealth tax on the value of the estate assets for all estates of Ontario residents, or \$15,000 per \$1M of assets. No deduction is allowed for any debts except those which are secured on real estate, such as mortgages and secured lines of credit (credit card debt or unsecured lines of credit are not deducted — the tax is on the gross value of a person's assets and not their net worth). If you have a high-value estate, this can be a significant expense.

While real property located outside Ontario is exempted from the value of an estate for Ontario Estate Administration Tax purposes, other extra-jurisdictional assets are not. Bank accounts, shares in private corporations, personal effects — all these are included in your Ontario estate value and subject to Ontario Estate Administration Tax, even if these assets do not require a probate certificate to administer. In some cases, the jurisdiction outside Ontario may require the Ontario Will to be probated in that jurisdiction as well, which can result in probate fees being paid twice on the same assets.

Fortunately, there are planning options available, as discussed in our Client Advisory “Planning to Minimize Estate Taxes under the *Estate Administration Tax Act*, 1998 (Ontario)”, where we set out a number of possible options for minimizing Estate Administration Tax. For extra-jurisdictional assets, one option is to implement a multiple will structure, and have separate wills to deal with assets in different jurisdictions. Ontario allows for a grant of probate to be obtained which is limited to the assets named in a Will. You can plan for extra-jurisdictional assets by executing one will for Ontario assets requiring a probate certificate for administration, and another will for other assets, including extra-jurisdictional assets. If any extra-jurisdictional assets are located in other high-probate fee jurisdictions, you can execute multiple wills to minimize your estate's exposure to such fees/tax as well as Ontario Estate Administration Tax by following a properly thought-out and integrated plan.

For example, some provinces such as Alberta levy a fee of a maximum of \$400. If you have any Alberta assets and your executor is able to administer most of your assets with an Alberta grant of probate (many financial institutions will require a grant of probate from a province or territory but not necessarily an Ontario one even if your accounts are in Ontario), at a fee of \$400, you could execute one will only for those Ontario assets which will likely require an Ontario grant of probate to be administered, such as Ontario real estate, and another will for your other assets.

To illustrate the potential savings, assume your Ontario real estate is worth \$1M and your remaining assets are worth \$2M. If you executed one Ontario Will, your estate would pay Ontario probate fees of approximately \$45,000 (assuming you did not hold any real estate in Alberta), but if you executed two Wills, one for



Ontario real estate and one for your other assets, your estate would pay \$15,000 in Ontario probate fees and Alberta probate fees of \$400, a potential savings of approximately \$30,000 (assuming all of your assets other than Ontario real estate can be administered with an Alberta grant of probate).

Multi-jurisdictional assets create multi-jurisdictional estates, and require proper, integrated planning. Not all plans which are effective for Ontario residents will be optimal for those with multi-jurisdictional assets, and plans for different jurisdictions should never be done in isolation. Sometimes less is just more tax, so consider multi-jurisdictional estate planning in appropriate circumstances.

## Special Opportunities for Canadian Resident Estate Beneficiaries With a Non-Resident Relative

by Margaret O'Sullivan

April 24, 2013

**IN THIS BLOG**, we highlight some special opportunities available where a non-Canadian resident passes assets on death to a Canadian resident. To illustrate, a couple of common examples:

- » **You have a parent or other relative** who never lived in Canada who will be passing significant assets down to you on his or her death under his or her will.
- » **You left Canada at least 18 months ago** and have become a non-resident of Canada for tax purposes, but you have children or other relatives back in Canada.

In both of these situations, there may be the opportunity to minimize or even eliminate Canadian taxation on the income on the inheritance which the Canadian beneficiary might otherwise have paid resulting in very significant tax savings over time.

Under Canadian tax rules, if you inherit a gift of capital outright, you do not pay tax on the inheritance itself. But if you are a Canadian tax resident, the ongoing income on the inheritance is taxable to you. Likewise, if the gift is by way of a trust, if the trust is considered resident in Canada for tax purposes, either the trust will pay tax on the income or the beneficiary will if the trust elects to allocate the income out to the beneficiary.

If however, a trust is created under a will of a non-resident of Canada who either never lived in Canada or has not been resident in Canada for tax purposes for at least 18 months at the time of his or her death and if the trust **is not** considered Canadian tax resident because it is not controlled by Canadian tax residents, if income earned by the trust is not paid out to the Canadian beneficiary (but instead capital is), the capital

distributions will be tax-free. As well, the income will not be taxable in Canada if it is not paid out to a Canadian resident beneficiary. As a result, it is possible to set-up the trust in a jurisdiction outside Canada where there may be little or no tax payable on the ongoing income. The terms of the trust could require that any unpaid income be accumulated, and becomes part of the capital of the trust.

For anyone who is Canadian tax resident and has a relative or other person from whom they may be receiving a significant inheritance or who has left Canada and has Canadian resident beneficiaries, this is a planning idea that may be worthwhile to consider, particularly where large sums are involved. Often a corporate trustee and/or persons resident in the low-tax jurisdiction would be named as trustees of the trust. The costs of maintaining a trust, including any trustee and administration fees and a variety of other considerations are relevant when considering whether this planning meets one's goals and objectives. However, where it does, it can provide for very significant tax savings over time.

Increasingly, people are more mobile and move to different jurisdictions outside Canada, or decide to come to Canada, but have relatives elsewhere, raising the need to consider the variety of options that may be available in each unique individual situation.

## Mobilize Your Incapacity Planning Across Borders

by Margaret O'Sullivan

February 11, 2014

**NOW THAT WE'VE HEARD THE PREDICTIONS** from a few furry prognosticators that winter is expected to last another six weeks, some of us may be planning extended stays at vacation properties in warmer climes. In the event that you became incapable of making either financial or personal care decisions — whether permanently or temporarily — while on one of those protracted sojourns, would you have documents in place that would allow someone to act for you in that jurisdiction?

It's fair to say that people are living longer and travelling more, as well as acquiring assets and spending longer spans of time in jurisdictions other than their home jurisdiction. Whether it's a ski chalet in Quebec, a golf villa in South Carolina or a country home in the south of France, people are investing in foreign vacation properties like never before. And while the use of multiple wills is a relatively common planning strategy for assets in different jurisdictions, it is not as common to see multiple powers of attorney put in place for the different jurisdictions in which we spend time and hold assets.

To date unfortunately, there has been very little harmonization among jurisdictions in terms of what effect a power of attorney prepared in one place will have in another. This is particularly true with respect to powers of attorney for personal care and health care directives — which can vary significantly from place to place.

There is legislation in many Canadian provinces and territories, as well as some U.S. states, that recognizes powers of attorney that have been validly created elsewhere. This is also true for European Union countries that have ratified the *Hague Convention on the International Protection of Adults*, 1999 in an attempt to harmonize rules applying to incapable adults.

Practically, however, there may be limitations to actually using powers of attorney in a foreign jurisdiction in spite of such legislation. For example, the recognition of foreign powers of attorney under Florida and Arizona legislation only applies to instruments executed in another U.S. jurisdiction. And despite legislation and conflict of laws rules that recognize foreign powers of attorney that are valid in the place where executed, many jurisdictions — either by local law or the requirements of third parties such as financial institutions and title companies — may insist on conformity with local law. For example, some jurisdictions require powers of attorney to be witnessed by a notary public — which is not a requirement in Ontario.

This lack of certainty — not to mention the possible time, expense, delays and uncertainty of success when seeking legal opinions to try to validate powers of attorney in other jurisdictions — supports the practical approach of putting local powers of attorney for property and personal care (or the equivalent document) in place in each jurisdiction where you have assets (in particular, real estate) and/or spend a significant amount of time.

When doing this planning, it is important to retain professional advisors in each jurisdiction who can work collaboratively to ensure your financial and personal care incapacity planning needs are properly addressed, based on each jurisdiction's laws. Issues to consider include:

- » **Ensuring that executing a power of attorney** in one jurisdiction does not mistakenly revoke one in another if they are intended to co-exist.
- » **Using the same set of decision-makers** if possible, subject to any local requirements.
- » **Being aware of rules** in different jurisdictions that can terminate powers of attorney (e.g., while not the case in Ontario, marriage or divorce may automatically terminate one in other jurisdictions).
- » **Understanding what attorney compensation** is permitted (if at all) in each jurisdiction and integrating provisions to prevent double or over-compensation.

- » **Adhering to the unique formalities** and requirements for executing valid powers of attorney in each jurisdiction.

Local law will also dictate what an attorney can do in that jurisdiction pursuant to a power of attorney.

Incapacity planning continues to move to the forefront of estate planning. Given the lack of cohesive rules amongst jurisdictions regarding powers of attorney, our planning should mobilize beyond domestic borders to encompass any jurisdictions where we spend significant time or own assets — requiring in many cases multiple powers of attorney.

# Multijurisdictional Succession Issues Checklist

by Margaret O'Sullivan

January 30, 2013

**AN INCREASING NUMBER** of individuals have connections to more than one jurisdiction which can significantly affect their estate planning. In this Blog post, we explore a few special issues and considerations that need to be factored in estate planning to ensure a comprehensive and effective estate plan where there is more than one jurisdiction involved.

1. Consider one's family background, habitual residence, citizenship, domicile and intended beneficiaries. In determining which law governs many succession issues, most common law jurisdictions apply the law of the deceased's domicile if the assets involved are not real estate, and local law where real estate is involved. Other countries may apply the law of the country of nationality, or of habitual residence or domicile. Many jurisdictions allow for a choice of law in the will or trust agreement. It is critical to determine which law(s) governs succession to property.
2. Consider the matrimonial regimes which may impact and the ability to transfer property on death. For example, most civil law jurisdictions provide for some form of community of property. The spouse with title to property may not have full ownership of it if it is subject to community property rights, and may not have the right to effect a gift of all of the property in his or her name on death.
3. Establish whether local law will give effect to the terms of the will. Does it offend local law in any way? For example, most civil law jurisdictions do not allow for complete testamentary freedom and impose a required distribution of property on death among family members. Will one's will be given effect in view of these entitlements, or result instead in a claim under the foreign law by the heirs to

enforce these entitlements? Also, most civil law jurisdictions do not recognize the concept of a trust. This factor will have to be considered if the estate involves holding assets on trust where the property is located in a civil law jurisdiction. Will the trust be enforced, and how will the trustee's rights to deal with the property be recognized? What alternative strategies are available?

4. Evaluate the relative advantages/disadvantages of using one will, versus multiple wills to dispose of assets on death in multiple jurisdictions.
5. Consider the tax treatment of the inheritance by one's beneficiaries in his or her taxing jurisdiction and seek foreign advice with respect to structuring the inheritances.
6. Consider the tax consequences of holding assets in each jurisdiction, in conjunction with taxation based on one's citizenship, nationality or residence or other affiliations and appropriate planning strategies.
7. Consider the advantages of "anti-probate" techniques to "rationalize" the holding of assets, streamline the administration of the estate, and minimize probate fees and multiple estate administration proceedings in order to restructure assets so they do not pass through the personal representative on death, including designation of life insurance policies, use of *inter vivos* trusts, joint tenancies and corporations.
8. Consider tax reporting and disclosure requirements and confidentiality/privacy issues.
9. Consider incapacity planning techniques. Will a continuing or durable power of attorney valid under the law of domicile/residence be given effect in the foreign jurisdiction? Consider the advantages of a continuing or durable power of attorney for each jurisdiction in which one holds assets. Also, consider other techniques for incapacity planning, such as trusts, including revocable or protective trusts.

As you will note, there are a number of special considerations that must be taken into account once a foreign jurisdiction is involved in one's estate plan. In this Blog post, we have set out a few of

them. It is important to ensure appropriate professional advice is obtained with regard to one's individual circumstances. With increasing globalization of people and their property, these issues will only become more prevalent and important in future.

## New Harmonizing Rules for Cross-Border Succession in Europe and its Impact on Canadians

by Margaret O'Sullivan

July 16, 2013

**WHEN A PERSON DIES LEAVING ASSETS** in more than one country, conflict of laws rules (also known as private international law or PIL rules) step in to help determine which law should govern succession of the estate. These rules are often tricky and confusing to navigate.

To achieve more clarity and certainty on these issues, the European Union passed Regulation (EU) No. 650/2012 (the "Succession Regulation") on July 4, 2012. It came into force in a transitional manner on August 17, 2012, and will be fully operational in all EU member states on August 17, 2015 (save for Denmark, the UK and Ireland, which exercised their right to not "opt in").

Even though it's a piece of European legislation, the Succession Regulation will have an impact on certain Canadians and/or their estates.

Instead of codifying a harmonized set of succession laws to be followed in all EU states, the Succession Regulation provides unified choice of law rules to determine which jurisdiction's own internal laws will apply to a deceased's worldwide estate so that (in theory) only one state's laws apply to the entire worldwide estate (both personal property and real estate). It will apply to estates of individuals dying on or after August 17, 2015 — whether testate or intestate.

Generally, under the Succession Regulation a deceased person's **last habitual residence** will determine which jurisdiction's internal laws apply. There is an exception to the "last habitual residence" rule however if the deceased was "manifestly more closely connected" to another jurisdiction through his/her vital interests such as personal presence, family and, to a lesser extent, business and economic interests. For example, if a French citizen with assets located in France moves to Germany and dies very shortly after moving, arguably French law will most likely apply to the succession of the deceased's estate.

An interesting feature of the Succession Regulation — and one of particular note to Canadians — is you can choose in your will to apply the law of your nationality if it is different from your place of habitual residence. If you have dual or multiple nationalities, you can choose any one of them to apply to your estate, even if it is not an EU member state.

Some of the likely scenarios in which the Succession Regulation may apply to Canadians include:

- » Canadian nationals resident in a EU member state;
- » Canadian nationals resident in Canada with assets in a EU member state; and
- » Canadian nationals resident in a non-EU member state (e.g., the UK) with assets in a EU member state.

For example, a Canadian (and Ontario) resident with a vacation property located in Spain can from this point forward state in his/her will that Ontario law is to apply to the estate in Spain, including Spanish real estate. If the declaration is done correctly, Ontario rules will apply to the Spanish real estate on a person's death if he/she dies after August 17, 2015. This is a significant change as before, Spanish law had to be applied to Spanish land. Spain's internal laws incorporate "forced heirship" laws, which an Ontario resident may wish to avoid with respect to his/her Spanish property. Forced heirship laws — present in a number of member states — often provide a mandatory scheme of distribution among spouses and children.

Consider also a Canadian national who is habitually resident in France (another EU member state) and he/she has not chosen his/her national law to apply to his/her estate. Local law (e.g. French law) will apply to his/her worldwide assets including assets outside of France. If there is real estate located in Ontario, the property falls under our PIL rules and is subject to Ontario law, but it can be brought into account in the French administration. With respect to the property, the applicable law determined by habitual residence brings into play France's forced heirship rules, which may be an unintended or unanticipated occurrence. However, under the new rules, the Canadian (say Ontario domiciliary) can choose his/her law of nationality prior to death, which would be Ontario's internal law.

In the Canadian context, when drafting a new will for a client with ties to EU member states, it's wise to consider not only existing rules, but also the post-August 17, 2015 rules. A Canadian resident owning real property in a EU member state has the opportunity to access provisions of the Succession Regulation in future, once fully in force.

In sum, these new European rules are a positive development in estate planning and administration, including for those Canadians who increasingly have ties to many jurisdictions.

# Successfully Navigating an Estate with Foreign Assets

by Jenny Hughes

September 23, 2014

**FOR MANY**, borders between home and foreign jurisdictions increasingly matter less and are easily overlooked when acquiring new assets, like a second home in another country and bank accounts and other financial assets. Updating your estate planning to reflect the new *status quo* of foreign asset ownership, however, doesn't always keep pace and is often an afterthought. Multijurisdictional wills and separate *situs* wills — important yet underused planning tools for an effective and comprehensive estate plan — help streamline and add greater certainty to administering an estate with foreign assets.

You may find yourself named the executor of an estate with foreign assets in the will of a friend or family member. While at first it may seem a daunting task to administer, with good advice and careful consideration this challenge can be successfully met. This post will briefly highlight a few special issues to think about when an estate has foreign assets — particularly those where no special planning was done by the deceased prior to death.

1. **Will probate or a similar court or legal process be required** in the foreign jurisdiction where the deceased held assets in order to manage and administer them? Obtaining probate in a foreign jurisdiction can be involved and costly, often requiring consecutive and multiple administration proceedings. If two or more common law jurisdictions are involved, it may be necessary to obtain a further grant of probate of the will in the other jurisdiction. If assets are located in another Commonwealth jurisdiction, “resealing” may be available from the local court to confirm an executor’s authority to act — essentially giving effect to the original Commonwealth jurisdiction’s probate grant in a simplified process. Civil law jurisdictions, on the other hand, generally do not require probate. Instead, if the inheritance is accepted, the heir(s) generally step into the deceased’s shoes for assets and debts.

Before embarking on the probate process, consider where the best place is to first probate. Requirements to secure a grant of probate may also vary. For example, a person resident in Canada may not be able to act in a foreign jurisdiction, or a fiduciary monetary bond may need to be posted with the local court before he or she will be qualified to act.

2. **Which law governs succession of a foreign asset?** Depending on its nature, it may be the asset’s location, or the deceased’s habitual residence, citizenship or domicile that determines this issue. Does the will choose the law to apply to the foreign asset? If the death occurs after August 16, 2015 and foreign assets are located in an applicable EU member state, a new provision called the Succession Regulation may also impact administration.
3. What **local laws** may affect the terms of the will and the administration of the foreign assets? Most civil law jurisdictions (e.g., France) do not permit complete testamentary freedom and impose a required distribution scheme for property among certain family members — often called “forced heirship”. There may also be matrimonial laws that affect or limit the transfer of the property, such as for California and other community of property jurisdictions.
4. What **tax and reporting requirements** arise in the foreign jurisdiction and how do they impact the estate’s administration in Ontario?
5. Are there **creditors in the foreign jurisdiction** and how will they affect the overall administration of the estate?
6. **Is it necessary to appoint agents** under a power of attorney to be physically present in the foreign jurisdiction to carry out certain actions on the executor’s behalf?

While administering an estate with foreign assets may present greater challenges and complexity (as well as longer timelines), with experienced counsel who can navigate the process and well-qualified advisors in the local jurisdiction, including lawyers and tax advisors, a coordinated, well-thought approach can be implemented.

## So You Don't Want to Be a U.S. Citizen?

by Susannah B. Roth

April 21, 2015

**STATISTICS TELL US THAT THE NUMBER OF U.S. CITIZENS** who expatriated from, or renounced, their U.S. citizenship has risen dramatically in the past few years. A big part of this rise has to do with increasingly onerous U.S. income tax filing and reporting obligations, combined with scrutiny of foreign accounts under the U.S. Foreign Account Tax Compliance Act (FATCA) reporting requirements. Matters are not expected to get better any time soon. Personal circumstances and attitudes will play the deciding role in choosing to expatriate—not everyone who lives abroad and finds U.S. tax reporting onerous and expensive will want to do so.

Ten years ago or so, each year only a few hundred U.S. citizens sought to expatriate. The process was more onerous including multiple visits to a U.S. consulate and bringing two independent witnesses to swear that one was not being coerced to expatriate, but the tax consequences were almost non-existent. The current process has become much more streamlined and the tax consequences can be quite daunting, but in 2013 approximately 3000 U.S. citizens expatriated. For an overview of the process involved in expatriation and the tax consequences of expatriation, please see our August 22, 2013 blog post on this topic.

When it comes to making the decision to expatriate, aside from making sure your U.S. income tax filings are up-to-date and in order, which is a necessary prerequisite, there are several matters you will also need to consider.

U.S. citizenship confers benefits on those who hold it, so you should think about whether you wish to keep such benefits. Other than protection abroad and consular services (not a big incentive for most), travel to the U.S. is an automatic right for a U.S. citizen, in addition to the rights to work in the U.S. and the right to vote in U.S. elections. If you plan to work or live in the U.S. in the future, you

may want to hold on to your U.S. citizenship. On the other hand, many of those living in Canada or elsewhere have lived outside the U.S. for many years, have no personal connection to the U.S., and may feel that U.S. citizenship confers no advantages on them.

A possible advantage to expatriation is ceasing to be subject to U.S. tax reporting, filing and payment requirements, including U.S. gift and estate tax. However, in certain circumstances the estate of an expatriated individual or a trust settled by an expatriated individual may create unexpected tax burdens for U.S. citizens or the expatriate's tax-resident beneficiaries. In addition, expatriots may also be subject to expatriation tax. This is an important reason why professional tax advice is crucial before expatriation.

Expatriation may result in restricted travel options. If you would be otherwise ineligible for travel to the U.S., for example, due to a communicable disease or criminal record, expatriation may render you ineligible to enter the U.S. or subject you to tedious and invasive scrutiny on each trip once you are no longer a U.S. citizen. One should also be mindful of a 1996 amendment to U.S. immigration laws (the so-called Reed amendment), which appears to be seldomly used successfully, but allows the U.S. to bar someone who renounces his or her U.S. citizenship from re-entering the country if the government determines that citizenship was given up for U.S. tax avoidance purposes. In future, the U.S. may choose to more vigorously enforce this law, or pass newer and tougher legislation restricting the re-entry of expatriates, as was attempted in 2013.

The names of expatriated individuals are also published each year in the U.S. Federal Registrar, which may not be ideal for those seeking privacy for their personal affairs.

Ultimately, the choice to expatriate is very individual, and will require professional advice. There are advantages and disadvantages regarding whether to expatriate or keep one's U.S. citizenship, and they should all be carefully weighed and considered before you make this decision.



# **MATRIMONIAL PLANNING**

## Cross-Canada Checkup: Property Rights on Marriage Breakdown and Death

by Margaret O'Sullivan

April 22, 2014

**CANADIANS ARE INCREASINGLY MOBILE** within Canada. Employees are transferred and move with their families to another province, couples decide to retire in a province with a more moderate climate, or seniors decide to move to be closer to their children and grandchildren. But in changing jobs, lifestyle and family connections, our legal “lives” are also changed. It is surprising how significantly the basic laws that govern property rights on marriage breakdown and death differ if we survey each province’s and territory’s regime. This fact is not well-known among most Canadians, and can lead to unexpected results.

In a recent presentation I made at the Annual International Estate Planning Institute in March in New York City, I had the opportunity to speak on this topic, and surveyed each Canadian jurisdiction. Here are a few highlights:

- » To divide family property, most Canadian jurisdictions use a **“proprietary” model** — which focuses on the division of **specific assets** (B.C., Alberta, Saskatchewan, New Brunswick, Nova Scotia, Newfoundland, and Yukon). Generally, this model is considered more flexible, provides less certain outcomes, and is more narrow in scope in the type of assets divided.
- » The other model used is the **“compensation” model** which divides the **value** of property built up during the relationship, not the property itself, with certain types of property excluded, such as gifts and inheritances (Manitoba, Ontario, Quebec, P.E.I., Northwest Territories and Nunavut). Generally, this model is considered less flexible, produces more certain outcomes since a formula is used, and is broader in scope, since it typically also includes business assets, leading to a greater equalization of property.

- » Some provinces have extended a claim for division of property on breakdown of a relationship to certain **cohabiting spouses**, not just married ones, (including B.C., Saskatchewan, Manitoba, Quebec, Nova Scotia, Northwest Territories and Nunavut) based on specific conditions being met, including length of the cohabitation. The rights of common law spouses can change dramatically if a couple moves to another province or territory.
- » A dramatic difference is that **death is not a triggering event** for a property claim in all Canadian jurisdictions: claims on death are not available in B.C., Alberta, P.E.I., Yukon (under pending Alberta legislation, death will be a triggering event for married spouses). Where a claim can be made, some limit it to married spouses only (Ontario, New Brunswick, Newfoundland, and Quebec (unless the couple have entered into a “civil union”)). Saskatchewan, Manitoba, Northwest Territories, Nova Scotia, and Nunavut allow claims on death for certain cohabiting spouses.

Consider the result if a couple moves from Ontario to P.E.I. to retire, and one of them changes their will to exclude the other. While resident in Ontario, the surviving spouse would have had a claim to equalization of their family property, which is not available in P.E.I. leaving the spouse in a far different situation than they may have expected. Or if a business owner moves from Ontario with her common law spouse to Manitoba, and the relationship breaks down. Had the breakdown occurred in Ontario, there would be no statutory claim for property division, and in Manitoba there is.

The overarching question is why is there not more harmonization and uniformity in Canada on certain fundamental issues relating to property division? Recent provincial updates of their legislation seem to reflect each province or territory still “doing its own thing”, which leads to disharmony, as well as unpredicted and unexpected results for the average person. And it also leads to the critical need before making that move to also understand the legal implications, and plan accordingly.

# The Importance of Updating your Affairs on Separation and Divorce

by Christopher Kostoff

March 5, 2015

**UPDATING YOUR ESTATE PLAN** on separation and divorce in a timely manner is critical in order to avoid unintended results, possible later disputes, and even litigation. The following highlights some of the most common concerns, as well as precautions to take.

## Wills

Generally, in Ontario the *Succession Law Reform Act* (SLRA) automatically revokes gifts to former spouses by will upon a subsequent divorce. As well, former spouses are deemed to have predeceased the person making the will. These laws shouldn't be relied on as a substitute to updating your estate plan, especially since they only apply to married couples who divorce. In addition, unintended outcomes could result if substitute beneficiaries have not been named or if those named are no longer appropriate.

In contrast, gifts to married separated spouses or to former common law spouses by will remain valid after separation and generally can only be revoked by executing a new will or codicil removing the gift.

The case of *Makarchuk v. Makarchuk* illustrates what may happen where married spouses do not execute new wills after a separation. In that case, the spouses entered into a separation agreement under which they released all rights they may acquire in each other's estates. The deceased spouse died with a will naming his separated spouse as the sole beneficiary. The court held that the separation agreement was not broad enough to remove entitlements received under each other's wills. As a result, the entire estate of the deceased passed to his separated spouse. This result could have been avoided if the deceased had prepared a new will or if the separation agreement was drafted to expressly exclude entitlements under will.

If a former married spouse dies without a will but was never legally divorced, a significant share of his or her estate will pass to his or her spouse. To avoid this result, a new will should be prepared soon after separation.

## Beneficiary Designations

Former spouses often neglect to update life insurance, RRSP/RRIF, and TFSA beneficiary designations on separation and divorce. In contrast to the laws relating to wills, divorce (and separation) has no impact on beneficiary designations. A former divorced spouse may be entitled to all or a portion of such policies and plans if the named beneficiary is not changed, which was the result in *Richardson Estate v. Mew*. In that case, the deceased had remarried but had failed to change his beneficiary designation for his life insurance policy. The court held that the deceased's former wife was entitled to the life insurance proceeds as she was the designated beneficiary, despite the fact that she had provided a general release under their separation agreement.

The above outcome is often exacerbated by the fact that the deceased's estate may also be liable for any taxes payable in respect of those plans designated to the former spouse.

Prior to updating beneficiary designations, it is important to review the terms of any separation agreement to determine whether a change of beneficiary is permitted. In some cases there may be express obligations providing for how insurance, for example, is to be maintained and designated, including for child support purposes.

## Powers of Attorney

In contrast to appointments of former spouses as executors or trustees, generally under Ontario law, divorce (and separation) does not revoke prior appointments of former spouses as attorneys for property or personal care. This is extremely problematic because one would generally not want a former spouse to make property and personal care decisions on his or her behalf. As well, in such cases, the former spouse may also be entitled (and more willing) to take compensation for acting as an attorney for property and personal care.

Difficulties could also arise if a former spouse was named but unwilling to act and the alternate attorney, if any, was also

unwilling to act. If the grantor is incapable and can't execute new powers of attorney due to a lack of capacity, it may then be necessary for a person to apply to court to become the court-appointed guardian, which will have the effect of revoking the power of attorney, but is a costly and time-consuming process.

### Jointly-Owned Property

Property owned jointly with a right of survivorship passes to the surviving former spouse even if the spouses separate or divorce. This issue is often dealt with in a separation agreement. Joint bank accounts can also pose their own unique problems as there may be a concern that funds could be depleted by one of the former spouses. In such circumstances, stopping direct deposits (such as paycheques) may be appropriate and matrimonial advice is often necessary.

### Family Trusts

On separation or divorce, any family trust's terms should also be examined, including considering changes to the trustees where both spouses are appointed as trustees.

It is important to review and update your estate plan, including wills, powers of attorney, and beneficiary designations, on separation and divorce on a timely basis. This is a necessary and critical step in the separation and divorce process and should always be given high priority. Otherwise, your estate may pass in a manner that is no longer in accordance with your wishes.

## Marriage Contracts — How Enforceable are They?

by Jenny Hughes

January 7, 2014

**MARRIAGE CONTRACTS** can certainly be sensible and valuable planning tools for protecting certain property down the road in the event of a separation or divorce.

A marriage contract allows a couple some flexibility in deciding the outcome regarding property division and support if (or when, in the case of death) the marriage ends. In Ontario, without one, spouses will be subject to the default "equal division of property" regime imposed by the *Family Law Act* on most family property.

Marriage contracts and their enforceability have recently come back into the spotlight with the high-profile decision of the Ontario Superior Court of Justice in *McCain v. McCain*. The decision is a reminder that these contracts will only be as good as the process used to put them in place.

Christine and Michael McCain (Maple Leaf Foods and the McCain family) were married for 30 years and had 5 children before separating in 2011. Madam Justice Greer, who decided the case, noted "[t]he Contract was signed by the parties at the insistence of [Michael's] father, Wallace McCain after 15 years of marriage. Both parties [agreed] that if the Contract had not been signed, [Wallace McCain] would have disinherited [Michael]" as he was determined to protect family assets and business interests.

Under the contract, Christine waived her equalization claim under the *Family Law Act* and all spousal support on a marital breakdown, while retaining the right to keep the assets solely registered in her name and being provided a \$7M lump sum payment. She did receive independent legal advice in advance of signing the contract. At the time of separation, Michael was worth approximately \$500M. Christine had the matrimonial home, as well as two cottage properties in her name (all of which were subject to significant mortgages Michael had registered against them).

On an interim basis, the Court nullified the waiver of spousal support in the contract and stated that “subtle and psychological” duress was placed on Christine to sign the contract in order for Michael to be able to receive an inheritance from his father. Justice Greer noted that the real question to be asked was “how could [Christine] have possibly refused to sign under those circumstances?...How could [she] possibly take on the burden of not signing the Contract for her own personal gain, knowing [Michael’s] father would cut [Michael] out of receiving his inheritance?” In Justice Greer’s view, while the duress was not overt, it was certainly present: “Of course, [Michael] did not say ‘you must sign this contract or I will divorce you,’ but that was the underlying stake in it all”.

Justice Greer also found that the bargain was not acceptable in a long-term marriage — and the contract was, on its face “unfair, improvident and unconscionable in the circumstances of the case” to Christine. Specifically, even if the agreement was fair when it was signed, Justice Greer determined that through time, it had become unconscionable.

Christine was awarded \$175,000 per month (before tax) in interim spousal support — the highest spousal support award ever made in Canada. The case is being appealed to the Ontario Court of Appeal.

Despite its unique facts and high stakes, this case serves as a reminder that it is important to take the time and effort to carefully and fairly negotiate and craft marriage contracts to ensure their enforceability if and when needed.

In Ontario, a valid marriage contract must, at the very least, be in writing, properly signed by each spouse and properly witnessed. Oral contracts are not valid.

Well before the signing of the contract, care must be given to its negotiation and preparation in order for it to offer the planning flexibility, certainty and protection ultimately intended. As illustrated in *McCain*, an Ontario court can set aside certain provisions or an entire contract if any one or more of the following did not occur: (1) one spouse did not provide full and proper financial disclosure to the other regarding assets, income and debts (including their values); (2) one spouse did not understand the nature or consequences of the contract

(e.g., each spouse should have proper independent legal advice prior to signing); or (3) the contract or the making of it somehow offends contract law rules (such as the presence of fraud, duress, undue influence or unconscionability).

The rules are there to ensure that each spouse has the information and ability to make a full and informed decision and to enter into a fair and acceptable bargain.

## Planning with Discretionary Trusts for the Matrimonial Home

by Jenny Hughes

March 25, 2014

**A COMMON CONSIDERATION** when completing or updating your estate planning is often how best to protect assets in the event of marital breakdown — whether your own marriage, including a second marriage, or an intended beneficiary's (e.g., a child or grandchild). The need to protect certain assets may be even more pressing when the property is a home or cottage that has been in a family for generations, carrying strong emotional ties and significant memories. Protecting this property can be complicated, however, if it qualifies as a matrimonial home under Ontario's *Family Law Act*.

A matrimonial home is any property occupied by married spouses or by a spouse and their children as a family residence and in which at least one of the spouses has an 'interest'. Married couples may have more than one matrimonial home. If a property qualifies as a matrimonial home, it is subject to a special set of rules. Our Advisory "Estate Planning and Marital Property Considerations" reviews some of these rules in relation to equalizing family property. In addition, both spouses have possessory rights in every matrimonial home while the spouses are still married regardless of whether they have an ownership interest in the property. Further, under the Act a spouse who does not hold title is entitled to receive notice of and must consent to any encumbrance or sale of the property.

We've recently discussed marriage contracts (see our January 7, 2014 post) as valuable and sensible tools for protecting certain property down the road in the event of separation or divorce. Properly negotiating and finalizing a marriage contract that will be enforceable in future, however (especially in the face of a pending marriage), may be easier said than done.

Our May 2013 post "Great Family Cottage Memories? Keep them that Way" mentioned that a carefully drafted discretionary trust may keep a spouse from acquiring an ownership interest in a property,

thereby preventing it from becoming a matrimonial home. The 2012 Ontario Court of Appeal decision in *Spencer v. Riesberry* supports this position.

Sandra Spencer and Derek Riesberry were married in 1994. Prior to their marriage, Sandra's mother Linda purchased a property and on the same day it was purchased, she settled a trust called the Spencer Family Realty Trust ("SFRT") and transferred the property's ownership to the SFRT. Linda was the trustee as well as the beneficiary of the trust while living. Upon her death, the capital of the trust at that time would be divided equally among her surviving children (or in the case of a deceased child, his or her issue). Linda transferred three more properties to the trust — each of which was occupied by one of her four children and the child's respective spouse. Sandra and a sister eventually replaced their mother as trustees of the SFRT.

Derek and Sandra separated in 2010. A trial was held to determine, among other matters, whether their family residence was a matrimonial home under the Act. If it was, Sandra had to include its full value in her net family property on the date of separation. The trial judge found that because Sandra only had an interest in the SFRT and not any specific asset held by the trust, the home did not qualify as a matrimonial home. This conclusion was subsequently affirmed on appeal.

Because the property in *Spencer v. Riesberry* was not a matrimonial home, the value of Sandra's interest in the SFRT on the date of marriage was also deductible from her net family property and only the increase in value of her trust interest during the marriage was includable for the purposes of the equalization calculation. Other important implications of the court's decision include that Derek would have had no possessory right to remain living in the home for a time upon separation and his consent would not have been needed if the property had ever been sold or mortgaged during the marriage.

The decision in *Spencer v. Riesberry* has important implications, including the use of a trust to protect an interest in a matrimonial home. If you are considering similar planning, professional assistance is necessary to ensure its proper implementation and other matters are considered, such as tax implications. Thought should also be given to whether other assets owned by the spouse outside of a trust would be available to satisfy any equalization payment.

## Heads Up: Grappling with Family Law's Treatment of Discretionary Trust Interests

by Jenny Hughes

January 6, 2015

**DISCRETIONARY TRUSTS** are common estate planning tools used for a variety of reasons such as tax minimization and general wealth protection, including protection on matrimonial breakdown and from creditors. These trusts are often used in an estate freeze where shares in privately-held corporations are “frozen” to defer capital gains liability which might otherwise arise on a shareholder's death in favour of the next generation where the “growth” shares are held by a trust. Margaret O'Sullivan's recent paper “When Trust Law Meets Family Law” (Global Legal Group, 2015) provides a review of discretionary trusts and their recent treatment by matrimonial courts in several jurisdictions. My post highlights some of the observations and concerns raised in Margaret's paper.

Traditionally, trust law would say that a person who is named as the object of a trustee's discretion — to whom the trustee can choose to pay income or capital but is under no mandatory obligation to do so — does not have an existing property interest. Instead, he/she would be viewed as having only an “expectancy” and a right to be considered as a potential beneficiary when the trustee chooses to exercise discretion to make a distribution from the trust. Because trust law does not consider an expectancy to be property, the traditional view has been the such interests have little or nominal value — an analogy is expecting to receive a birthday gift or a present at holiday time.

Matrimonial courts, on the other hand, which oversee the equitable division of property between spouses at a marriage's end, have muddied the waters in certain jurisdictions by imputing value to these discretionary interests.

Whether a person's interest in a discretionary trust is property and if it is, the value of that interest, become important questions when a beneficiary is going through a marital breakdown. If the interest is property that has a value, it may factor into division with the beneficiary's spouse.

In Ontario, as well as other Canadian provinces, some courts in recent years have on occasion not only found that an interest in a discretionary trust is property for the purposes of dividing assets between divorcing spouses, but have also attached significant value to those interests for the beneficiary spouse.

Recently, British Columbia eliminated any ambiguity regarding the treatment of such interests through unprecedented (in Canada, at least) provisions in its new *Family Law Act*, which expressly include discretionary trust interests among the pool of assets available for marital property division.

Unfortunately, to date in Canada, no formal methodology has been developed in the case law or by statute for reliably calculating the value of a discretionary trust interest.

Similar shifts in the court's treatment of discretionary interests have occurred in other common law countries such as the UK and Australia, while other jurisdictions (like many U.S. states and New Zealand) generally tend to continue to take a more conservative stance and exclude discretionary interests from matrimonial property division.

Given the complexity and uncertainty of the treatment of discretionary trust interests in the matrimonial setting, three considerations come to mind:

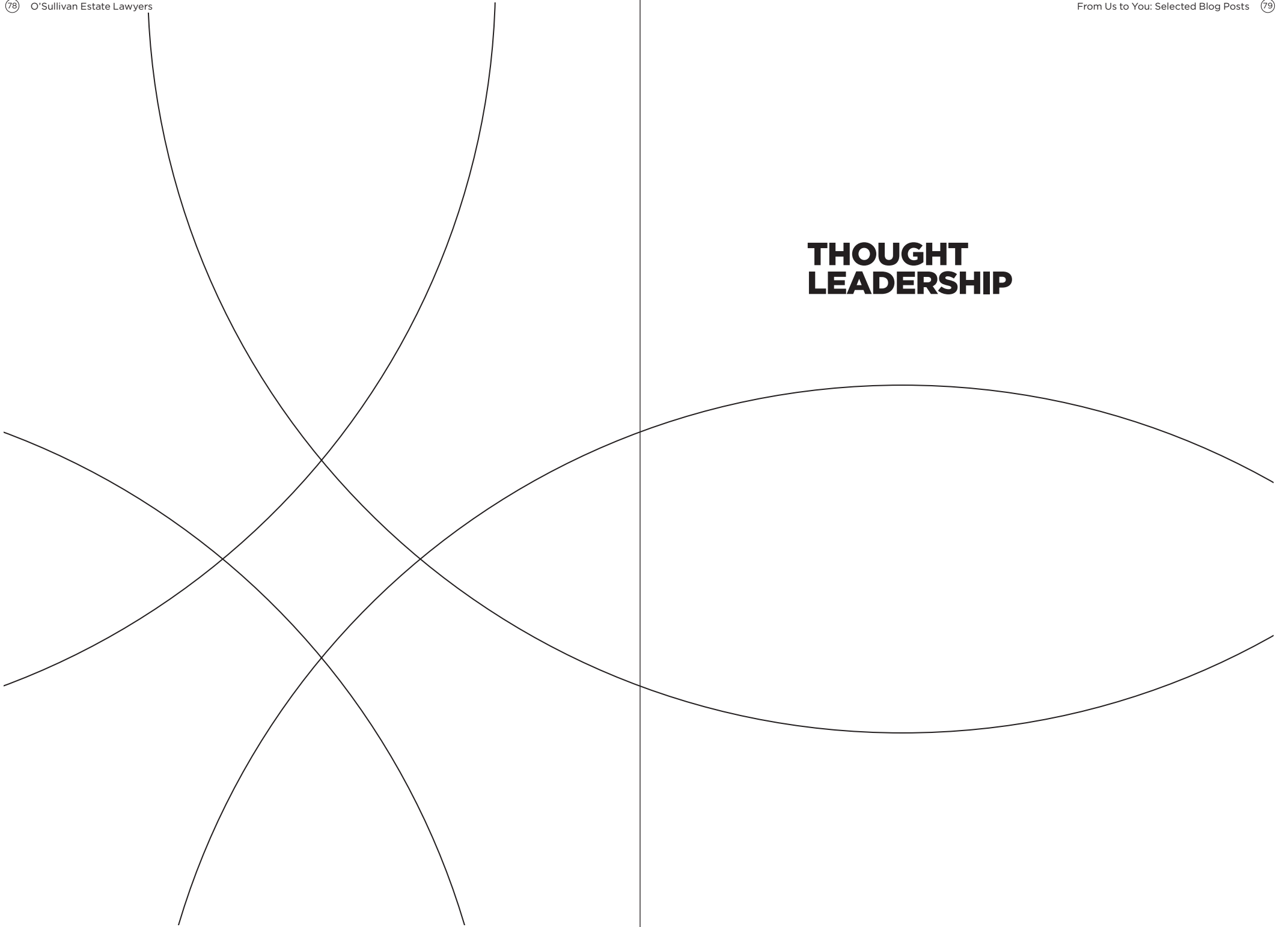
1. **During the planning stage**, take a careful and focused approach, with proper trust law advice, to the use and drafting of these trusts in light of recent developments.
2. **The treatment of these interests during a marital breakdown** should involve not only expert family law advice, but also expert trust advice and where required, professional valuations based on actuarial evidence to arrive at a sound methodology and set of guidelines in answering the valuation question.

3. **Beneficiaries of such trusts** (for example, children) should consider domestic and marriage contracts to deal with their trust interests.

Discretionary trusts will continue to be valuable planning tools. In light of the change happening in our family law courts as judges attempt to make an equitable distribution of property between spouses when a relationship ends, it will be more necessary now than ever to get proper trust law advice at all stages.



# THOUGHT LEADERSHIP



## Reflections on the “Trusted Advisor”

by Margaret O'Sullivan

November 12, 2012

**WE INCREASINGLY SEE USE OF THE TERM “TRUSTED ADVISOR”**, particularly in the arena of financial and estate planning services.

But what is a “trusted advisor” as opposed to someone simply providing advice? At its root I would submit is the requirement that a trusted advisor acts in the best interests of the client which are primary, and any self-interest of the advisor is a clear and resounding second.

The primacy of the client's interest is the essence of true professionalism. The professions have played a unique role in society, which historically required certain groups be subject to fiduciary obligations because of the essential and critical nature of the services they provide. In return is the privilege of self-regulation, whether it be medicine, accountancy, law or other professions as part of their “social contract” with society. A professional provides his or her selfless independent advice and judgment, and does not “sell” products or services for commercial gain.

This distinction is topical as the investment industry and regulators in Ontario and elsewhere move towards consideration of the adoption of legislated fiduciary duty for investment advisors and dealers in providing investment advice to their clients. The objective is to ensure the client's interest is placed first, breach of which will leave an advisor liable civilly in damages. A consultation paper dated October 25, 2012 released by the Canadian Securities Administrators has been released to stakeholder groups dealing with these issues for their input.

In the provision of wealth management and estate planning advice, independence is critical, and the advisor must be in a position to provide it. The range of problems and choice of solutions is complex and challenging. It is no wonder that clients are often overwhelmed, vulnerable and dependent on the

advice of their advisor. The importance of these decisions from a societal perspective, which impact many others, including future generations to come, must be grounded in the best available objective advice and the client's interests must be paramount and protected.

This issue is becoming only more relevant and pressing with the aging of the baby boomers, and the massive intergenerational transfer of wealth which is attracting renewed interest and growth in the wealth management sector and new entrants to the field. Conflicts of interest are sure to abound.

I was reminded of this as I recently conferred with a U.S. lawyer who needed advice for a long-time friend who is a dual U.S./Canadian citizen. Concerned with his exposure to U.S. estate tax, the friend had received “advice” from an “estate planner” that given the size of his estate, there would be a large estate tax liability and the appropriate solution was to buy a very expensive life insurance policy — and guess what, the advisor would be able to place it! The U.S. lawyer and I both acknowledged our mutual chagrin given the many ways in which this possible liability could be planned for to minimize or eliminate it, none of which required life insurance.

As the familiar saying goes, “you can buy most things, but you can't buy trust” — trust is earned. And trust although perhaps increasingly rare in our modern commercially-focused society, is a value that clients will increasingly need to have — and a trusted advisor — as they navigate many challenging choices in their estate and financial planning.

The question is — will our financial institutions and others providing estate planning and wealth management services take the high road and gather the will to rise and meet this challenge in a timely fashion or will they ultimately be forced to?

# Planning for Personal Care Issues — The Empowering Journey

by Susannah B. Roth

September 26, 2013

**EVERYONE KNOWS ABOUT THE SHIFT** in demographics in our society. People are living longer; it is estimated that one in ten Canadians born today will live to be 100! An aging population puts financial strains on individual, corporate and government resources, trying to keep up with unexpected demands and unplanned-for expenses. The strain of trying to find the best way to pay for necessary expenses as we age can be matched or surpassed by the strain of dealing with issues of personal care. We would like to challenge you to take an “empowering journey” to help alleviate and perhaps even eliminate this strain.

As you know, a power of attorney for personal care allows a person to appoint decision-maker(s), called attorney(s) for personal care, to make personal care decisions if they are incapable of doing so for themselves. A person can also set down instructions and wishes, which will be legally binding under Ontario law on the attorney(s) for personal care, unless such wishes are impossible or unreasonable to carry out. These wishes can include any and all aspects of medical treatment and personal care, such as: therapeutic medical treatments including surgery, prescription drugs, end of life decisions, preventive health care, palliative treatments, diagnostic tests and treatments, cosmetic treatments, admission to a hospital or other treatments facility, admission to a long-term care facility, personal assistance help and care, housing decisions, food choices, clothing choices, entertainment and decoration choices.

Although many people have a power of attorney for personal care, most do not give much thought to providing guidance to their attorney(s) for personal care in making specific decisions for the person's care. We may think these issues are of limited interest when we are healthy and competent to make our own decisions,

and understandably so. But perhaps the time to make our wishes known, to consider what those wishes might be and who is best situated and best able to act on those wishes when we are no longer able to do so ourselves, is now.

You may be asking yourself, “Why should I make this a priority now? Won't my attorney for personal care know how to make decisions as and when they come up?”

Your attorney(s) will almost certainly welcome some guidance, a road map, to assist them in making decisions, to reassure them that the decisions they are making are in accordance with what you would have wanted, when you were best able to consider the full ramifications of your choices. This reassurance can also be helpful for your other family members and friends who are not your attorney(s) to know that the decisions made are in keeping with the incapable person's wishes. This is true for “large” decisions, such as care at home versus care in a facility or certain life-or-death medical decisions, and as well for “small” decisions, such as clothing choices or food options.

Lack of direction can result in care that does not reflect your wishes, even if it is well-meaning and enacted with thought and love. It can leave your attorney(s) for personal care and family and friends with difficult decisions and doubts, and can lead to disagreements, arguments and even court action to resolve problems.

The benefits of future care planning are not just to assist attorney(s), family and friends. Each one of us can derive significant benefits from considering and writing down their wishes at an early point in our lives. The benefit of ensuring as best we can that our wishes are understood and will be followed is usually paramount. Thinking about our future care can also assist us to plan for the financial resources to fund our wishes. However, in addition, taking control of these issues, thinking about them and talking about them, can start each of us on a journey of self-reflection, making proactive decisions, and creating a concrete, specific plan which will empower us and our future attorney(s) and caregivers — an empowering journey.

# Globalization, Wealth Planning and the Mobile Client

by Margaret O'Sullivan

July 23, 2014

**THE WORLD** is only getting smaller, not bigger.

Technological change combined with affluence has increased our connectivity. People are traveling more and increasingly buying foreign real estate and residing in different parts of the world for extended periods of time — often in warmer climates south of the border in the cold months, a cottage or country place in the warmer months, and a city place in between. Many of us study outside our home jurisdictions and pursue a variety of international business and employment opportunities in foreign jurisdictions, often leaving behind a chaotic trail of financial assets in different parts of the world.

Globalization has a major impact on wealth and succession planning by making it more complex than ever before. A purely domestic approach often fails to best serve the needs of mobile clients who need planning solutions that cross borders. Interesting planning challenges arise in a variety of circumstances: a child moves to the U.S. and minimizing exposure to U.S. estate tax becomes a concern; a retired couple purchases a vacation home in Arizona and local law will be primary; or a Canadian executive is seconded to Europe, taking up residence in a civil law jurisdiction such as France or Germany with very different laws. Further challenges arise where people move to Canada, bringing with them their citizenship and affiliations to other jurisdictions.

Prior to moving, it is important to understand the effect of the laws of the new jurisdiction. This is especially important where a couple moves to a community property jurisdiction from a common law jurisdiction without community property, or vice versa. Both types of regime will impact and dictate what each partner owns and can transfer during lifetime or on death. An interesting fact is that almost one third of Americans live in a community property state where these considerations are critical. Or consider the implications where a couple moves to, or acquires assets, in particular real estate, in a

civil law jurisdiction which has fixed rules governing succession to property on death often called “forced heirship”, as discussed in our July 16, 2013 blog post “New Harmonizing Rules for Cross-Border Succession in Europe and its Impact on Canadians”.

Globalization brings with it the need for our lawmakers to understand its impact and to work co-operatively to prioritize the harmonization of law across borders as a clear objective in itself. A parochial approach creates obstacles for those who need less, not more complexity, and more, not less uniform approaches for their basic estate planning.

In a globalized society where the virtual increasingly reigns supreme and people are more migratory, the reality is that geography and place are simply not as important as in the past.

As we sip our favourite summer beverage in a shady spot this summer, let's mull that thought a little...

## Ethical Wills

by Margaret O'Sullivan

November 25, 2014

**YOU MAY OR MAY NOT HAVE HEARD** of the term “ethical will”. An ethical will doesn’t deal with money or assets, but instead with values, beliefs, words of wisdom, inner thoughts, and family history and tradition. We predict it will become a more common part of the estate planning process in future.

An ethical will can take many forms. The simplest is a written letter that can be kept with your legal will. Or it can be high-tech (with modern technology there are so many ways that we can communicate with each other)—an ethical will can also be composed as a recorded video, a slide show with pictures or a digital scrapbook.

What is perhaps most important is that an ethical will is a way to leave what may be the most valuable legacy, when all is said and done. A legacy of our own unique core beliefs, principles and life experiences to share with our family and loved ones.

When my own father passed away, as part of the funeral arrangements I composed a statement called “Dad’s Words of Wisdom” which we shared with others. In remembering him, it was all of his sayings, proverbs and sage advice that I had heard for a lifetime and resonated the most, and continue to do so to this day.

As a trust and estate lawyer who has prepared thousands of wills during my professional life, I recognize that a legal will is often dry and technical. But a legal will combined with an ethical will can be a compelling and wonderful gift, and can say things that might otherwise go unsaid. In its preparation, it is also an opportunity for self-reflection on what is most important, and on the lessons life has taught us which we can share with others.

Estate planning should involve not just the tangible but also the intangible, including dealing with our family and relationships and leaving our legacy in the most optimal way. An ethical will can be an invaluable part of our planning.

## A New Protective Regime for an Aging Society?

by Susannah B. Roth

February 11, 2015

**IF YOU HAVE A CHILD OR SPOUSE**, you may be surprised to learn that you have no automatic right to manage their property should they become incapable and unable to make decisions unaided. Capable adults in Ontario can make a continuing power of attorney for property to allow one or more persons to make financial decisions for them if they become unable to make such decisions for themselves. However, if your spouse or child did not make a continuing power of attorney for property before becoming incapable (or if your child was never able to make one), then you will most likely have to apply to Court to be appointed your family member's guardian of property in order to manage their property.

The Court guardianship application process can be onerous, time-consuming and expensive, depending on your family member's circumstances and assets. Unfortunately, the onerous nature of your responsibilities will not end with the appointment; one requirement of the appointment will almost always be that you pass your accounts in Court periodically, e.g. every 3 or so years, adding to your burden and your family member's expenses. Requirements regarding record-keeping and restrictions on the decisions you can make and the way you can spend your family member's funds are the same for guardians and attorneys, but can seem more onerous for guardians given the level of oversight by the Court and the Public Guardian and Trustee.

Adding to any burden in such situations is the question of how you determine if your family member is no longer capable of making decisions regarding their property, and when you should take steps to confirm incapacity. If there is a dispute in the family regarding whether or not your family member is no longer capable of managing their property, which can be the case for example where they can still make some decisions (such as paying household bills) but can no longer make others (such as

overseeing a business), the negative repercussions and impact on the family, not to mention the expense of litigating such disputes, can be multiplied exponentially.

These situations highlight the challenges and shortcomings of our current test for determining when a person is not able to manage their property and our current regime for how decisions are made on behalf of the person after it is determined that they are unable to do so. The Law Commission of Ontario issued a consultation paper in June, 2014 titled *Legal Capacity, Decision-Making and Guardianship*, which explores some of the shortcomings in our current system and suggests some potential ways to remediate or minimize them. Areas of challenge which are highlighted in the paper are the test for legal capacity, the substitute decision-making model, and access to the law. Public consultations were held last year following the release of the paper, and the Law Commission of Ontario expects to release an interim report this year.

One suggestion made in the Law Commission of Ontario paper is to replace the current model of substituted decision-making with supportive or co-decision-making, to allow the incapable person to have as much input as reasonably possible into the decisions which are made regarding their property. Whether or not you are in favour of such a change, this proposal does highlight the need to appreciate that incapable people are still the owners of their property while it is being managed by others; it does not belong to their loved-ones or heirs, and it should be used to protect them and for their best interests only. A person who has lost their capacity should not lose their dignity too.

Having to assume control over a family member's property is a difficult and sometimes painful and expensive process, all the more so if a family dispute develops due to the person's incapacity or suspected or potential incapacity. As our society ages, these disputes are becoming more common, just as are reports of elder abuse, including financial abuse. Maybe it is time for a more sophisticated protective regime for vulnerable persons, which takes account of their wishes and desires in a more responsive and nuanced way and seeks to enable good decision-making, not to simply take it away.

## Testamentary Freedom: A Dying (no pun intended) Legal Principle?

by Margaret O'Sullivan

October 17, 2013

### ONE OF THE HALLMARKS OF THE ENGLISH COMMON LAW

is the notion of testamentary freedom — that each of us is free to pass our property on death as we wish, and to whom we wish, and that we can be as foolish, eccentric or capricious as we choose to be, subject only to minimal legal limitations.

This notion extends throughout the common law countries, and is embraced in Canada and the U.S. where the ethos of rugged individualism and individual rights have traditionally dominated.

In contrast, most civil law jurisdictions in Europe and many other places in the world follow a far different ethic: one based on mandatory rules that obligate a certain percentage of one's estate to pass on death in fixed proportions to family members. In "testamentary freedom-based" jurisdictions we rather pejoratively call this type of regime "forced heirship", but in European jurisdictions it is termed more positively "rights of inheritance". At its root, the difference in approach is grounded in a legal-political and philosophical debate over the primacy of the individual and individual rights versus the family, society, equality and inclusion.

But is the sand shifting in the Canadian setting? With the advent under modern matrimonial legislation of enhanced rights for spouses to ensure an equitable division of property on death in effect in most Canadian provinces, certainly inheritance rights between spouses, whether legal, common-law or same sex, have increased substantially over the last two decades.

Recent court decisions have arguably further enhanced rights of unmarried spouses and other dependants to make claims on death for a greater share of property, not just based on financial need but also on "moral obligation". In *Morassut v. Jaczynski*, the

Ontario court recently made a substantial award to a common law spouse on the basis he had been inadequately provided for under the deceased's estate. The court took into account the large size of the estate, the length of the relationship, that there were no other dependants and the inter-dependence — emotionally and financially — of the couple, as well as case law, including from British Columbia, which also looks to moral obligations, not just financial need. The judge concluded the deceased failed to make adequate provision for her spouse's "proper support".

The notion of moral obligation has also been asserted by adult children who have been disinherited or received less than their expectation under a parent's estate in making a dependant's relief claim, and B.C. legislation specifically provides for same.

The courts have also of late provided support to "mutual wills" which have been executed relying on the assumption that each party's will makes certain provisions on their death, and that the survivor is not free to change the intended distribution in his or her will, which is a common concern with second marriages and blended families. Under the mutual wills doctrine, the court has the authority to impose a trust of the property if the survivor changes his or her will.

Are we moving to a more familial model, and a less individualistic one? It seems the concept of testamentary freedom is being increasingly eroded, with the result that there is now more convergence between inheritance rights throughout the world than in the past. Is the world getting smaller and more homogeneous on these issues, perhaps recognizing our increased interdependence and connectivity?

## On Death and Dying: The Supreme Court of Canada's Landmark Decision in *Carter v. Canada (Attorney General)*

by Margaret O'Sullivan

May 13, 2015

**THERE IS NO DOUBT THAT CARTER** has caused an enormous cultural shift for Canadians as Canada joins the few but growing number of jurisdictions that have decriminalized physician-assisted dying, including Belgium, Luxembourg, the Netherlands, and in the United States, Montana, New Mexico, Oregon, Vermont and Washington.

In a nutshell, in *Carter*, the Supreme Court in a unanimous decision held the criminal offence under the *Criminal Code* of aiding and abetting suicide and the *Criminal Code* provisions which say that no person may consent to death being inflicted on them are unconstitutional. In *Carter*, Gloria Taylor was diagnosed with ALS which causes progressive muscle atrophy eventually leading to difficulty in swallowing and breathing and sought the right to seek a physician's assistance if her suffering became intolerable.

The Court overturned the prior decision on this issue in *Rodriguez* as no longer being good law. It held the provisions under the *Criminal Code* are overly broad and that its blanket prohibition violated Taylor's rights to life, liberty and security of the person under the *Canadian Charter of Rights and Freedoms*. The Court found that individuals who meet specific criteria should be able to avail themselves of physician-assisted dying where: they are a competent adult; clearly consent to the hastening of the death; and have a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable.

But in many ways, *Carter* raises more questions than it answers.

Some of the questions that remain to be answered include to whom does *Carter* apply? For example, do you have to currently be "dying" or instead, not necessarily dying but suffering from a grievous and irremediable medical condition? An example might be severe and debilitating depression. Also, can you make a decision and give a directive **in advance** of having the medical condition? It seems the Court has said that the decision has to be concurrent with the event, and can't be done beforehand, which rules out pre-planning prior to the onset of such a medical condition.

Even the nomenclature shows a lack of clarity and consistency. The term "physician-assisted suicide" is frequently used, the historic term euthanasia increasingly less, while the less pejorative "physician assisted dying" seems to be gaining more traction, in particular in the health community.

What will happen next? The Court has said Parliament and the provincial legislatures have twelve months to enact new legislation to uphold these fundamental rights if they wish to, but they are not obliged to. Doing nothing, however may be problematic given the risk it could expose doctors and other healthcare professionals to if there are no clear parameters for when an act may be criminal or not, and conversely could expose patients to possible abuse, including those most vulnerable. It would seem there will be a clear need to set out what constitutes consent to physician-assisted dying, and rigorous safeguards for providing consent, including appropriate witness requirements.

Undoubtedly, we are embarking on a new frontier which among many matters, may impact the scope of health care directives we prepare as part of our personal care planning.

Stay tuned for the legislative response we are all keenly waiting for.



## About the Authors



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Jenny performs a broad range of roles, including office management and administration, legal research and writing, document preparation, as well as marketing and social media coordination. Since 2004, she has worked solely in the areas of trusts and estates, both as a law clerk and lawyer, and spent over eight years with a large law firm in London, Ontario. She holds an Honours B.E.S. in Geography from the University of Waterloo with a minor in English Literature (1999 Alumni Gold Medal recipient); a B.Ed from the University of Toronto (OISE), and a J.D. (with distinction) from the University of Western Ontario. Jenny was called to the Ontario bar in 2004.



### Christopher Kostoff

Chris practices in the areas of estate planning, administration and litigation including will, trust and incapacity planning, advice to executors and trustees, and estate litigation and alternative dispute resolution. Chris received a B.A. from the University of Guelph in 2007 and a J.D. in 2010 from the University of Western Ontario. Chris graduated law school with distinction and received several awards for academic achievement. He was called to the Bar of Ontario in 2011. Prior to joining O'Sullivan Estate Lawyers, Chris was an associate at a tax boutique where he had a broad tax planning and dispute resolution practice. Chris is a student member of the Society of Trust and Estate Practitioners (Canada) and a member of the Canadian and Ontario Bar Associations. Chris has co-authored articles on the topic of the taxation of partnerships for the Law Society of Upper Canada and the Ontario Tax Conference.

### Margaret O'Sullivan

Margaret's practice involves all aspects of private client work, including estate planning; will and trust planning; incapacity planning; estate litigation; advising executors, trustees and beneficiaries and administration of estates and trusts. Recipient of the 2014 STEP Founder's Award for Outstanding Achievement and the Ontario Bar Association's 2013 Award of Excellence in Trusts and Estates Law. Past Deputy Chair and past member of the Board of Directors and Council for STEP Worldwide and a past Chair of the Professional Standards Committee. Past Deputy Chair of STEP (Canada) and past Chair of Editorial Board for *STEP Inside*. Past Chair, Trusts and Estates Section and member of Council, OBA. Elected Fellow, ACTEC, 1995. Co-author, Canada Chapter, *International Succession Laws* (Tottel 2009), and a contributing author to *Widdifield on Executors and Trustees* (Carswell 2002), *The Private Wealth & Private Client Review* (Law Business Research 2014), *The International Comparative Legal Guide to: Private Client 2015* (Global Legal Group 2014) and to *Private Client Multi-jurisdictional Guide 2014/15* (Practical Law Company 2014). Called to Ontario Bar in 1983.



### Susannah Roth

Susannah's practice has focused on trusts and estates law since her call to the Ontario bar in 2002. Susannah has experience in estate planning, estate administration and estate litigation. Susannah is a member of the Society of Trust and Estate Practitioners, an Ontario Bar Association Council Member, a Past Chair of the Ontario Bar Association Trusts & Estates Section Executive and a trustee of the OBA Foundation. She is a Past Chair of the Ontario Bar Association Young Lawyers' Division Executive Committee and a Past Co-Chair of the Ontario Bar Association Young Lawyers' Division Continuing Legal Education Committee. Susannah was the 2011 inaugural recipient of the Ontario Bar Association's Heather McArthur Memorial Young Lawyers' Award which recognizes exceptional contributions and/or achievements in continuing legal education or the development of the law, for the benefit of the profession or the citizens of Ontario.



