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Message From The Chair

*Suzana Popovic-Montag**

I am privileged to be the Chair for the 2009-2010 term of the Trusts and Estates Section Executive of the Ontario Bar Association. This year's executive is comprised of another group of 24 hard-working and dedicated individuals, who will no doubt continue the excellent work that has been done in the past.

We currently have 17 sub-committees, consisting of past, returning and new members. In addition, we are fortunate to have the assistance of a few non-executive volunteers as well. With a mixture of experience, enthusiasm and fresh perspectives, this is bound to be a memorable year for our section.

Our mandate this year, as it has been in previous years, is to represent you to the best of our ability, and to be your voice in respect of all matters as they pertain to our practices of trusts and estates. We have a number of new initiatives that we will be considering, with the hope that we can assist estate practitioners in the long run. In addition, we will continue to plan and offer amazing continuing legal education and section programs for our membership, so that we can maintain the flow of knowledge and information.

With the guidance of my past Chair, Kimberly Whaley, and the assistance of my Vice-Chair, Craig Vander Zee, this is bound to be another exciting year for our section. If you should have any comments, questions or concerns, or any suggestions on how to improve the practice of trusts and estates for our members, please feel free to contact me at 416-369-1416 or email me at spopovic@hullandhull.com. I will endeavor to ensure that you are heard, and that your views are considered by our executive, as we go about trying to fulfill our mandate. After all, we are here for you!

On behalf of our executive, we look forward to a productive and memorable year – and to serving you to the best of our ability during our tenure.

Best wishes,

Suzana Popovic-Montag, Hull & Hull LLP

End of Term Annual Awards Dinner: May 28, 2009

*Suzana Popovic-Montag**

Once again, the Section End of Term Dinner was held at the Jamie Kennedy at the Gardner Museum. A wonderful time was had by all, and we congratulate our End of Term Dinner Committee, who made the evening a very memorable event.

This year's recipient of the OBA Award for Excellence in Trusts and Estates was Timothy G. Youdan of Davies Ward Phillips & Vineberg LLP. Mr. Youdan was recognized for his exceptional contributions and achievements, and for having demonstrated leadership, expertise and passion in the area of wills, trusts and estates. Presentations and speeches recounting memorable moments in Mr. Youdan's past were made by Marty Rochwerg, Ian Hull and the Honourable Mr. Justice Cullity.

Mr. Youdan's many accomplishments were celebrated by his fellow OBA Section members, friends, family, colleagues and members of the judiciary. Mr. Youdan joins a list of exemplary past recipients of the Award, including Barry Corbin (2008), Brian A. Schnurr (2007), M. Elena Hoffstein (2006), Rodney Hull, Q.C. (2005) and William P.G. Allen (2004). Congratulations to a most deserving recipient!

The Hoffstein Book Prize was presented to Kimberly Whaley of Whaley Estate Litigation, and the Widdifield Award was presented to C. David Freedman.

We thank our generous sponsors Scotia Private Client Group, Whaley Estate Litigation, Hull & Hull LLP, Borden Ladner Gervais, Sweatman Law Firm, Davies Ward Phillips & Vineberg and Carswell: Thomson Reuters, and our hard-working and dedicated OBA representatives.

We look forward to the next End of Term Dinner, and to celebrating next year's Awards' recipients.

**Suzana Popovic-Montag, Hull & Hull LLP*

***Above**: The evening's award recipients (L to R) Timothy Youdan, OBA Award for Excellence in Trusts and Estates, Kimberly Whaley, Hoffstein Book Prize and Professor C. David Freedman, The Widdifield Award.*

***Above**: Guests at the award dinner were invited the sign the "Where's Timothy" memento card.*

Recent Costs Decisions in Estate Litigation

*Elizabeth Seo**

Introduction

As recent decisions like *Salter v. Salter Estate*[1] illustrate, courts are not as inclined as they once were to automatically award costs of parties out of an estate. The traditional approach of granting costs in estate litigation is falling out of favour as courts revive the general civil litigation principle of the "loser pays", subject to a consideration of all relevant factors found under Rule 57 and subject to limited exceptions outlined in *McDougald Estate v. Gooderham*.[2]

Broad Discretion of Court to Order Costs

The court has broad discretion with respect to the issue of costs. The authority of the court to order costs, including costs in estate litigation, can be found in section 131 of the *Courts of Justice Act*.[3]

In exercising its discretion as to the allocation and quantum of costs to be paid, the court considers a number of factors, in addition to the principle of indemnity, outlined in Rule 57. These factors include the amount of costs an unsuccessful party could reasonably be expected to pay, the result in the proceeding, written offers to settle, the amount claimed and the amount recovered, the complexity of the proceeding, the importance of the issues, the conduct of any party that tended to unnecessarily lengthen the duration of the proceeding, whether the proceeding was improper, vexatious or unnecessary, and any other matter relevant to the question of costs.[4]

The result in the proceeding is not always determinative of the costs award. The court's broad discretion to order costs, includes the power to award costs against a successful party in a proper case. A successful litigant has no absolute right to costs.[5]

Traditional Approach to Awarding Costs in Estate Litigation

The traditional approach to costs in estate litigation can be traced back to cases like *Mitchell v. Gard*.[6] It was the practice of English courts to order the costs of all parties to be paid out of the estate where the litigation arose as a result of the actions of the testator who created the conflict or ambiguity, or from those with an interest in the residue of the estate, or where the litigation was reasonably necessary to ensure the proper administration of the estate. Public policy considerations informed this approach as it was important for courts to give effect to valid wills that reflected the intention of competent testators:

> Where the difficulties or ambiguities that give rise to the litigation are caused, in whole or in part, by the testator, it seems appropriate that the testator, through his or her estate, bear the costs of their resolution. If there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will, it is again in the public interest that such questions be resolved without cost to those questioning the will's validity.[7]

Canadian courts of first instance have followed this traditional practice for some time.

Costs Provisions under the *Trustee Act*

Costs of a proceeding under the *Trustee Act* may be paid out of the trust or by such persons as the Superior Court of Justice considers proper.[8] In *Geffen v. Goodman Estate*, the Supreme Court of Canada stated:

> The courts have long held that trustees are entitled to be indemnified for all costs, including legal costs, which they have reasonably incurred.[9]

Litigation accounts are the sole responsibility of a trustee until they are approved by the court or by beneficiaries.[10] A trustee's right to reimbursement depends upon a finding that the expenses are reasonably incurred, and that in participating in the litigation, a trustee has acted prudently and properly. Reasonable expenses may include the costs of an action reasonably defended.[11]

In determining costs under the *Trustee Act*, the court will examine all of the circumstances, including the initial decision to commence or defend a proceeding, the manner of conduct of the proceeding, the motivation of the parties and the decision to conduct an appeal.[12] The court will consider the objectives and outcome of the litigation and assess whether any step taken was "improper, vexatious or unnecessary" or "taken through negligence, mistake, or excessive caution."[13] For instance, where a trustee is unsuccessful on a trustee removal application and his conduct contributed to the protracted litigation, despite his efforts to settle a trustee may be denied costs from the trust and costs can be awarded against the trustee personally.[14]

Disadvantages of the Traditional Approach to Awarding Costs

The traditional approach to costs has disadvantages. While it arguably improves access to justice, it also serves to increase the risk of depleting an estate, encourages frivolous and vexatious litigation, dampens opportunities to settle, and results in a higher volume of cases that negatively impacts the administration of justice.

Current Trend in Awarding Costs in Estate Litigation

A trend towards granting of costs to the successful litigants on a partial indemnity basis has been gaining steady momentum. *Mitchell v. Gard* has been narrowed or restricted in application by a number of cases including *McDougald Estate v. Gooderham,*[15] a 2005 decision of the Ontario Court of Appeal.

In *McDougald Estate*, two residual beneficiaries of an estate appealed a finding that a bequest of property left to the testatrix's sister did not adeem as a result of a sale prior to her death, and that the proceeds did not form part of the residue of her estate. The Court of Appeal found that there was no basis upon which to interfere with the finding of the application judge and dismissed the appeal. Justice Gillese held that a modern approach to awarding costs at the first instance involved carefully scrutinizing the litigation, and unless the court found that one or more of the public policy principles applied, the costs rules that governed civil litigation should be followed.[16] Justice Gillese commented:

> Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive that there is nothing to be lost in pursuing estate litigation.[17]

The Court of Appeal further found that the same rules that applied to costs in civil litigation at the appeal level also applied to unsuccessful appellants in estate litigation.

Very recently, in *Salter v. Salter Estate*,[18] the former spouse of the deceased brought a motion against his estate for a declaration that she possessed the sole beneficial interest in certain assets owned by him prior to his death. The former spouse also asserted that she had a constructive trust claim over remaining assets held by the estate trustee or damages for breach of the alleged minutes of settlement with the estate. The motion for the declaration was dismissed; however, the former spouse was permitted to advance her claim for constructive trust and damages for breach of agreement with the estate.

The Estate Trustee claimed costs in the sum of $28,933.51 out of the estate for the motion. The judgment creditor claimed costs of $5,700.00 jointly from the estate and the ex-wife. A party asserting a dependant's relief claim sought $12,960.70 in costs from the estate as well as $6,574.08 in costs from the former spouse. Justice Brown ordered that costs were to be reserved to the judge hearing the trial of the issues and stated that:

> From a year of acting as administrative judge for the Toronto Region Estates List I have concluded that the message and implications of the *McDougald Estate* case are not yet fully appreciated. A view persists that estates litigation stands separate and apart from the general civil litigation regime. It does not; estates litigation is a sub-set of civil litigation. Consequently, the general costs rules for civil litigation apply equally to estates litigation - the loser pays, subject to a court's consideration of all relevant factors under Rule 57, and subject to the limited exceptions described *in McDougald Estate*. Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation.[19]

Justice Brown further noted that a reinforcement of the "loser pays" principle would bring needed discipline to parties who are assessing their personal exposure to costs before launching a proceeding, especially in estates litigation where there is often charged emotional dynamics.[20]

In *Kaptyn Estate, Re*[21] the court refused to grant the relief requested by the co-estate trustees in their respective competing motions concerning a potential action by the estate against those involved in the preparation of their father's will. The estate was worth millions and the full indemnity costs collectively claimed by all the parties involved totalled $63,168.92. Justice Brown, who decided this matter, concluded that the co-estate trustees, instead of acting together, came to the court asking the court to tell them what to do, and that as estate trustees it was their responsibility to act together to figure out what to do. Since the results of both motions was merely to remind the estate trustees of their existing duties, neither motion could be characterized as being reasonable for the purpose of the administration of the estate.[22] Each party was to bear its own legal costs of the motions.

In *Fiacco v. Lombardi*,[23] the court ordered the unsuccessful litigants to pay costs in a contested guardianship of property proceeding brought under the *Substitute Decisions Act*.[24] Justice Brown, who also determined this case, stated:

> Contested guardianship applications are more problematic. While bona fide disputes may exist amongst those interested in the well-being of the incapable person as to who should be appointed her guardian, a significant risk exists that a contested guardianship application may lose sight of its purpose - to benefit the incapable person - and degenerate into a battle amongst siblings or other family members, some of whom may have only their interests at heart. In such circumstances courts must scrutinize rigorously claims of costs

made against the estate of the incapable person to ensure that they are justified by reference to the best interests of the incapable person.[25]

In guardianship of property applications, the court will examine what, if any, benefit the incapable person, and by analogy minor children, derived from the legal work that generated the costs.

Another recent costs decision has highlighted the importance of proportionality. In *Teffer v. Schaefers*, Justice Fragomeni found that a bill of costs should reflect that the amount sought is fair, reasonable and proportionate to the nature of the issues before the court.[26] Excessive amount of duplication and unreasonable number of hours docketed may establish that a file was "overworked", "overly lawyered", and "overly staffed" resulting in a significant reduction of costs by the court.[27]

A discussion of the difference between an assessment of costs and fixing of costs by the court pursuant to Rule 57.01(3) can also be found in *Teffer*. The overall objective of fixing costs was to set an amount that was fair and reasonable for an unsuccessful party to pay in specific circumstances:

> In fixing costs, the Court does not conduct a line-by-line analysis of the services performed by counsel. The Court is required to consider the factors set out in the Rules and jurisprudence and determine a fair and reasonable quantum that reflects those principles.[28]

Since legal fees in estate litigation can be quite significant, these recent decisions should be carefully considered when making a future claim for costs.

This case comment represents the opinion of the author and does not represent or embody the official position of The Children's Lawyer or the Ministry of the Attorney General.

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[1] *Salter v. Salter Estate*, [2009] W.D.F.L. 3762, 2009 CarswellOnt 3175; see also Salter v. *Salter Estate 2009* CarswellOnt 1272, 49 E.T.R. (3d) 139 (Ont. S.C.J.)
[2] *McDougald Estate v. Gooderham* (2005), 17 E.T.R. (3d) 36, 2005 CarswellOnt 2407, (sub nom. *McDougald Estate, Re*) 199 OA.C. 203, 255 D.L.R. (4th) 435 (Ont. C.A.)
[3] *Courts of Justice Act*, R.S.O. 1990, Chap. C. 43, section 131
[4] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 57.01
[5] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 57.01
[6] *Mitchell v. Gard* (1963), 3 Sw. & Tr. 275, 164 E.R. 1280; see also *Spiers v. English*, [1907] P. 122 (Eng. P.D.A.); *Olenchuk Estate, Re* (1991), 43 E.T.R. 146 (Ont. Gen. Div.)
[7] *McDougald Estate v. Gooderham* (2005), 17 E.T.R. (3d) 36, 2005 CarswellOnt 2407, (sub nom. *McDougald Estate, Re*) 199 OA.C. 203, 255 D.L.R. (4th) 435 (Ont. C.A.) at paragraph 78
[8] *Trustee Act,* R.S.O., 1990, c.T.23, section 64
[9] *Geffen v. Goodman Estate* [1991] 2 S.C.R. 353, 81 D.L.R. (4th) 211, 80 Alta L.R. (2d) 293, [1991] S.C.J. 53 at paragraph 74
[10] *Coppel v. Coppel Estate* (2001), O.J. 5246 (S.C.J.), at paragraph 10
[11] *Re Dingman* (1915), 35 O.L.R. 51 (H.C.)
[12] *Bogoch Estate*, [2004] M.J. No. 20 (Man. Q.B.) varying, [2003] M.J. No. 61 (Man Q.B.), at para. 16
[13] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 57
[14] *Oldfield v. Hewson*, [2005] 18 E.T.R. 318 (S.C.J.), at paragraphs 6, 7
[15] *McDougald Estate v. Gooderham* (2005), 17 E.T.R. (3d) 36, 2005 CarswellOnt 2407, (sub nom. *McDougald Estate, Re*) 199 OA.C. 203, 255 D.L.R. (4th) 435 (Ont.C.A.); see also *Re Lotzkar* (1985), 19 E.T.R. 135 (B.C.S.C.); *Montreal Trust Co. of Canada v. James* (1985), 19 E.T.R. 135 (B.C.S.C.); *Beaurone v. Beaurone* (1997), 31 O.T.C. 236 (Gen. Div.); *Re: Marshall Estate* (1998), 17 C.P.C. (4th) 46 (Ont. Gen. Div.); *Gamble v. McCormick*, [2002] O.J. No. 2694, 2002 CarswellOnt 2189, 4 E.T.R. (3d) 209 (S.C.J.); *Babchuk v. Kutz*, 2007 ABQB 88
[16] Ibid., at paragraph 80
[17] Ibid., at paragraph 85

[18] *Salter v. Salter Estate*, [2009] W.D.F.L. 3762, 2009 CarswellOnt 3175; see also *Salter v. Salter Estate* (2009), 2009 CarswellOnt 1272, 49 E.T.R. (3d) 139 (Ont. S.C.J.)
[19] Ibid., at paragraph 6
[20] Ibid., at paragraph 6
[21] *Kaptyn Estate, Re* (2009) CarswellOnt 3224
[22] Kaptyn, ibid., at paragraph 13
[23] *Fiacco v. Lombardi*, 2009 WL 2874406 (Ont. S.C.J.), 2009 CarswellOnt 5188
[24] *Substitute Decisions Act*, R.S.O. 1992, c.30 as am.
[25] *Fiacco v. Lombardi*, 2009 WL 2874406 (Ont. S.C.J.), 2009 CarswellOnt 5188, at paragraph 36
[26] *Teffer v. Schaefers*, 2009 WL 1300531 (Ont. S.C.J.), 2009 CarswellOnt 2283 (Ont. S.C.J.) at paragraphs 30, 48, 49
[27] *Ziskos v. Miksche*, 2007 CarswellOnt 7162 at paragraph 184 referred to in the Teffer v. Schaefers decision
[28] *Teffer v. Schaefers*, 2009 WL 1300531 (Ont. S.C.J.), 2009 CarswellOnt 5447 at paragraph 55

The Continuing Power of Attorney For Property

*Irit Gertzbein**

The Continuing Power of Attorney for Property (“POA”) under the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30 (“SDA”) is an integral component of estate planning. The purpose of this article is to provide an overview of attorney liability, and the limitations and risks related to the use of the POA in corporate succession planning.

Attorney Liability

The potential personal liability of the attorney for financial damages to the grantor during the grantor’s lifetime or to the estate of the grantor, and consequently to the beneficiaries of the estate, has been the subject of extensive estate litigation.

The decisions of an attorney are subject to challenge and where there is demonstrable non-compliance with the prescribed duties of the attorney under the SDA, the acting attorney may incur personal liability. Decisions focusing on the nature and extent of attorney liability arising as a result of the exercise of substitute decision-making while a grantor is still capable, highlight the dilemmas which attorneys may face when acting for a capable grantor.

In the 2005 *Fareed v. Wood*[1], the judge held that where a grantor is capable, an attorney who assumes any decision-making functions triggers full responsibility for all actions with respect to the grantor’s property, whether the actions were taken by the attorney or the grantor. In Fareed, the court imposed liability on the attorney for transactions undertaken by the grantor without the knowledge of the attorney. The court was critical of the attorney for failing to monitor gifts made by the grantor to third parties under suspicious circumstances.

In contrast, the 2006 decision in *McMullen v. McMullen*[2], while not binding in Ontario, instructs that an attorney may be held liable for losses, including legal fees or other costs associated with actions taken to protect the capable grantor’s property, if those actions are taken without the grantor’s consent. The court held that even where the attorney is acting in the best interests of the grantor (perhaps where the attorney perceives suspicious circumstances to be the basis of transactions contemplated or undertaken by the grantor vis-a-vis third parties), the attorney must not act without the knowledge and consent of the capable grantor. If the attorney fails to obtain the grantor’s consent, he or she breaches the duty to account, the duty to act in accordance with the grantor’s intentions and wishes, and the duty to not undermine the grantor’s independence.

These decisions should have a chilling effect on the readiness of attorneys to exercise their authority when invited to do so by a capable and willing grantor. If acting while the grantor is still capable, and, depending on the direction in which circumstances develop, before long an attorney may find himself or herself in a "catch-22" situation, ultimately heading towards POA litigation. It may be in the best interest of the attorney to not act while a grantor is legally capable.

Acting As Director

Often a grantor is the sole director of a private corporation. Once incapable, the grantor can no longer perform his or her director functions.[3] It is assumed by some that where there is no co-director, the granting of a POA is sufficient to ensure smooth transition of corporate governance during a time of incapacity of the grantor. This assumption is misguided. The POA grants authority to the attorney to step into the shoes of the grantor with respect to ownership of property and decision making regarding that property. In the corporate context, the attorney steps into the shoes of the grantor as owner of the shares, the property interest of the grantor in the corporation. In that capacity, the attorney has legal ownership of the bundle of rights attached to such shares. The attorney has the authority to sell, transfer, and vote on the shares, on behalf of the grantor.

However, where the grantor is also a director of the corporation, the attorney does not step into those shoes of the grantor. The attorney has no authority to act as director on behalf of the grantor.[4] Only where the grantor is the sole shareholder or, with the consent of other shareholders, can the attorney, in his capacity as shareholder under the POA, elect himself or herself to be a director and act in that capacity.

Tax Considerations

Although this is not settled law, where an attorney steps into the shoes of a grantor as shareholder pursuant to an unconditional POA, the Canada Revenue Agency ("CRA") takes the position that a POA is a right under a contract for purposes of ss. 251(5)(b)[5] and 256(1.4)(a)[6] of the *Income Tax Act* ("ITA") and the attorney is deemed to own all of the shares held by the grantor. In certain circumstances, where the attorney is also a shareholder in other corporations, stepping into the shoes of the grantor in his capacity as shareholder may result in a deemed association of previously unassociated corporations, thus reducing the availability of the small business deduction under the ITA.[7] Where the POA instrument states that the POA is effective only as a result of incapacity of the grantor, neither provision applies prior to the time of incapacity.[8] At time of the grantor's death, the POA is no longer in effect, thus the attorney no longer owns the shares of the now-deceased grantor and the issue of potential deemed association no longer exists.

CONCLUSION

The POA is an indispensable instrument in estate planning. However, if not carefully considered and cautiously implemented, it may give rise to unexpected consequences. Added to the known dangers of fraud and abuse are traps of a more subtle nature, namely, the shortcomings of the POA in the corporate governance and succession context. It is recommended that prior to the granting a POA, particularly where the grantor owns corporate shares, legal advice be obtained.

** Irit Gertzbein is an associate at Goodmans LLP*

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[1] (2005), 140 A.C.W.S. (3d) 225, [2005] O.J. No. 2610 (QL) (S.C.J.)
[2] (2006), 27 E.T.R. (3d) 304, 49 R.P.R. (4th) 112, 153 A.C.W.S. (3d) 255 (B.C.S.C.)
[3] Ontario Business Corporations Act ("OBCA"), subsection 118(1)(2) and Canada Business Corporations Act ("CBCA"), s. 105(1)(b).

[4] OBCA s. 127(1) and CBCA s. 115 exclude certain powers from being delegated. Because these functions cannot be delegated, a grantor cannot grant authority to anyone, including a attorney, to perform these functions.
[5] The CRA's view is that for purposes of 251(5)(b)(i), a separate determination of "control" must be made for each person who has a right.
[6] "Control" is determined by taking into account all the shares that all persons with a right are deemed to own.
[7] See Technical Interpretations 9623675, October 17, 1996, 9726535, November 26, 1997, and 9814370, June 12, 1998.
[8] 256(1.4)(b) ITA

TFSA Beneficiary Designations: Your Government is Fooling You

*Barry S. Corbin**

The TFSA (tax-free savings account) came into existence on January 1, 2009. However, the essential details of the TFSA had been made public nearly 10 months earlier as part of the 2008 federal budget. It did not take long for lobbying efforts to get underway in a number of Canadian common law jurisdictions, seeking a change in the relevant provincial / territorial law to allow direct beneficiary designations to be made for TFSAs.[1] For its part, the Ontario Bar Association wrote to the Attorney General in a letter date June 16, 2008 to make that pitch. (You can find the OBA letter at http://www.oba.org/en/pdf/SuccessionLawReform.pdf.) Notwithstanding that early entreaty and - given its status as the most populous province - the virtual certainty that its residents would lead the country in the number of TFSAs being established, Ontario dragged its legislative feet.

The first indication that the Ontario government was going to move on that front was contained in a rather strange place - the March 27, 2009 provincial budget ("Budget") - which made the following announcement:

> The government proposes to change the Succession *Law Reform Act* (SLRA) to allow for beneficiary designation of Tax-Free Savings Accounts (TFSAs). Designated beneficiaries would be able to receive TFSAs outside of a will in the same way that beneficiaries can receive proceeds of RRSPs. The TFSA could also pass to the designated beneficiary without being subject to Estate Administration Tax, simplifying estate matters and reducing costs.

Despite this announcement, there was no amendment to the *SLRA* - indeed, not even the introduction of a Bill – before the legislature took its summer recess. That did not mean the government had entirely overlooked its commitment in the Budget. Instead of enacting an amendment to the statute, the government added TFSAs to the definition of the term "plan" in Part III of the *SLRA*, taking advantage of the regulation-making power set out in section 53.1 of the statute. Regulation 203/09 was filed with the Registrar of Regulations on May 28, 2009 and e-filed (that is, posted on the province's e-laws website) the following day. The effect of that Regulation was to add new section 2 to existing Regulation 54/95[2] as follows:

> Tax free savings accounts within the meaning of the *Income Tax Act* (Canada) are prescribed as plans for the purposes of Part III of the Act, *regardless of when the designation of a beneficiary was made.* [emphasis added]

Thus, Ontario now has a regulation that, on its face, appears to validate pre-existing direct beneficiary designations for TFSAs – thereby curing the mischief resulting from the legislative vacuum the government had created by its inaction. Indeed, the Ontario government said as much in the press release it issued on June 16, 2009: "Any beneficiary designations that have been made on existing accounts will remain legally effective."[3]

Well, just because the government says so doesn't mean it's true. Indeed, there is a serious problem with this legislative change. Retroactive regulations cannot be made without statutory authority. The *SLRA* contains no such authority. But to complete the analysis, you must also examine the general framework for regulations; namely, the *Legislation Act, 2006* – and, in particular, section 22 of that statute:

1. Subsection 22 (1) states: "A regulation that is not filed has no effect." So we know that Regulation 203/95 was not effective before May 28, 2009.

2. Subsection 22(2) states: "Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation comes into force on the day on which it is filed." Does this mean that a regulation can declare itself to be retroactive?

3. Subsection 22(3) gives an unequivocal negative answer to the last question: "Nothing in this section authorizes the making of a regulation that is effective with respect to a period before its filing."[4]

In the writer's view, a non-insurance TFSA for which the holder made a beneficiary designation prior to May 28, 2009 will be part of the holder's estate, to be disposed of in accordance with his or her will or according to intestate succession rules, as the case may be. The creditor protection derived from the Ontario Court of Appeal decision in *Amherst Crane Ltd. v. Perring*[5] would be lost. And the financial institution that paid out in accordance with such a designation would not enjoy the protection of section 53 of the *SLRA*.[6]

In due course, Regulation 203/59 will be examined by, and have to pass muster with, the Ontario Legislature's Standing Committee on Regulations and Private Bills. Standing Order 108(i) declares that Committee to be "the Committee to which all regulations stand permanently referred", with a mandate that includes the responsibility "to examine the regulations with particular reference to the scope and method of the exercise of delegated legislative power without reference to the merits of the policy or objectives to be effected by the regulations or enabling statutes." The Standing Order requires the Committee to have regard to a number of guidelines when reviewing regulations, one of which is that "Regulations should not have retrospective effect unless clearly authorized by statute."

Unfortunately, this particular Regulation is unlikely to be reviewed by the Committee until many more months have gone by. Furthermore, even if the Committee agrees with the writer's view, all it can do is make that view known to the Attorney General, who is free to decide whether he will respond with the appropriate legislative fix or barrel ahead on the faulty premiss that the Regulation is not retroactive in its effect.[7] In the latter case, the Committee can do no more than indicate its disagreement in one of its periodic reports to the legislature.

In the writer's view, unless or until the province moves to fix this problem, the estates practitioner's review of any client's estate plan should include an examination of existing non-insurance TFSA beneficiary designations and a recommendation that the client "refresh" any designations made prior to May 28, 2009.

**Barry S. Corbin, Corbin Estates Law*

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[1] This article deals only with non-insurance TFSAs. Where a TFSA qualifies as insurance under the *Insurance Act*, the rules regarding beneficiary designations are set out in Part V of that statute.

[2] The original purpose of Regulation 54/95 had been to increase the surviving spouse's preferential share from $75,000 to $200,000.

[3] This invocation of the regulation-making power in section 53.1 of the statute was in fact the methodology suggested by the Ontario Bar Association in its submission to the Attorney General. Unfortunately, the problem that is the subject matter of this article arose because the Attorney General failed to act on the recommendation in a sufficiently timely manner.

[4] It is evidently for a similar reason that New Brunswick adopted a more carefully thought out course of action. Like the *SLRA*, that province's *Retirement Plan Beneficiaries Act* permits the term "plan" to be expanded to include arrangements that are prescribed by regulation. Firstly, the statute was amended to allow for a regulation to be made that was retroactive in its operation to any date on or after January 1, 2009. The amending statute was itself declared to be retroactive to January 1, 2009. Secondly, a new regulation was made, expressly deemed to have come into force on January 1, 2009, the effect of which was to amend the existing regulation to add TFSAs to the definition of the term "plan".

[5] 11 E.T.R. (3d) 112 (Ont.C.A.)

[6] Let's assume for the moment that the Regulation is valid. What would happen in a case where the TFSA holder had died prior to May 28, 2009? Could the Regulation interfere with vested rights? It seems unlikely, having regard to subsection 23(2) of the *Legislation Act, 2006*:

> Unless otherwise provided in a regulation or in the Act under which the regulation is made, a regulation is not effective against a person before the earliest of the following times:
>
> 1. When the person has actual notice of it.
> 2. The last instant of the day on which it is published on the e-Laws website.
> 3. The last instant of the day on which it is published in the print version of *The Ontario Gazette*.

In the writer's view, the italicized portion of the amended Regulation quoted would not suffice to override these limitations. Accordingly, the TFSA would not be creditor-proof. Nor would the designated beneficiary be victorious in a dispute with the person(s) entitled to share in the deceased holder's estate.

[7] The only contrary argument the writer can conceive is that because a beneficiary designation does not have practical consequences until the death of the TFSA holder, the Regulation cannot be said to be effective with respect to a period prior to its filing. The fallacy in this argument is that it confuses the effectiveness of the designation with the effective date of the Regulation. Furthermore, a revocation of a beneficiary designation is governed by the same rules. How can it be said that a revocation of a beneficiary designation takes effect only when the holder dies? Lastly, suppose the TFSA designation is contained in a will made before May 28, 2009. Subsection 52(7) of the SLRA provides: "Despite section 22, a designation or revocation in a will is effective from the time when the will is signed." In the face of this statutory provision, it is manifestly impossible to assert that a valid beneficiary designation does not take effect before the holder's death.

Herring Estate (Re), 2009 CanLII 44707 (ON. S.C.)

*Ameena Sultan**

This endorsement by the Honourable Justice D.M. Brown, issued August 31, 2009 deals with the issue of the appointment of a foreign trust company as estate trustee in Ontario. Justice Brown overturned a decision of the Estates Registrar and held that section 175(2) of the *Loan and Trust Corporations Act,* ("the Act") does not prevent the appointment of a foreign trust company as estate trustee pursuant to a certificate of ancillary appointment of estate trustee with a will.

Facts

The deceased, Timothy Herring was a North Carolina resident who had during his lifetime established an *inter vivos* trust in North Carolina. The trust named his wife Donna as the sole beneficiary and its sole trustee was the Branch Banking and Trust Company (BBT), a trust company licensed in the state of North Carolina. Mr. Herring's will named the trust as the sole beneficiary of his residuary estate, and the trust company as his executor.

All of the deceased's assets were in North Carolina, with the exception of a condominium unit in Toronto, the purchase of which was not completed at the time of the deceased's death. The occupancy date was set for more than a year after the date of death at which time a final payment of just over $126,000.00 was to be made to the builder.

The Superior Court in North Carolina issued letters probate to BBT. In order to deal with the Toronto condominium, BBT applied for a certificate of ancillary appointment of estate trustee with a will to the Superior Court of Justice in Ontario. The Estates Registrar rejected the trust company's application on the basis that the trust company was not an approved and registered Ontario trust corporation under section 175(2) of the *Act*.

Upon receipt of the Registrar's decision, BBT requested that the application be referred to a judge for reconsideration pursuant to Rule 74 of the *Rules of Civil Procedure*. Justice Brown issued directions after receiving written submissions from BBT's counsel in respect of the application.

Law and Analysis

The trust company argued that section 175 of the *Act* permits the court to grant probate to an Ontario-registered trust company and not require the posting of any security for acting as an executor or trustee, but does not serve to prohibit the appointment of a foreign trust corporation not registered under the *Act*. Justice Brown agreed with the trust company's submission.

The trust company also argued that section 213 of the *Act* which limits the entities that may "offer … services to the public as … executor or administrator, or... act as a trustee in respect of any service it provides to the public" did not function to prohibit the trust company from acting as ancillary estate trustee in respect of the deceased's estate. Justice Brown agreed with this submission on the basis that BBT sought to simply discharge its duties as a named executor in respect of a North Carolina resident who had a single asset in Ontario. BBT's role was narrowly restricted and they were not seeking to "offer services" to the Ontario public. The letters probate issued by the North Carolina court also supported the view that BBT was properly charged with administering the deceased's estate. Therefore section 213 of the *Act* did not apply to prevent BBT's appointment as estate trustee in Ontario.

BBT also requested that the court dispense with the requirement to post security. BBT filed a consent from the deceased's widow, the sole beneficiary under the trust. Justice Brown took into account the considerable size of the estate in North Carolina and the sole beneficiary's consent and rather than requiring a bond in the amount of twice the value of the Ontario property (subsection 37(1), the *Estates Act*) he required a bond in the amount of $125,000.00, the approximate amount of the outstanding balance on the condominium unit.

As a consequence, BBT, as named executor could execute its duties and act as estate trustee in Ontario to deal with the estate's Ontario asset.

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Feinberg Estate: Restrictions on Inheritance on Religious Grounds

*Jane E. Martin**

The Supreme Court of the State of Illinois recently released a headline-grabbing judgment in the Estate of Max Feinberg.[1] The State's highest appellate court overturned the circuit court and appellate courts' holdings that a testamentary restriction on inheritance was void as against public policy.

Max Feinberg, who died in 1986, created testamentary trusts in his Will. He granted his widow Erla life interests and limited powers of appointment over the distribution of the assets of both trusts. The remainder of both trusts were subject to a "beneficiary restriction clause" which directed that the assets be held in trust for the benefit of the then-living descendants of Max and Erla's two children on a *per stirpes* basis. Any descendant who married outside the Jewish faith or whose non-Jewish spouse did not convert to Judaism within one year of marriage would be deemed deceased as of the date of marriage for all purposes of Max's Will and that descendant's share of the trust would revert the children of Max and Erla. The descendants in question were five adult grandchildren, only one of whom qualified to receive a bequest as of the date of Erla's death.

Erla exercised her power of appointment: she directed a *per capita* gift to each of her grandchildren not deemed deceased under the terms of Max's Will as of the date of her death.

The Supreme Court considered a narrow question on appeal – whether the holder of a power of appointment over the assets of a trust may direct that the assets be distributed at the time of death to Max's then-living descendants, deeming deceased any descendant who has married outside the settlor's religious tradition. The Court answered the question in the affirmative, finding no violation of public policy in such an exercise of a power of appointment and made no determination about whether the "beneficiary restriction clause" itself was contrary to public policy.[2]

Justice Garman wrote the unanimous opinion of the Supreme Court and her reasoning is instructive to Ontario estates practitioners: Illinois and Ontario share similar legislation governing testamentary dispositions, and Ontario common law reveals a similar tension identified by the Illinois court: what is the appropriate balance between the competing values of freedom of testation versus the resistance to "dead hand" control? Justice Garman reviewed Illinois legislation and common law to identify the public policy of the state with respect to testamentary freedom and its appropriate limits.

The Illinois *Probate Act* (similar to the Ontario *Succession Law Reform Act*) restricts testamentary freedom only where a testator fails to make adequate provision for the support of a spouse or of children, "heirs at law." The *Trusts and Trustees Act* gives the settlor of a trust the freedom to dispose of property as he or she wishes, unless that disposition is otherwise illegal. Further review of the *Statue Concerning Perpetuities* and the Rule in *Shelley's Case Abolishment Act* illustrates that the public policy of the State of Illinois is to protect the ability of an individual to distribute his property, even after his death, as he chooses with minimal restrictions.

Erla's exercise of appointment was within the bounds of appropriate testamentary freedom: the grandchildren's interest in the estate was contingent until Erla died, at which point it crystallized. As exercised by Erla, the appointment created a condition precedent upon inheritance. Even a complete restraint on marriage is an acceptable condition precedent for a testamentary disposition, whether tied to religion or not.

Would the same conclusion be reached by an Ontario Court? Quite possibly: our legislation and case law shows a similar deference to testamentary intent. The somewhat recent case, *Fox v. Fox Estate*, (1996) 10 E.T.R. (2d) 229 (Ont. C.A.), in which the Court of Appeal considered the exercise of absolute discretion by an executrix to disinherit a son of a deceased on the grounds of his marriage to a non-Jewish woman, does not contradict this view. In Fox the court was considering the rights of a beneficiary whose interests in a trust had vested at the time when the executrix in question, motivated by bad faith, exercised her discretion to disinherit the beneficiary. Had a good faith exercise of discretion been evidenced, effecting un-vested interests, the court may have granted the same deference as the Illinois Supreme Court in Feinberg Estate.

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[1] The Court's opinion can be found online at: http://online.wsj.com/public/resources/documents/feinberg.pdf .
[2] The Court explicitly stated: "We need not decide if such a provision [i.e. the beneficiary restriction as appeared in Max's Will] would violate public policy because no such provision is implicated in the present case".

Private Member's Bill 188 - Proposed *Protection of Vulnerable and Elderly People From Abuse Act*

*Sean Lawler**

On June 1, 2009, MPP John O'Toole's Private Member's Bill 188 was given its 1st reading in the Ontario Legislature. The Bill would create the *Protection of Vulnerable and Elderly People From Abuse Act*. The Bill would amend the *Substitute Decisions Act*, *1992* ("SDA") to implement safeguards to protect people from their attorneys for property and for personal care. The Bill would: (i) restrict the class of people who may witness the execution of a power of attorney; (ii) require attorneys to account annually to the Public Guardian and Trustee ("PGT"); and (iii) establish a register of powers of attorney.

Witnesses

Currently, the *Substitute Decisions Act* prohibits the following people from witnessing a power of attorney for property or for personal care: the attorney; the spouses of the donor or of the attorney; a child of the grantor; or someone who is under guardianship or is under 18.[1] The Bill adds a further restriction by specifying that only one of the two witnesses to the execution of the power of attorney may be a "*relative*" of the donor.[2] Neither the explanatory notes to the Bill, nor Hansard, set out the purpose of this proposed restriction. Presumably, the Bill anticipates that the presence of a witness who is not in the "family" will deter mischief on the part of family members.

The problem is the breadth of the term "relative": it increases the risk of an invalid power of attorney. S.2.1 of the SDA defines "*relatives*" to be two people "*related by blood, marriage or adoption*". It is possible for two people to be related to each other and not know it. It is quite possible for people to misunderstand the definition; particularly where the power of attorney is prepared without the assistance of a lawyer. For example, people may differ on whether a brother-in-law is a "relative", although he is one under the *SDA's* definition.

The *SDA* itself appears to recognize the vagueness of the term "relative" because that term is not used elsewhere as a basis to invalidate a power of attorney or a guardianship. In other parts of the *SDA*, "relatives" are people to whom notice of certain proceedings should be given,[3] or who should be asked

if they intend to apply to become someone's guardian of property.[4] However, a power of attorney that has not been properly executed and witnessed is invalid unless the Court declares it to be effective despite the error.[5] The criteria for the validity of a power of attorney must be transparent and easy-to-understand. The term "relative" is not.

Annual Accounting

The Bill also requires attorneys for property to "*provide an annual accounting*" to the PGT of the grantor's assets and liabilities, of the attorney's compensation, and of "*any other prescribed information*".[6] An accounting provided to the PGT would be confidential unless the grantor wanted a copy, or unless the Court ordered its production. The Bill does not say what else the PGT would do with an accounting.

The Bill's purpose is to prevent attorneys from abusing their power. In order for an annual accounting to fulfill this purpose, someone must review these accounts; otherwise, they are only symbolic. There must be tens of thousands of powers of attorney for property in Ontario. The bureaucracy required to annually review lay-person-prepared accounts for each power of attorney would be enormous, and the cost staggering. It is difficult to imagine the provincial government making such a commitment.

The government would, however, be filling a need if it began to monitor the actions of attorneys. At common law, and pursuant to s.42 of the *SDA*, attorneys must be prepared at all times to pass their accounts, and must pass their accounts when a Court orders them to do so. But where the donor is without close friends or family, as can happen to the elderly, who else will spend the time and money to review, and possibly challenge, the attorney's actions?

Registry

Lastly, the Bill requires the PGT to create and maintain a register of powers of attorney for property and for personal care.[7] Under the proposed legislation, donors of powers of attorney would be required to advise the PGT of the following information: their own name and address; the contact information of the attorney; any restrictions on the attorney's authority; and the date that the attorney's authority took effect. The donor is required to update the register as s/he makes changes to her/his powers of attorney. "Family members" of the donor, (his spouse, adult children, parents, and adult siblings), can ask for the information in the register about the donor. The information in the register is otherwise confidential, unless a Court orders disclosure.

The vulnerable can only be helped by banishing secrets; however, it would be a mistake to assume that an abusive attorney will necessarily be deterred by such a register. The register does not prevent attorneys (whether or not they are known to family members) from keeping their abuse a secret. It would still be up to family members to monitor the attorney and, if necessary, compel him to pass his accounts.

Conclusion

The Bill is easy to criticize because it provides limited solutions to broad, complex problems: the proposed rule about witnesses is vague; the proposed accounting expensive; and the proposed register of limited use. But it is difficult to identify a comprehensive solution to the problem of abuse by attorneys for property and personal care that does not require a significant regime change and heavy investment. Whether it becomes law or not, the benefit of Bill 188 is that it forces the provincial legislature to confront this problem directly.

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[1] Ss.10(2) & 48(2).
[2] S.1(1) of Bill 188.
[3] For example, and with certain exceptions, notice of resignation of an attorney must be given to the grantor's 'relatives' – s.11(d).
[4] For example: s.16(2)(c).
[5] S.10(4) & s. 48(4).
[6] S.2 of Bill 188.
[7] S.4 of Bill 188.

Please Do Not Give Presents to Court Staff

Mr. Justice David M. Brown has asked us to bring this issue to the attention of our members:

> "I understand some lawyers, or their employees, have provided gift certificates or other presents to staff in the Estates Office. I wish to remind the profession that such a practice is not appropriate and should be discontinued, however well-intentioned.
>
> Court employees are not permitted to receive gifts from the Bar. To do so would give rise to an appearance of partiality by court staff towards those who present them with gifts, thereby violating the cardinal principle that justice must not only be done, but be seen to be done.
>
> Moreover, Rule 4.01(2) of the Rules of Professional Conduct issued by the Law Society of Upper Canada prohibits lawyers from endeavouring to influence the action of a tribunal "or any of its officials" by means other than open persuasion as an advocate. Applications for certificates of appointment of estate trustees constitute proceedings before the court. Gifts made to Estates Office officials who process such applications could be regarded as attempts by members of the Bar to gain special treatment for applications filed on behalf of their clients."

While Justice Brown raises this issue in the context of the Toronto Estates List Office, the same rules apply throughout the Province.

Spelling and Grammar Query: "Irregardless"

*Susan. J. Stamm**

I have been asked to report on the use and misuse of "regardless" vs. "irregardless". Is it ever correct to use the word "irregardless"?

I did note that my spell-checker did not knock out "irregardless". I turned to my usual websites to investigate. Grammar Girl had such a perfect response to this issue, I felt I could not improve on her. I refer you to her website, http://grammar.quickanddirtytips.com/irregardless.aspx. This is what she had to say:

Irregardless versus Regardless

First, let's talk about *irregardless*. Some people mistakenly use *irregardless* when they mean “regardless.” *Regardless* means “regard less,” “without regard,” or despite something. For example, Squiggly will eat chocolate regardless of the consequences.

The prefix *ir*- (i-r) is a negative prefix, so if you add the prefix ir to a word that's already negative like *regardless*, you're making a double-negative word that literally means “without without regard.”

Language experts speculate that irregardless comes from a combination of the words *regardless* and *irrespective* and that another reason people might say "irregardless" is that they are following the pattern of words like *irregular* and *irreplaceable*. But *regardless* already has the *-less* suffix on the end, so it's not like those other words.

Standard versus Nonstandard English

Now, on to dictionaries. Although it's true that the *American Heritage Dictionary*, the *Merriam-Webster Online Dictionary*, and the *Oxford English Dictionary* all list the word *irregardless*, they also note that it's considered nonstandard. Listing a word as nonstandard is a way that dictionaries concede that a word is in common use, but isn't really a proper word. Standard language is defined as the language spoken by educated native speakers (1), but comprehensive dictionaries also include nonstandard words, dialect, colloquialisms, and jargon--words like *ain't*, *conversate*, and *irregardless*. It seems pretty common for people to look up a word in a dictionary, and if it's there, they think it's fine to use that word in every circumstance. It's the "Look, it's a word!" phenomenon. But you have to look a little further to see what kind of word it is, and if it's nonstandard in some way, then use it with caution. You'll sound uneducated if you go around saying things like *I ain't gonna conversate with him irregardless of the consequences*.

Sometimes words make the transition from nonstandard to standard English. My dictionaries assure me that *snuck* is a word that falls into this category (although I know that will upset some of you). But since many educated people still rail against *irregardless*, and the word isn't commonly seen in edited writing, I don't believe *irregardless* is going to make the transition to standard language any time soon.

Prescriptive versus Descriptive Dictionaries

And one final thought about dictionaries—irregardless was listed in every dictionary I checked, but sometimes words will show up in one dictionary and not another. And it's important to realize that there are different kinds of dictionaries. For example, there are prescriptive and descriptive dictionaries. A prescriptive dictionary focuses on the way the language should be according to traditional rules, and a descriptive dictionary focuses on the language that is actually in use by the population. So a descriptive dictionary is likely to include words that a prescriptive dictionary would leave out. Many older dictionaries are prescriptive, but most modern dictionaries are descriptive. Some people think the *American Heritage Dictionary* is the most prescriptive modern dictionary (2). It still includes nonstandard words like *irregardless*, but it seems to make stronger statements against them than other dictionaries.

References

1. nonstandard. *Merriam-Webster Online Dictionary*. Springfield: Merriam-Webster. http://www.merriam-webster.com/dictionary/nonstandard (accessed February 7, 2008).

2. RBB. "Booklist review of the American Heritage Dictionary," *Amazon.com* http://tinyurl.com/yvwkup (accessed February 7, 2008).

Paul Brian notes simply that, "Regardless of what you have heard, "irregardless" is a redundancy. The suffix "-less" on the end of the word already makes the word negative. It doesn't need the negative prefix "ir-" added to make it even more negative." See http://www.wsu.edu/~brians/errors/irregardless.html.

Have a look at http://motivatedgrammar.wordpress.com/2009/08/31/irregardless-has-a-posse/ for some history on "irregardless".

Accordingly, the answer to the question is that while "irregardless" appears in the dictionary, it has no place in the writing of a literate estates and trusts lawyer. Regardless works just fine without an extra "ir".

If you would like us to address common errors, please send an email to me at susan.stamm@ontario.ca.

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Brown Bag Lunch Update

Diane Vieira and Suzana Popovic-Montag***

It's been some time since we last reported on our Brown Bag Lunch series. In an effort to keep up to date, we set out the following summaries of our last few meetings.

We had a Brown Bag Lunch on **May 19, 2009**, just following the May long weekend.

The Lunch began with a discussion of Bill 133, Ontario's *Family Statute Law Amendment Act*, 2008, which introduced new regulations with respect to pension calculation rules. In particular, it introduced a scheme of immediate settlement, under which a plan member's former spouse can immediately receive his or her share of the member's pension. This replaces the current scheme of deferred settlement, under which a member's pension cannot be divided until retirement or termination.

The new regulations also change the calculation of equalization entitlements under the *Family Law Act*, and we had an academic discussion of the impact of those amendments on such claims.

A participant then discussed the issues he was facing in a situation where he was required to obtain an affidavit of condition for a Will, but was unable to find the witnesses. Reference was made to the provisions of the *Succession Law Reform Act*, and to the requirements set out therein for valid alterations to a Will.

We also considered the investment duties of attorneys, and whether they could rely on the investment practices of the grantor if criticized in the future by beneficiaries of the grantor's estate for the attorney's current investment decisions. The general consensus was that the attorney's decisions had to

reflect the best interests of the grantor, regardless of the grantor's previous investment decisions and the impact on the beneficiaries of the estate.

Another participant raised an intriguing situation in which his client wanted to create a trust for his grandchildren who lived overseas, that would require his grandchildren to become landed immigrants to benefit from the trust. There was a helpful discussion on how the trust could be drafted to include a number of conditions, and what would happen if certain conditions were not met.

We then considered whether it was possible to remedy a situation in which an incapable person did not change a life insurance designation from his previous wife to his current wife. The current wife was the attorney pursuant to a power of attorney for the husband, and the one paying premiums on the insurance. Despite the unfairness of the situation, participants agreed that it was not possible for the attorney to change the designation.

We ended our May discussion with a review of the payment of RSPs to spouses as designated beneficiaries, and the attendant tax consequences to spouses and to the estate.

Our next Brown Bag Lunch was held on **June 16, 2009.**

We opened our Lunch discussions with an announcement that the *Succession Law Reform Act* was being amended to recognize beneficiary designations of Tax Free Savings Accounts.

There was an enquiry then as to whether it was the practice of solicitors who drafted Wills to keep copies of all drafts, in addition to a copy of the final Will. We discussed various file storage practices for solicitors. The discussion then shifted towards a discussion on paperless offices and the Law Society requirements with respect to electronic storage.

A participant requested some feedback on a situation one of his client's was having with respect to the administration of an estate that was almost fully administered, with the exception of one beneficiary who did not want to be involved. We discussed options such as having that beneficiary execute a formal disclaimer of his interest, as well as the options available to the estate trustee, such as passing his accounts and paying the bequest into court.

Our last Lunch before the summer break ended with a discussion of the statutory requirements for an estate trustee to post a bond and, in light of the *Re Henderson* (2008 CanLII 69136) decision, the requirements to dispense with a bond.

After a brief summer hiatus, our Brown Bag Lunch series returned on **September 15, 2009.**

We began by discussing a specific situation encountered by a participant, in which foreign letters of administration without a Will were granted and the estate trustee later found a Will. Participants suggested that the estate trustee ought to return the initial grant and then file again with a Will, and also ensure that the estate did not pay the associated fees twice.

We also canvassed the issue of whether probate tax had to be paid in a situation in which the deceased failed to designate his surviving spouse as the beneficiary of his RSP, but the surviving spouse was the residual beneficiary of the estate. We then had an insightful discussion concerning the possible insertion of assisted suicide clauses in attorneyship documents.

We moved on to briefly discuss the implications of the *Re Ashton* (2008), 40 E.T.R. (3d) 153 decision with respect to standard revocations in Wills. Participants overwhelmingly felt the decision was wrong, and hoped a further decision would clarify the court's position.

We then revisited the issue of dispensing with bonds for estate trustees who live outside of Canada. Some participants were now drafting Will provisions stating that any person who was a non-resident was deemed to renounce their appointment as estate trustee.

Following that, we had an informative conversation on how to deal with RESPs upon the death of the testator that were not mentioned in the Will. One view that was expressed was that if the RESP was not mentioned in the Will, the default position was that it fell into the residue of the estate.

We ended our September Lunch with a discussion of the tax treatment of RSP trusts and estate planning. One participant volunteered to make further enquiries of Canada Revenue Agency to obtain an update on their treatment of RSP trusts. We look forward to receiving this information at a later Brown Bag Lunch.

We hope you can join us for our next Brown Bag Lunch on **Tuesday, October 20, 2009**. If you have any suggested topics for conversation, please feel free to contact us.

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- iTrusts: Technology and your Trusts and Estates Pracitce (Sections)
  Date: Tuesday, October 27, 2009

- VIDEO REPLAY - Advising the Estate Trustee in Turbulent Times (Regional)
  Date: Thursday, November 5, 2009

- VIDEO REPLAY - Advising the Estate Trustee in Turbulent Times (Regional)
  Date: Wednesday, November 18, 2009

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