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DYING TO DONATE — DETERMINING CHARITABLE DONATION TAX CREDITS ON DEATH AFTER 2015

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The following article appeared originally in Wolters Kluwer's Tax Topics, April 16, 2015.

In the 2014 Budget, the Department of Finance proposed a number of changes to the taxation of testamentary trusts and estates.[2] While the most significant changes were to the taxation of testamentary trusts,[3] changes were also made to the manner in which the charitable donations tax credit (the "CDTC") could be claimed with respect to charitable gifts[4] made by individuals on their deaths. The Supplementary Information relating to these changes states that the purpose of these amendments is to "provide more flexibility in the tax treatment of charitable gifts made in the context of a death that occurs after 2015".[5]

Currently, subsection 118.1(5) of the *Income Tax Act*[6] deems all charitable gifts made by an individual in his or her will to a qualified donee[7] to have been made by that individual immediately prior to his or her death and may be applied only against tax payable by the deceased. Similar deeming provisions apply to gifts of life insurance proceeds, funds in a registered retirement savings plan, funds in a registered retirement income fund, or funds in a tax-free savings account by way of direct designation ("Direct Designation Gifts") to qualified donees.[8] Under the current legislation, charitable gifts made on death may be applied against tax otherwise payable by the deceased in the deceased's terminal tax return or, if any amount remains unused after that, against tax otherwise payable by the deceased in the taxation year prior to death.

One of the benefits of the current legislation is that the charitable gift is deemed to have been made at the same time the deceased is deemed to have disposed of all of his

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[1] The author is grateful for the input and feedback of Rick Cruickshank Q.C., Partner, Dentons Canada LLP. Any and all errors, oversights, and omissions are the author's alone.

[2] These changes were implemented in S.C. 2014, c. 39 (Bill C-43), which received Royal Assent on December 16, 2014.

[3] These changes will not be discussed in this article, except to the extent that they relate to charitable gifts made as a consequence of death.

[4] Any reference to charitable gifts includes a reference to property described in subparagraph 39(1)(*a*)(i.1) ("cultural gifts") and property described in the definition of "total ecological gifts" in subsection 118.1(1) ("ecological gifts") unless the context otherwise requires.

[5] 2014 Federal Budget, Annex 2 — Tax Measures: Supplementary Information (released February 11, 2014).

[6] All legislative references are to the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended, unless otherwise specified.

[7] As defined in subsection 149.1(1).

[8] Subsections 118.1(5.1) and (5.3).

or her property.[9] As a result, the executors of the deceased's estate do not have to complete separate valuations for the purposes of the deemed disposition and for the purposes of determining the amount of the charitable gift. Another benefit of the current legislation is that when a person gifts publicly traded securities[10] to a qualified donee, makes ecological gifts, or makes cultural gifts, any capital gain on the disposition of those properties is deemed to be nil.[11] This applies regardless of whether the charitable gift is made during the individual's lifetime or the gift is made under the individual's will.

One significant drawback, however, is that charitable gifts made by an individual in a will cannot currently be applied against taxes payable by the estate nor can the charitable gifts be applied in the deceased's taxation year immediately prior to the taxation year in which the deceased died, except to the extent that there is any excess after the application of the gifts in the year of death.

The proposed amendments released in the Notice of Ways and Means Motion released on October 10, 2014, which received Royal Assent on December 16, 2014, will change the tax treatment with respect to charitable gifts made by an individual as a consequence of that individual's death. The amended legislation will apply to gifts made under a will to a qualified donee and Direct Designation Gifts, where the donor has died after 2015. As set out above, the changes were made with the goal of increasing flexibility with respect to charitable gifts made on death.

The amended legislation will no longer deem all charitable gifts to have been made by the deceased immediately prior to the deceased's death. Instead, all charitable gifts made by the deceased on his or her death will be deemed to have been made by the deceased's estate at the time the property is transferred to the donee.[12] This includes Direct Designation Gifts.[13] While this would seemingly eliminate the deceased's ability to claim the CDTC on his or her terminal tax return or penultimate tax return, the definitions of "total charitable gifts", "total cultural gifts", and "total ecological gifts" have all been amended to allow the executors to allocate the charitable gifts made by the deceased on death between the deceased and the deceased's estate, provided that the deceased's estate is a "graduated rate estate" at the time the gift is made.[14]

An estate will be a "graduated rate estate" of a deceased individual at any time, if:

(a) that time is not more than 36 months after the individual's death;

(b) the estate is at that time a testamentary trust;

(c) the individual's Social Insurance Number (or if the individual had not, before the death, been assigned a Social Insurance Number, such other information as is acceptable to the Minister) is provided in the estate's return of income under Part I for the taxation year that includes that time and for each of its earlier taxation years that ended after 2015;

(d) the estate designates itself as the graduated rate estate of the individual in its return of income under Part I for its first taxation year that ends after 2015; and

(e) no other estate designates itself as the graduated rate estate of the individual in a return of income under Part I for a taxation year that ends after 2015.[15]

If the estate is a graduated rate estate at the time the gifted property is transferred, the executors of the deceased's estate can allocate the gift among any of:

(a) the last two taxation years of the individual;

(b) the previous taxation years of the estate; and

(c) the taxation year of the estate in which the gifted property is transferred.

[9] Subsections 70(5) through (5.2).

[10] That meet the requirements set out in paragraph 38(*a*.1).

[11] Paragraphs 38(*a*.1) and (*a*.2) and subparagraph 39(1)(*a*)(i.1).

[12] Subsection 118.1(5), effective 2016.

[13] Subsection 118.1(5.2), effective 2016.

[14] See clauses (*c*)(i)(C) and (*c*)(ii)(B) in each of the definitions of "total charitable gifts", "total cultural gifts", and "total ecological gifts" in subsection 118.1(1).

[15] Subsection 248(1) — "graduated rate estate", in force December 31, 2015.

Another benefit is that if the estate is a graduated rate estate at the time the gifted property is transferred and the gift is a gift of publicly traded securities[16] to a qualified donee, an ecological gift, or a cultural gift, the deceased will realize a capital gain of nil on the deemed disposition of the property on death and the estate will realize a capital gain of nil on the actual disposition of the property to the donee.[17]

One drawback to the amendments is that they decrease the flexibility with respect to the allocation of charitable gifts between spouses. In the past, the Canada Revenue Agency's ("CRA's") administrative position was that either the donor or his or her spouse could claim the CDTC. This position has now been codified by amending the definitions of "total charitable gifts", "total cultural gifts", and "total ecological gifts" to include gifts made by the taxpayer's spouse.[18] The administrative position also allowed the spouse of a deceased individual to claim the CDTC with respect to charitable gifts made by his or her spouse under a will.[19] However, none of the amendments will permit the deceased's spouse to claim the CDTC with respect to charitable gifts made by his or her spouse on death. Furthermore, the CRA has confirmed that it will no longer apply this administrative position to gifts made under a will, as the gift will no longer be deemed to have been made by the deceased, but is deemed to have been made by the estate instead.[20] As a result, after the amendments are in force, spouses will have less flexibility with respect to the allocation of charitable gifts between themselves than they did under the CRA's former administrative position.

The amendments with respect to the claiming of the CDTC on death will also likely result in additional administrative hurdles for executors. As set out above, when an individual dies, he or she is deemed to have disposed of all of his or her assets for proceeds of disposition equal to the fair market value of the assets immediately prior to death. As a result, the executors must determine the fair market value of all of the deceased's assets at that time. This can be a relatively simple process for assets such as cash or publicly traded securities. It can be significantly more difficult for shares of a private corporation or real estate assets. Under the current legislation, no further valuations are required when the property is transferred to the donee, because the charitable gift is deemed to have been made by the deceased at the exact same time the deceased is deemed to have disposed of all of his or her assets.[21] However, under the amended legislation, the gift is deemed to have been made by the estate at the time the property is transferred to the donee. If the gift is not a cash gift, the executors will likely have to carry out another valuation of the gifted property at the time the gift is made, which could delay the making of the gift and increase the costs of administering the estate.

Another hurdle executors will have to deal with is the maintenance of the estate's status as a "testamentary trust".[22] This status may be difficult to maintain if trusts outside the will have been used for probate or wills variation planning.[23] If the estate ceases to be a testamentary trust, it will lose its status as a graduated rate estate.

If the estate is not a graduated rate estate at the time the charitable gift is made, then the estate may claim the CDTC only in the year in which the gift was made or in any of its five[24] subsequent taxation years.[25] It will not be able to claim the CDTC with respect to the gift in any of the estate's prior taxation years nor will the deceased be able to claim the CDTC with respect to the gift. Furthermore, even if the charitable gift is a gift of public securities, an ecological gift, or a cultural gift, the deceased will realize any accrued gain on the gifted property.[26] This was not an issue under the current legislation, as the deceased was deemed to have made the charitable gift immediately prior to

[16] That meet the requirements set out in paragraph 38(*a*.1).

[17] Paragraphs 38(*a*.1) and (*a*.2) and subparagraph 39(1)(*a*)(i.1), effective 2016.

[18] See clause (*c*)(i)(A) of each of the definitions of "total charitable gifts", "total cultural gifts", and "total ecological gifts" in subsection 118.1(1), effective 2016.

[19] To the extent the credit was not claimed on the deceased's terminal return.

[20] CRA Technical Interpretation No. 2014-0555511E5, *Spousal Sharing of Charitable Gifts*.

[21] See CRA *Registered Charities Newsletter* No. 27, Fall 2006.

[22] As defined in subsection 108(1).

[23] For further discussion of this issue, see Pam Prior, "Review of August 29, 2014 Technical Amendments Affecting Testamentary Trusts and Testamentary Charitable Gifting", 2014 British Columbia Tax Conference, (Toronto: Canadian Tax Foundation, 2014), 7B: 1–15.

[24] Ten years, in the case of ecological gifts.

[25] See clause (*c*)(ii)(A) in each of the definitions of "total charitable gifts", "total cultural gifts", and "total ecological gifts" in subsection 118.1(1), effective 2016.

[26] However, any gain on the gifted property between the date of death of the deceased and will be deemed to be nil under paragraphs 38(*a*.1) and (*a*.2) and subparagraph 39(1)(*a*)(i.1).

death, so a delay in transferring the gifted property did not impact whether or not the testator realized a capital gain on death with respect to that property.

The treatment of charitable gifts made by estates that are not graduated rate estates is particularly disconcerting for gifts of all or a portion of the residue of more complex estates, as these estates may take more than 36 months to fully administer and would therefore cease to be graduated rate estates before the gifted property can be transferred to the donee. Similarly, if the estate is the subject of litigation, the executors of the estate may be unable to transfer property that is the subject of a charitable gift within 36 months after the donor's death and the estate may cease to be a graduated rate estate before the gifted property can be transferred.

Individuals can mitigate the risks that their charitable gifts will not be completed within 36 months after their death by making Direct Designation Gifts instead of making their charitable gifts under a will, as the assets comprising the Direct Designation Gifts will not form part of the deceased's estate. Another alternative for individuals who anticipate having a complex estate would be to make specific bequests to qualified donees in their will instead of making a gift of the residue, as the determination of the value of the residue and its distribution to the donee may take more than 36 months to complete. If litigation relating to the estate is anticipated, however, specific bequests may not make a difference with respect to the executors' ability to complete the charitable gift within 36 months after the deceased's death. If litigation is anticipated, individuals could also consider making charitable gifts during their lifetime, as charitable gifts can be carried forward up to five years.[27] However, the individual will lose the ability to use the gifted property[28] for at least 60 months after the gift is made and the value of the CDTC will generally be less with respect to charitable gifts made during the individual's lifetime than with respect to gifts made on death.[29]

We will likely have to wait some time to see whether the amendments with respect to the claiming of the CDTC for charitable gifts made by individuals on their deaths will provide the benefits intended by the Department of Finance. In particular, we will have to wait until at least 2019 to see whether the requirement that the estate be a graduated rate estate at the time the property is transferred to the donee in order to obtain the benefits of the amendments will have a significant impact on donors and their estates. In the meantime, advisers should be cautious when developing charitable donation plans with their clients and should consider both the anticipated complexity of their clients' estates and the likelihood of estate litigation when developing the donation plan. Any plan must also consider the individual's charitable giving objectives.

THE EFFECTIVE USE OF TRUSTS IN CONNECTION WITH INCOME SPLITTING (PART III OF IV)

— Michael Goldberg, Tax Partner, Minden Gross LLP, MERITAS law firms worldwide and founder of "Tax Talk with Michael Goldberg", a quarterly conference call about current, relevant and real life tax situations for professional advisors who serve high net worth clients.

Part I of this series of articles reviewed some of the basic tax requirements for using trusts to split income, and Part II discussed a number of tax planning opportunities that can be accessible through the use of *inter vivos* trusts. The focus of this third instalment of the series will be traditional testamentary trust income splitting planning and the upheaval to trusts, wills, and estates practices caused by the December 16, 2014 enactment of Bill C-43, *Economic Action Plan 2014 Act, No. 2* ("Bill C-43").

Testamentary Trust Planning

Non-Tax Matters

Income splitting is also a benefit that can be enjoyed when planning involves "testamentary trusts", which are trusts formed upon or as a consequence of the death of an individual and which have not received property contributions by anyone other than the deceased individual,[1] and include a deceased's estate and trusts formed under the terms of a deceased's will. However, these trusts serve numerous other non-tax purposes.

[27] Ten years, in the case of ecological gifts.

[28] Subsection 118.1(16).

[29] The definition of "total gifts" in subsection 118.1(1).

[1] The term "testamentary trust" is defined in much greater detail in subsection 108(1) of the *Income Tax Act* (Canada) (the "Act"). Unless otherwise noted all statutory references are to the Act.

By law, a deceased's assets will be dealt with by his administrators under his will or, if there is no valid will, under the provincial rules that govern an intestacy. The vehicle for holding the assets will be a form of trust that is referred to as an estate. Assuming the deceased's last wishes are governed by a will, the will would normally instruct his administrators on how to satisfy the obligations he owed and how to dispose of the property he owned at the time of his death. In this way the estate serves a number of practical purposes, including providing a vehicle to collect taxes owing by the deceased at the time of his death and while the assets remain within the estate.

Eventually, the estate should be fully administered and the property may be distributed outright to the deceased's beneficiaries or the terms of the will might create and fund other trusts that, if properly structured, should be testamentary trusts for purposes of the Act. For example, a spousal trust will often be used to maintain control over a deceased's assets for the benefit of her spouse, while the spouse is alive, so as to maintain the spouse's lifestyle and also to protect and preserve family assets for distribution to the deceased's children, grandchildren, and so on. Also, the deceased's will might give rise to more traditional family trusts, insurance trusts, or protective trusts such as Henson trusts that can be created for disabled beneficiaries or spendthrift trusts.

Although well beyond the scope of this article, there are many good US tax and non-tax reasons to form trusts for US beneficiaries that are either created prior to the death of an individual and funded out of a Canadian estate or, depending on the US adviser one engages, even created in the will itself.

Traditional Canadian Income Tax Advantages of Using Testamentary Trusts

There has traditionally been a number of Canadian income tax advantages associated with the use of testamentary trusts.

First, a bequest left to a properly drafted spousal trust will defer death taxes until the death of the surviving spouse. This could also have been the case if the property had been bequeathed outright to the surviving spouse and held by the survivor until his death. However, by leaving the property in the trust, it is possible for the deceased, through her executors or trustees, to ensure control over the estate property to make sure that it is not used in a manner contrary to the deceased's wishes and/or that it is preserved for the benefit of the surviving spouse and future generations.[2]

Second, as was the case with non-testamentary trusts, properly drafted testamentary trusts can allow the income of a trust to be taxed in the hands of the beneficiaries at their marginal rates.

Finally, the taxation of testamentary trusts differ in a number of other favourable ways from the taxation of ordinary *inter vivos* trusts ("Pure Testamentary Trust Tax Benefits"). Probably the most significant of these tax differences is that testamentary trusts have traditionally been taxed at graduated rates as though they were a separate individual.[3] The annual tax savings available to a testamentary trust varies by province but can be significant. In this regard, the chart below shows the 2015 testamentary trust savings on the first $135,000[4] of income on a province-by-province basis,[5] as compared to a situation where that same $135,000 of income had been taxed at the top marginal rate in each particular province.

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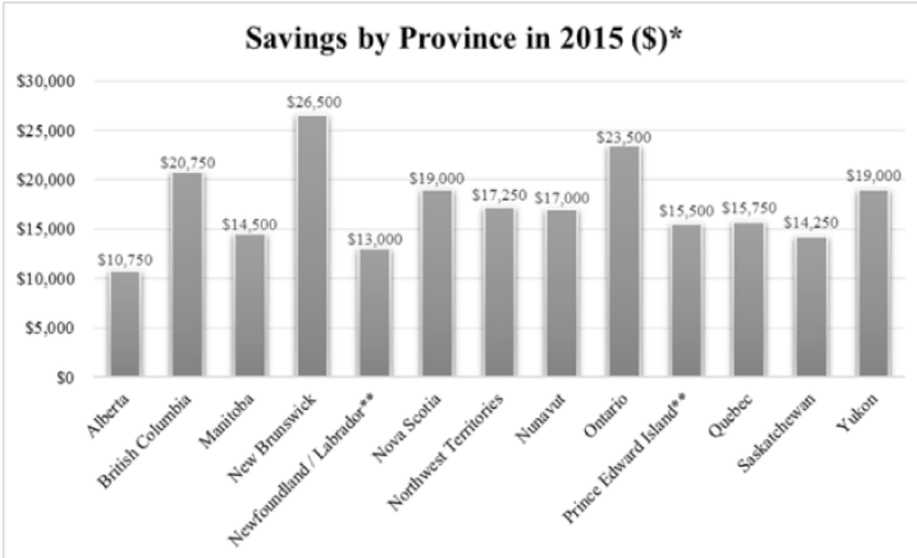
[2] Similar results apply to *inter vivos* spousal trusts but, creating such trusts while a person is alive gives rise to tax and non-tax issues that are beyond the scope of this article.

[3] As was discussed in Part II of this series of articles, rules in subsections 104(13.1) and (13.2) might also have been used to designate amounts paid by a trust to a beneficiary as being taxable only in the trust, which could have given rise to a number of income splitting benefits, including allowing designated amounts paid out to beneficiaries to still enjoy the testamentary trust's graduated tax rates. However, due to the enactment of Bill C-43, effective for the 2016 and subsequent taxation years, the ability to utilize the designations provided under these provisions will be restricted so that designations can only be made to permit trusts to use up losses.

[4] This figure was chosen to approximate the top federal tax rate in 2015. As at the date of writing this article Manitoba, Newfoundland and Labrador, and Prince Edward Island had not yet released their 2015 budgets, so rates used in the chart continue to be 2014 tax rates.

[5] Because not all credits available to individuals are available to testamentary trusts, the tax savings associated with a testamentary trust's graduated rates is a bit lower than for individuals.



** All figures rounded. ** 2015 Budget not yet released.*

As illustrated, based on the assumptions in the chart, 2015 savings will range from a low of about $10,750 in Alberta to a high of about $26,500 in New Brunswick. In addition, since British Columbia, New Brunswick, Nova Scotia, and the Yukon all have marginal provincial tax rates that exceed the top federal tax bracket, 2015 testamentary trust benefits may be even greater than those shown in the chart.

A Whole New World — The End of Testamentary Trust Planning?

In 2013 the Department of Finance proposed to eliminate most Pure Testamentary Trust Tax Benefits, including the benefits of unlimited access to graduated tax rates for testamentary trusts. In particular, beginning in 2016 it was proposed that the graduated tax rate advantage would only be permitted for a maximum of the first 36 months of an estate. In addition, following that 36-month period the proposals were intended to strip testamentary trusts of their other unique benefits by eliminating exemptions from income tax installment rules, rules requiring ordinary trusts to have a calendar taxation year, and the alternative minimum tax rules. In addition, while in the past testamentary trusts were not subject to tax under Part XII.2 of the Act, which applies to ensure non-resident beneficiaries of trusts do not avoid tax on certain types of Canadian income, this preferential tax treatment was to be eliminated. Also, rules that would automatically qualify testamentary trusts as personal trusts and which would allow trusts to make investment tax credits available to beneficiaries were to be eliminated (collectively, all of these benefits, including the graduated rate benefit, are referred to herein as "Traditional Testamentary Trust Benefits").

Notwithstanding much critical commentary, the 2014 Budget announced plans to implement the proposals, and draft legislation was released on August 29, 2014. The draft legislation, which contained no grandfathering provisions, not only proposed to implement the proposals but went far beyond the original proposals in ways that will broadly and generally negatively impact traditional testamentary and other non-testamentary trust planning.[6] Despite additional submissions having been made to the Department of Finance by, among others, the Joint Committee and STEP, with very few substantive changes from the draft legislation, Bill C-43 was introduced for first reading on October 23, 2014. On December 16, 2014, Bill C-43 was enacted as the law of the land, though the implementation of the provisions of Bill C-43 relating to testamentary spousal trusts as well as to other trusts and particularly to "lifetime trusts" (these are self-benefit trusts, *alter ego* trusts, and joint partner trusts) will generally be delayed until 2016.

Although there is no way to adequately address the legislative changes in in Bill C-43 in this series of articles,[7] some of the more critical changes that will impact testamentary spousal trusts and lifetime trusts are highlighted below.

[6] To be fair the draft legislation contained a few beneficial provisions. In particular, the proposals (now law) will make it easier for certain testamentary trusts to make use of charitable donation credits and will allow some relief from the rules that will otherwise limit access to testamentary graduated rates for certain testamentary trusts formed to benefit disabled individuals who are eligible for the disability tax credit.

[7] For those interested in further reading on the proposed changes see, for example, Ross, A. M. (2014, October). Proposed Tax Legislation Affects Trusts and Donations on Death. *Conference for Advanced Life Underwriting*. CALU, North York, ON.

(1) Testamentary spousal trusts and lifetime trusts will all now have deemed year-ends on the date of death of the individual or last spouse or common law partner to die, as the case may be.[8]

(2) The income earned by a trust subject to the new deemed disposition rules for its taxation year that ends on the deemed year end will be deemed to be that of the deceased trust beneficiary and not the income of the trust.[9]

(3) Access to many traditional testamentary tax planning practices such as planning involving subsections 164(6) and 112(3.2),[10] certain beneficial charitable planning opportunities,[11] preferential charitable donation tax rates,[12] and all of the Traditional Testamentary Trust Benefits will only be available to trusts that qualify as graduated rate estates ("GREs").[13]

(4) Pursuant to new subsection 104(13.3), the ability to make designations under subsection 104(13.1) and (13.2) will be restricted to situations where any trust — including testamentary spousal trusts and lifetime trusts — has unused losses.

Another significant problem with Bill C-43 is that it was enacted without provisions that would "grandfather" situations where wills can no longer be changed (e.g., because the maker of the will is dead or incapacitated). Consequently, in these situations it may not be possible to take any steps to address the legislative changes, which could give rise to adverse tax results and, in some situations, potentially lead to unnecessary litigation.

We understand that lobbying bodies and practitioners continue to make presentations and submissions to the Department of Finance, the Minister of Finance, and whoever might be willing to listen in hopes of causing the Department of Finance to fix Bill C-43 before it comes into force in 2016. Stay tuned to find out if they will be successful.

In the meantime, what are practitioners to do? Unfortunately, the most that can be said is that all advisers should consider whether it is appropriate to contact some or all of their will clients to encourage them to review their wills in 2015. As well, since the changes enacted in Bill C-43 will impact lifetime trust planning, advisers who employ such trusts should also consider encouraging their clients to review whether those trusts will continue to meet their client's planning needs in the future.

Unfortunately, solutions to problems caused by Bill C-43 will not always be straightforward and, as mentioned earlier, it remains unclear whether changes could still be made to the legislation before its January 1, 2016 effective date. As a result, the whole exercise may prove to be an unsatisfactory one.

Assuming Bill C-43 does come into force on January 1, 2016, and results in the elimination of most of the Pure Testamentary Trust Tax Benefits, leaving only modest ongoing tax benefits akin to those available to ordinary *inter vivos* trusts, or in some cases even potentially leading to significant tax problems, is there a future for testamentary and

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[8] See new paragraph 104(13.4)(*a*).

[9] This rule may result in significant inequitable results where the deceased beneficiary's heirs are different from the residuary beneficiaries of the trust. It should be noted that the estate will continue to have liability for this taxable income pursuant to subsection 104(13.4). The interaction of these rules with trustee fiduciary obligations has been discussed by Elena Hoffstein and Pearl E. Schusheim in the following presentation: Hoffstein, E., & Schusheim, P. E. (2014, November 18). New Testamentary Trust Rules. *Jewish Community Foundation Professional Advisory Committee Seminar*. Lipa Green Centre, Tamari Family Hall, Toronto, ON. There also appear to be technical drafting errors in the rules that, unless corrected, would appear to cause the last-to die spouse's estate to be taxed on income rather than capital account. It can only be hoped that this is unintended and will be corrected (on February 3, 2015, Joan Jung of Minden Gross LLP made a submission to the Department of Finance in connection with this matter).

[10] Planning involving subsection 164(6) would traditionally be used to carry capital losses realized in the first taxation year of an estate back to the deceased's terminal taxation year to offset against capital gains in that taxation year. Often such capital losses are realized in connection with the redemption of shares, which itself may give rise to taxable dividends in the estate. Where capital losses would otherwise have been realized on shares on which capital dividends have been paid those losses can be restricted pursuant to a number of provisions in section 112. Subsection 112(3.2) provides estates with important exceptions to these stop-loss rules. From January 1, 2016 onward these beneficial provisions will only be available to GREs.

[11] Including those briefly discussed in footnote 5 above.

[12] For example, the "zero" inclusion rate for taxable capital gains in paragraph 38(*a*.1).

[13] A deceased person is only able to have one GRE, which is that person's estate. Only that GRE can benefit from the 36 month period of access to testamentary graduated rates and the other Traditional Testamentary Trust Benefits. Although based on informal discussions with the Department of Finance we understand that multiple will structures involving identical trustees in each will should generally not result in a person having more than one estate, it appears that no other testamentary trusts, including insurance trusts, would qualify as GREs. At the end of 2015 for current testamentary trusts or at the end of the 36-month period of existence of the GRE, whichever is later, a year-end will occur pursuant to new subsection 249(4.1).

lifetime trusts? In situations where such trusts are implemented with proper care and attention to details and the non-tax benefits warrant their use, the answer certainly appears to be yes.

PURPORTED "WILL" LACKED TESTAMENTARY INTENT

The document filed for probate on this application was a printed form of will: someone had filled in the blank spaces in handwriting, the deceased signed it, and two persons signed it as witnesses. Rather than specifically gifting property to beneficiaries, the deceased granted the applicant R. J. Walmsley and M. H. Walmsley ("R.J. and M.H.") the responsibility of disposing of the property as they saw fit. The question was whether the deceased's direction to have his estate divided as R.J. and M.H. saw fit, satisfied the requirement that, to be admitted to probate, a document must express the testamentary intent of the deceased.

A very similar issue was considered by this Court in *Balfour Estate, Re* (1990), 85 Sask. R. 183 (Q.B.). In that case, Gerein J (as he then was) refused a grant of probate where the document placed the responsibility of dividing the estate on the testator's daughter. The document directed that "Whatever Brenda Goll my daughter decides is O.K. if anyone else doesn't like it too bad." In making his decision to refuse the grant of probate, Gerein J found at pp. 184-185:

> The words, "Whatever Brenda Goll my daughter decides is O.K.", do not constitute a disposition in favour of Ms. Goll. Equally, they do not constitute a disposition in favour of anyone else. They do nothing more than deputize Ms. Goll to distribute the estate property. The result is that there is no testamentary disposition which in turn precludes any finding of testamentary intention.

The Court on the current application applied the same logic: the document did nothing more than "deputize" R.J. and M.H. to distribute the estate property. The deceased did not dispose of the property himself, but instead gave that duty to his estate trustees. Accordingly, there was no testamentary disposition, without which there could be no finding of testamentary intention.

The question then arose whether the document could be put right pursuant to section 37 of the *Wills Act* — a substantial compliance provision allowing the court to order a will to be fully effective despite the document's failure to meet all of the formal requirements of the Act. The answer was that, for section 37 to apply, the court must be satisfied that, whatever its shortcomings, the document expresses the deceased's testamentary intention. That was not the case here; accordingly the application was refused.

***Re Walmsley Estate*, 2001 SKQB 105**

ONTARIO ESTATE ADMINISTRATION TAX ACT — ESTATE INFORMATION RETURN

Beginning January 1, 2015, an Estate Information Return must be received by the Ministry of Finance within 90 calendar days after a Certificate of Appointment of Estate Trustee has been issued by the court. However, this does not apply to anyone who applied to the court for a Certificate of Appointment of Estate Trustee prior to January 1, 2015.

A fillable PDF version of the Estate Information Return is available on the ministry's website, ontario.ca/finance , under the "Forms and Publications" link on the left. Its accompanying Guide is available on the website as well. The Estate Information Return may be filled out online and printed, or it may be printed and filled out by hand, before submitting it to the Ministry of Finance. An Estate Information Return may be submitted to the Ministry of Finance in the following manner:

- by mail or courier to Ministry of Finance, Advisory and Compliance Branch, 33 King Street West, PO Box 625, Oshawa ON L1H 8H9;
- by fax to 1-866-888-3850; or
- in person to Ministry of Finance, 33 King Street West, Oshawa ON L1H 8H9 (between 8:30 am and 5:00 pm, Monday to Friday).

Effective May 1, 2015, an Estate Information Return will also be accepted in person at select ServiceOntario locations. For ServiceOntario locations, hours of operation, and telephone numbers, please visit ontario.ca/serviceontario or call toll-free 1 888 745-8888 (TTY toll-free 1 800 268-7095). For additional information, please contact the Ministry of Finance at:

- 1-866-ONT-TAXS (1-866-668-8297);
- 1-800-263-7776 — Teletypewriter (TTY); or
- EstateAdminTaxProgram@ontario.ca.

ONTARIO TAXATION OF TRUSTS AND ESTATES

Per the April 23, 2015 provincial Budget, Ontario will follow the federal changes to the taxation of trusts, which take effect after 2015. Specifically, only a graduated rate estate or qualified disability trust will have access to graduated tax rates in Ontario. Such trusts will equally be subject to surtax, if their tax payable is sufficient.

All other trusts will pay tax on their taxable income at the top Ontario rate — 20.53%. These trusts will calculate their Ontario credit on annual charitable donations over $200 at 17.41%.

Notice: *Readers are urged to consult their professional advisers prior to acting on the basis of material in this Newsletter.*

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