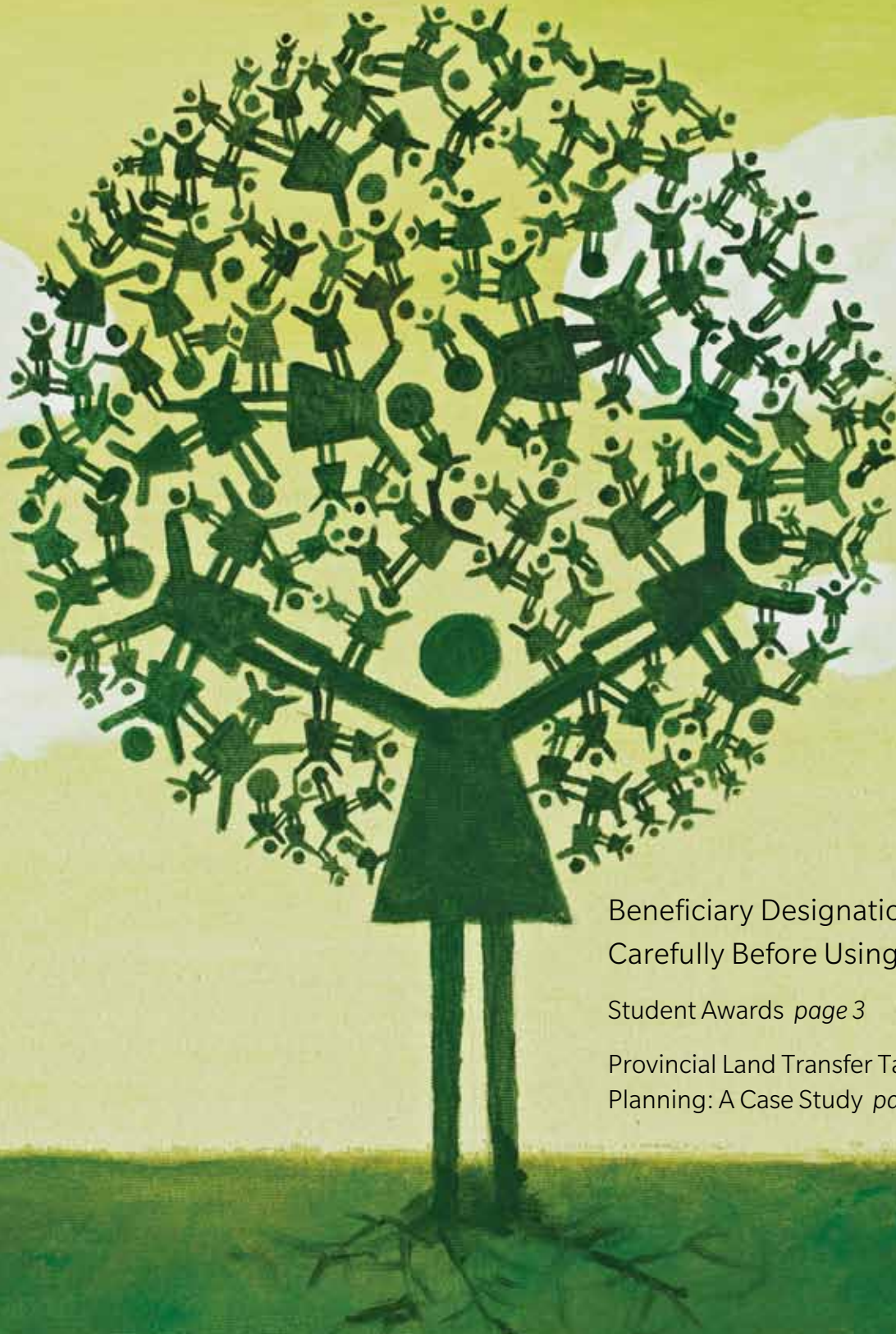


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STEP Inside

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STEP Inside is published three times a year by the Society of Trust and Estate Practitioners (Canada), an organization of individuals from the legal, accounting, corporate trust and related professions who are involved, at a specialist level, with the planning, creation, management of and accounting for trusts and estates, executorship administration and related taxes. STEP Canada has branches in the Atlantic region, Montreal, Ottawa, Toronto, Winnipeg, Edmonton, Calgary, and Vancouver; and three chapters in London and Southwestern Ontario, the Okanagan Valley, and Saskatchewan.

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Coming Soon

CETA and DIPLOMA program courses in French!

STEP Canada is excited to announce that the CETA and Diploma education programs will soon be rolling out in French. The materials will be written with a new focus on civil law specifically for students in Quebec and other students for whom civil law is most pertinent. These French-language courses promise to round out our offerings, ensuring that STEP's education programs are relevant to all our students.

First courses will be offered this fall for both CETA 1: Foundations of Estate and Trust Administration and DIPLOMA 1: Law of Trusts. Subsequent courses will be rolled out over the following two years.

Be sure to visit the education booth at the National Conference for more information, and visit STEP.ca for updates.

Prochainement

Cours des programmes CETA et DIPLOMA en français!

STEP Canada est heureuse de vous annoncer que les programmes de formation CETA et Diploma seront bientôt disponibles en français. Les documents seront élaborés en mettant l'accent sur le droit civil, spécifiquement pour les étudiants du Québec et tous autres étudiants pour qui le droit civil est pertinent. Ces cours en français viendront compléter notre offre, de façon à ce que les programmes de formation de STEP soient adéquats pour tous nos étudiants.

Les premiers cours seront offerts cet automne pour CETA 1 : Fondements de l'administration des successions et fiducies et DIPLOMA 1 : Droit des fiducies. Les cours suivants seront lancés au cours des deux prochaines années.

Nous vous invitons à visiter notre kiosque sur la formation au Congrès national pour obtenir plus de renseignements et à consulter STEP.ca pour des mises à jour.

FAMILY TRUST PLANNING: LAWYERS' NEGLIGENCE AND VALUATION ISSUES

JOAN E. JUNG, TEP

Member, STEP Toronto
Minden Gross LLP

Ozerdinc Family Trust et al. v. Gowling et al., 2017 ONSC 6, provides a cautionary note for practitioners involved in family trust planning. The legal advice that gave rise to the negligence claim arose not at the initial settlement and introduction of a family trust into a family-controlled group of corporations but a number of years later, when certain changes were considered desirable. The related Tax Court of Canada case, *Grimes v. The Queen*, 2016 TCC 280, contains interesting valuation points.

The Ozerdinc family trust (trust 1) was settled on February 1, 1990 by Kathleen Grimes for the benefit of the children of her marriage to Ersin Ozerdinc. Ms. Grimes and Mr. Ozerdinc were the trustees of trust 1. Under the terms of trust 1, the trust property was to be divided and distributed at the date on which the youngest child attained the age of 22 or an earlier date determined by the trustees in the exercise of their discretion. In 1990, there were two young children of the marriage, born in 1986 and 1988, respectively. Two other children were born after the date of settlement of the trust, in 1991 and 1993, respectively.

In 2007 (17 years later), Ms. Grimes contacted the lawyer involved in the creation of trust 1 because she was concerned that the children would be too young for distribution when the youngest child attained the age of 22. At that time, the youngest child was 14. On the basis of the advice provided, including an opinion that there

were no immediate consequences to the transactions involved in creating the new trust, Ms. Grimes settled a second family trust (trust 2) on September 28, 2007. The settlor, trustees, and beneficiaries of trust 2 were the same as those of trust 1. However, trust 2 provided for distribution of the trust property to beneficiaries when the youngest child attained the age of 30, effectively creating an extension of seven years.

All of the property of trust 1 was transferred to trust 2 as a “qualifying disposition” pursuant to subsection 107.4(3) of the Income Tax Act. As a result, there was deemed to be no change in the beneficial ownership of the property of trust 1. Trust 1 made the transfer on a rollover basis to trust 2 and dissolved at the end of the year. The opinion provided by the defendant law firm did not mention the application of subsection 104(5.8) in connection with the 21-year deemed disposition rule. Subsection 104(5.8) basically provides that in the case of a trust-to-trust transfer on a rollover basis, the 21-year deemed disposition date of the transferor trust continues to apply to the transferee trust.

In 2012, the Canada Revenue Agency audited and reassessed trust 2 on the basis that there had been a deemed disposition of the property of the trust for proceeds of disposition equal to its fair market value on February 1, 2011. This was the date of the 21st anniversary of the date of settlement of trust 1, which continued to be the relevant date because of the application of subsection 104(5.8). In the Tax Court, there was no dispute that trust 2 was subject to the application of the 21-year deemed disposition rule and that the deemed disposition date was February 1, 2011.

Ms. Grimes, Mr. Ozerdinc, trust 1,

trust 2, and others commenced a civil action against the lawyers who had proposed and implemented the 2007 reorganization involving the creation of trust 2 and the transfer of property from trust 1 to trust 2, claiming negligence and seeking damages resulting from the application of the 21-year deemed disposition rule.

Ozerdinc Family Trust was a motion for partial summary judgment, and there was no full trial of any issue. The defendant law firm admitted that the actions of the particular lawyer fell below the standard of care of a reasonably prudent tax lawyer but argued that the obligation to advise the plaintiffs of the deemed disposition date was an obligation of the accountants. In other words, liability was admitted but causation (whether breach of the standard of care caused the damage) was not. Curiously, however, the plaintiffs had not sued the accountants, and while the defendant law firm apparently made a cross-claim against the accountants, they were not made parties to the main action.

The court noted that proof that the defendant law firm was negligent (owing to its breach of the requisite standard of care) did not make it liable for the loss suffered by the plaintiffs. It had to be established that the defendants’ negligence caused the injury. Partly on the basis of the defendants’ admission, the court held that there was negligence in the provision of tax advice. Summary judgment was rendered on this issue alone, but the action would have to go to trial on the issues of causation and damages. The court accepted the expert report submitted by the plaintiffs that “the standard of care expected of a tax lawyer in advising on the law is not diminished because an accounting firm prepares tax returns.”

Trust 2 held the sole issued and outstanding common share of a holding company. Voting control was held by Ms. Grimes by virtue of her ownership of a class of non-participating shares with no dividend entitlement but carrying the right to 500,000 votes per share. In *Grimes*, after considering expert valuation reports submitted by both the taxpayer and the Crown, the Tax Court held that both a marketability discount (15 percent) and a minority discount (12.5 percent) should be applied in the valuation of the common shares. The family's control of the holding company did not prevent the application of these discount principles.