Planning for Children: Children's Property and Status
The Planner's Perspective
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I. Introduction

Making a good estate plan for minor children is an important part of planning regardless of the marital status of the child's parents or guardians. Where a parent or parents die without a Will the opportunity to appoint a guardian of choice has likely been missed. Furthermore, government intervention through the office of the Public Guardian and Trustee ("PGT") will be inevitable to deal with any inheritance that the minor receives until such time as the minor attains the age of 19 years. Where a Will is made but makes inadequate trust provisions for minor children, the PGT will similarly be engaged to administer the trust fund for the minor unless the inheritance is modest enough to fall under the provisions of section 178 of the *Family Law Act*, SBC 2011, c. 25 ("FLA"). That section allows a minor's guardian to hold funds or other property for a minor if the value of such property is less than the maximum amount of $10,000 (see *Family Law Regulation*, BC Reg. 347/2012).

Sections 179 and 180 of the FLA provide for the appointment of a trustee by the court, if the court is satisfied that the appointment would be in the best interests of the child. However, the PGT must provide written comments to the court setting out its position to the application (FLA, s. 179(2)(f)). The costs of such an application may be disproportionate to a child's inheritance where the amount or property inherited is modest. See for example, *Leniuk Estate*, 2016 BCSC 159, where the inheritance in question totalled $15,000.

This paper considers how different legislative regimes at play in BC identify the status of a child or a minor, introduces the use of trusts in estate planning with a particular focus on assisting clients with minor beneficiaries and considers certain issues that arise in estate administrations involving the interests of minor beneficiaries and children's property.

A. Status of Children

1. Who is a minor: pursuant to section 1 of the *Age of Majority Act*, RSBC 1996, c.7, the age of majority in BC is 19 years.

2. Authority to Contract: In BC, the *Infants Act,* RSBC 1996, c. 223, governs the general legal position of children under 19 years of age. For many purposes, a child under the age of 19 years old is considered to have a legal disability which prohibits him or her from entering into legal binding contracts unless the court or the PGT approves. Section 19 of the *Infants Act* sets out that, except in limited circumstances, a contract made by an infant will be unenforceable. Parties who wish to contract with a minor can apply either to the BC Supreme Court and/or the PGT for an order that the minor in question be granted a limited capacity for the relevant contract. See for example, *Hann-Byrd Estate*, 1990 CanLii 1645 (BCSC) which involved a minor seeking to contract to be employed in the entertainment industry.

   Rules 1, 11, and 17 of the *Small Claims Court Rules*, BC Reg. 261/93, apply when an action involving the rights of an infant is commenced in the Small Claims Court. The Rules require

a guardian ad litem and consent of the PGT in regard to any settlements for a person under the age of 19 years of age.

Rule 20-2 of the *Supreme Court Civil Rules*, BC Reg. 169/2009, sets out the requirements for representation when a person under disability, which includes an infant under the age of majority (Rule 20-2(12)).

3. Liability: A person must be over the age of 12 years in order to be liable for a criminal offence: *Criminal Code*, RSC 1985, c. C-46, s. 13. A person between the ages of 12 and 17 can be criminally liable as a young offender under the *Youth Criminal Justice Act,* SC 2002, c. 1.

The *Parental Responsibility Act*, SBC 2001, c. 45, though limited to small claims actions, provides that parents may be found liable for the actions of their children.

4. Employment: for employment purposes, a child is under the age of 15 years. Employment regulations permit employment of 12 to 14 year olds with the permission of the Director of Employment Standards. The parent or guardian of a person under the age of 15 years must also consent to the child's employment. After the age of 15, the child can consent to his or her own employment. The *Employment Standards Act,* RSBC 1886, c. 113, (the "ESA") and Employment Standards Regulation, BC Re. 396/35, have some specific conditions for employment of children in the entertainment industry: http://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/igm/esr-part-7-1-division-2. The ESA provides that consent of a child's parent or guardian must be provided before a child under the age of 15 is employed in the entertainment. If a minor under the age of 15 is employed in the entertainment industry and earns more than $2,000 on a production, the employer must remit 25% of all earnings over $2,000 to the PGT to hold in trust for the child. Similarly, if a child under the age of 15 earns more than $1,000 per week on a live performance, 25% of his or her earnings must be paid to the PGT to be held in trust for the child.

5. For planning purposes: generally, a child is under the age of 19 years, although, pursuant to section 36 of the *Wills, Estates and Succession Act*, SBC 2009, c. 13 (the "WESA"), a person who is over the age of 16 years or older and who is mentally capable of doing so may make a Will. However, both witnesses to the Will must be over the age of 19 years (WESA, s. 40) and the personal representative named must be over the age of 19 years in order to act. The court may appoint a guardian or other suitable person if a minor is named as the sole executor under the Will (s. 134).

A trust settlement should not appoint an infant as a trustee since the infant does not have the legal capacity to contract so presumably cannot accept the role, responsibilities and duties or fulfil this role. Canada does not have the equivalent of the restriction in England's *Law of Property Act*, 1925 (Eng.), s. 20, which prevents a child from acting as trustee. The result appears to be that an infant may act as a trustee in Canada but such appointments would be

"illogical", unwise and impractical: see, for example, Donovan Waters et al., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 121-122.

A trust is a legal relationship created when a "settlor" gives property to a "trustee" to hold for the benefit of one or more "beneficiaries". The terms of the trust will usually be established in a written agreement (the Settlement) which sets out the terms by which the trustee will hold and manage the property on behalf of the beneficiaries. Three certainties are required for a trust to be valid, (1) intention, (2) property and (3) beneficiaries, and the trust must be constituted by the transfer of the trust property to the trustees. The trustee is the legal owner of the trust property. He or she is a fiduciary and has a number of duties in regard to the trust property and the beneficiaries, including a duty to manage the assets and a duty to act in the best interest of the beneficiaries.

Only an "adult" (defined in section 1 of the *Power of Attorney Act,* RSBC 1996, c. 370, as "an individual who is 19 years of age or older") can make an enduring power of attorney and, while an individual who is not an adult can be named as an attorney, only an adult can act as an attorney.

Only an "adult" (defined in the *Representation Agreement Act*, RSBC 1996, c. 405, as "anyone who has reached 19 years of age") can appoint a health care and personal care representative and only an individual who is an adult can be named as a representative.

6. Inheritance Purposes: a child can inherit but, where the inheritance is outright (i.e. the plan lacked trust provisions), funds and property are held by the PGT until the child attains the age of 19 years. The PGT is authorized to hold funds or property in trust for a child, pursuant to direction in a statute, will, trust agreement or court order. A child may also be entitled to money as compensation for injuries or from monies left to them by a family member. Under these circumstances, property is paid to the PGT in trust for the child where it is invested and administered on the child's behalf: http://www.trustee.bc.ca/services/child-and-youth-services/Pages/trust-services.aspx. When the child turns 19 years of age, the PGT will provide release documents and will provide the funds to the child directly. See *Infants Act*, s. 14 for PGT ability to encroach on funds for benefit of the infant during his or her minority.

Pursuant to s. 53 of WESA, an inheritance that is payable to a minor in absence of trust conditions must be paid to the PGT and will be paid out in full to the beneficiary when he or she reaches majority (19 years old). However s. 153(3) of the WESA provides that the court may appoint a trustee to hold the interest upon trust for the minor beneficiary. On the day that the child attains the age of 19 years old, the PGT is required to pay the whole of the child's trust fund directly to the child.

Notice to the PGT in respect of a minor's interest in an estate will not be necessary where all of the following conditions are met: there is an executor, the minor is not a spouse or child of the deceased, and there is a trust and a trustee to hold the minor's interest.

7. Family law: a child is "a person who is under 19 years of age" (FLA, s. 1). However, section 37 of the FLA requires the child's views to be considered by the decision-maker when making an agreement respecting guardianship, parenting arrangements or contact "unless it would be inappropriate to consider them". Section 202 of the FLA permits the court to give direction regarding how to receive a child's evidence and section 203 of the FLA permits the court to appoint a lawyer to represent the child's best interests. Subsection 211(1)(b) of the FLA permits the court to appoint a person to obtain the "views of the child" and section 224 of the FLA allows the court to make an order requiring a child to attend counselling, specified services or programs. Section 31 of the FLA requires that if the child is over the age of 16 years and an order is being sought to determine parentage, the child will be served with notice of the application (along with each guardian and parent of the child).

8. For medical consent purposes, any infant under the age of 19 years can agree to their own medical care if they are capable: *Infants Act,* s. 17.

   The *Child, Family and Community Service Act*, RSBC 1996, c. 46 (the "CFCSA"), defines a child as a person who is under the age of 19 years and a "youth" as someone who is 16 years of age or over but is under the age of 19 years. Section 2 of the CFCSA requires that the child's views should be taken into account when decisions are made.

   There is no set age for determining the "capacity" to consent and a doctor will generally consider that a child can consent if they understand the need for medical treatment, what the treatment involves and the consequences of receiving or not receiving the treatment. However, if there are disagreements, this matter of the medical consent of a child can be expanded to include the child's parents, the court, the Ministry of Children and Family Development and other intervenors. A doctor or healthcare advisory may feel that he or she cannot disclose confidential medical information unless the child agrees: http://www.cbabc.org/for-the-public/dial-a-law/scripts/health-law/422.

   See for example, *S.J.B., by her Litigation Guardian, K.B. and D.A.S. v. The Director of Child, Family and Community Service for the Province of British Columbia*, 2005 BCSC 573. In that case, the minor was 14 years old and, along with her family support, refused to be transfused with blood or blood products in the process of a chemotherapy regime. The lower decision (provincial court) determined that although the child was a mature minor the court had an overriding right to give or consent to treatment for the child and blood products were ordered. On appeal (the BCSC) the Court determined that neither the CFCSA or the *Infants Act* provisions infringed on the child's fundamental rights and freedoms (religion and right to dignity, privacy and personal autonomy) and the trial decision was upheld.

   To be eligible for medical assistance in dying (*An Act to amend the Criminal Code and to make amendments to other Acts (medical assistance in dying*, S.C. 2016, c. 3 (the "MAID")), an individual must be at least 18 years old and be mentally competent. MAID received assent on June 17, 2016. The provisions can be found in s. 241.1 – 241.3 of the *Criminal Code.* Section 9.1(1) of MAID does provide that 180 days after the MAID received royal assent,

that issues relating to mature minors would be independently reviewed and within two years the findings would be reported.

9. Marriage: In BC, a person under 19 years of age may not have a marriage solemnized and a license issued unless all of the minor's living parents who have guardianship, the guardian of the minor if no parents or the PGT or the court consent: *Marriage Act,* RSBC 282, s. 28. If the minor is over the age of 16 years, a court order is required to permit the marriage to be solemnized and a licence to be issued: *Marriage Act*, s. 29.

10. Voting: In order to vote in a provincial election in BC, an individual must meet the following criteria:
    - be a Canadian citizen,
    - will be at least 18 years old on General Voting Day,
    - have been a resident of B.C. for the six months immediately before General Voting Day,
    - be registered as a voter, and
    - not be disqualified from voting.

11. Ownership of Real Property: while a person under the age of 19 years should not have been registered on the title for real property in BC, it does happen. However, the minor cannot consent to sell or deal with the real property since the minor is not contractually capable. Since the minor cannot make a legally binding contract to deal with the property this kind of ownership can make for an extremely impractical situation. See *Wong v. Huang*,2012 BCSC 975, where a piece of property was transferred into joint tenancy with an infant. The minor cannot enter into a real estate contract and it would not be enforceable against him or her without further steps being taken.

    Section 2 of the *Infants Act* allows the PGT to apply to the court to sell a minor's interest and the court to authorize such a sale. The money arising from the disposition will be applied and disposed of as the court orders.

    If the minor owns less than the whole interest in the property, an application can be brought pursuant to s. 9 of the *Partition of Property Act,* RSBC 1996, c. 34, in which a request for sale is made by an infant's litigation guardian or guardian and the court will comply if the sale would be in the infant's best interest.

12. Section 18 of the *Limitation Act*, SBC 2010, c. 13, provides that the limitation period with respect to a minor commences upon the child attaining the age of 19 years old. In the case of estate administration, it will not be possible for a personal representative or trustee to receive consent to his or her accounts where one or more of the beneficiaries is a minor or unascertained until those persons attain the age of majority. In such circumstances, the personal representative or trustee may apply to the court to have his or her accounts approved in a summary manner.

B. The Planner's Perspective

1. Appointing standby, testamentary and temporary guardians

Only a person who is a child's guardian may appoint a guardian for the purposes of Part 4, Division 3 of the FLA. If the guardian dies without making any appointment, the child's surviving parent who is not already a guardian will not become the guardian unless so appointed by the court pursuant to section 51 of the FLA. If a guardian dies without appointing a testamentary guardian and there is a surviving guardian or guardians who are a parent or parents, the surviving guardians will assume all of the parental responsibilities unless there is a court that provides otherwise. Generally, parents will have agreed to a similar provision regarding the surviving parent guardian becoming the sole guardian if they have adopted the terms of the "Joyce model" of guardianship and the court approved terms would govern the process. A guardian can only appoint the same parental responsibilities that he or she has with respect to the child: FLA, s. 56.

a. Standby Guardian

Section 55 of the FLA permits a parent or other legal guardian of a child to appoint a standby guardian using a prescribed form where the guardian is facing "terminal illness or permanent mental incapacity". The form is Form 2 as set out in the *Family Law Regulation.* The appointment must state the conditions to be met before the appointment will take effect and should also confirm if the appointing guardian intends the standby guardian's authority to continue upon the death of the appointing guardian regardless of other appointments made in an instrument such as a Will. The guardian must sign the form in the presence of two witnesses (neither of whom is the person being appointed) and the witnesses must watch the guardian sign and then both witnesses must sign in the presence of the guardian.

b. Testamentary Guardian

Subject to the comments above, section 53 permits a guardian to appoint a testamentary guardian either in a Will ("made in accordance with the *Wills Act*", presumably this should point to the WESA) or in the prescribed form as long as the form is witnessed appropriately by two witnesses who witness the guardian sign the form and then the witnesses also sign the form in the presence of the guardian.

It is standard to include a guardianship provision in a Will where there will-maker has a minor child or children. The drafting solicitor will discuss the ability to name a testamentary guardian and confirm with the will-maker his or her guardianship scope. For example, the drafter will need to know whether the will-maker is the sole guardian or whether both of the child's parents act as a guardian with an agreement that the survivor will be the sole guardian in the event of a death. This arrangement will be reflected in the terms of the Will. The drafter should also explain that, if an individual commences to act as the child's guardian, that individual will be responsible for appointing a successor guardian rather than that responsibility returning to the will-maker. Many will-makers include wish language informing the named guardian of the person or persons they would like to act in that role if the appointed guardian was not able or willing and requesting that the named guardian also appoints a testamentary guardian if they commence to act.

c. Temporary Guardian

Subsection 43(2) of the FLA contains provisions for appointing a temporary guardian where the guardian is temporarily unable to exercise parental responsibilities, including the following: making the day-to-day decisions affecting the child, making the decisions respecting with whom the child will live and associate, education and extracurricular activities and refusal or withdrawal of consent for medical, dental or other health related treatments. The temporary authorization must be in writing and will only be available until the guardian is able to assume those responsibilities. There is no prescribed form of writing or witness requirements for the appointment of a testamentary guardian.

2. Planning in Wills and Trusts:

Trusts for minor children are a valuable planning tool. Creating a trust for a minor child or trusts for minor children will give the will-maker or settlor of the trust the confidence that they have effectively planned for their family's future.

a. Trusts Created in Wills

A testamentary trust is created by a Will or some other instrument and by consequence of the death of an individual: s. 108(1) of the *Income Tax Act*. Testamentary trusts are usually funded with assets from the estate but can also be settled with the proceeds of life insurance (see later discussion on Life Insurance Trusts). Testamentary trusts that arise in a graduated rate estate ("GRE") may be taxed at the graduated rate of the estate during the 36 months following the death of the will-maker. The following conditions must be satisfied for an estate to be a GRE: the personal representative must designate the estate on its first T3 return, no other GRE estate can be designated for the deceased and the GRE status may only be in effect for 36 months following the death of the deceased: http://www.cra-arc.gc.ca/gncy/bdgt/2014/qa15-eng.html After the first 36 months, greater savings may be realized if the income of the trust can be attributed (paid or made payable) to trust beneficiaries who pay tax at a lower marginal rate (e.g. children, grandchildren).

Long-term discretionary testamentary trusts may be created using specific assets, a designated portion of the estate or the entire remaining residue of the estate. Multiple long term trusts may be created by one Will and may benefit the will-maker's spouse, children or more remote family members. The trustees may be given the absolute discretion to distribute (sprinkle) capital and income among any one or more of a group of beneficiaries and therefore provide an income splitting opportunity in the right circumstances (through the attribution decisions). A long term discretionary trust can potentially last for a period of 80 years or the common law perpetuity period in British Columbia, whichever is longer.

Broad investment and administrative powers can be given to the trustees in the Settlement so that the trustees have maximum flexibility. For example, trustees may be permitted to invest in a business, pay for schooling, a home, a recreational property or anything else that appeals to the beneficiaries including secured or unsecured loans to beneficiaries or their issue.

The will-maker can name the trustees who will administer the trust for the benefit of the minor beneficiary and can specify that money can be paid for the education, medical needs or care needs while the child is a minor. The trust can continue into the beneficiary's majority for the perpetuity period.

Including the child's notional issue in the class of beneficiaries will provide the maximum income splitting benefit for future taxation purposes.

The will-maker can specify when the beneficiary should receive money and how much (e.g. income to age 30 years then 1/3 of capital gets paid out etc.) or can make the trust discretionary as to distributions of income and capital. Also, the will-maker can provide for the beneficiary to grow in responsibility as they age by permitting the beneficiary to be appointed as his or her own protector and/or his or her own trustee upon reaching a desirable age. The will-maker can additionally provide significant encroachment powers which would permit the beneficiary to appoint the property of the trust to him or herself absolutely. The will-maker may provide a Letter of Wishes to the trustees of the trust which sets out non-binding instructions for the trustees regarding distributions and the use of their discretion.

The 21 year rule will apply to trusts established for minor beneficiaries and trustees will need to consider investment strategies to avoid serious consequences of the deemed disposition as the trust matures.

Recent changes to the principal residence exemption and its availability after 2016 are worth noting. The principal residence exemption will only be available where the residence is held in a trust in certain circumstances. One such circumstance is where a residence is held in trust for the benefit of a minor child of the settlor whose parents are deceased before the end of the year for which the trust is claiming the principal residence exemption and the minor has the right to use any "housing unit" comprised in the trust as a residence. The drafter should therefore discuss the inclusion of the prescribed "housing unit" language if the testamentary trusts could possible become an orphan trust.

b. Special Considerations for Trusts for Disabled Minors

Special considerations are necessary when creating a plan for the benefit of a minor family member with disabilities. Depending on the nature of the disabilities, the family member may have particular challenges which could inhibit him or her from managing his or her own affairs at majority. Trustees can be appointed to manage the funds and successor trustees can be appointed as time passes.

A trust can be structured to make particular payments or may be absolutely discretionary and can benefit both the disabled child and his or her family members too. A trust can make payments for the benefit of the disabled child, such as payments to caregivers or care facilities, and can purchase property, such as a home or vehicle, which can then be used by the disabled child and his or her family. Where the trust is being created in the Will, the planning lawyer should discuss with the will-maker the opportunity for the trust to qualify as a Qualified Disability Trust ("QDT").

Selecting the trustee or the team of trustees is important when planning for a disabled child. If family members need ongoing assistance with this role, Planned Lifetime Advocacy, Community Living Network and Coast Mental Health provide a number of services which can help. A trustee for a disabled child must be someone the parents can trust to exercise judgment to make good decisions after the parent has passed away. They should communicative well with the child, but they should not be so close to the beneficiary that they could be easily pressured by a high functioning beneficiary. The role of trustee for a disabled child could potentially continue for many years, therefore a trustee should be someone who can reasonably be expected to act for a number of years.

If it is likely that the child will eventually qualify as a "person with disabilities" and may wish to receive provincial disability benefits ("Benefits"), all planning must be done in the context of the *Employment and Assistance for Persons with Disabilities Act,* S.B.C. 2002, c.41 (the "EAPDA") and its associated regulations and policies in order to preserve the ability to receive Benefits. Benefits are designed to provide last resort funding for persons with disabilities and provide a monthly allowance, including housing allowance and access to programs and medical and dental coverage.

Access to Benefits is disability and asset/income dependent. A "person with disabilities" is a person over the age of 18 years who has a severe mental or physical impairment that in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and, in the opinion of a "prescribed professional" (which includes not only a medical practitioner or nurse practitioner, but also physical or occupational therapist or social worker, among others), the impairment directly and significantly restricts the person's ability to perform daily living activities, and as, a result, the person requires help to perform those activities. Persons who have been approved for certain other provincial or federal benefit programs may be considered to be a "person with disabilities" without obtaining an opinion on the nature of the person's impairment.

In order to qualify for Benefits, the "person with disabilities" must not have assets which exceed $100,000 (for a single person). However, certain assets such as a home, clothing, a vehicle and certain trusts are exempt assets. Subsections 12(2) through (5) of the *Employment and Assistance for Persons with Disabilities Regulation*, B.C. Reg. 265/2002 (the "Regulation") deal expressly with trusts for persons with disabilities who are receiving benefits; pursuant to section 12 of the Regulation, a trust of up to $200,000 is an exempt asset for the purpose of the Benefit asset/income test.

A fully discretionary trust gives the trustees all the power to make decisions about how money is spent and under a fully discretionary trust, the disabled child has no right or entitlement to call for payments from the trust. In this situation, the disabled person does not have an "asset", since the individual has no right to any money in the trust. Therefore, fully discretionary trusts can be used as estate planning tools for families wishing to care for their disabled children. Due to the nature of a fully discretionary trust, the EAPDA and Regulation do not establish asset limits for the trust since the disabled child is only one of a potential class of beneficiaries and does not have rights to any of the trust assets. A discretionary trust for a disabled family member (either *inter vivos* or testamentary) is often called a "Henson trust" (after the Ontario case in which it was held that such a trust did not disentitle the disabled beneficiary, Audrey Henson, from receiving benefits under the provincial benefit scheme*): Ministry of Community & Social Services v. Henson* (1987), 28 ETR 121 (Ont. Div. Ct.) affirmed 36 ETR 192 (Ont. CA).

However, the asset exemption for the trust is only a portion of the solution. A person with disabilities is not eligible for benefits if the income of that person's "family unit" exceeds the amount provided in the Regulation. In most circumstances, distributions of funds from the trust to the disabled person are considered unearned income which will offset dollar for dollar the amount of benefits that person receives that month. In addition, the receipt of any asset which takes the disabled family member over the allowable asset level will result in a loss of all benefits for each month afterwards until the disabled person once again meets the allowable asset level. Therefore, care must be taken by the trustee when distributions are made. The exception is where income from the trust is paid towards certain "disability related costs", pursuant to the Regulation. Payments to "disability-related costs" are exempted from income

consideration and may be distributed from a trust to a disabled beneficiary without triggering income considerations.

The Ministry publishes an information booklet regarding its policies for disability assistance and trusts. This booklet, *Disability Assistance and Trusts*, is available on the Ministry website at www.gov.bc.ca/hsd and recognizes two kinds of trusts, a discretionary trust and a non-discretionary trust.

The 21-year rule under the ITA will typically apply to trusts for disabled persons, such that there will be a deemed disposition for income tax purposes every 21 years from the trust's creation. Accordingly, consideration should be given to how that disposition will be managed, either by paying the tax or some form of distribution.

3. *Inter Vivos* Planning for Minors

An *inter vivos* trust is a trust that is created while the donor is alive. Different tax rules apply depending on the type of trust and *inter vivos* trust planning should never occur without considerable attention to tax ramifications that may occur as a result of funding the trust. Attribution rules can have a significant undermining effect on *inter vivos* trust planning and careful consideration of the *Income Tax Act* is imperative, particularly where minors are involved.

Generally, when property is transferred to an *inter vivos* trust, there is a deemed disposition for tax purposes and a tax liability is triggered for any accrued capital gains on the property being transferred unless that property has its own tax exemption (e.g. where the principal residence exemption may be claimed: s.107.4(3) of the ITA. Further to recent changes to the principal residence exemption available to trusts, care should be taken at the planning stage to discuss with the client how and if the trust can continue to qualify for the principal residence exemption) or the trust is a special trust (e.g. an alter ego or joint partner trust). Therefore, specific planning must be used transfer the property in the most tax efficient manner. Also, income distributed to a beneficiary by the trust is taxed in the hands of the beneficiary at that beneficiary's personal marginal rate.

Where the intended beneficiaries of the *inter vivos* trust are minors or may include a class of minors (e.g. gifts to "issues"), then as with the trust in a Will as described above, rigorous and flexible trust provisions are recommended so that the trustee will be able to encroach on capital and income for the benefit of the minors during his or her minority. The settlor can name the trustees who will administer the trust for the benefit of the minor beneficiary and can specify that money can be paid for the education, medical needs or care needs while the child is a minor. The trust can continue into the beneficiary's majority for the perpetuity period if that would be desirable.

4. Life Insurance Testamentary Trust

If minor children are named as the beneficiaries of life insurance policies, since they are under a legal disability, they are not entitled to receive the funds and the PGT will be required to assume control of the funds until the child attains the age of 19 years.

Pursuant to section 62 of the *Insurance Act*, SBC 2012, c. 37a family member who is the owner of a life insurance policy can by contract or designation name a trustee as the beneficiary of the policy upon his or her death. This designation of a trustee can be made on the life insurance form but there will be no

specific details or powers contained there and it will be highly uncertain how the trustee is supposed to manage the funds for the minor's benefit. It is possible that the "trustee" would not have the right to encroach on the capital of the funds for the benefit of the minor and it is likely that the trust would end upon the minor attaining the age of 19 years. Fortunately, the owner of the insurance can make a more robust trust declaration either in a Will (less desirable and requires discussion with the drafter) or in a separate Life Insurance Trust Settlement. Where a Life Insurance Trust Settlement is made, the trustee will hold the proceeds of the life insurance upon trust for the benefit of the family beneficiaries and, where desired, the trust can be a fully discretionary testamentary trust. This strategy is particularly useful where the life insurance proceeds will be of considerable value and the family contains minors, disabled or vulnerable beneficiaries.

When the proceeds pass to a designated trustee rather than to the deceased's estate, the life insurance proceeds will not be subject to the delay and costs of probate. Further, the life insurance proceeds will not be available for the satisfaction of the estate's liabilities nor can they be challenged by a variation challenge under the WESA, unless the claimant can show a reason for the insurance trust designation to be set aside. Therefore, this mechanism provides a strategy for side-stepping challenges to an estate distribution where the deceased wishes to favour one family member, such as one child, over one or more of his or her other heirs.

Additionally, the life insurance trust provides the same trust benefits discussed above. Trustees can be selected and given discretionary power to govern the income and capital of the trust fund for the benefit of minor children, vulnerable or disabled children for 80 years or the common law perpetuity period, whichever is sooner, upon parallel terms to the trusts that are created in the Will (if so desired).

Furthermore, the Life Insurance Trust will qualify as a testamentary trust pursuant to section 108(1) of the ITA and in circumstances where the minor child is disabled and upon attaining the age of 18 years becomes eligible for federal disability tax credits (http://www.cra-arc.gc.ca/E/pbg/tf/t2201/README.htm) the Life Insurance Trust could have as separate tax status at its own marginal rates if it qualifies as a Qualified Disability Trust. The 21 year rule will apply.

5. Trust Declarations for the proceeds of RRIFS, RRSPs and TFSAs

One of the benefits of registered investment plans is that the owner has an ability to designate how the investments are transferred to beneficiaries upon his or her death. The beneficiary designations have the advantage of bypassing the owner's estate (unless the estate is appointed as the beneficiary) thus avoiding probate fees and challenge under the variation provisions of the WESA. Regardless, Canada Revenue Agency "deems" the registered plan to be deregistered immediately before death and will therefore consider the full fair market value of the plan as taxable income to be included in the deceased's terminal return. This deemed disposition of the registered plan is subject to some special tax-rollover exceptions which should be considered at the planning stage and which can include a roll-over to a spouse and limited provision for income tax deferral where financially dependent minor children or grandchildren are named as beneficiaries. The rules governing the registered investment rollover provisions for dependent minor children or grandchildren are technical and rigid; accounting advice is recommended if that option is being considered. If a financial dependent minor child is named, there are requirements that the proceeds be utilized to purchase an annuity with payments continuing to age 18.

Division 9, Part 5 of the WESA has provided the ability for the owner of a registered plan (as defined in section 1 of the WESA and including RRSP, RRIF and TFSA) to designate a trustee to hold the proceeds on behalf of one or more beneficiaries (i.e. a trust declaration). Many policy providers permit a designation to be made on the form, (e.g. John Smith as trustee for Jane Smith). However, a "thin" designation such as this does not contain many of the powers and protections that are desirable when a trust arrangement is being made for a minor. For example, it is not clear that John Smith would be able to access the trust funds to pay for Jane's education or medical care and it may be necessary for John Smith to report the "trust" arrangement to the PGT to ensure that Jane's assets are properly governed. Where the proceeds of the RRIFS, RRSPs and TFSA are intended to benefit a minor or minors, it is recommended that in parallel to any life insurance planning, a trust declaration is made either in a Will (less desirable and requires discussion with the drafter) or in separate trust declarations to ensure that these funds are held in a manner which is practical for the care and support of the minor during his or her minority.

It is also unclear how an RRSP that is designated to a minor is to be rolled over to that minor. Where there is no trustee named for the RRSP, the plan should be checked to confirm whether a default trustee is provided for or, as is the case under some plans, if the PGT is specified as the payee. If not, and the amount is under $10,000, the trustee of the plan may consider delivering the property to the guardian of the minor. If it is greater than $10,000 then the PGT may need to be approached to act by consent or, alternatively, a court order may need to be sought.

C. An Estate Administration Perspective

1. Children Born After Death of Deceased

In the case of an estate where the deceased died with a Will, the common law concept of *en ventre sa mere* (in the stomach of mother) will apply where the Will provides for an individual or class of individuals who are unborn but conceived at the time of the deceased death. It is a very old common law principle: see *Burrows v. Cleghorn* [1895] 2 Ch 497 and *Doe v. Clarke*, 126 ER 617 (1795). Many Wills will include a mention of this concept in the precedent language. Pursuant to section 10 of the WESA, the unborn infant must survive for 5 days in order to be included as a beneficiary of the estate.

In the case of an intestacy, section 8 of the WESA provides that descendants and relatives of an intestate who were conceived at the time of the death but born after the death inherit as if they were living at the date of death providing the infant survives the deceased by 5 days (the survivorship period). The determination of who is a descendant of the deceased is governed by Part 3 of the FLA.

Section 29 of the FLA considers what happens when an intended parent or parents die after a child is conceived and a surrogacy is involved. Pursuant to s. 29(5) of the FLA, the surrogate can give written consent to deliver the child when born to the personal representative (executor or administrator) or other person acting in place of the deceased parent or intended parents. The writer is not aware of circumstances where a personal representative has been called upon to receive the child.

2. Children Conceived After Death of Deceased:

Section 8.1 of the WESA addresses the possibility that a child of the deceased may be conceived after the deceased's death utilizing assisted reproduction and stored reproductive material. The section provides

certain rules that must be followed to ensure that the estate administration is not tied up indefinitely. Specifically, (1) the deceased's spouse must give the personal representative and all other beneficiaries and intestacy successors notice within 180 days of the issue of a representation grant that he or she intends to use the deceased's stored reproductive material to conceive a child and (2) the child must be born within 2 years of the deceased's death and live for at least 5 days. The court does have the right to extend the limitation period. Furthermore, s. 8.1 of the WESA does require that the deceased is the child's parent under Part 3 of the FLA.

The rules for determining parentage where reproductive material of a person who has died prior to conception are set out in s. 28 of FLA. The FLA requires that there is proof that the deceased gave written consent to the use of the reproductive material after his or her death. Furthermore, the *Assisted Human Reproduction Act* (s. 8(1)) and associated Regulation (ss. 3(1) and 4(1)) also require that informed written consent is provided when the reproductive materials are collected or used after the death of the deceased. Additional rules apply with respect to the use of embryos.

3. Property in Reproductive Material

An unusual 2016 case, *K.L.W. v. Genesis Fertility Centre*, 2016 BCSC 1621, has dealt with circumstances where the spouse of a deceased who died intestate sought a declaration from the court that the reproductive material of the deceased was estate property and should be released to her as the intestate beneficiary so that she could use it to conceive a posthumous child. In that case, the forms for the deceased to give written consent pursuant to the requirements of the *Assisted Human Reproduction Act* were not presented to the deceased and during his lifetime he had not provided written consent. However, the deceased had on numerous occasions made it clear that he understood and wanted his wife to have the ability to utilize the material after his death.

In the decision, the Court determined that the frozen sperm was the deceased's property and the deceased's had rights of use and ownership of the material that were sufficient to make it "Property". The Court went on to hold that since the sperm was Property, following the death of the deceased, the reproductive material vested in the deceased's spouse as the sole beneficiary of the intestate estate.

4. Child Support Issues

The deceased's estate is subject to rights and obligations under court orders and contacts entered into prior to the deceased's death. At common law, the obligation to pay support died with the death of the payor. However, the FLA has specific provisions that permit a deceased's support obligations to be changed after the death of the paying deceased. The Court has exercised this authority in two cases: *Kumagai v. Campbell Estate*, 2016 BCSC 450 and *C.(P.K.) v.R. (J.R.),* 2014 BCSC 932. But see also, *Joffres v. Joffres*, 2014 BCSC 1778.

Section 170 clearly provides that a duty to pay child support continues after death (subject to the provisions of s. 171 of the FLA) and is considered a debt of the estate for the period fixed by the court. subsection 171(1) of the FLA provides the factors that should be considered by the court when determining if the support order should be binding on the payor's estate. Subsection 171(3) provides for a person receiving child support to apply to the court to make the support obligation binding on the estate where the initial support order was silent on this matter. However, subsection 171(2) also permits the

personal representative of the deceased to make an application to court to reduce, suspend or terminate the obligation to pay support.

Authority prior to the FLA was clear that a support order could not be made once the payor was dead: *British Columbia (Public Trustee) v. Price* (1990), 1990 CanLii 705 (BCCA). However, section 150 of the WESA has expanded the ability for a cause of action to be commenced against a deceased person naming the deceased person or his or her personal representative as the defendant/respondent. The proceedings commenced under this section bind the estate.

Section 146 of the WESA provides a personal representative with the ability to give notice to a creditor or other person with a claim against the estate that the personal representative rejects the claim. If notice is given, the claimant must commence proceeds with respect to the claim within 180 days of the notice. However, it is not clear that this section's scope is broad enough to encompass potential support claims. Section 154 of the WESA also permits the personal representative to advertise for claimants against the estate. In the case of unresolved support claims or claims where it is not clear whether the obligations continue after death, the personal representative is advised to consider making an application under section 171(2) of the FLA for a variation or termination of the support claim to ensure that the matter is resolved prior to distributing the estate assets.

II. Summary

From a planning perspective, it is essential that anyone who intends for minors to benefit from his or her estate engages in proper estate planning. In the event that property is left to a minor either on intestacy or through a poorly conceived Will without sufficient trust provisions, the PGT will be required to step in and once the child attains the age of 19 years the entirety of the property will be provided outright to the child, regardless of the child's circumstances or maturity at that time. A properly drafted Will, addressing guardianship (if the will-maker is a guardian) and robust trust provisions, will always provide for a better estate outcome.