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• The Secret Life of Tax Returns: Part I — Corporate Income Tax Returns •

Richard E. Davies and Antonina Wasowska

Financial statements and tax returns are among the first documents we request to value an interest in a private company, or to calculate income for support purposes for a shareholder spouse. Through an initial review of these documents, we can identify key issues for follow up with the client and draft an appropriate disclosure request.

However, depending on time and budget constraints, sometimes matters arise in which financial experts are not retained until later in the process, or perhaps not at all. In such cases, we are often contacted to shed light on more high-level questions. These questions usually begin with "*I am trying to find…*" or "*I am looking at [insert document name here]. Where can I find..?*", and, more often than not, these questions pertain specifically to either a spouse's personal tax returns, or their business' financial statements or corporate income tax returns.

In this two-part article, we will discuss some of the most common questions, and where the answers can often be found if one knows what to look for on an income tax return.

In this Part I, we will provide a roadmap for navigating **Corporate Income Tax Returns**.

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1. My client has provided consolidated financial statements, should I be requesting a consolidated tax return?

Consolidated financial statements may be prepared if a company has a controlling interest in one or more subsidiary companies. Such statements combine the financial results for each legal entity in the consolidated group and eliminate inter-company transactions between the consolidated entities.

Consolidated financial statements are very useful for valuation and corporate attribution purposes. However, for Canadian corporate income tax purposes, separate returns must be filed for each legal entity.

If your client has provided consolidated financial statements, you should always review the note disclosure to understand which legal entities have been included (this will be listed in one of the first few notes to the financial statements). Ensure you request corporate tax returns for each consolidated entity.

2. What should a corporate tax return look like?

Often when a client is asked to provide corporate tax returns, he or she first supplies a one-page form titled T183CORP –"Information Return for Corporations Filing Electronically". While this form confirms that a return was filed, it provides little other useful information.

A complete corporate income tax return (or "T2") includes a "jacket" plus all relevant accompanying schedules. The jacket is approximately eight to 10 pages (depending on the year and the software program used) and includes: (a) general information about the company; (b) a checklist of supporting schedules; and (c) a condensed calculation of tax owing for the fiscal year.

The first page of the jacket lists key corporate information (*e.g.*, name, business number, tax year, and address). The first page also includes information about the occurrence of certain significant corporate events in the current year, such as incorporation, amalgamation, and dissolution. This can be useful in understanding the corporate history and narrowing down the years for which you should request financial statements and tax returns.

The jacket also includes an "Additional Information" section which indicates the corporation's primary source of revenue, and whether it is inactive. If your client has an ownership interest in a larger corporate group, this section can provide a useful starting point for where to focus analysis.

Pages two and three of the jacket provide a checklist of the schedules that were prepared in calculating the company's corporate income taxes. This checklist can help to ensure you have received a complete tax return. The inclusion or absence of certain schedules on the checklist also provides useful information, such as an indication of the type of income earned by the company and whether it is part of a larger corporate group, as discussed in more detail below.

3. How can I tell when a company was incorporated?

While the Articles of Incorporation are the best source for a company's incorporation date, this information can often be found on the corporate tax return as well. Ontario Corporations are required to complete and file Schedule 546 – "Corporations Information Act Annual Return for Ontario Corporations". If provided, box 110 of Schedule 546 indicates the "*Date of incorporation*

or amalgamation, whichever is the most recent". Alternatively, if the jacket indicates that it is the first year of filing since incorporation, the start date of the tax year will be the incorporation date.

4. How can I tell who the company's shareholders are?

Schedule 50 – "Shareholder Information" must list all shareholders of Canadian private companies who own at least 10 per cent of the company's common or preferred shares and the percentage of common and/or preferred shares owned.

As it is not a requirement to include shareholders with less than 10 per cent in Schedule 50, smaller shareholdings may not be listed. Further, caution should also be used when dealing with a company that has a history of frequent share transactions as, while Schedule 50 should be completed annually, it is not always updated on a timely basis.

5. What does the corporate organizational structure look like? Which of the company's customers and vendors represent related parties?

Schedule 9 – "Related and Associated Corporations" and Schedule 23 – "Agreement Among Associated Canadian-Controlled Private Corporations to Allocate the Business Limit" are both very useful for understanding the overall corporate organizational structure of a group of companies.

From a high-level perspective, related companies for tax purposes include associated companies (more on that below), plus any companies directly or indirectly controlled by related parties (*i.e.*, a parent, child, or sibling).[1]

Schedule 9 – "Related and Associated Corporations" includes relevant ownership details, such as the company name, the type of relationship (*i.e.*, parent, subsidiary, associated, related but not associated), and the number and percentage of common and/or preferred shares held by the company.

Schedule 23 – "Agreement Among Associated Canadian-Controlled Private Corporations to Allocate the Business Limit" provides a snapshot of all of the companies in which your client has a controlling interest.[2] You should always review Schedule 23, as well as ask your client about their interest in any companies listed that were not previously disclosed.

Canadian private companies pay a lower rate of tax on the first $500,000 of "active business income" (also referred to as the "small business deduction"). However, if an individual has a direct or indirect controlling interest in more than one company, these associated companies share the small business deduction.[3]

As the purpose of Schedule 23 is to allocate the business limit among the associated group, the allocation itself can provide useful clues as to the nature of each company's operations. For example, if there are five companies listed on Schedule 23, and one of the companies is allocated the full $500,000 small business deduction, this will usually be the primary operating company in the group. Alternatively, if several companies are each allocated a portion of the deduction, the relative deduction allocated to each company is usually a good clue as to their relative profitability. Companies that are not allocated any portion

1 A detailed explanation of all the possible ways in which two corporations could be related is beyond the scope of this article.

2 This includes cases of joint control.

3 We note that this is a simplified explanation of the association rules; a listing of all the conditions that would make two corporations associated is beyond the scope of this article.

of the small business deduction may be companies that earn primarily investment income (rather than active business income), or companies that incur losses.

Together, Schedules 9 and 23 can provide valuable insight into the structure of the corporate group. Any time a client provides you with corporate tax returns, always make sure to review Schedule 9 and Schedule 23 and request the financial statements and corporate tax returns for all entities in which your client has a direct or indirect interest.

6. What is Net Income (Loss) for Income Tax Purposes?

While financial statements are prepared using several different standards (*e.g.*, International Financial Reporting Standards or Accounting Standards for Private Enterprises), corporate income tax returns must be prepared in accordance with the provisions of the Canadian *Income Tax Act*. As such, certain adjustments are required to convert net income for accounting purposes to net income for tax purposes. This reconciliation is outlined on Schedule 1 of the corporate tax return.

Schedule 1 – "Net Income or Loss for Tax Purposes" provides a useful starting point for identifying personal discretionary expenses to be included in the shareholder spouse's income for support purposes. For example, any non-deductible expenses, such as life insurance premiums, club dues and fees, and automobile expenses, will be listed on Schedule 1.

Schedule 1 is also helpful in identifying unrealized gains and losses (*i.e.*, gains or losses reported on the company's financial statements that arise from accounting entries, rather than actual transactions in the year). A company's pre-tax income is typically adjusted for unrealized amounts in order to determine the maximum amount of corporate income potentially available for attribution.

7. What if I don't have a company's financial statements?

Canadian companies (with the exception of insurance companies) must provide financial statement information with their corporate tax returns using General Index of Financial Information ("GIFI") codes. Specifically, companies must complete GIFI Schedule 100 – "GIFI Balance Sheet", Schedule 125 – "GIFI Income Statement", and Schedule 141 – "GIFI Notes Checklist". These schedules are particularly useful if you do not have a company's financial statements, or if the company does not prepare separate financial statements (as discussed below).

The GIFI statements filed with the tax return should tie into a company's non-consolidated financial statements; however, the presentation and account groupings may be different. Any material differences should be reviewed and reconciled.

8. How do I know if a company has had external financial statements prepared?

If financial statements have not been provided, Schedule 141 – "GIFI Notes Checklist" should indicate if financial statements were prepared. Further, this schedule is also useful for identifying other relevant items, such as who prepared the company's financial statements, the type of financial statements prepared, and whether the preparer expressed any reservations. It also identifies whether certain information was included in the notes to the financial statements.

The information on Schedule 141 is important when considering if, or the extent to which, you can rely on financial statement amounts. For ex-

ample, you may place less reliance on financial statements prepared by an employee of the company, compared to an external accountant who prepared audited financial statements.

9. What is the difference between eligible and non-eligible dividends?

The difference between eligible and non-eligible dividends is not well understood and is something that we are frequently asked about. In order to explain the difference, it is important to first understand the concept of tax integration. While integration is not always achieved in practice, conceptually, the Canadian tax rules and rates are designed so that the income earned by a corporation and distributed to a shareholder should be subject to approximately the same amount of total income tax (*i.e.*, combined corporate and personal) as if the income had been earned directly by the shareholder (*i.e.*, personal only).

Second, it is important to understand that corporations are subject to varying corporate income tax rates. Some entities are entitled to a small business deduction (as discussed above), which reduces their corporate income tax rate. For example, a Canadian Controlled Private Corporation in Ontario may pay a combined corporate tax rate of only 13.5 per cent on the first $500,000 of active business income in 2018.

A company's ability to pay an eligible dividend depends on the tax rate that it paid on the relevant income. The type of dividend then dictates the relevant personal income tax rate on the shareholder's dividend income. Conceptually, the easiest way to remember this is that eligible dividends are paid out of earnings that were taxed at a higher corporate rate and are, therefore, subject to a lower personal tax rate at the shareholder level. In contrast, non-eligible dividends are paid from earnings taxed at a lower corporate rate (*i.e.*, a rate which incorporates the small business deduction) with the resulting dividends taxed at a higher personal tax rate at the shareholder level.

To illustrate, the 2018 Ontario top marginal combined corporate and personal tax rates are as follows:

- Eligible Dividends – 26.5 per cent combined (federal and provincial) corporate tax rate (*i.e.*, on active business income above the small business deduction limit), and 39.34 per cent combined personal tax rate; and,
- Non-Eligible Dividends – 13.5 per cent combined corporate tax rate (*i.e.*, on the first $500,000 of active business income) and 46.84 per cent combined personal tax rate.

10. How can I determine if a company paid an eligible or non-eligible dividend?

If a company received any dividends during the year, or paid any taxable dividends, it must complete Schedule 3 – "Dividends Received, Taxable Dividends Paid, and Part IV Tax Calculations", as well as prepare T5 – "Statement of Investment Income" tax slips for each dividend recipient.

While Schedule 3 provides detail as to the source of dividends received, and certain information as to the dividends paid, it does not indicate whether eligible or non-eligible dividends were paid. The T5 slip is the easiest way to determine the type of dividends paid, as there are separate boxes for eligible dividends and non-eligible dividends. Where the T5 slips are unavailable, Schedule 53 – "General Rate Income Pool (GRIP) Calculation" and Schedule 54 – "Low Rate Income Pool (LRIP) Calculation" can be used to determine the amount of eligible dividends paid during the year.

11. What are capital dividends and where can I find if any were paid?

In addition to eligible and non-eligible dividends, a company may also elect to pay capital dividends (when available). What makes capital dividends different, as compared to eligible and non-eligible dividends, is that they are paid out of a company's Capital Dividend Account ("CDA") on a tax-free basis to a recipient and are not reported (*i.e.*, included) on the recipient's personal income tax return. The CDA is a net cumulative balance of various tax-free amounts received/paid by a private company. For example, if a company has capital gains, the company is taxed on 50 per cent of the gain (referred to as the taxable capital gain) and the CDA is increased by the other 50 per cent.

If a company paid out capital dividends, these will be identified separately on Schedule 3 of the corporate tax return. Further, if a spouse's company has a CDA balance at either the date of marriage or date of separation, this amount may need to be considered when calculating contingent disposition costs.

Capital dividends exemplify the importance of analyzing all relevant corporate tax returns when calculating income for support purposes, as they are only reported on the company's tax returns, and not on a shareholder's personal tax return.

12. What is Refundable Dividend Tax on Hand and why do I care?

Refundable Dividend Tax on Hand ("RDTOH") represents the portion of corporate income taxes paid by a company on investment income which is refundable to the company upon payment of sufficient dividends to its shareholders. Without going into the mechanics of the calculation itself, this is another mechanism used at the corporation level, to achieve tax integration (as discussed above). If a company has a material RDTOH balance, this amount may need to be taken into consideration in the company's valuation.

The calculation of a company's RDTOH balance and applicable dividend refund, if any, are both found on page 7 of the jacket.

Recent government changes have resulted in the creation of a second RDTOH account as amounts will now be separated between eligible and non-eligible RDTOH (similar to the distinction for dividends).

13. Where can I find if a company has any loss carry forward balances and why do I care?

Companies that have losses in certain fiscal years can apply those losses against income in other years in order to reduce the amount of tax owing.[4] Schedule 4 – "Corporate Loss Continuity and Application" tracks the continuity of each type of loss incurred (*i.e.*, capital and non-capital losses, farm losses, listed personal property losses, and limited partnership losses) in a given year, as well as how/when they get applied. These losses often need to be taken into consideration in matrimonial disputes when a company is being valued.

Canadian corporate income tax returns are far from intuitive. Complete returns often run 50 pages or more, many of which are filled with jargon and complicated, nested calculations. Further, as tax legislation evolves, new schedules and calculations are continuously being added. While many cases necessitate dedication to financial valuations expertise, key elements of corporate income tax returns highlighted here in Part

[4] The time period over which losses can be applied depends on the type of loss, and the year in which it was incurred.

I can provide valuable insight for matrimonial engagements. Part II will provide an analogous roadmap for navigating personal income tax returns in the context of family law.

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His casework has encompassed companies ranging from regional and privately owned, to multinational, and he has accumulated experience in a diverse variety of industries.

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Antonina has worked with companies in a broad range of industries, including real estate, hotel and hospitality, food and beverage, retail/distribution, manufacturing, professional practices, transportation, and construction.]

• Interview with Ian Hull •

Jerrod Patterson

Mr. Ian Hull holds an Honours B.A. from the University of Western Ontario and an LL.B. from the University of Windsor. He was called to the Ontario bar in 1990 and practiced commercial litigation for two years before beginning a practice in Wills and Estate Litigation. Mr. Hull and his father, Rodney Hull, co-founded Hull and Hull LLP in 1998. Mr. Hull is a certified specialist in estate and trust law and civil litigation and also maintains a mediation practice in those areas.

Mr. Hull spoke with Jerrod Patterson about his practice, the intersections between family law and estate law, and the estate law concerns family lawyers need to be aware of in their practices.

Q: Can you tell us a bit about your practice today?

A: I do estate, trust, and capacity litigation, and it's mostly focused on individual clients. I do very little institutional work, though I do some for LAWPRO and some large charities. Most of my work is with individual clients with will challenges, power of attorney problems, or interpretation issues on a will, as well as solicitor's negligence defense work.

Q: We all have ideas about what it would be like to work in another area of practice. Is there something about the practice of estates or trusts that would surprise other lawyers?

A: I think there are a few things. One is that it's a highly emotional area, just like family law.

It's family law without the kids, right? It's really quite fast-paced and a lot of urgencies where we're dealing with death, even though one might think: what could be the rush? You have very highly emotional and vulnerable clients who come to you with typically not very unique problems, but very unique academic aspects to them. I think it would surprise people that the law behind the work we do is probably a higher percentage than a lot of practice areas. There are parameters upon which we operate, it's not just following rules 74 and 75. You have deep academic traditions, which is fun, but can also sort of stumble you at the beginning. Day in and day out, I love what I do, and it's largely because I deal with people.

Q: Would you say that family law and estate planning are more or less integrated now than in the past?

A: I would say they're much more integrated, and I see it more and more every day. They are tied together in the areas of trust law, capacity law and will challenges and so on, but trust law mostly. Family law has quite a strong tradition, and a good tradition, of being a bit looser on the academic parameters upon which they can behave, but trust law keeps getting in their way. Specifically, the three certainties and about 600 years of trust law kind of get in their way. So, that's a rigid parameter upon which they can't really get around as easily. I find I'm doing more and more work with family law lawyers where there's a trust involved.

Q: Why do you think that there is more intersection now than in the past?

A: I think partly because the courts have reminded us in the last 10 years that trust law actually matters, and there's some great Court of Appeal decisions to support that. There's *Spencer v. Riesberry*, [2012] O.J. No. 2749, a decision of the Court of Appeal, and other cases where Justice Gillese has been a real leader. She reminds the bar that you can't be too loosey-goosey about trusts. That's part one: the courts will keep reminding us. Number two, I think, is that more trusts are being used as more wealth is involved today. There's a much higher volume of trusts on the planning side.

Q: What is the most important lesson to take from the Court of Appeal's decision in *Dagg v. Cameron Estate*, [2017] O.J. No. 2259?

A: Two things I thought were fascinating about that decision were, one, the Court of Appeal let counsel argue a moot point when they had settled it. It blew me away, and it's rare, but shows how important the decision is. The other thing is that, I think it is the perfect intersection of family law and estates. As an estate lawyer, when I read the Court of Appeal decision – and our firm argued the case all the way through – I still think it's wrong in the sense that I don't think it applies the principles of the *Succession Law Reform Act* ["SLRA"] the way that they're intended to be. But I can totally understand why the Court of Appeal did what it did, and from a practical standpoint, I think it's the right result. It was a shock to the family law bar at first, but it's a bit of a shock to the estates bar now, so that's a great illustration of the intersection between the two. Phil Epstein's office and Aaron Franks argued it ably, obviously, because from a family law perspective, they won in the Court of Appeal. We kept forcing our es-

tates law perspective, but the family law perspective prevailed.

Q: What general estates advice do you think family lawyers should keep in mind when preparing marriage contracts, separation agreements, or any domestic contracts?

A: The age-old thing, of course, is doing their will, and being mindful that the impact of separation and divorce on a new will in Ontario is still dramatic. I think the other part of it is drafting. There's typically not enough attention paid to the statutory reality of the SLRA that says that on death, where there is a dependent support claim, a court can ignore the contract, or it can enforce it. The two sections, sections 62 and 63, are juxtaposed to each other in the Act. One says you can ignore a contract and the other one says you can enforce a contract. The court has a complete, wide discretion over this. To the extent that there is some planning going forward that needs to be done, one, the client needs to be warned that this is going to be the be all and end all. Two, what is it that we can put, maybe in the language of the contracts that we're creating, that emphasizes the understanding that parties knew that this could be reconsidered on death, but still don't want it to be? Some of the clauses that you see aren't as strong and as broad as they should be. I like to specifically articulate the SLRA claims in the releases as between the parties, whereas some of them, they'll just say "any and all claims". I like to particularize it because then at least I can say to the judge later, "look, they put their minds to it, so that's a factor you should consider in deciding whether you're going to enforce this or not".

Q: As you are likely aware, there is a lot of ink spilled over the legal and ethical basis of spousal support in family law. The *Spousal Support Advisory Guidelines* ("SSAG") are ubiquitous, and if they present any single problem, it might be that lawyers forget that they do not directly answer the question of entitlement. How do the relief claims of dependents compare to spousal support claims under the SLRA?

A: Justice Greer was upheld by the Divisional Court in *Morassut v. Jaczynski Estate*, [2015] O.J. No. 302 and that says it really well at paragraph 43(c). The difference is this: at the end of the day, people have to understand that the payor is dead. The goose is no longer there to create the golden eggs, and by that fact alone it has to be considered, at least in some way, from a different perspective. The cases, what I would say are the strong cases, say that the Guidelines don't apply, and for good reason. One, because it's under a new Act, and two, because of the fundamental policy reality that there is no more money being generated. That's not the full answer, though. There are cases that support the application of the SSAGs and say they are helpful because they give benchmarks. There is a wide spectrum under the Act and they do give some benchmarks as to what you can expect. I don't think that they are ever going to be irrelevant, but I also don't think that they are going to be the guiding force. Having said that, though, more and more family law practitioners in this area are making great inroads with the courts and, maybe for good reason, are persuading judges that the Guidelines should be benchmarks. I still don't understand the policy reason behind it, but the one area where I will say that it works is this: on a very big estate, the Guidelines would likely make sense because the income flow is so

large as a result of the massive capital. If you have hundreds of millions of dollars, your income flow is so massive that, actually, the goose never died. In those cases, I get it, and the Guidelines can be a perfect tool to impose on such large estates.

Q: And how do you see that applying to incomes over $350,000, which is the income over which the SSAGs do not strictly apply?

A: What has happened in family law cases, like *McCain v. McCain*, [2012] O.J. No. 6224, is that massive wealth is identified, and the court says, "that massive wealth should produce this kind of support for the spouse". Those cases are, I think, right on point when you have an estate that large. So, the family law bar has done all the hard work for us. There are really only two reported estate cases in Canada that have done a support analysis over 10 to 20 million dollars, so we don't really have any law out there that assists us in the big cases. But the law is present in family law because there are cases like the *McCain* decision.

Q: If you had to identify one thing that family lawyers could do or stop doing that could improve outcomes for our clients from an estate planning perspective, what would that be?

A: One thing is that, "in trust for" clauses in domestic agreements aren't well drafted. They are put in for support provisions all too often and would be my number one do-not-do because it does not create a trust of any meaningful degree. These end up opening wide litigation opportunities. The classic one we see is with insurance policies. That's one area. The other area dives into the other half of that last point, that if you're going to buy the insurance policy – and I know good practitioners do this in family law – what mechanism is going to be created to make sure the policy is maintained? All too often, I get a case where I've got a properly drafted clause in an agreement, but there's no insurance because the deceased didn't keep it up.

Q: Are there any recent cases you know of that family lawyers might have missed, but should read?

A: There's *Spencer v. Riesberry*, which we talked about earlier, from the Court of Appeal. I just did a case called *Moore v. Sweet*, [2017] O.J. No. 1129 which went to the Court of Appeal and we just argued in the Supreme Court of Canada in February. We're waiting for that decision, and I mention it because I believe family and estate lawyers can never learn enough about unjust enrichment. It is the foundation of both our practice areas, and I would also say that the family law bar has a much stronger understanding of unjust enrichment in large part because of the *Kerr v. Baranow*, [2011] S.C.J. No. 10 decision. The family bar really had to embrace it because the joint family venture was created, and you were forced into learning it. Now, I think the estates bar will have to learn more about it because *Moore v. Sweet* is an unjust enrichment case. Both bars can always learn more about it. In the same way I read books on cross-examination from time-to-time to keep those skills honed, unjust enrichment is an area we all need to be strong in.

Q: A particularly salacious case on the facts was recently in the news: *Hunt v. Worrod*, [2017] O.J. No. 6636. It is a pretty clear example, it seems, of a predatory marriage. Is it a fair assessment to say that so-called predatory marriages are an increasing

concern in Ontario? If so, what concerns does it raise in your eyes?

A: Yes, it is a very salacious decision, and predatory marriages are a rising societal problem in Ontario because of the aging population. Justice Cullity wrote a series of decisions in a case called *Banton v. Banton*, [1998] O.J. No. 3528 (C.J.), all in the context of a predatory marriage. It just so happens that this case has some newsworthiness to it. There was great counsel, and a very interesting costs decision just came out on it yesterday where legal aid got hit. I guess the thing is this: those who know this area know that it's a growing concern. There's a legislative solution here that doesn't seem to be a priority to the government. Sure, the volume has gone up, but I don't think it's really any different, I don't see it as an epidemic. I think the predatory marriages will continue to be around and because of our aging population, we need to pay attention to it, but it is the same problem it was 20 years ago in *Banton*.

Q: And what does that legislative solution entail?

A: I think that marriage revoking your will is the fundamental change, and British Columbia, as well as Alberta, had the courage to address it. We simply need to catch up our legislation on that, and I think that will go a long way in correcting the predatory marriage problem. The other part of it is that we still don't have a sort of standardized capacity assessment process where we can identify – and we'll talk about the *Chuvalo* case – but, we create these different tests for different conduct, and I think the bench, and maybe the lawyers, have gone the wrong direction on that. To categorize the activity to the standard that you must have, for example, a will is apparently the highest standard to have the capacity to do, and then marriage is the lowest, and that came out of a decision of Justice Benotto, which is the right decision, *Calvert v. Calvert* [1997] O.J. No. 553. I think what we have to do is look more at situation-specific decision-making, and it's something that I think we can easily standardize, and something that needs some government assistance and the bar, both the family law bar and our bar, to work toward. Regarding the revocation of a will upon marriage, what we need to do is look at the B.C. and Alberta legislation, which has given a remedial opportunity, and maybe it doesn't need to be hard and fast, but there is no remedial opportunity here in Ontario.

Q: It seems like matters must get increasingly complicated in cases of second (or third, or fourth, *etc.*) marriages. Do you have any advice about how to approach such situations?

A: I think the simplest thing to do with second, third, and fourth marriage situations is, when you are doing your estate planning, you need to have two different lawyers, so that all of the issues can be properly canvassed. And I am not sure, I don't know enough about the family law context, but when someone comes into a second marriage and wants to do a will, the couple looks perfectly happy, but we have no idea what is going on, and there are a lot of mouths to feed around each of them. And so that's number one, and then the other estate planning tool, which I see more and more second and third marriages doing, is creating a spousal trust scenario. That can, of course, be defeated on death through the *Family Law Act*, but at least it's an attempt to try to organ-

ize your affairs in a way that will help pass down the wealth in a more organized fashion.

Q: Do you think this is a place where mirror or mutual wills can help?

A: I don't think so. I think what happens essentially is, if it's done properly, a mirror will is quite properly the way to do it as well. But if you do it with the same counsel, you haven't explored the dynamics and the tension that may or may not occur here as between the spouses and their families – their expected families. Mutual wills are dying on the vine, and they should. They are not a proper planning tool. The only real proper planning tool that exists is a marriage contract or a mutual will contract that only family lawyers can really draft.

Q: Are there other family law events that trigger consequences for estates that the family bar should be cognizant of?

A: I think incapacity is the one area where there really is a lacuna, so to speak, of the law. That is because someone who isn't quite capable, or is arguably incapable, can separate, leave a capable spouse at the behest of the first family children, and there's not an easy solution here. But, I think if we can at least identify the issue in that instance, that incapacity or the findings of incapacity, in the context of separation, needs to be very seriously explored as an avenue to either prevent chaos or maintain the status quo. Someone in a vulnerable situation who's becoming incapable may be persuaded by their own first family children to leave a second spouse for financial reasons as opposed to from the heart.

Q: The *Chuvalo v. Chuvalo*, [2018] O.J. No. 150 decision is also an interesting one insofar as it relies on a reversed onus for capacity: rather than prove someone does not have capacity, the husband was required to demonstrate that he did have the capacity to reconcile with his wife. Is this a novel requirement?

A: I think it was a classic case of getting to the right answer using the tools that exist, but it is very novel. First of all, we have a presumption of capacity. Everyone is presumed to have capacity under the legislation and the common law. To suggest that it's novel, well, the worrisome thing this demonstrates is that the court had no choice but to go this way. Whether it's the right way or the wrong way, other courts will decide as it has been appealed. But it comes back to the theory that has been expounded by academics and the intellectual community, that is, that testing for capacity on the basis of an event is the wrong way to go about this.

Reconciliation, breakdown of marriage, divorce, all of these events shouldn't be driving the decision. It has to be: look at the situation, look at the decision you're making and draw a graph, and if you're in a highly volatile situation, and you have a very difficult decision to make, then your level of capacity has to be demonstrated higher, because you're in a high-tension and high-cognitive decision-making area. If you have a decision with, for example, "do I change the beneficiary designation" or "do I change my executors", well, even in a highly volatile situation, that is probably not something that needs high cognition and that's where I believe the whole methodology is wrong. I don't think it's anyone's fault, but we've fallen into it. But all the strong academic writing on this is saying it's wrong, and it makes sense.

Q: Section 2 of the *All Families Are Equal* amendments seem to call into question the validity of wills made prior to 2017 with respect to children under the new parentage definition. What are your thoughts about the effect of this section?

A: Truthfully, I'm actually not as worried as some of the pundits about that. I'm not as sure that it is such a risk. But, if it is, then I think what's going to happen is there will be legislative changes to fix it, because I don't think, practically speaking, we can fix the problem by going back and fixing every 2017 will, but it may be a viable argument.

Q: How about a hypothetical: parties make a domestic contract that includes a provision requiring Party A to leave something to Party B in their will. Party A dies, and it turns out they either have not made a will, or their will is not compliant with the provisions of the domestic contract. What options should Party B consider? Should they schedule a consultation with a family law lawyer or an estates litigator?

A: This is no different than, and it happens frequently, you entered into a lease agreement on a car, and the car payments still have to be made whether you're dead or alive. You entered into a binding contract and it should be pursued on that basis in that the contract needs to be upheld. You're using the domestic contract to enforce contract law against the estate. Now we have additional assistance through the SLRA, whose dependents relief provisions make it a little bit easier to make the claim. Generally speaking, it's a valid claim against the estate, so I would consult an estates litigator (and not for personal reasons!). I would want to talk to the family law lawyer and get some history, but I don't really think that family law is the way to manage it because there are estate remedies and contract remedies to pursue.

Q: When couples with young children are separating, we encourage our clients to consider the needs of their children, especially as it pertains to their care. What are some of the considerations we might want to discuss with our clients about revisiting their wills and how to make provision for the care of their children on their death?

A: I guess that breaks down into two categories. One is young children, and one is older-ish children. One of the main reasons I can't get young couples to sign a will is because they're still arguing over who should be the guardian. I make it clear to them that the appointment of guardian in a will is a 90-day appointment under the SLRA, and it is subject to review after 90 days of death. So, the choice is helpful and guides the court to know that's what the deceased wanted, but it is not binding. I think it is very important to have that discussion, but it is not so important if you have that discussion and don't do your will. If you have older children, and I would say once they are 14 and up, then the question is "when do you want them to get their dough, and how far out do you want to trickle it out?", keeping in mind deemed disposition rules after 21 years. The reality is that you can't rule from the grave – well, you can, but ruling from the grave forever is a dangerous game sometimes. So, that's the discussion that has to be had, just when you want to start and on what basis. We create formulas: give a little bit out at 18, a little at 21, then all of it at 25, or something like that. Or, bring it out at 30. But those discussions, the trust arrange-

ments, need to be made and then of course, the choice of the trustee for all of this.

Q: What are the issues that make that advice to consult an estate lawyer important or pressing?

A: Well, I think the key is this: if you don't get planning advice with children, you're handing a Corvette to them at 18. Almost anybody who has a job, maybe accident insurance, a little bit of life insurance with their group plan, they are going to die with more money than you want your eighteen-year-old to have. That's why it is urgent, and that's why I find it remarkable when people who have children don't have wills: because it is all going to land in these kids' hands at 18.

Q: If my client dies while I am retained, are there any immediate steps that I should consider as family law counsel to protect my client's estate?

A: Look at the will quickly and find out who is in charge. If the person hasn't changed their will and the person who is in charge is a combatant on the other side, steps need to be taken to get that person off the job. This definitely happens in family law. Really, the urgent thing is finding out who is in charge, because, actually, the fact is it's really not that easy to move assets instantly in an estate unless they're held in certain ways. What you need to do is figure out where the enemy is, who is around you, if the person in charge is competent, and whether they're the enemy or not.

Q: Are there contentious situations where somebody doesn't want to give that will or information to a lawyer?

A: Yes, and under the *Estates Act*, you have abilities to get production of testamentary documents and production of wills under the rules. There are litigation steps that can be taken to make sure you know who is in charge.

Q: Regarding life insurance policies taken out to secure child support, we are sometimes asked if it is possible to insist that the money from the policy will be used to spend it wisely on the children, and not frittered away by the surviving parent. Is there a way to give effect to this wish?

A: Yes, and it's a very simple estate planning tool that, again, I think family law lawyers should seek out some advice for, or the client should seek out planning advice. You just set up an insurance trust and it's quite simple.

Q: Looking to the future, do you think technologies like Blockchain and "smart contracts" stand to change the way wills and estates are dealt with?

A: Almost certainly. First of all, storage of original documents. I don't see it being realistic in 10 years and it shocks me that we're still there. We still can't do a digital will. We can't do a virtual will in any way, shape, or form. To be fair, most jurisdictions are standing firm on that for a lot of good reasons. But Blockchain gives an immense amount of flexibility to custody of documents and access to information, and I think the other part of that would be, "what are we going to do with this Bitcoin stuff?" Ultimately, nobody knows who has a bitcoin, nobody knows how to get to it, nobody knows your password, it's all in your head. You don't have to keep it in a safe or anything, so who knows? It vanishes. So, Blockchain could offer opportunities to secure information, access information in a good way, but also in a bad way. It probably could help hide assets, which is not a good thing.

Q: Are you seeing issues with Bitcoin arise in your practice?

A: Yes, I already am. And there can be big swings. The two that I've had so far have been modest, but one of them we lost. We still cannot figure out how to get in. We know there was an account, but we have no idea how to get in, and we never will. There's simply no infrastructure to chase it.

Q: Finally, what else do you think the future may bring to the areas of law in which you specialize?

A: I think interactive technology to make a will has to be more app-like and more efficient. I personally am working on some of that technology with some people because I don't see how the pressures of time and the reality of the costs of doing a will should stand in the way. I think there certainly are ways to make it more efficient, both on the intake side and on the producing of the document side. I think it's going to be the same with a lot of the contract work on the family law side where you're doing the solicitor-type work. But I don't yet know how it's going to change litigation except to bring some efficiencies on document exchange.

[**Ian Hull** LL.B, is a Certified Specialist in Estates and Trusts Law and in Civil Litigation. He is a frequent lecturer and author of numerous articles and publications specializing in estate law issues. For more information or how to contact Ian Hull visit <www.hullandhull.com>.

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