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Advice for Advisors

JUNE 2010

The Calgary Foundation welcomes new staff member

Jantina Oosterhuis, BA, LLB

The Calgary Foundation extends a warm welcome to Jantina Oosterhuis in her new role as **Senior Officer, Gifts and Estate Planning** with the Foundation's Gifts & Donor Relations department.

As a Lawyer and Professional Executor, Jantina brings a wealth of knowledge and experience to the position, having specialized in administrating and advising on estates and trusts both in Alberta and British Columbia. She began her career in private practice with an emphasis on estate planning and estate administration, and in the process, acquired significant experience in estate related litigation, probate and trust matters.

After several years with the Public Guardian & Trustee of BC, Jantina returned to Alberta in 2007 to join TD Waterhouse, Private Client Services, in the Private Trust department. Jantina role involved administering estates, overseeing the ongoing management of a variety of trusts and acting as Power of Attorney for incapable clients. Jantina advised clients on their financial and estate planning needs, including creating Intervivos Trusts, Testamentary Trusts or Charitable Remainder Trusts, and on the variety of options available to fund the creation of a charitable fund.

Jantina is a member of the Canadian Bar Association and the Law Society of Alberta. She attended the University of Victoria, earning a BA with Distinction and completed her law degree at the University of BC.

As an on-staff Professional Advisor, Jantina is a dedicated to the professional and effective management of estate bequests at the Foundation.

"I enjoy working in the legal field of estates and trusts and experience great satisfaction in assisting people to meet their philanthropic goals. Everyone has special considerations to take into account when preparing their estate plan, including their charitable intentions. I hope to help you identify concerns and assist in finding solutions."

Jantina Oosterhuis, BA, LLB
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Advice for **Advisors** is for professionals working in the financial planning, insurance, estate and tax accounting, Wills and estates law, investment planning and wealth management fields. This publication, distributed three times/year, provides authoritative information on the topic of philanthropy and highlights The Calgary Foundation's expertise in charitable and planned giving.

In this issue…

Updated PA Section

Check out the ***UPDATED PROFESSIONAL ADVISOR SECTION*** at **thecalgaryfoundation.org**

New section on Discussing Charitable Giving includes tools and resources to talk about clients' social capital –

WHY ASK • HOW TO ASK • WHEN TO ASK

The Calgary Foundation
welcomes
Jantina Oosterhuis

Senior Officer, Gifts & Estate Planning

2010 – 2011 Donor Relations/Professional Advisors Committee Members

The Donor Relations/Professional Advisors Committee at The Calgary Foundation (TCF) develops and enhances the relationship between TCF and donors, potential donors and professional advisors.

Dale Ens, *CHAIR*	Blaeberry Estate Planning Inc.
Jasbinder Butalia	Retired Partner, BDO Dunwoody LLP
Pierre Fournier	Raymond James Ltd.
Cheryl Gottselig	Burnet, Duckworth & Palmer LLP
Ross Kobayashi	Kobayashi and Associates Ltd.
G. Kenneth Little	Carscallen Leitch LLP
Carl Scholz	Catalyst LLP
Mike Skrypnek	GMP Private Client LP
Don Smith	DSI Estate Planning Inc.

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Bequests: Equal Opportunity Giving

A new study contradicts widely held assumptions about bequest donors.

by **Melissa Brown**
Philanthropy Matters

When fundraisers hear the term "charitable bequest," they may most often think of an unmarried woman who leaves a portion of her estate to her favorite charity. But according to a new study, an unmarried man is just as likely to provide for a charitable bequest—and at higher incomes, married people are as likely as singles to do so.

The study, *Gender Differences in Giving Motivations for Bequest Donors and Non-Donors*, found that, after controlling for factors such as income, age, and educational level, single men and single women are equally likely to leave charitable bequests in their Wills.

Moreover, although male and female donors who have never married are more likely than married or widowed donors to leave bequests, single and married donors in households earning more than $100,000 per year are equally likely to designate bequests.

These findings have important implications as fundraisers encourage donors to consider what Ken Ramsay, founder of the consulting firm Legacy Leaders, calls "the last significant growth area of fundraising." About 16 percent of the donors surveyed in the study had a charitable bequest in their Will.

"Bequest giving is only going to grow in importance, especially as the Baby Boomers grow older and the inter-generational transfer of wealth begins to occur in full swing," says Paulette Maehara, president of the Association of Fundraising Professionals (AFP). "Once individuals are certain their families will be taken care of, many will consider how they can use other funds to make a difference in the world. Charities need to be ready to address these concerns and discuss how a bequest can have a huge impact."

The *Gender Differences* study, says Patrick M. Rooney, executive director of the Center on Philanthropy at Indiana University, helps nonprofit organizations understand the reasons for charitable giving among donors who already support the cause but who have not yet made a charitable bequest. "Work in this area augments ongoing research undertaken by Center staff and faculty to understand donor motivations," Rooney says.

When asked why they give to charity, all three types of donors surveyed—donors with charitable bequests in their Wills, those with Wills but no bequests, and those without Wills—cited "helping those with less" most frequently, with women citing it more frequently than men. Religious beliefs were the second-most common motivation for all three groups.

Compared with people with a charitable bequest, not having a bequest was associated with lower income, less education, and lower frequency of attendance at religious services. Donors without a Will were likely to be younger, to be unmarried, to have lower incomes, to be African American or Latino/Hispanic, or to be infrequent participants in worship services than donors with a Will.

"If I were a fundraiser, I would talk about how a bequest would help somebody realize their ambitions long-term," says Melissa S. Brown, associate director of research at the Center on Philanthropy and co-author of the study, which was conducted by the Center with a grant awarded by AFP and funded by Legacy Leaders.

Brown recommends that fundraisers focus their bequest efforts on highly engaged donors in their late 40s or early 50s, when most people begin considering their legacies and make their first Wills. "If somebody has shown their loyalty to your organization, you should make sure to ask them how they would like to continue to make an impact beyond their lifetime," she says.

Donors who have bequests rarely tell the benefiting nonprofits about the gifts, and even if a nonprofit does know, donors can always change their Wills."Nonprofits have to continue to keep those donors engaged," Brown says. "People who make a bequest are not necessarily going to remain loyal to the same charity for the next 20 or 30 years unless that charity makes some effort."

Download the report at www.philanthropy.iupui.edu/Research/docs/2009_AFP_CharitableBequestsGenderDifferencesGivingMotivations.pdf.

Reprinted with permission from Volume 17, Issue 2, 2009 of *Philanthropy Matters*.

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The Estate Freeze *(cont'd)*

One or more RealtyCo's for real estate no longer used in the business, which again may have implications for tax status, as well as non-business liability exposure.

As can be appreciated, the legal and tax issues become increasingly complex as values, number of holdings and parties to the proceedings increase. The estate freeze can usually be scaled upward to capture such concerns, though of course implementation costs will also rise, which may become difficult to justify when planning against more remote contingencies.

The investment freeze candidate

As mentioned at the outset, the principles of an estate freeze need not be limited to business situations. In fact, the business example can be instructive as to the positioning of the estate freeze as an end-product of a clearly considered planning process.

In qualified circumstances, a portfolio investor may be able to make use of corporations and trusts to implement a freeze, but the assistance of tax professionals is a must before taking action. Certainly for wealth generated within an active business corporation and migrated into a holding company, the strategies used in the business estate freeze are fairly easily transported into an investment freeze.

Variations for later planning

Thaws, melts, gels and re-freezes are cute terms used to describe sophisticated planning alternatives for contingencies that may arise down the road.

The key issue to recognize is that, with the right planning, there is great latitude in how an estate freeze may be structured from the beginning, including the flexibility to build upon, re-cast or undo the process, as later circumstances may require.

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The Estate Freeze *(cont'd)*

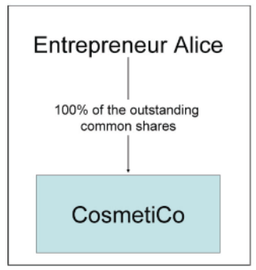
both value and control (with these two elements sometimes separated between classes), generally including:

- A corporate redemption option and shareholder retraction option, both aligned with the current/freeze value of the corporation
- A priority right to return of capital if there is a wind-up of the corporation. This priority is as against all other share classes, but does not guarantee the full return of capital if corporate assets have depleted or there are superior creditor claims
- Voting control (or at least participation) in order for the freezor to monitor activities and possibly re-assert management control over the business
- A dividend. The preference, accumulation and triggering features of the dividend can be catered to the freezor's needs and desires
- Of key importance, a 'price adjustment clause' to provide protection (though not a guarantee) against future tax liability should the freeze share valuation be challenged by Canada Revenue Agency

It is usual that these shares will remain outstanding until the death of the freezor, or last death of freezor and spouse. Nonetheless, it may be that a redemption schedule is followed so that the freezor is eased out of the business, both from a financial and a control perspective. In particular, where the freezor may be at less than top marginal tax bracket in very senior years, it may be sensible to trigger some of the tax liability early, rather than awaiting an inevitable large tax bill in the estate.

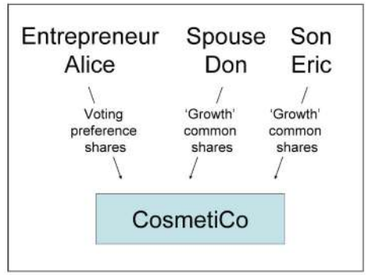
A progression of freeze examples

Let's consider entrepreneur Alice Bolton and her successful make-up distribution and retailing operation run under her corporation, CosmetiCo. Alice has gone through the analysis and is ready to implement an estate freeze. She has a husband Don and adult child Eric.



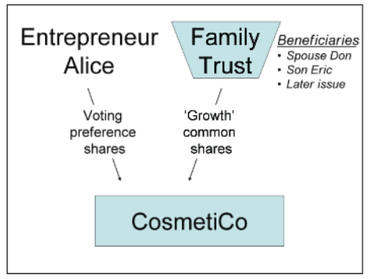
Simple freeze

Alice and her professional advisors may be content that there are no serious complications to the business or the people involved. Accordingly, an option with the least 'moving parts' is what is desired. Alice could do a basic share-for-share exchange to effect the freeze, and have the growth shares issued directly to Don and Eric. Whether Don would be included in this manner would depend on valuations and respective wealth positions of Alice and Don.



Freeze with added family trust

On further consideration following conversations with her legal advisors, Alice might be a little concerned about the untethered wealth transfer to son Eric. She may be especially uncomfortable with the potential that his interest in the business could be exposed to his creditors, open to matrimonial claim with a later spouse and generally be subject to his own lack of maturity. By adding a family trust as a layer that separates beneficial entitlement from legal ownership, Alice can take some solace that these risks are mitigated, particularly if she is a trustee of the trust.



Freeze with additional corporations

With the input of her tax advisors, Alice may come to the conclusion that one or more additional corporations may be appropriate:

A holding company interposed so that excess cash may be pushed out of operating companies where tax status and creditor issues may be of concern

A separation of the operating company into a RetailCo and DistibuteCo, based on distinctive business needs and to prepare for a potential later spin-off

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Worldwide Will

Assets in multiple jurisdictions might warrant multiple Wills.

by **Akua Carmichael**
Advisor's Edge Report

When advising clients on making a Will, it isn't uncommon to discover they have assets in foreign jurisdictions. That being the case, advisors need to know how to deal with issues that may arise from owning overseas wealth.

Consider the following scenario. Mary is a Canadian citizen who lives in Ottawa but spends her winters in Florida, where she owns a condominium. Mary also inherited property from her parents in France.

In advising Mary about her estate plan, what issues should you be aware of?

The main concern is whether one Will is sufficient for Mary's multiple assets. A Will created in one jurisdiction and purporting to distribute assets in another may or may not be valid, depending on whether the Will is accepted pursuant to the laws of the jurisdiction in which the asset is located. Issues concerning the domicile of the client, and whether the foreign-owned assets are real property or personal property must also be considered.

Let's assume Mary makes a Will in Ottawa, leaving her Florida condominium to her sister, Bianca. There are several possible consequences. Bianca may or may not receive the condominium depending on whether the Will is in compliance with Florida laws. If the Will isn't valid in Florida, an intestacy regarding the condominium will result. Whether Bianca receives the property will depend on the law in Florida governing property distribution when one dies without a Will.

What the courts say

In the case of *Granot v. Hersen, (1998, 21 E.T.R. (2d) 153)*, Henry Hersen, a Swiss and Canadian citizen, made a Will three weeks before his death. He owned property in both Ontario and Switzerland. He Willed the Ontario property to his son and the Swiss condominium to his daughter, although he didn't specifically identify the condominium in his Will.

The court decided the rights to the Swiss property would be determined by the internal law of Switzerland, which granted a one-fourth interest to Hersen's son.

So even though an individual may attempt to distribute real property through a Will, if it is in a foreign jurisdiction, the law governing the location of the property may prevail.

What options, then, does Mary have? For one, she can make a separate Will for each of her foreign-owned assets, while ensuring that each complies with the law of the jurisdiction where the asset is located.

Mary might also consider making an international Will recognized by the Succession Law Reform Act. An international Will is valid between countries that are signatories to the Convention, assuming it complies with the form of an international Will.

So, if Mary made and signed an international Will in Ontario, leaving her French property to Bianca, there would be no issue as to whether French law or Canadian law would govern this distribution, or about the validity of Mary's Will.

Most important, Mary's wishes concerning the distribution of her property would be carried out.

Although the international Will is an excellent response to dealing with many of these issues, it isn't without limitations. Only 12 countries have signed and ratified use of the convention. (These include Canada, Italy and France, but not the United States.)

And in Canada, while Ontario, Manitoba, Newfoundland, Alberta, Saskatchewan, Prince Edward Island, New Brunswick, and Nova Scotia recognize the international Will, British Columbia and Quebec don't.

So it's important to be aware of the issues that arise when assisting clients who own assets in multiple jurisdictions, particularly if they intend to make a Will. Prudent estate planners will ensure they have an understanding of the issues, and that their clients are well apprised of the options available to them.

Akua Carmichael is an independent estate lawyer. This article isn't intended as legal advice.
If you feel you need legal advice, please obtain legal counsel concerning your individual situation.

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The Estate Freeze

Putting tax on ice

by **Doug Carroll**
Vice President, Tax & Estate Planning, ***Invesco Trimark Ltd.***

There is perhaps no greater satisfaction for an individual taxpayer than to be able to tell the tax collector, "Just wait!"

This is stated with the full respect that as a society we require a properly functioning tax system to enable our economy to operate effectively. Still, if there are legal means available to defer a payment then it would be crazy not to explore *how to put tax on ice.*

An "estate freeze" is a term most often attached to the succession planning activities of a small business entrepreneur, though it may potentially have application for portfolio investors in some circumstances.

What is an estate freeze?

Though the term would likely sound obscure to the general public, an estate freeze is a commonly available wealth technique that can make the succession of selected assets more tax efficient. In this context, the term 'tax efficiency' may be a combination of:

- Deferral of a taxpayer's existing inherent tax liability from a current to a future payment date, often aligned with the taxpayer's death or a spouse's later death
- Transfer of future growth and tax liability from a taxpayer to a child, grandchild or other person, usually extending time horizons and possibly accessing lower brackets
- Potential ongoing management of the timing and distribution of tax on the growth using existing, newly-created or future-planned trusts, partnerships or corporations

While the legal structure and components may vary, the general principle of a freeze remains constant: Lock in the value of chosen assets without triggering tax, while deferring the tax on future growth for years or even decades.

Purpose of a freeze

But let's not put the cart before the horse.

These tax benefits must follow from the core purpose of an estate freeze, which is to facilitate the orderly transition of selected assets to those whom the taxpayer wishes to benefit, generally being those to whom estate assets would otherwise pass in the traditional sense. (As children are the usual recipients, that will be the term used from here on, but it is certainly possible to pass on to later generations and non-family recipients if desired.)

The bonus with an estate freeze is that, by managing the tax liability early on, more can be expected to pass on.

Ready to proceed?

The decision to undertake an estate freeze has to be considered very carefully. Invariably it involves changes to legal ownership of assets – and it is often irreversible once implemented. Above all else, the would-be parent/freezor must be certain that there will be adequate assets remaining under his/her ownership and control to continue to live a comfortable life unfettered by nagging tax and legal thorns.

Of course, the ultimate benefit of the estate freeze accrues to the children carrying on after the parent has passed on. The goal of the freeze is to allow for the greatest value to be received by the children, and the early crystallization of tax in a freeze can assist in that regard. Even so, it would be folly to focus so tightly on the tax bite – and early timing in particular – to the extent that the assets become exposed to even greater loss risks, possibly cutting off other planning options.

While it may be technically possible to freeze an estate at almost any point in time, it may be ill-advised or at least premature in situations where:

- The candidate is a young person, perhaps unattached and without children, bringing into question whom the freeze will favour and whether that is a desired permanent result
- The children are young (whether or not of minor age), making current asset ownership impractical, and even near future ownership an unpalatable outcome
- The candidate's marriage is not on the strongest footing, raising the spectre of a division of assets, child support and/or spousal support, which taken together could negate the benefits of a freeze (or be exacerbated by the cost of undoing a freeze)
- Despite being at a reasonable age, the children may have marital, creditor, disability, mental health or addiction issues, any of which would militate strongly against implementing a freeze, or if doing so then would warrant very firm strings attached
- Where the candidate is at a fairly advanced age, the tax deferral from the freeze will be somewhat limited in time, and thus the scope of a freeze may in turn be limited, or preferably coordinated with some strategic testamentary trust planning in the Will

The motivation to reduce eventual tax liabilities must therefore be tempered with the practicality of age, life stage, maturity and vulnerabilities of both the parent as benefactor and the children as beneficiaries.

Assuming that these hurdles have been addressed, what does a freeze actually look like?

The business freeze scenario

Take the classic example of an entrepreneur who has invested a significant amount of time and capital into the growth of a small business corporation. Inherent in that built-up growth can be a substantial tax liability, even with the expectation of using the $750,000 lifetime capital gains exemption for shares of a small business corporation. Assuming a positive outlook for business growth, that attached tax liability will only get larger.

In fact, if left unmanaged, the tax incursion could inconveniently come due at the entrepreneur's death, potentially threatening the viability of the operation as a going concern. This in turn could lead to a fire sale of the business or its assets in a desperate attempt to find liquidity to service the tax obligation, further imperiling family wealth.

In an effort to contain that tax liability and protect future value, an estate freeze could be implemented as part of a broader business succession process. The components of the larger plan would include:

- Detailed analysis of the business itself, and specifically the technical skills required of current and future management and ownership
- Candid consideration of the soft issues motivating the founder, including an honest introspective of personal/parental motivations and expectations
- Tough love. A frank examination of the children, placing their capabilities, limitations and personalities under a bright light
- Consideration of the reaction of constituencies within and surrounding the business, including employees, suppliers, customers, bankers – and those children who are projected to take on less-favoured roles (whether actual or perceived)
- Review of asset holdings to isolate and realign appropriate assets for tax restructuring, while of course preserving the integrity of the business
- The freeze. Crystallization of tax through creation of legal structures (trusts, corporations or partnerships), execution of asset transfers and necessary tax elections
- Allocation of future growth to the successors through one or a combination of corporate share issuance, beneficial trust entitlement, or partnership interest, all in such proportions and subject to such limitations built into those legal structures
- Assuring later estate liquidity by obtaining life insurance coverage aligned to the determined tax liability, usually joint-last-to-die coverage for founder and spouse, given the availability of asset rollovers at tax-cost basis between spouses at first death
- Insulating against the children's risk events through a wide variety of measures including shareholder agreements, key person insurance for those with active roles in the business, matrimonial contracts and Will & estate planning

As this series of activities shows, the technical freeze is really part of the end-product implementation of a lengthy and potentially very challenging process. Its ultimate form will be dictated by circumstances, being as simple or complex as needs may require.

Freeze mechanics

For a business to be of sufficient value to warrant an estate freeze discussion, it is a given that the existing business form will be a corporation. The mechanical procedure then is to make adjustments to the entrepreneur's/freezor's share interest so that current value is frozen, and future value can be shifted to the children.

The most common procedure for doing this is for the freezor to exchange current common shares for one or more new classes of preferred shares having a fixed value equal to the value of the original common shares at the time of the exchange. Growth in the future value of the business will accrue to one or more other share classes. The preferred shares will have a number of features that preserve

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The Estate Freeze *(cont'd)*