# HCLA News

Newsletter of the Halton County Law Association

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**This issue:**



**Deadline for Next Issue:**
**July 2018**

## HCLA

# President's Report by Sam Misheal

I am pleased to serve my second-year term as the President of the Halton County Law Association. I am happy to report that we have had a very busy year, my aim will continue to increase our offerings/ benefits to our members.

In 2017 the HCLA changed accounting firms to the local, Burlington firm, SB Partners. On the library side, we purchased 5 new computers and added additional copies of DivorceMate to the Library Computers and updated the Librarian's computer as well. We also used some of the surplus funds to re-instate several loose-leaf services.

We held our Annual General Meeting and Judge's Night on March 1, and as always, we are pleased to have judges from the Superior and Ontario Court of Justice.

I would like to extend congratulations to Justice Marvin Kurz on his appointment to the Superior Court of Justice. Mr. Justice Kurz was appointed to the Ontario Court of Justice in December 2015, and prior to his appointment to the bench, Justice Kurz spent over 32 years as a civil, family, and human rights lawyer. Prior to joining the Ontario Court of Justice, Justice Kurz also sat as a Small Claims Court deputy judge and a Dispute Resolution Officer in the Peel Superior Court of Justice.

Furthermore, on the judicial front, Justice D.K Gray, and Justice Van Melle's elected to become supernumerary judges. I would like to recognize their dedicated contribution to the Halton Region, and wish them the best on their semi-retirement.

Also, in the middle of June this year Justice Wolder will be retiring, I like to take this opportunity to thank him for his years of dedication on the bench and his service to the people of Halton.

I would like to extend my gratitude to Peter Kazman, Ann Stoner, Elliot Vine and Dorothy Kosinska who dedicated their time and served on the board for the past few years and welcome the new and existing board members for the 2018/2019 year.

Without entering the political ring, the Liberal Government continue to assure the Halton County Law Association on their commitment to the June 2017 announcement of building the new consolidated Halton Courthouse. I was contact by Minister Naqvi's office and was assured of their continued commitment to funding the new Halton Courthouse. Furthermore, I was advised that construction is expected to begin in late 2019, and that an up-to-date status of the project can be obtained by visiting Infrastructure Ontario website for the latest information at http://www.infrastructureontario.ca/Halton-Region-Consolidated-Courthouse/

Mark your calendars for our Annual Charity Golf tournament, in support of Radius Child and Youth Services, at Crosswind Golf Club on Thursday, June 14, 2018. You can be a major sponsor, sponsor a hole, donate an item for the silent auction, or join us for a fun day of golf. For more information or to register for any of our events, please contact Librarian Andre Blake via email.

On the educational front, our recent "Halton County Law Association Criminal Law Seminar" was held on January 20, 2019, and it was a remarkable success! Special thanks to James Page for organizing this very engaging event.

Please join us at the Oakville Golf Club on Friday May 4, 2018 for our Estates & Family Law seminar, co-chaired by Ian Hull and Suzana Popovic-Montag. In addition to the panel discussion, the event will highlight the following topics: Secondary Will Drafting, Unique Issues That Arise in Will Drafting, Annotated POA, and Panel Discussion on Succession Planning and Contingency Planning for Your Practice.

Lastly, join us at the Oakville Golf Club on Friday June 15, 2018 for our Family Law Seminar, co-chaired by Rachael Pulis and Ann Stoner. We promise this CLE will be packed with exciting topics and networking opportunities and special guest Speaker professor Rollie Thompson.

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*For Good For Ever*

The Community Foundation of Halton North (CFHN) , www.cfhn.ca, provides an opportunity for people to donate to their favourite cause or causes, numerous times, with only one donation. Gifts made to CFHN are placed in endowments. The principle amount is never disbursed or depleted. The endowment generates revenue and from that revenue, grants are distributed into the community each and every year.

Donors can give to a specific charity or choose to support a desired area of interest including health and social well-being, art and culture, the environment and/or sports and recreation. Donors can even support several charities at the same time.

Individuals can make a gift today or can choose to make a gift as part of their estate plan. A bequest to CFHN will not affect one's current lifestyle and donors can direct their bequest to a particular charity or area of interest. Making a bequest has many tax advantages and will benefit the community in a significant way.

Consider a gift to the Community Foundation of Halton North. A gift made today will have an impact for generations to come. Community Foundation of Halton North – for good for ever.

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# Managing property without a POA or Guardianship
## By Monique J. Charlebois

Last year, an elderly gentleman called me with the following problem. His dear wife was now in a fairly advanced stage of dementia such that she was not capable of executing a valid power of attorney for property. To his surprise, the bank had denied him access to her personal bank account to help pay their rent and other expenses. Her government pensions were being deposited to that account. His own financial resources were inadequate to support them both on an on-going basis. Furthermore, the family vehicle was in her name and its registration papers had been lost. Overall, a sad example of poor planning, but a 'real world' problem that requires a creative solution.

What could he do? A guardianship application is out of the question for such a couple – they cannot afford it and it's not an appropriate remedy. If his wife did not object to a capacity assessment, he could retain a certified capacity assessor to trigger a statutory guardianship. He would have to pay the assessor up front and be reimbursed from his wife's funds in due course.

The Ontario Public Guardian and Trustee ("OPGT") would automatically become the wife's statutory guardian. The investigation of his wife's finances and file set-up could take several months. It could feel quite intrusive. And there is no guarantee that the OPGT would maintain the status quo. The husband could apply to replace the OPGT and would likely be successful if an appropriate management plan and application were filed. A fee of $382.00 is payable to the OPGT to process this application, and legal advice would be recommended, which is another cost.

In this case, some informal and inexpensive arrangements could be put in place that may be quite adequate for some time.

First, it seems much simpler for the husband to be appointed as a Private Trustee for purposes of receiving and managing his wife's OAS, CPP and/or GIS. He could open another bank account to which he has access, and change the direct deposit from his wife's personal account to this new account under his control. I would recommend that the husband open a new account specifically for the purpose of his wife's deposits and expenses. He would need to complete and provide several documents to Service Canada, including an Agreement to administer benefits, a medical 'Certificate of Incapability' and a new request for direct deposit.

Becoming the Private Trustee of his wife's benefits means that the husband would be responsible for managing those benefits in her best interests. He would be responsible for notifying Service Canada of her death, and reimbursing any overpayments. He would NOT be her guardian for any other financial purposes.

A similar mechanism is available for private trusteeships of ODSP payments. The bank is unlikely to allow prior benefits that accumulated in the wife's personal bank account to be transferred to the new account. However, those funds could be accessed to pay for the wife's funeral, and probably also for payments to any long-term care residence, if the wife were admitted

With respect to the vehicle registration, a lost document can be replaced if the wife is capable of signing a request letter, to be filed with a Service Ontario office along with a copy of her ID. The new registration slip would be mailed to her address on file with the Ministry of Transportation. She may not have sufficient legal capacity to transfer legal ownership of the vehicle. It may be simpler for the husband to continue to use the vehicle and to transfer ownership after his wife's death.

Income tax returns can be filed informally by the husband for his wife. In practice, the Canada Revenue Agency is not particularly fussy when it comes to a signature on the return. However in the event of a dispute or inquiry, it may be impossible to deal directly with CRA without either a pre-existing representation authority on file (form T1013), a power of attorney or guardianship. Again this would require balancing the cost and value of a tax matter vs. obtaining legal authority as a guardian of property.

A certain well-known estates litigator likes to tease me about joining the "real world" of private practice, after many years in government. I can't help but think that the financial situation of that colleague's clients is far removed from the 'real world'. The majority of Halton practitioners have regular dealings with our middle class neighbours and many of their problems do not need expensive litigation.

And my elderly client? He located a power of attorney that his wife had signed many years ago, and he'd forgotten about it….. So all's well that ends well!

*Monique J. Charlebois is a bilingual estates solicitor in Oakville. Her website is www.moniquecharlebois.ca and she can be reached at 905-849-3939.*

## HEADS UP! by Noel A. Nolasco da Silva'

Did you see the article in the July 2017 edition of Canadian Lawyer? In case you did not, here is my brief takeaway. No, not the article on marijuana in the workplace, but the one titled "Collaborative Practice Comes Into Its Own." It chronicles how Collaborative Practice has started to permeate the family law landscape across Canada. I attended an ad hoc meeting at the International Academy of Collaborative Professionals (IACP), annual forum in Chicago a few short years ago. The genesis of a national Canadian group was given expression then. It was followed up at the IACP forum in Washington D.C.. Now Canada's interdisciplinary group Collaborative Practice Canada is being launched.

If you are a lawyer, accountant, financial professional, psychologist, social worker, family professional or mediator you need to know about this development. It is directly relevant to many other professions such as medicine and people in government and the courts concerned about the crisis in resolving family law disputes.

There has been lots of interest provincially in Collaborative Practice and Collaborative Law since 2001. It is the acceptance from the public and likeminded professionals that has proliferated across Canada. Clients are coming to my office and asking about the Collaborative process of solving divorce, custody, access, support and property division disputes. This experience is shared all across Canada.

There are statutes in British Columbia, Saskatchewan and several U.S. states dealing with Collaborative Law. I recall one of our best litigators now Justice Marvin Kurz, of the Ontario Court of Justice who when requested to attend one of our Peel Halton Collaborative Practice meetings asked in jest if we were all going to sit around, hold hands and sing "Kumbaya". Well, with great strides all across North America and around the world and now a national Canadian organization, Collaborative Professionals have gone well past the holding hands stage.

What's the message? Collaborative Practice arrived long ago. Its foundations are stronger than ever and clients are asking for representation from a Collaborative Practice team or the individual parts of the team. There are a few thousand families who embraced this dispute resolution process with excellent results. They are quietly telling family and friends. Why? There are many reasons. Find out for yourself. Mainly, it works.

*Noel is a family lawyer and mediator from Brampton, a trained Collaborative Professional, a member of Collaborative Practice Toronto, Peel Halton Collaborative Practice and the International Academy of Collaborative Professionals.*

# Considerations for LGBTQ Estate Planning

by Suzana Popovic-Montag & Sayuri Kagami, Hull & Hull LLP

**Introduction**

While a preliminary step for any estate planner is to determine the marital and parental status of their client, it is important to recognize the difference in family structures one might encounter when assisting LGBTQ clients. Not only do these differences impact the type of estate planning that a practitioner might suggest, it should also serve as a reminder of the importance of fully informing clients of the differences in legal rights that they and their partner will experience as common-law spouses. Given the prevalence of common-law relationships and more unique parenting situations, particular issues are more pressing for LGBTQ individuals. There are important planning considerations for such individuals during their lifetimes, including potential incapacity and end of life planning.

**Incapacity of LGBTQ Individuals**

The laws providing who will be given priority in making financial and health care decisions for an incapable person vary jurisdiction by jurisdiction. Legal and biological family, such as spouses (sometimes including common-law partners), children and parents, will generally be favoured over other persons who may have a close, but legally unrecognized, relationship with the incapable person. For LGBTQ individuals who have dealt with difficult or non-accepting family members, having these people take over their finances and health care when they are at their most vulnerable is likely the last outcome that they would wish for. Even where an LGBTQ individual has a common-law (or even married) partner who may have first priority, other family members who refuse to accept the relationship may potentially seek court intervention to have themselves instead appointed to manage such decisions. Appointing persons by power of attorney for health care and power of attorney for finance can never fully reduce the risk of other family members disputing the attorney's appointment. However, such documents provide clear guidance to outsiders, including courts, as to whom an individual wished to have appointed to manage their affairs.

**Particular Concerns for Transgender Individuals**

Transgender individuals will likely wish to designate an attorney for their health care, not only to ensure that someone who is supportive of their gender identity manages these decisions, but to ensure that they will have a strong advocate for them when receiving medical care. In the United States, a survey by the National Centre for Transgender Equality and the National Gay and Lesbian Task Force of over 7,000 transgender individuals provided statistics as to the degree of discrimination faced by transgender individuals in obtaining medical care. These statistics showed that 19% of respondents were refused medical care due to their transgender status, 28% of respondents experienced verbal harassment in medical settings, and 50% reported having to educate their medical care providers about transgender care. Given the ongoing barriers faced by transgender individuals in medical care settings, it is important for these individuals to choose the right people to take on the mantle of ensuring they receive proper and respectful medical care in the event of incapacity.

**Providing for Children After Death**

Ensuring that someone's children will be properly cared for after death is often a primary concern in that person's estate planning. For LGBTQ individuals, this planning can be complicated by the lack of recognition of unique family structures in the law. Many same-sex couples rely on assisted human reproduction in order to have families. This may include the use of egg donors, sperm donors, and surrogates with one of the members of the same-sex couple being the biological parent of the child and one not being biologically related. When relying on assisted reproduction, some parents may intend for the person who provided genetic material or acted as surrogate to also be a parent of the child.

In order to ensure that any children are properly provided for after death, wills that set out the property or share of the estate that each child is to receive should be created. As the family expands, individuals will need to revisit their wills in order to ensure that all children of the family are accounted for. For grandparents (or other relatives) of such children, care should also be taken as to how gifts are made in order to ensure that any gifts for grandchildren will encompass the children who may otherwise not fit the legal definition of "grandchild". Bequests to a person's "grandchildren" may still encompass persons treated like grandchildren, but not legally recognized as such as courts will look to the intention of the person at the time of the drafting of their will. However, any uncertainty that may arise is better dealt with by additional precision in the drafting of the will. Where any uncertainty is not dealt with, undesired applications for a court's interpretation of the will may be required. A simple way of ensuring that a child is provided for, regardless of whether such a person may be legally recognized as a child, is to name the individual children being benefited in the will. Thus, rather than leaving an equal share of the estate to "my children" or "my grandchildren", names of the children being benefited would be provided.

Naming each individual child in a will may be problematic, however, where the family is expected to grow. This is particularly true for grandparents who may have many children and even more grandchildren. Regardless of the governing law as to when parent-child relationships are established, consideration should be given to providing a definition of "child" or "grandchild" where such terms are used in the will. By crafting the will with a definition of child or grandchild specific to the circumstances of the family, the testator can ensure that they benefit their children and grandchildren on their death.

While jurisdictions across Canada have grappled more and more with the changing views of family and the different ways in which children may be brought into a family, even provinces with the most progressive expansion of recognition of parentage do not fully encapsulate all parent-child relationships. For this reason, LGBT individuals should not rely on intestacy laws in providing for their children. Careful will planning should be undertaken which takes into account the unique needs and structure of the family.

**Funeral and Memorial Planning**

For transgender individuals, the potential for the erasure of their identity can be a grave concern. The potential for such erasure continues after death. Careful estate planning can mitigate such risks. At common law, the right to determine the manner and burial of a deceased lies with the executor of the deceased person's estate. In order to ensure that unsupportive family members do not control the manner of burial after death, transgender individuals should carefully choose an executor for their estate. In addition to giving careful consideration to choosing the executor of an estate, transgender individuals should consider including provisions in their wills setting out their wishes as to the disposition of their remains and memorial planning.

**Conclusion**

There are important considerations for LGBTQ individuals to consider in their estate planning. Careful estate planning should be undertaken which takes into account the unique needs and structure of the family. By ensuring the proper safeguards are in place, LGBTQ individuals can rest easy knowing their wishes, and their loved ones, will be protected.

Jamie M. Grant et al, "National Transgender Discrimination Survey Report on Health and Health Care: Findings of a Study by the National Centre for Transgender Equality and the National Gay and Lesbian Task Force", Report, (National Center for Transgender Equality and National Gay and Lesbian Task Force: 2010), online: <http://www.thetaskforce.org/static_html/downloads/resources_and_tools/ntds_report_on_health.pdf>.

See, for example, *Hickey v Greig,* [1987] WDFL 1544, 27 ETR 17 (ONSC (HCJ)), where the court found one step-child of a child to be a "grandchild" for the purpose of a bequest to "my grandchildren", while holding that the other step-child of the child was not a "grandchild" based on the testator's treatment of one of the step-children as his grandchild.


# Constructing The Best Legal Team
## By Harpreet K. Sidhu

Last year I was very fortunate to have a talented young corporate lawyer with a sterling law firm background do a secondment with me in my in-house legal department. At one of our one-on-one meetings a few weeks into his new job, he recounted his struggle to gain the trust of business people, manage difficult business executives, handle multiple and simultaneous crises and cut costs.

He paused for a moment, before asking me quietly, “Harpreet, is there a manual that will tell me how to do this job?” I just looked at him for three seconds and then laughed. Yet his question planted a seed in my brain: could it be possible to articulate a framework that would, in fact, help in-house counsel to accelerate their performance?

The demand for an in-house lawyer’s manual has grown over the years and the need has existed since the role has been around. The demands on in-house lawyers is increasing day by day from General Counsel, to the board secretary, senior executives, privacy officers, and other executives.

To succeed in this new climate, today’s in-house counsel must effectively become their own chief executive – able to communicate, inspire and build outstanding legal teams, identify and anticipate risks, formulate and execute strategy, implement procurement and technology pipelines, control costs, ensure efficacy and nurture culture and talent. After all of this still be a great lawyer and protect the organization from risk and litigation.

Frequently, lawyers get to the GC position precisely because they are great, even outstanding lawyers. But what they sometimes lack are the other skills they need to succeed in their GC roles; especially in today’s era. Some of those other skills include: how to design and build a world-class team, how to develop a culture and nurture human capital, how to manage budgets, how to select smart technology, how to think of the long-term strategy of the organization.

\Today’s environment is certainly growing and changing. The complex environments that companies and their in-house lawyers and advisors find themselves in has raised the stakes for today’s GC. Pressures are growing, threats are more diffuse, corporate insurance is now more needed than ever, and the costs of getting it wrong are rising. Internal demand for legal support is increasing but legal department resources are shrinking. It’s difficult to see the opportunity in all of these caveats and perhaps a secondment lawyer may ask himself or her, “Why would I do this job?” As Yuvraj Chhina, a transportation lawyer, mentor and principal puts it “New lawyers and students have to be the sponge to soak it up!”

The GC population is known to be a very seasoned group of people and usually includes some pretty senior lawyers sitting way up on the food chain. It is important to ensure that current GC’s prepare, second, mentor and nurture the next wave of young lawyers who will someday take over the reigns and that they know what the role involves because there certainly isn’t a manual for it!

*Harpreet K. Sidhu is General Counsel, Corporate Secretary and Privacy Officer at Pethealth Inc. – A Fairfax Company. She advises in all areas of corporate compliance, litigation, general contracts, employment, mergers and acquisitions, and patent and trademark matters. She also manages governance and regulatory compliance for the corporation, and is responsible for in-house ethics programs, government affairs and public policy activities on domestic and international affairs.*

# Proposed Changes to the Rules for Simplified Procedure by M. Claire Wilkinson

There is a movement underway that originated with the judiciary in Toronto to amend the Rules of Civil Procedure to expand the scope of Simplified Procedure.

The proposed changes are as follows:

1. Increase the limit on simplified procedure cases to $200,000.00 (currently the limit is $100,000.00)
2. Eliminate juries for simplified procedure cases.
3. There will be a maximum trial length of five days, to be allocated at the discretion of the trial judge.
4. The maximum costs that can be awarded will be $50,000.00, and the maximum disbursements awarded will be $25,000.00 (it is not clear if these amounts will be inclusive or exclusive of HST).
5. Consideration of a maximum 3 experts rule.
6. No specific opt-in/ transition rule.

The fallout from the *R. v. Jordan* decision continues. There appears to be a lot of interest in removing juries from adjudicating cases involving lower damage awards. By removing juries from simplified procedure cases, and by increasing the amounts permitted to be claimed in a simplified procedure case, this initiative will hopefully shorten trial wait times as there will be fewer cases being tried by juries. In practice, judge alone trials are far more efficient than jury trials, so fewer jury trials should mean that the courts can process more cases.

As of right now, it would appear that the five-day cap on the length of the trial will be a firm cap.

The new rules may limit the number of experts that can be called by each party to three, but this change may require an amendment to the *Evidence Act*, so it is not clear if this specific aspect the proposal will still be maintained in the final draft of the proposed changes. However, practically speaking, if the length of the trial is limited to five days, it would likely be difficult to call more than three experts in any event, so there may not be a need to implement a formal cap on the number of experts who can testify for each party.

Some concerns have been raised that the increase in the simplified procedure limits may lead to unintended costs consequences. For example, what if a case appears to have *the potential* to be worth substantially more than $200,000.00, but, as the trial approaches, the lawyers involved feel that the value of the case has decreased? It is hoped that the lawyers will have the opportunity to opt-in to a simplified procedure trial at that point. Conversely, if a case is initially filed as a simplified procedure case but develops greater value as the case goes on, then presumably the parties could move the case into ordinary procedure.

The details with respect to these sorts of transitions have not been clarified yet, so hopefully more guidance on this front will emerge as this initiative continues.

Once thee changes are introduced, presumably lawyers will be able to choose to bring a motion to amend existing claims to bring them within the jurisdiction of simplified procedure. The motions judge would decide if such an amendment is appropriate in each case, considering the prejudice to all parties and the benefits of the case proceeding with or without a jury.

To date, there has been no specific mention regarding Rule 49, so presumably judges will retain the same discretion that they currently possess regarding the costs consequences connected to offers to settle. There has also been no specific information given as to when we might expect to see these changes formally adopted. The changes will at minimum require an amendment to the *Courts of Justice Act*, so nothing will move forward until the Attorney General approves the changes and takes the necessary legislative steps to have the changes formally enacted. With the upcoming election, it is unknown if these changes will be enough of a priority for the government to push through the legislature prior to the June election.

Hopefully the proposed changes will indeed streamline more cases, and improve the overall access to justice and timely trials for litigants patiently waiting for their day in court.

## Trials and Appeals

Chair: The Honourable Justice S. Sherr

Panel: Michelle Cheung, Counsel, Children's Aid Society of Toronto

Gary Gottlieb, Family Law Lawyer

Video replay followed by discussion led by Justice Victoria Starr.

Where: Halton County Law Association Law Library, Milton Courthouse, 491 Steeles Avenue East, Milton

When: Monday, April 30th, 2018 - 4:30 p.m. to 6:30 p.m.

Skills on how best to conduct a family law and child protection trial are necessary. This program will offer key insights, demonstrations, invaluable materials and checklists which will improve your skills and confidence in conducting a trial. The program will also introduce you to the procedures involved in Appeals.

This program is eligible for .5 professionalism hours and up to 1.0 substantive hours.

**Fee: $25.00** – credit card, cash or cheque payable to Halton County Law Assoc. Includes HST#107462350


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