



ESTATE PLANNING

Making Difficult Decisions

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PLANNING ROADBLOCKS

- ▶ Blended Families
- ▶ Common-Law Relationships
- ▶ Foreign Assets
- ▶ Foreign Beneficiaries or Estate Trustees
- ▶ Business Ownership
- ▶ Cottage Properties
- ▶ Beneficiary Incapacity Issues
- ▶ Minor Children
- ▶ Siblings who don't get along

BLENDED FAMILIES & COMMON LAW RELATIONSHIPS

- ▶ Issues include ensuring own children and new spouse / partner are all provided for:
 - Utilize Cohabitation Agreement (Pre-marital Contract)
 - Utilize an Agreement that mirror wills cannot be changed without consent of the other person
 - Utilize life insurance
 - Utilize joint ownership of assets, beneficiary designations, RRSP tax-deferred roll-over

Vacation Property

- ▶ Have a cottage along the lake?
 - Consider what will happen after you pass?
 - Are you considering giving it to more than one child?
 - Utilize a Family Trust
 - Creating a Life Interest and Remainder Interest
 - Capital Gains Tax Issues
 - May consider using the Principal Residence Exemption
 - ALWAYS keep your receipts for improvements to the cottage!

What if you die without a will?

- ▶ You lose the opportunity to set out who you wish to be your executor;
- ▶ You lose the ability to decide how you wish your estate to be administered;
- ▶ You lose control over the distribution of your estate;
- ▶ You increase costs and time in administering estate assets
- ▶ Your estate is in limbo until somebody applies for a Certificate of Appointment of Estate Trustee Without a Will and the Ontario Superior Court of Justice appoints such Applicant

When to Review Your Will

- ▶ A major change in your family structure or assets
- ▶ If a beneficiary dies
- ▶ If a person you named as Estate Trustee or Guardian dies or moves out of province

When to Review Your Will

- ▶ If there is an addition to your family who you wish to ensure benefits through your will, such as a child or grandchild
- ▶ If a beneficiary named in your will, such as a charity, changes its name, changes its function, no longer exists, or merges with another entity
- ▶ If there is a major change in tax laws or family property laws

How to choose an Estate Trustee

- ▶ Consider:
 - Does your potential Estate Trustee live outside Ontario?
 - Is there a potential conflict of interest?
 - Does the person have the time?
 - Does he or she have the skills, knowledge and aptitude to administer an estate or will he or she be responsible enough to enlist the assistance of professionals?
 - Does your potential Estate Trustee have the ability to act impartially if there is a dispute between beneficiaries?
 - Will the person likely outlive you?

Responsibilities of an Estate Trustee

- ▶ In general, the Estate Trustee will be responsible for all aspects of the administration of the estate, including:
 - Gather and distribute your assets in accordance with the instructions contained in your Will;
 - Arrange for payment of your funeral;
 - Re-route mail, cancel credit cards and magazine subscriptions;
 - Ensure payment of all bills and debts;
 - Gather information regarding the beneficiaries named in the Will; Gather and inventory the assets;
 - Probate the Will, if necessary;
 - Prepare tax returns of the deceased and the estate.

When is a Will invalid?

- ▶ A Will may be deemed invalid due to:
 - **INVALID EXECUTION**
 - A WILL MUST BE WITNESSED BY TWO PEOPLE WHO ARE NOT BENEFICIARIES OR SPOUSES OF BENEFICIARIES;
 - BOTH WITNESSES MUST BE PRESENT WHEN WILL IS SIGNED
 - The grantor is found to not being mentally competent and not able to understand what he or she was doing when the Will was executed
 - The grantor is found to have been under *duress* or *undue influence* around the time of giving instructions for the Will

What happens if a Will is deemed Invalid?

- ▶ Your estate may be administered as though you died intestate (without a Will)
- ▶ Your estate will be administered in accordance with law

Minor Children and Incapacitated Beneficiaries: Trusts

- ▶ A properly constructed Trust is essential when:
 - there are **minor** children who may become beneficiaries under your will **or** if a potential beneficiary has a **disability** or is unable to manage property (use of an absolute discretionary trust)
- ▶ A Trust allows the Trustee:
 - to manage assets over a specified period of time;
 - to pay income and/or capital to a beneficiary over time

Will Drafting Considerations

- ▶ Estate Trustee
 - Who do you wish to handle the administration and winding up of your estate?
 - Consider an Alternate Estate Trustee, just in case
- ▶ Specific Bequests
 - Consider whether you wish to leave a specific bequest to a person or charity

Will Drafting Considerations

- ▶ Memorandum Clause
 - If you wish to leave specific items to individuals, prepare a written Memorandum to be attached to your will
 - If you prepare a memorandum after executing your will, it is not enforceable on your Estate Trustees, only persuasive of your wishes, but is more common due to its flexibility to make changes over time

Will Drafting Considerations

▶ Age of Inheritance

- Possible that part of your estate may end up in the hands of a minor?
- At what age do you want the minor to attain before she/he is entitled to receive her/his share?
- In Ontario, a child will inherit his/her share at 18 unless the will provides otherwise
- Age 18, 21, 25?
- Consider a percentage to be provided at one age, and the remainder at another age.

Will Drafting Considerations

▶ Guardianship

- If you have a child under the age of 18, you should consider naming a guardian
- Ensure the guardian is prepared to accept this responsibility
- Clause is effective for 90 days, if there is not another person with lawful custody of the child (such as another parent)
 - During this period the temporary guardian should apply for a court order for custody of the child

Estate Planning Considerations

- ▶ Family Law Act
 - Do you wish to exclude spouses of beneficiaries from sharing in an inheritance in the event of separation or divorce?
- ▶ Own a business?
 - Consider Multiple Wills to possibly lessen probate fees
 - Succession planning is warranted for business owners
 - Consider a Shareholders' Agreement that considers what happens when a shareholder dies or becomes incapacitated.
 - *****Keep abreast of changes to law*****

Estate Planning Considerations

- ▶ Joint ownership of property
- ▶ TAXES! TAXES! TAXES!
 - Filing Separate Elective Tax Returns Upon Death
 - Use of Principal Residence Exemption
 - Spousal Rollover
 - Medical Expenses in 24 Month Period
 - Testamentary Trusts now taxed at highest tax rate
- ▶ Beneficiary Designations
 - Life Insurance
 - Registered Plans

Estate Administration Tax

- ▶ **NOTE: THIS IS NOT A NEW TAX:**
 - What *is* Different is the REPORTING REQUIREMENTS for which Estate Trustees are responsible and the ENFORCEMENT POWERS of the Ontario Government
- ▶ Estate Administration Tax Act:
 - Amended by Bill 173, Better Tomorrow for Ontario Act (Budget Measures), 2011
 - In effect since January 1, 2013.
 - Amendments are contained in section 4.1
- ▶ The Minister of Revenue now has jurisdiction to enforce the EATA.

History: Estate Administration Tax

- ▶ 1992 – Ontario tripled the then probate rate to 1.5% on estate assets over \$50,000
- ▶ (0.5% on assets under \$50,000)
 - This led to practitioners to focus their energy on the minimization of exposure of estate to the tax; Very successful as revenue collected after 1992 was less than prior to 1992
- ▶ 1998 – Eurig Estate (Re) the SCC ruled the then probate fee to be unconstitutional
 - Ontario was given a six months window to rectify
 - Estate Administration Tax Act came into force

ESTATE INFORMATION RETURN

- ▶ Must be filed within 90 days from the issuing of a Certificate of Appointment
- ▶ Each estate representative must certify the Information Return after reading the verification statement:
 - **“I certify that the information I have given in this return, and in the documents I have provided, is true, correct and complete.”**
 - It is an offence to make a false or misleading statement in the Information Return about any information required under the Act and its regulation. Upon conviction, a person who makes such a statement is liable to:
 - a fine equal to an amount that is at least \$1,000, but does not exceed twice the amount of tax payable by the estate if that amount is greater than \$1,000
 - imprisonment for a term of not more than two years; or
 - both.

For Estate Trustee Protection

- ▶ Estate Trustee to obtain Date of Death Appraisals for all assets
- ▶ E.T. to obtain date of death values for all bank accounts, investments, etc.

For more information or to make an appointment please contact:

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Grow, Protect, and Share your Legacy.