Avoiding Dependent Relief Claims Using Will Substitutes

By Richard Niedermayer

One of the most difficult discussions an estate planning lawyer can have with a client occurs when the client wishes to disinherit a child. Although the legislatures in Canada have placed limits on testamentary freedom, use of a will substitute can be an effective tool for achieving the client's goals.

The nature and extent of dependent relief legislation was examined by George Clarke and Jill Graydon in their article "Moral Obligations Owed by Testators Form Basis of Dependants' Support" in the November 30, 2007 issue of *The Lawyers Weekly*. Similar legislation exists across Canada which imposes limits on testamentary freedom based upon an assessment of the moral obligations owed by testators to various classes of dependants. The dependants to whom these duties arise generally include spouses and children. Spouses will also have recourse to the matrimonial property legislation in each province and avoiding claims by spouses is difficult to achieve (see, for example, *Stone v. Stone***,** [2001] O.J. No. 3282).

However, for various reasons, testators may want to reduce the share of a child to be less than equal with other children or disinherit that child altogether. The reasons behind this will undoubtedly be complex, but assuming the testator has capacity and is not under any undue influence or coercion from another person to make that decision, the role of the estate planning lawyer acting for that client is to advise on ways that the desired outcome can be achieved.

The dependant relief statutes in Canada generally apply to assets that pass through an estate under a will. As such, assets passing through the estate will be caught by that legislation.

How can such claims be avoided? While certainty in this area of the law is difficult to achieve, simple steps can be taken to pass assets to those persons the client wishes to benefit by means other than through a will. These could include:

1. Gifts – giving assets away prior to death to someone other than the child the testator wishes to disinherit is a very effective way to avoid claims by the child. There is no legally enforceable moral duty not to give assets away;

2. Joint Tenancy – assets held in joint tenancy with right of survivorship are transferred on death outside the estate, thereby avoiding a challenge by a child who is not one of the joint owners. Again, there is no legally enforceable moral duty that a child can rely upon in this case. Care must be taken to properly document the intentions of the testator to pass the assets by right of survivorship if the other joint tenant is another child of that testator given the Supreme Court of Canada's recent decision in *Pecore v. Pecore***,** 2007 SCC 17;

3. Beneficiary Designations – life insurance policies and registered assets such as RRSP's and RRIF's which can have designated beneficiaries pursuant to various statutes in each Province also pass outside of the testator's estate directly to the designated beneficiary to the exclusion of the child;

4. Trusts – various types of trusts can be settled during a person's lifetime which provide for the distribution of the trust assets upon that person's death. These can be regular inter vivos trusts or tax preferred trusts such alter ego and joint partner trusts. In most cases, the use of a trust which excludes a child as beneficiary should avoid a dependent claim by that child. However, the recent case of *Drescher v. Drescher Estate,* 2007 NSSC 352 highlights two different ways which a trust could be altered to provide benefits to a child whom the testator otherwise wished to exclude. Although the trust that was varied in the *Drescher* case was a testamentary trust, the rule in *Saunders v. Vautier* and the applicable variation of trust statutes across Canada apply equally to inter vivos trusts, highlighting the weaknesses of trusts if the other beneficiaries consent to or do not oppose a redistribution of the trust assets to the disinherited child.

A significant issue with any of these types of will substitute mechanisms to transfer assets is the income tax consequences. Generally speaking, transferring assets through one of these other mechanisms may create an increased level of taxation. Assuming only children are considered and there is no spousal rollover that would otherwise apply, the issue is generally only one of timing in that tax may be triggered earlier than necessary. Nevertheless, the income tax considerations of each of the alternate means of passing assets must be considered, both as to timing and also as to the incidence of where that tax will fall.

The choice to exclude a child from the distribution of one's estate is not an easy decision. However, in my experience, competent adults who are not suffering any coercion or undue influence may make that decision for a variety of reasons. Once they have decided on how they wish their estate to distributed, the use of a will substitute to transfer those assets to the intended beneficiary can preserve the integrity of that client's desired estate plan.

Richard Niedermayer is a partner with Stewart McKelvey in Halifax and focuses his practice in the areas of estates and trusts, tax planning and corporate/commercial. He is a Past Chair of the CBA – NS Wills, Estates & Trusts Section. His partner, Tim Matthews, Q.C., was counsel for the plaintiff in the Drescher case.