

Wills and Estate Planning

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"Mr. Frosty, it's March.
Time to talk estate planning."

Overview

1. What is estate planning?
2. Powers of attorney/personal directives
3. Wills
4. What happens if you don't have a will?
5. Probate (and probate avoidance)
6. Professional advice

What is Estate Planning?

- Planning directed at:
 - Accumulating wealth
 - Transferring wealth to succeeding generations
 - Protecting wealth from:
 - unnecessary income and probate taxes
 - creditors
 - others challenging the estate plan



What is Estate Planning (cont'd)

Key ingredients:

1. Will
2. Power of attorney
3. Personal directive
4. Discussion with family/beneficiaries



Two Main Areas of Estate Planning

1. Planning for incapacity
2. Planning for death



Planning for Incapacity

- Mental and/or physical
- Key – have something in place **BEFORE** you need it

Power of Attorney

- For mental incapacity
- An authorization for someone else to act on your behalf to make decisions about your finances and property
- Your attorney can do anything you can (a general power) or you can restrict the attorney to certain tasks (a specific power)

Power of Attorney (cont'd)

- If enduring, authority then continues through your incapacity
- Substitute attorney can (and should!) be named
- Effective immediately and used when required
- Alternative: adult guardianship – costly, time-consuming and cumbersome (court-appointed)



Personal Directive

- Personal directive allows you to give another person authority to make health and personal care decisions on your behalf
- An “advance directive” regarding your health

Personal Directive (cont'd)



Personal Directive (cont'd)

- An authorization respecting medical and personal care – specific treatments, life-support, “general philosophy”
- Must be made while competent
- Not effective until proven incompetent
- New *Personal Directives Act* (April, 2010) – broader definition of “personal care”

“Living Will” – sample language

- Near death
- No hope of recovery
- Permanently unconscious
- Medical treatment needed to remain alive

“I express the wish that I not be kept alive by medical treatment. Instead, I wish medical treatment to be limited to keeping me comfortable and free of pain.”

- Can make a crisis/emotional time easier for family

Planning for Death

- Key: Ensuring your assets are disposed of in the manner you wish and that your family is provided for
- Tax minimization is important, but secondary



What is a will?

- Your will is the foundation of your estate plan
- Your executor/trustee is the most important decision you will make
- Role of executors:
 - Your personal representative
 - Trustee and fiduciary

Executors and Trustees - Duties

Duties:

- **1** - take control of property
(professional advice - estate lawyer)
- **2** - pay debts and taxes
(professional advice - estate lawyer and accountant)
- **3** - distribute property according to the will
(professional advice - estate lawyer)
- **4** - administer any ongoing trusts
(professional advice - estate lawyer and financial advisor)

What is a will? (cont'd)

- Legal document dealing with distribution of property on death
- Person who makes the will is the “testator”
- Can be changed any time before death as long as testator has “testamentary capacity”
- Good idea to review every 3 to 5 years, or when circumstances change

Will formalities

- In writing
- Signed at end by testator
- Signed in presence of 2 witnesses

Key elements of a will

- Personal and household effects
- Specific gifts of money, including charitable gifts
- Primary beneficiary (typically spouse)
- Secondary beneficiary (typically children and/or grandchildren)
- Alternative beneficiary (extended family or charity)

Other types of clauses in a will

- Trust provisions
- Beneficiary designations
- Technical provisions (not posting bond, 30-day survivorship, etc.)
- Powers of executors and trustees
- Wishes regarding burial, organ donation
- Guardianship of the person – for minor children (or can be separate document)

Challenges to a will

- Important to minimize chance of a will being challenged. Claims could include:
 - Improper execution by testator
 - Lack of testamentary capacity
 - Undue influence over testator
 - Lost original will
 - Will revoked upon marriage of testator unless made “in contemplation of marriage”
 - Dependent relief claims (spouse and children)

What happens if you don't have a will?

- Intestacy
- Assets distributed according to legislation (first \$50,000 or home to spouse, then rest split between spouse and children in various shares)
- Administrator, not executor
- Legislation doesn't apply to common-law partners
- No guardian appointment, no opportunity for tax or estate planning, no use of testamentary trusts

Testamentary Trusts

- Established in the will at the time of death
 - i.e., all to spouse, *but in trust* . . .
- Assets pass through the estate, but are then transferred to or held by the trustee of the testamentary trust
- Probate tax is generally payable on those assets

Testamentary Trusts (cont'd)

- Income tax savings far outweigh the probate tax over time
- Testamentary trust can take advantage of the graduated tax rates in the *Income Tax Act*

Testamentary Trusts (cont'd)

- Useful in many situations:
 - Spouses who have income of their own
 - Adult children who have income of their own (separate trusts for each child are best)
 - To protect assets from marriage breakdown
 - Consider testamentary insurance trust for existing life insurance policies

Probate - and Probate Avoidance!

Stu's Views

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I'm a performance piece entitled,
"The Probate Experience".



Probate – What is it?

- Probate is the process of obtaining court approval of your final will and the authorization of your executor to act
- Probate is typically required by financial institutions in order to deal with estate assets and ALWAYS for land held solely in the deceased's name
- Why would you consider avoiding the probate process?
 - Probate taxes of over 1.5% on the value of your assets are payable
 - The probate process is public – avoiding it protects your confidentiality



Probate Avoidance

- There are ways to avoid probate:
 - Joint ownership with right of survivorship
 - Naming of beneficiaries (for RRSPs, RRIFs and insurance policies)
 - Trusts established while you are alive – family, “alter ego” and “joint partner”
 - Gifts to beneficiaries before death

The Will Kit: Should I do it myself?

- Many potential traps for the unwary – see “challenges to a will”
- No broader tax/estate planning
- Problems with clauses themselves – “I direct my executor to divide \$45,000 equally between Brad and Sally, and my sister.”
 - Fails to specifically name a beneficiary –which sister?
 - Fails to specify what happens if Brad, Sally or ‘sister’ dies before testator
 - Ambiguous – do Brad and Sally share 1/2 or each get 1/3?

Professional estate planning

- A standard package of simple wills, POAs, PDs and guardianship appointment for a couple is in the range of \$500 to \$600
- Complex family, assets or wishes will increase fees
- Tax planning such as testamentary trusts extra
- Lawyers will often give you a “checklist” to help you get organized and think through issues
- **Planning upfront is much less expensive than litigation afterwards!**
- **Planning helps ensure there is MORE money in your estate to benefit your family after you’re gone.**

Conclusion

- Succession and estate planning are customized processes – each plan is unique
- Various tools are available to maximize benefits and minimize risks
- Goal is to create a customized plan that is best for each person's personal circumstances

A final thought . . .





Questions ?



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