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ESTATE PLANNING GUIDE

Part I – Planning for Death

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INTRODUCTION

Estate Planning is the process of anticipating and arranging, during your lifetime, for the orderly management and disposal of your assets in the event of your incapacity or death. Estate Planning sometimes also includes planning for health and end of life care. The ultimate goal of estate planning can only be determined by the specific goals of the person and can be as simple or complex as the person's wishes and needs direct.

The purpose of this book is to give you a basic understanding of the key issues relating to estate planning in Manitoba. The law relating to estate planning and incapacity in Canada is province specific and laws change over time. This guide does not address the laws in other Canadian provinces and is only current to March 17, 2023.

This Guide is intended to be a high-level summary of key estate planning principles and is intended to guide and inform our estate planning clients prior to our discussions with them.

Estate Planning Basics

Who Should Have an Estate Plan?

Everyone can benefit from having an estate plan in place. By getting the proper advice and planning ahead, you can:

- Make your wishes known and followed, and avoid the default system of distribution which would take place if you did not have a Will;
- Reduces estate administration time and expense, including legal and executor fees, and other fees, taxes, and expenses;
- Ensure that a person you trust will manage your finances and make health care decisions for you if you are incapable of doing so;
- Work towards preserving family harmony; and
- Minimize the risk of any dispute or court challenges.

Beneficiary designations and joint ownership are sometimes useful tools, but they are not a replacement for proper estate planning.

Getting Started: Information Gathering

A good estate plan can only be built on a proper foundation of facts. It is crucial to gather key information about:

- you, your family, and the circumstances concerning your family
- your assets, their nature, how they are owned, as well as your debts and obligations
- your goals and expectations

Fact gathering is a crucial part of the estate planning process. The better we understand the facts, the better the advice we can provide to you.

A properly constructed estate plan needs to consider your current and future assets and your current and future obligations.

Assets: What Does Ownership Really Mean?

Many assets can pass 'outside an estate'.
Assets that pass outside an estate are not governed by the Will.

For many Canadians, it is possible to transfer most of their wealth assets to beneficiaries by owing assets through joint ownership and by making beneficiary designations when available. When that happens, those assets often do not form part of the estate and are therefore not governed by the Will. Whether or not assets should form part of an estate is a whole other question which requires an analysis of that person's circumstances and estate planning goals. Understanding how your assets are owned and organized, and ensuring that these assets will pass as intended on death is one of the keys of proper estate planning. This is why the act of simply making a Will is not a substitute for receiving proper estate planning advice.

Assets to which this may apply include:

- Any real estate, bank accounts or investments owned by two or more people in joint tenancy. If done correctly, joint ownership is an easy way to bypass the Will. If done incorrectly, joint ownership will be the subject of disputes and lawsuits, not to mention creating significant discord within a family.

- Registered Plans such as TFSAs, RRSPs and RRIFs (among others). Most registered plans allow the use of beneficiary designations. When beneficiary designations are in place, the proceeds of the registered plan will be paid directly to the named beneficiary and will bypass the Will. This sometimes makes a lot of sense. Be that as it may, even though the proceeds of a registered plan bypass the Will, the tax liability on those plans does not. If not correctly planned for, a beneficiary designation can have serious tax implications for the estate and can completely upset the planning done in a Will.

- Pensions. Pensions are governed by the Pension legislation to which your employer is subjected, either provincially or federally. Pensions may also be subject to collective agreements or the internal policies of an employer. Often, your pension will be made payable to your surviving spouse. If you do not have a spouse, some pensions impose a payment to your dependent children or your estate, while others allow you to designate your benefits by way of beneficiary designation. Unless your pension is made payable to your estate, the pension will not be governed by your Will and will not form part of your estate.

- Life insurance. Life insurance policies can have designations of beneficiaries. When beneficiary designations are in place, the proceeds of the insurance policy will be paid directly to the named beneficiary and will bypass the Will. With proper planning, proceeds of life insurance can be paid to a designated beneficiary through a trust created in the Will.

Just because assets can pass outside the estate does not mean that they should. A fundamental question of estate planning is whether these assets should pass outside the estate, or whether they should be brought into the estate and governed by the Will.

The use of beneficiary designations and joint tenancy works very well for certain people such as married couples who intend to leave 100% of their estate to each other, with no restrictions on how the surviving spouse deals with the assets later.

Joint Ownership with Your Spouse

If you own an asset (for instance a house or bank account) in joint tenancy with a right of survivorship with your spouse, and you both intend for the asset to pass to the surviving spouse, then on your death 100% of that asset would belong exclusively to the surviving spouse. The asset will not be part of your estate, and no probate is necessary. This can be a very efficient and effective way to hold assets, especially with your spouse.

A house may be:

- Owned by one spouse alone
- Owned by the two spouses as joint tenants with a right of survivorship
- Owned by the two spouses as tenants-in- common

If you are not absolutely certain as to how the title to your house is held, a title search should be done.

On the other hand, if you and your spouse own your home as 'tenants in common' then each of your respective shares of the house will fall into your respective estates. This means that on the death of the first spouse, the share of the deceased's spouse is dealt with by his or her estate.

Joint Ownership with Children

Joint ownership with an adult child is very different from joint ownership with your spouse:

1. Unless the child can prove that you intended to give the asset to them, the asset is deemed to form part of your estate and is subject to probate. Jointly owned bank accounts and houses are an invitation for family disputes and expensive litigation. If you really want to make a gift to an adult child, you absolutely must document your intention, and better yet, you should probably give them the asset outright and not retain a joint interest in it.

2. Adding a child as a joint owner of your property also makes the property vulnerable to your child's creditors, and as a joint owner, your child can prevent you from taking any action with the property, or force you to sell the property.

3. Adverse income tax consequences can be triggered when transferring property to someone who is not your spouse. This is true whether the whole property is being transferred, or even just adding a joint ownership right.

If you want to put any property in joint tenancy with anyone other than your spouse, get advice from a lawyer first.

If you want to make arrangements so that an adult child can pay your bills, a properly drafted power of attorney is the right tool for that, not a joint bank account.

Beneficiary Designations

Beneficiary designations can have unforeseen consequences. Often, people make beneficiary designations without considering their full effect. Others forget to update them following significant events, such as cohabitation, marriage, divorce or separation. Here are a few unfortunate examples of planning pitfalls:

- Designating a minor child under a beneficiary designation: Minor children in Manitoba are not legally authorized to manage their own assets, including inheritances and windfalls. If a minor beneficiary is the designated beneficiary under a plan, the inheritance will either need to be managed by the Public Guardian and Trustee of Manitoba, or someone (usually the child's parent or legal guardian) will have to apply to the Court for the right to manage the child's inheritance. This process is inflexible and usually quite costly. It is often difficult to make funds available for the child while they are growing up. Furthermore, the minor will receive his or her inheritance at age 18 without exception.

- Designating a group of beneficiaries, but not setting out what happens if one or more of them die: Often, beneficiary designation forms set out that if more than one person is named as a beneficiary, then if one dies, the remaining beneficiaries will share in the proceeds. By way of example, if you have named your three adult children as beneficiaries, then the share of your deceased child will go to your other children, and not to the children of your deceased child.

- Tax consequences of the designation of registered retirement plans: It is possible to defer the taxes that become due on your registered investments on death: It is possible to roll your registered retirement plans over to your spouse without income tax consequences, provided that the spouse also elects the roll over. If it is not rolled over to a spouse, then the entire value of your registered retirement plan will be included in your taxable income in the year of death. This can result in your estate having to pay very significant income taxes. If the named beneficiary of the registered retirement plan is not your estate, that individual will receive the whole value of the plan *without any deduction for the taxes payable.* The liability for the tax will be borne firstly by the estate (and thus the beneficiaries of the estate). A well drafted Will can address this issue.

Having assets pass directly to named beneficiaries is a common strategy for keeping assets out of the estate. However, it is not without risk if the beneficiary is anyone other than your spouse who is also the principal beneficiary of your estate.

Know and Consider Your Obligations and Your Options

An estate plan must take into consideration your obligations and commitments.

The obligations that must be addressed include:

- debts, such as mortgages, credit cards, funeral and burial expenses, and unpaid bills;

- income tax liabilities from both before and after death;

- obligations to spouses, former spouses and children under separation agreements, Court orders, under *The Family Property Act* and under *The Homesteads Act*;

- obligations to individuals who are financially dependent on the deceased under *The Dependants Relief Act*

An estate plan should also consider your options and wishes regarding the following matters:

- Management of your finances during any period of incapacity prior to your death (usually addressed via powers of attorney*)*; and

- Who you wish to benefit under your Will, and how you intend to benefit those beneficiaries (immediate distribution, or by way of trusts).

Rights of Spouses and Ex-Spouses

If you give less to your spouse in your Will than what they would be entitled to under the *Family Property Act*, then it is possible for them to make an application to the Court to receive more than you have left them by Will. This would require your spouse, if named as the executor, to renounce as your executor since they would then be in a conflict of interest. The *Family Property Act* applies equally to both married spouses and common-law partners.

If you have any obligations to a former spouse under a Court order or agreement, then those obligations may also bind your estate. If they do, then those obligations need to be taken care of before anything is distributed to the beneficiaries of your estate.

If your spouse does not receive your family home by way of survivorship or as a beneficiary under your Will, then unless your spouse has formally waived their rights, your spouse likely has a life interest in your home. The *Homesteads Act* of Manitoba essentially gives the surviving spouse the right to remain in the home for the remainder of their lives, subject only to the rights of secured creditors.

It is a surprising fact to many that it is possible to have obligations to more than one spouse at the same time. For instance, if you are in a common-law relationship with your current spouse, but have not divorced your former spouse, each of these spouses may have competing claims against your estate.

Equalizing Gifts/Dealing with Loans and Advances

It is not uncommon for a parent to lend or gift money to one or more of their children during the parent's lifetime. Disputes after the fact among the children are common. Accordingly, a good estate plan addresses these head on by doing the following:

1. Properly documenting loans (including the principal, the interest if any, and any repayment terms);

2. Properly documenting gifts; and

3. If appropriate, providing a mechanism in the Will to equalize the inheritance of beneficiaries having regard to prior gifts or loans.

BASIC PRINCIPLES OF WILL DRAFTING

A Will is a document that implements some, but not all, of your estate plan. Specifically, it addresses how the assets that fall into your estate are distributed after your death.

Testamentary Freedom

Subject to the obligations of the estate (as set out above), the basic rule in Manitoba is that a person making a Will has almost complete freedom to decide how they want to distribute their assets at death.

You Cannot Predict When You Will Die

Because a Will speaks from the date of death, it is impossible to know what the value of your estate will be at death. The nature and extent of your assets will change over your lifetime.

As a result, proper estate planning needs to take into account possible future contingencies. For instance, you may want to leave a gift to your grandchildren, but should it be a set amount of money, or a percentage of your total estate? The answer to this question may depend on a number of factors such as the size of the gift, the extent of your wealth and your age. An experienced estate planning lawyer can help you understand all of your options and inform you of the consequences of each choice so that you are fully informed and can make the best decision for you and your family.

Choice of Executor

The executor is the person chosen by the testator to administer their estate in accordance with the Will. The executor also has the authority to handle funeral and burial arrangements. It is the Executor's responsibility to maximize the value of the Estate to be passed to the beneficiaries. When the Executor is also a beneficiary, conflicts may arise between the Executor and other beneficiaries (see conflicts below).

Being an executor is a demanding job that requires skill, integrity and judgment. It is not easy, or quick, or just a favour. Choosing an executor is not about choosing who is nicest or closest to you. It is important to choose a trustworthy person as your executor. It also helps if they are good communicators, as they will be required to communicate effectively with the beneficiaries of your estate.

At the best of times being an executor requires a lot of paperwork and handling forms and money. The executor needs to collect assets (i.e. clean out your house and arrange to have it sold), invest funds prudently, hire and instruct professionals like lawyers and accountants, open and close bank accounts, make decisions on when and how to cash out investments, and complete and file probate forms and tax returns. The executor needs to send and receive considerable correspondence, get advice, make decisions, and keep detailed accounting records throughout. The executor needs to be detail-oriented, prudent, but decisive, and able to carry on the task for months and perhaps several years. Make sure that you choose someone who has the right skills and aptitude.

It is possible to name primary and alternate executors. It is also possible to name joint executors. If you intend to appoint more than one joint executor, you should discuss the pros and cons of joint executorship with your lawyer.

Where does the Executor Live?

Your executor does not have to be a resident of Manitoba, but it makes life easier if they are. Subject to occasional practical issues dealing with assets like houses and personal possessions, there is no impediment to appointing an executor resident in Canada outside of Manitoba. However, it is recommended that the individual be a resident of Canada, as difficulty and added costs sometimes arise when the executor does not live in Canada. There can also be unintended tax consequences, as the location of your estate, for tax purposes, is connected to the residency of your executors and trustees.

Compensation

Being an executor is a demanding job. Executors are commonly entitled to request compensation. An amount in the range of equal to 2-5% of the value of the estate is typical. The amount is dependent on various factors with the overriding principle being that the amount requested must be fair and reasonable.

Avoid Conflicts of Interest

It is very important not to choose an executor who will automatically be in a conflict of interest. When an executor is also one of many beneficiaries, the executor may be tempted to exercise his or her authority in a way that benefits the executor as a beneficiary, at the expense of the other beneficiaries. This is guaranteed to create distrust and often creates acrimony and disputes.

These disputes can destroy families!

For instance, if one of your children lives with you, and the others do not, generally it is a bad idea to choose the live-in child as the sole executor of your estate as their personal interest in continuing to live in the house may be in conflict with their duty as executor to maximize the value of the estate for all of the beneficiaries.

Successor Executors

Wills can last a long time. Someone who was a perfectly suitable executor at one time may no longer be able or willing to act many years later. You should name at least one alternate executor.

Consider Using a Professional

Unless you have a relative or friend who happens to enjoy filing legal forms and doing taxes and accounting, we recommend that you consider appointing an independent professional who is not a beneficiary of the estate to be the executor.

Often, this will get the job done 'better, faster' and without the risk of poisoning family relationships. In addition, many professionals, especially trust companies, will have made arrangements to have someone ready, willing and able to fill the role when the time comes.

LEGACIES, BEQUESTS & RESIDUE

The core of the Will is 'who gets what'. Bequests and legacies are specific gifts of money or property. Legacies and bequests can be set out in the Will as being made no matter what, or only in specific circumstances. For example, you may wish to leave a gift to charity, even though your spouse survives you, or you may only wish to give to charity if your spouse has already passed away. Note, however, that conditions that are contrary to public policy, such as dispositions that require or encourage the trustees or beneficiaries to engage in criminal activity, are not legal.

The residue of an estate is everything that is left over after the payment of debts, taxes bequests and legacies.

When the Primary Beneficiary of the Residue is Your Spouse

A very common form of Will leaves everything to the testator's spouse, provided they are alive. However, this does not satisfy the needs of all couples. If the testator wishes to restrict what their spouse can do with the assets they receive, then they should be talking to their lawyers about the benefits of an Estate Planning Agreement (also known as a Disposition Agreement or Mutual Will Contracts). An Estate Planning Agreement is a type of spousal agreement. A law firm with both estate planning lawyers and family law lawyers will be able to provide proper guidance on this matter.

Such contracts are particularly important to consider in 'blended' family situations; if you want to provide for your spouse during their life, but wish for your children (often from a prior relationship) to benefit from your assets after your spouse passes away, you should consider whether an Estate Planning Agreement or a Spousal Trust makes sense.

Alternate Distribution

It is important to consider who you wish to benefit if your primary beneficiary (for example, your spouse) dies before you, or within a very short period of time following your death. You have the testamentary freedom of leaving your estate to anyone you wish as long as it is not against public policy (for example you cannot leave your estate to a known terrorist organization for the purpose of funding terrorist acts).

Many people wish to name their children, grandchildren, nieces, nephews, friends, charities, or any one or more of them. You may also wish to consider further alternate beneficiaries.

Here are some common examples:

- Primary: to my spouse, if they survive me;
- Secondary: if my spouse does not survive me, to my children in equal shares, provided they survive me;
- Thirdly: if any of my children does not survive me, but has an issue, to pay such child's share to his or her issue in equal shares.

All gifts to minors should form part of a properly structured trust at least until the beneficiary attains the age of 18.

Trusts

Trusts are a powerful tool, but they are sometimes complex and hard to understand. An improperly considered or drafted trust can result in unexpected or unwanted outcomes.

The most common trusts, and the rationale for them, are:

- Spousal trusts, whereby the spouse of the testator has the right to use certain assets during their lifetime, with a gift over to children on the death of the spouse. These are sometimes used in situations where you want your estate to ultimately benefit your children, but you wish to provide some support to your spouse during their lifetime. Key considerations include the choice of trustee, what can be accessed by the spouse and when, and who will ultimately benefit from the trust and when. Tax consequences of a spousal trust must also be considered.

- Trusts for children, which may extend beyond their early adult years to avoid improvident spending (trusts lasting to age 25 or 30 are not uncommon for younger children). These trusts can also be made to last a long time. Key questions include: who is an appropriate trustee, who decides what can be paid from the trust; and when (will you set out those terms, or will you provide discretion to the trustee?), when will the trust be wound up, what happens if the child passes away before the specified age?

- Trusts for adult children are also interesting for various purposes such as preserving governmental support for disabled children or children on social assistance and protecting spendthrift children and those with substance abuse issues.

- Trust for specific assets such as family cottages, mineral rights or business interests.

Trusts are tools that are available to help you ensure that your estate benefits those you wish to benefit, in the manner you intend to benefit them. Trusts are complex and must be drafted with care. The key considerations for every trust are:

- Who should be the trustee?

- Who are the beneficiaries? Are the beneficiaries of the income and capital the same? Who benefits from what is left in the trust once the primary beneficiary dies?

- How much discretion will the trustee have to allocate or distribute income or capital to beneficiaries, or to retain or sell specific assets?

- How long will the trust last, and what will happen when it terminates?

GUARDIANSHIP

Most parents with a child under 18 choose to name a guardian for that child in their Will. The appointment of a guardian in a Will is not binding on the courts in Manitoba but is very persuasive. The Courts - not parents - retain the ultimate authority to appoint a guardian of a child. The expressed wishes of the parent can be an important factor that the Courts will consider, but it is just one of many factors that will be considered by the Court in determining what is in the best interest of the child.

- For some families, the choice of guardian is obvious. For many others, the choice is very difficult. There is no shame in that, but do not let it derail the whole process. It is better to have a Will that does not address guardianship than to have no Will at all.

- Who is most suitable can vary on a number of factors, including the age and development of the child, and the most suitable guardian for your child can change over time.

- Guardianship can be difficult and can consume a lot of emotional and financial resources. Make sure that your proposed guardian has the ability and capacity to look after the child.

- If you can, make sure that you provide sufficient resources for the guardian to provide for your child.

- You should discuss your wishes with the guardian prior to making your Will in order to determine whether or not the person in question is likely to agree to accept the appointment.

RETENTION, REVOCATION, DESTRUCTION, LOSS

Retention

There should only ever be one original of a Will. The original must be provided to the Court when applying for probate. Therefore, it is very important to keep the original Will in a safe place where it can be easily located when needed and without being tampered with or destroyed. It is important to tell your executor(s) where your Will is located. When a Will cannot be located, the increase in expense and delay for the beneficiaries is significant, and the entire estate plan may be voided.

There are a number of options for storage. Here are the consequences of a lost Will:

1. If the Will was last in your possession and cannot be found upon your death, you will be presumed to have revoked your Will. Anyone trying to probate a copy of the Will needs to provide the Court with sufficient evidence to show that you did not intend to revoke it.

2. If the Will was last in the possession of another person and cannot be found upon your death, then the presumption is that you did not intend to revoke it. As such, it will be much easier to have a copy of your Will probated.

If the Will is in your possession, do not tamper with it. Writing on a Will after it has been signed invites litigation. Such changes are seldom done properly, and may or may not be valid. It is often much cheaper to have your Will revised properly by your lawyer during your lifetime than to have your beneficiaries litigate the matter after your death.

Destruction

A Will that is destroyed by the testator is revoked. You can revoke a Will by tearing it, burning it, or otherwise destroying it. Generally, if you make a new Will you should destroy previous ones.

Wills & Marriage & Divorce

In Manitoba, a will is automatically revoked upon marriage, unless the will was made in contemplation of the marriage or of a common-law relationship with the person you eventually marry (i.e. Your Will needs to specify your intention that the will remain valid after your marriage to the person in question).

A Will is not automatically revoked by a divorce. Instead, it is read as if your ex-spouse died immediately prior to your death. Thus references to the ex-spouse as executor and beneficiary are nullified, but leaves the rest of the Will intact, for better or worse.

Generally, if you separate from your spouse or common-law partner, you should consider immediately creating and signing a new will. You should also review and update all of your beneficiary designations on things like life insurance policies and registered plans.

MULTIPLE WILLS

You should only have one original of each Will that deals with any given asset. However, it is not uncommon to have more than one Will, with the different Wills dealing with different assets. This technique is particularly useful for dealing with assets in another jurisdiction. If you own property in Manitoba and property in Florida, it is quite possible that it would be best to have two separate Wills. You may even have two separate executors. This may make getting probate in each jurisdiction and administration of each estate simpler.

Obviously, it requires some finesse to properly draft multiple Wills. In particular, it is very important to make it very clear which Will deals with which assets, to make sure that all assets are dealt with, that the overall disposition of the estate to beneficiaries meets your intentions, to ensure that each Will is valid and enforceable in the jurisdiction where it applies (no point following Manitoba law for a will that will govern assets in Florida) and to ensure that one Will does not revoke the other(s).

AMENDMENTS

The best practice when making substantial changes to a Will is first to revisit and update the estate plan, and then, if necessary, make an entirely new Will from scratch. Remember, making changes to a Will without confirming that they are consistent with the estate plan is very risky.

Historically, when typing was difficult, Wills were amended by "codicil". To be admitted to probate, a codicil must meet all of the formalities of execution as a Will. Your lawyer may still recommend using a codicil in limited circumstances as they deem appropriate, however in many circumstances where changes are needed drafting a new Will is the most appropriate way to make changes to your estate plan.

Making changes to your Will is not recommended. Handwritten notes and edits on the face of a signed Will are often invalid as they do not meet the formalities of the *Wills Act*. They also frequently create great confusion, cost or disputes – a court application to determine the validity of the changes will usually be required, and if interested parties are not happy with the changes, they may choose to litigate.

The Consequences of Intestacy

In Manitoba, if you die without a Will ("intestate" or "intestacy" are the formal legal phrases), *The Intestate Succession Act* of Manitoba sets out who will benefit from your estate. There is no discretion to benefit someone else, no matter what your relationships were like during your lifetime.

You will also not get to choose who will administer your estate. That right will go to your next of kin who is living in Manitoba. If you have none, then your next of kin may need to hire a professional executor, such as a trust company, to administer the estate since the administrator must be a resident of Manitoba.

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