

The ABCs of Estate Planning in Ontario

Wills, Powers of Attorney and much more

Presentation to

Wellspring Cancer Support Foundation

November 8, 2007

Mark Blumberg



www.blumbergs.ca

Overview

- ❑ comprehensive estate planning
- ❑ basic estate planning documents
- ❑ no one size fits all and avoiding litigation
- ❑ questions
- ❑ presentation is not legal advice, if you have concerns retain a lawyer



Comprehensive Estate Planning

- ❑ determining assets, their value, how assets are held, their location
- ❑ personal and family values
- ❑ careful selection of executor
- ❑ professional advisors – lawyer, accountant, financial advisor, insurance agent
- ❑ insurance and liquidity



Comprehensive Estate Planning (cont)

- ❑ beneficiary designations
- ❑ trusts – income tax, probate, creditors
- ❑ family law – agreements, litigation
- ❑ business succession planning
- ❑ minimize probate and income taxes,
tax efficient transfer of assets



Comprehensive Estate Planning (cont)

- ❑ guardianship and dependent relief
- ❑ cottages and sentimental property
- ❑ charitable goals, bequests, private foundations
- ❑ understanding how assets will pass on after death
- ❑ asset protection for estate and for beneficiaries



Basic Estate Planning Documents

- Will
- Power of Attorney for Property
- Power of Attorney for Personal Care
- Trusts



Why have a will?

- ❑ pick your executor, alternate executor
- ❑ transfer assets on death
- ❑ avoid legislation, such as SLRA, deciding on who benefits from estate.
- ❑ create spousal trust – defer taxes.
- ❑ create multiple testamentary trusts to reduce taxes.



Why have a will (cont)

- ❑ trusts for children – prevent PGT dealing with assets of minor children
- ❑ avoid conflict and litigation
- ❑ legacies to friends
- ❑ bequests to charities – benefit charities you care about and tax savings
- ❑ Appoint guardian of minor children



Intestacy (no valid and available will)

- ❑ Succession Law Reform Act (Ontario) determines who gets share of estate
- ❑ joint assets by right of survivorship
- ❑ estate (after liabilities) – preferential share (200G) to spouse, if spouse and 1 child (s ½, child ½), if spouse and 2 or more children (s 1/3, children 2/3), if no spouse and no issue then parents, then siblings, nephews and nieces, other next of kin, then Crown.
[spouse - not common law]



Intestacy (no will) (continued)

- ❑ Certificate of Appointment of Estate Trustee Without a Will (Letters of Administration)
- ❑ effective from date of grant, not death
- ❑ who can apply – spouse, children, grandchildren etc.
- ❑ has to be resident in Ontario



Continuing Power of Attorney for Property

- ❑ property can be dealt with if incapacitated, outside country, kidnapped, killed but no body found
- ❑ delegate financial decision making
- ❑ concern with misuse and abuse
- ❑ Substitute Decisions Act (Ontario)



Power of Attorney for Personal Care

- ❑ incapacity
- ❑ legally binding – not “living will”
- ❑ health care, nutrition, shelter, clothing, hygiene, safety
- ❑ make your wishes understood in terms of attorney and guidance.
- ❑ *Substitutes Decisions Act (Ontario)*



Trusts in Estate Planning

- ❑ Settlor gives property to trustee to use as directed in trust for benefit of beneficiaries.
- ❑ spousal trust, family trust
- ❑ inter vivos vs. testamentary
- ❑ Henson trust – children with disabilities



What are your Assets?

- ❑ house – principal residence - mortgage - ownership
- ❑ other real estate - investment properties or cottage
- ❑ personal property, jewellery, cars etc.
- ❑ marketable securities, GIC, stock options
- ❑ private company shares – shareholders agreement



What are your assets? (cont)

- pension
- life insurance – term vs. whole life
- bank accounts
- safety deposit box
- likely inheritances?



Personal Property and Memoranda

- ❑ Will – can be general about personal property in will such as give it all to spouse or children
- ❑ precatory memoranda
- ❑ legally binding memoranda
- ❑ Will – can bequeath specific personal property in text of will



Residue and Beneficiaries

- ❑ spouse and spousal trust
- ❑ children and multiple testamentary trusts
- ❑ testamentary trusts taxed at progressive rates
- ❑ other family and charities
- ❑ per stirpes – if child predeceases



Bequests and Charities

- ❑ leaving a legacy
- ❑ avoiding common bequest mistakes in wills such as name of charity, proper legal wording, restrictions, # of charities and structure, tax
- ❑ advantages and disadvantages of bequests
- ❑ why I love bequests!



Executor and Attorney for POA

- ❑ one of the most important decisions
- ❑ trustworthy, fair, impartial, knows limits of knowledge, no conflict of interest, age
- ❑ preferably lives in Ontario and nearby
- ❑ has time/interest/availability
- ❑ usually spouse



Executor and Attorney for POA (Cont)

- ❑ usually 1 and alternate
- ❑ if more than 1 consider decision making
- ❑ corporate executors (Scotia, RBC, TD, BMO)
(length of trusts, residency, specialized skills)
- ❑ special executors (foreign or unusual assets)



Executor Compensation and Guidelines

- ❑ depends – quantum, responsibility and risk, time spent, skill, results and success
- ❑ 2.5% of capital receipts of the Estate,
2.5% of capital disbursements,

2.5% of the total revenue and
disbursement

0.4% Annual fee for average annual
market value of the capital
- ❑ will or agreement can set
amount



Executor Compensation and Guidelines (Continued)

- ❑ shared if more than one executor
- ❑ executor can take less



Avoiding estate litigation

- ❑ can destroy relationships
- ❑ can cost a lot of money
- ❑ can hold up estate
- ❑ can result in unintended beneficiaries
- ❑ often easily avoided



Ten Ways to Encourage Litigation

- ❑ treat children differently in a will without any obvious justification or explanation
- ❑ poorly thought out estate plan and poorly drafted wills.
- ❑ cottages and other sentimental property
- ❑ dramatic changes just before death
- ❑ inadequate provision for dependents



Ten Ways to Encourage Litigation (Cont)

- ❑ making an unusual will without testamentary capacity
- ❑ picking the wrong executor
- ❑ second marriage and little consideration of children of first marriage
- ❑ not updating will especially after separation and before divorce
- ❑ joint tenancy with someone other than spouse



Estate Administration

- ❑ will vs. no will
- ❑ post mortem planning
- ❑ executor's duties
- ❑ executor's year
- ❑ Certificate of Appointment and Probate fees



Children with disabilities

- ❑ taking care of children with disabilities
- ❑ Henson Trust – absolute discretionary trust
- ❑ importance of understanding costs of care
- ❑ trustees and alternates that will survive child
- ❑ acceptable to treat children differently when disability



Cottage properties

- ❑ sentimental
- ❑ tax
- ❑ upkeep – regular and capital
- ❑ not all beneficiaries use equally
- ❑ some times better to transfer before death



Probate avoidance - it is overrated

- ❑ probate 1.5%, income tax 46%
- ❑ dangers of poorly thought out approaches
- ❑ common – insurance, jointly held assets with spouse and multiple wills
- ❑ avoid disposition and income tax liability
- ❑ compared to US estate tax



Asset Protection

- ❑ Incorporation
- ❑ Trusts
- ❑ beneficiary designation and life insurance
- ❑ risk management and insurance



Insurance

- ❑ especially important for those with few assets and lots of responsibility
- ❑ concern about uninsureability
- ❑ up to date beneficiary designations
- ❑ creditor protection –in certain circumstances like irrevocable direction to person, spouse/child/parent, (policy vs. proceeds, creditor of insured vs. creditor of beneficiary)



Foreign Assets

- ❑ adds complexity
- ❑ multiple wills and international wills
- ❑ US and other death taxes
- ❑ foreign restrictions on currency or assets
- ❑ should foreign executor or special executor be used?



Formalities and Wills

- ❑ **holograph will** – only in testator's own handwriting, not stationer's form (only signature of testator required, no witnesses)
- ❑ **typed or computer printed will** -
testator signature plus
- ❑ 2 witnesses (over 18, not spouse or beneficiary or executor)
- ❑ witnesses and testator present together at the same time



Formalities and Wills (continued)

- ❑ only make one copy of will
- ❑ affidavit of execution (commissioning)
- ❑ courts do not have power to cure errors in execution
- ❑ initial bottom of each page
- ❑ wills safe rather than safety deposit box



Revocation of Wills

- ❑ marriage revokes will unless wording that will made in contemplation of marriage
- ❑ new will or writing
- ❑ separation does not revoke will
- ❑ divorce – voids gift to spouse
- ❑ alterations?



Multiple Wills – Assets in different countries or probate minimization

- ❑ when property in different countries
- ❑ when valuable private company shares to avoid probating private/secondary will
- ❑ if \$10,000,000 in private company shares then save \$150,000 in probate
- ❑ Primary (Public) will for all assets except private company shares/personal property
- ❑ Secondary (Private) will for private company shares and personal property



Estate Freeze

- ❑ private businesses
- ❑ way to pass on shares etc to another generation while minimizing taxes
- ❑ if not done right it can be a disaster
- ❑ future growth in hands of trust for benefit of children etc.



To use or not to use a lawyer?

- ❑ no requirement to use lawyer for estate planning and document preparation
- ❑ increasing use of will kits and computer programs – buyer beware
- ❑ legal advice and expertise versus document preparation
- ❑ depends on assets, interests, time, skills, impartiality and experience



Initial Meeting with lawyer

- ❑ Assets –what, located where, how much, how is it held (questionnaire)
- ❑ Executors and Guardians
- ❑ Family and obligations and interests
- ❑ Instructions
- ❑ Costs



More Information

<http://www.blumbergs.ca/estate.php>

Mark Blumberg

Blumberg Segal LLP

1202-390 Bay Street, Toronto, ON M5H2Y2

www.blumbergs.ca mark@blumbergs.ca

TEL: 416-361-1982 x. 237

FAX: 416-363-8451



www.blumbergs.ca