Houser Henry & Syron LLP

Later Life and Estate Planning

Our 'Top Ten' list of issues you should be aware of when doing your later life and estate planning.

Not planning for the future can bring undesirable and unexpected consequences, and dealing with these consequences can be very expensive and time-consuming.

Later Life & Estate Planning

Many people find planning for possible mental and physical decline or death a frightening and overwhelming experience. It doesn't need to be. Let us help you make arrangements for later life and create an estate plan that reflects your particular needs and desires.

Planning is a dynamic process: it is important to keep plans current and revisit them whenever your circumstances change.

The following is our list of the 'Top Ten' issues that we think everyone needs to know about later life and estate planning.

1. If you were to die without a Will ('intestate'), your wishes could not be taken into account in the distribution of your property and assets.

Without a written Will your property will be distributed according to a scheme set out by the Ontario government. According to this scheme, if you leave a spouse and no children, the entire estate will be given to your spouse. A different division will occur if you leave a spouse and a child. If there is no spouse, no children, no grandchildren and no parents, your surviving brothers and sisters will inherit your estate.

There is no provision made for any special circumstances, such as a common law spouse (under the laws of intestacy only a legally married spouse can inherit). A surviving common law spouse may apply for some relief under the 'Support of Dependents' laws, but this takes time and involves additional costs.

Decisions you might have made, say, to leave a greater share to one of your children, or make gifts to friends, charities or godchildren, cannot be taken into consideration without a written Will.

2. Granting a Power of Attorney avoids the emotional, slow and expensive process of making a Guardianship application.

Under circumstances where you are not capable of making decisions about your personal care or property (following a severe stroke, for example), the person you have designated in a Power of Attorney document will make these decisions for you.

If you have not named an Attorney, someone (often your spouse or a close relative) will need to apply for guardianship to make these decisions on your behalf. As this application must be approved by a court, it is an expensive process, which can cost thousands of dollars compared to the relatively small amount it costs to set up a Power of Attorney.

As the incapable person is deemed to benefit from the appointment of a guardian and "ought to have planned" for this development, he/she must bear all the expenses associated with the application. Financial costs aside, the application process is also often distressing because until a guardianship order is granted, no one can access your funds and those funds may be required for your care. Furthermore, the guardian who is appointed may not be the person you would have chosen. Planning ahead and granting a Power of Attorney makes things easier for everyone if tragedy strikes and the 'inconceivable' happens.

3. 'Living will', Last Will and Testament, and Powers of Attorney: three distinct and separate documents.

A 'living will' and Power of Attorney are valid only during your lifetime, and as such are separate documents from your last Will and Testament, which deals solely with the distribution of your property and assets upon your death.

Designating someone as executor in your last Will and Testament does not empower him or her to act as your Attorney for personal care or property decisions during your lifetime. Similarly, a 'living will' is not a substitute for a Power of Attorney for Personal Care, but is often included in a Power of Attorney for Personal Care. A 'living will' (also called an 'advance directive') is a specific set of instructions to your Attorney (and others) should you become seriously ill and unable to communicate. A 'living will' usually addresses whether or not you wish to be kept alive by artificial means if there is no possibility that you will get better.

4. A 'Do-it-Yourself' Will Kit does not substitute for a lawyer's knowledge, experience and judgment, and may result in a Will that is invalid or especially vulnerable to attack.

The following are four areas where people who use a kit to write their own wills may run into difficulties:

- **Observing formalities**: A lawyer specializing in Wills and estates will ensure that all the formal requirements for last Wills and Testaments in Ontario are met. Failure to observe these formalities can invalidate your Will. For example, your Will should be witnessed by two people, neither of whom are named as executor or beneficiaries under the Will. After you have signed the Will, they must sign acknowledging your signature.

- **Testament capacity**: It is a requirement that the person creating the will (the 'testator') has the ability to write a legally valid will ('testament capacity'). Incapacity is often alleged by those opposed to the Will and who instead favour prior Wills or intestacy. Wills written shortly before the testator's death are particularly vulnerable to attack. At the time of the Will's creation, a lawyer takes the necessary measures to test for the testamentary capacity and therefore minimize the risk of potential challenges to the Will's validity.

- **Addressing legal obligations**: A lawyer will analyze your particular situation and help create a Will which addresses all of your legal obligations, such as those to dependants (see #5).

- **Potential Conflicts**: A prudent lawyer will advise you of any foreseeable conflicts created by the Will. For example, should you wish to give one of your children more than the others, a lawyer can help you draft a clause in your Will or in a letter left with your Will in which you explain your reasons for doing so. This can ease any potential conflict and help avoid estate litigation.

5. You cannot necessarily do whatever you wish with your property and assets.

Under Ontario's 'Support of Dependents' laws, any dependents left out of your Will are entitled to apply for relief upon your death. If they are successful, they will receive part of your estate, even if this goes against your express wishes. Dependency is established if you were providing support (or had a legal obligation to provide support) or giving someone financial support during your lifetime. This obligation to them continues after your death. Full disclosure to your lawyer will be necessary to determine your obligations, which might include:

- Spouses: Any of the following can make an application under the 'Support of Dependents' laws: a legally married spouse, a common law spouse of over three years, a common law spouse with whom you have a child, or a spouse whom you have divorced. Family law requires that your surviving spouse receive a significant portion of your estate, particularly when the house in which

you were living (the 'matrimonial home') is a major part of your estate. A legally married spouse may be entitled to up to 50% of your estate. Ex-spouses to whom you were making support payments are also entitled to part of your estate.

- Children: You may also be required to provide for your children, whether adopted or biological, particularly if they are minors or under a disability. Grandchildren also have a claim if you treated them as your children and supported them. If you have looked after dependent siblings during your lifetime, they can also make a claim against your estate.

6. Adding someone to your bank account may have unanticipated consequences.

In situations where you want someone to help you with your financial affairs (such as paying bills), naming someone as your Attorney in a Power of Attorney for Property is a safer choice than simply giving someone access to your bank account. Your Attorney for Property owes you certain obligations, amongst them using 'reasonable care' when managing your affairs and not obtaining secret profits. Misappropriation or mismanagement of your property by someone you have added to your account is more difficult to challenge.

Consult with your lawyer before you add someone to your account, because there are consequences to your estate. Consider the following.

- If you have added a spouse to your account, it will be presumed that the account was intended as a 'gift'. Upon your death, your spouse will receive that account entirely and will not be required to share it with your other beneficiaries. The same applies when a parent adds a minor child (under eighteen years of age) to an account.

- When a parent adds an adult child to a bank account, a court will presume that the parent intended for that child to hold the account 'in trust'. This means that the account is not a gift to your child and will be divided among all beneficiaries of the parent's estate. If this is not your intention, you must provide evidence (such as a clause in your Will) that you wish to give your child that specific account.

7. Benefits and drawbacks of naming a beneficiary of an asset directly.

- Benefits: Naming a beneficiary on an asset (such as an RRSP, pension plan or life insurance policy) allows that asset to pass directly to that person upon your death. Because it will not form part of your estate, probate fees (also known as estate tax) will not be payable on that asset. There are circumstances where designating a beneficiary can protect an asset from creditors. A lawyer can address these complex issues in your estate plan.

- Drawbacks: The designated beneficiary of an asset is not required to share that asset with others named in your Will, even if that was your intention. A further drawback you may wish to discuss with your lawyer is that your estate will still be responsible for paying capital gains taxes on assets which have been designated to particular beneficiaries.

8. You can change or revoke your will or Powers of Attorney. Revisit your Will periodically to ensure that it still reflects your wishes and current circumstances.

Although an out-of-date Will can still be admitted in probate, it causes problems which can result in delays in estate administration. If, for example, you have sold the cottage you had written in your Will as going to your son or daughter, your Will should be amended to remove this clause.
Similarly, if it is no longer possible or appropriate for someone to act as your Attorney or Executor, a substitute should be designated.

9. A Power of Attorney can be tailored to your specific needs and desires.

You are not required to give an Attorney absolute control in a Power of Attorney document. Clauses can be added to limit their power. You may not wish to give your Attorney for Property the ability to mortgage your home, for example. Your lawyer can guide you in any areas of concern. In a case where you might outlive your Attorney for Personal Care, for example, an alternate Attorney should be designated.

10. Attorneys, guardians and executors may be paid for their efforts on your behalf.

These roles come with significant responsibilities and remuneration is appropriate. There is no strict rule setting out the amount of compensation an executor may receive. There is, however, a general guideline which has evolved. Generally, an executor is entitled to 5% of the value of the estate. An executor for a large estate may be paid significantly more than one for a small estate. It is advisable to discuss remuneration with your future Attorney and Executor. Your lawyer can write a specific clause within your Powers of Attorney documents and your last Will and Testament dealing with this issue.

11. Bonus: If you write a Will and then get married, your Will is likely invalid.

It is presumed (correctly or incorrectly) that you did not account for your new spouse in any Will written prior to marriage. As mentioned in #5 in the discussion of 'Support of Dependents', your spouse may be entitled to a significant portion of your estate. If you draft a will before marriage but have accounted for your soon-to-be spouse in your will, it is advisable to clearly state in the Will that you are creating this last Will and Testament 'in contemplation of marriage'.

Powers of Attorney and Guardianship

Powers of Attorney are powerful documents that allow a person appointed as the 'Attorney' to make decisions for someone who has become incapable of making decisions regarding his or her personal care or property. The Attorney should be chosen carefully.

- Powers of Attorney for Personal Care are required for decisions regarding a person's residence, medication or treatment.

- Powers of Attorney for Property are required to deal with a person's bank accounts, investments and real estate.

If a person becomes incapable without having appointed an Attorney, no one is authorized to make decisions about his or her property. With regards to personal care, the law allows close relatives to make limited decisions regarding a person's treatment but does not allow relatives to have access to a person's health records or make decisions about admission to a hospital or other care facility. To be able to make these decisions, an application must be made for guardianship. These applications are lengthy and expensive, even if the applicant would have been the natural choice for the role.

As is the case with Powers of Attorney, there are two types of guardianships: Guardianship for Personal Care and Guardianship for Property.

A number of documents are required to convince the court that the guardianship is necessary and the proposed guardian is acceptable. These documents include:

- An affidavit setting out the background information regarding the incapable person's mental health;

- The consent of the proposed guardian and relatives;

- A management plan listing all of the incapable person's assets and setting out the proposed guardian's plan for managing such assets;

- Assessments of the incapable person by designated capacity assessors; and
- Medical evidence in the form of affidavits.

Once a guardianship order has been made, guardians have a number of duties. They are required to exercise their powers and duties diligently, with honesty, integrity and in good faith for the incapable person's benefit. They are also required to encourage the incapable person to participate in decisions wherever possible and to consult with the incapable person's family and friends. There are also important duties regarding the management of property. Guardians of property are required to keep the incapable person's property separate and should present an accounting of such property to the courts every few years for approval.

If you need assistance with a power of attorney or a guardianship matter, please contact us. We would be pleased to help you with this important and challenging task.

If you would like more information on this topic, please contact us.

About Houser Henry & Syron LLP

For over 75 years, Houser Henry & Syron has helped entrepreneurs and private companies of all sizes grow and prosper. We provide a range of business law services - from assisting with day-to-day legal requirements to providing strategic counsel on highly complex transactions. We are uniquely positioned to provide high-quality legal advice, tailored to the specific needs of our clients, at a reasonable price.