



VOLUME TWO

**FROM US
TO YOU:
SELECTED
BLOG POSTS**

O'SULLIVAN

ESTATE LAWYERS



O'SULLIVAN

ESTATE LAWYERS

O'Sullivan Estate Lawyers LLP
TD Bank Tower, Toronto-Dominion Centre
66 Wellington Street West, Suite 3430, P.O. Box 68
Toronto, ON M5K 1E7

www.osullivanlaw.com

Contents

3 Message: From Us to You

4 Estate and Trust Planning

- 6** Leaving Wealth Well to the Next Generation and Beyond
- 8** Trusts and “Total Return” Investing in Challenging Times: Adopting a Winning Approach
- 11** What’s Tax Got to Do With It? Trust Planning in Wills After Graduated Income Tax Rates are Eliminated
- 13** Proactive Charitable Giving: A Balancing Act
- 16** Using Trusts: The Future is Bright
- 19** One Key Ingredient for a Successful Estate Plan: Proper Asset Alignment
- 22** Considerations in Appointing Guardians of Minor Children Under Wills
- 25** Filtering out the Noise in Your Estate Planning
- 27** The Many and Varied Uses of Letters of Wishes in Your Estate Plan
- 30** Start the New Year Off on the Right Foot
- 33** Special Needs Planning: Knowledge is Power
- 35** Safekeeping of Original Estate Planning Documents: Hard Copies are Hard to Replace

38 Fiduciary Administration

- 40** Processes for Activating Powers of Attorney — Do You Know Where Your Documents Are?
- 43** Confidentiality *Matters*: Thoughts on Death and Privacy
- 46** Towards a More Just Society: Law Commission of Ontario Breaks New Ground on Decision-Making
- 49** Fiduciaries, Mom and Apple Pie

52 Cross-Border & Multijurisdictional Planning & Administration

- 54** New EU Rules for Cross-Border Succession Now Apply from August 17, 2015
- 57** New Developments in Interjurisdictional Incapacity Planning
- 60** Canada, the U.S. and Going Borderless: Nowhere to Hide
- 62** Don’t Let Cross-Border Properties Turn into Cross-Border Pains
- 64** Appointing Non-Resident Attorneys for Property: Important Considerations
- 67** For Better or For Worse...Especially If You Move
- 69** Fun in the Sun, Until the Probate Court Comes?
- 71** Multiple Taxation on Death: The Taxpayer’s Nightmare
- 73** Tax Reform Revealed: Will the U.S. Become the Best Next Tax Haven?

76 Thought Leadership

- 78** On Death and Dying: The Supreme Court of Canada’s Landmark Decision in *Carter v. Canada* (Attorney General)
- 80** Keeping Your Estate Plan Healthy with Periodic Check-Ups
- 82** Family Meetings: An Underutilized Tool
- 84** Zen and the Art of Estate Plan Maintenance
- 86** Redefining Family
- 88** Ethos for an Aging Society
- 90** Best Interest — Conflict of Interest: The Provision of Financial Advisory and Financial Planning Services
- 92** The Family Wealth Conversation — Too Little, Too Late?

94 About the Blog Team

Message to You

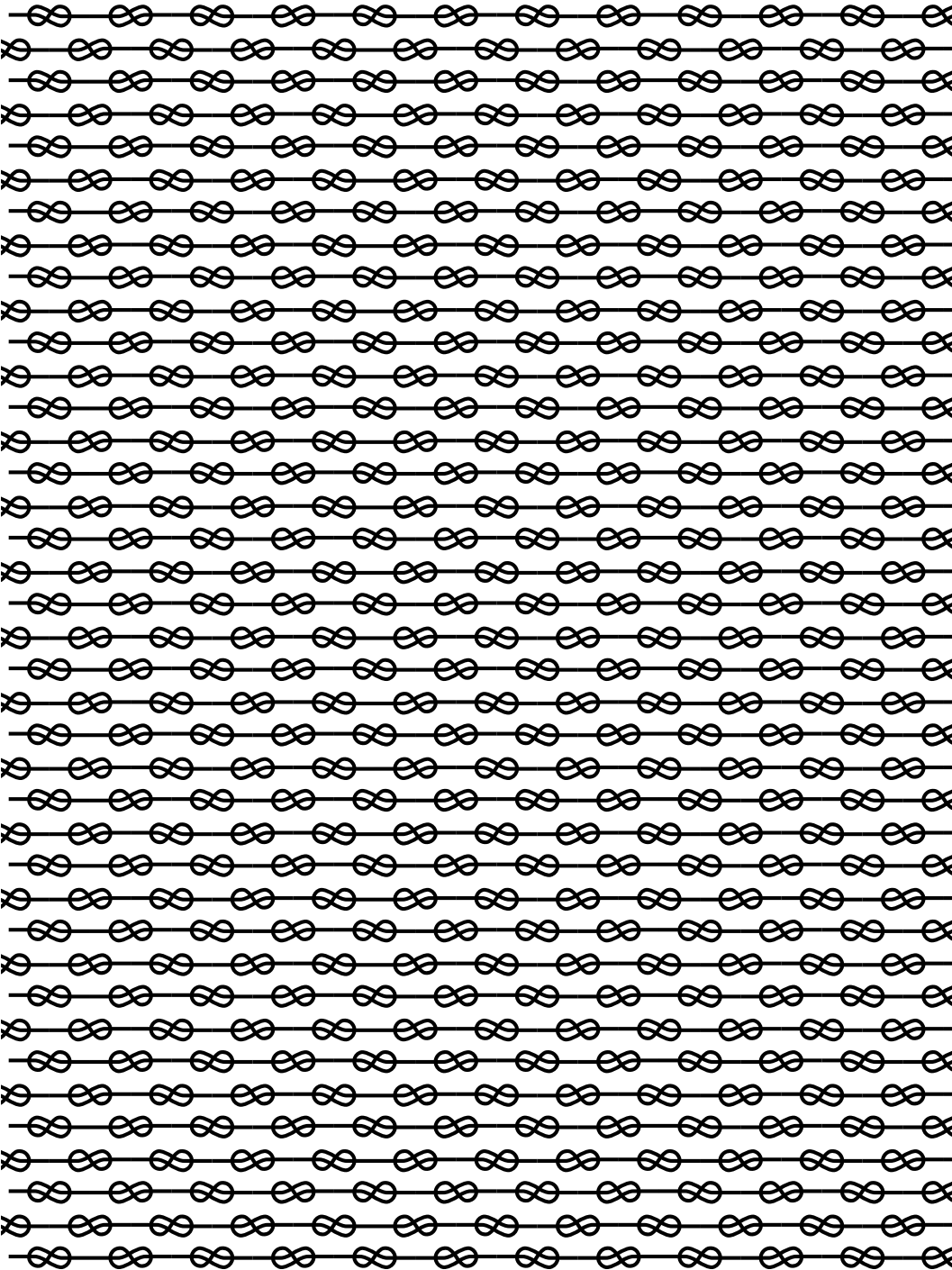
OVER 80 BLOGS AND ALMOST 4 1/2 YEARS LATER we have touched our blog readers one post at a time. Our goal has been to provide a few “pearls of wisdom” — easy to comprehend, relevant, and when strung together, an important and valuable collection of current domestic, cross-border and multijurisdictional trust and estate issues. We have strived to be clear, concise but also provocative. What is most satisfying is receiving positive feedback from many of our readers that our posts are insightful, knowledgeable and useful.

Our readership has grown significantly, as has the number of our blog posts. We would like to thank our readers for joining us on our journey and for being regular passengers along the way. It’s been both fun and energizing.

In Volume Two, we have compiled a selection of our posts from 2015 to 2017 — a gift from us to you. And when you’re done perusing, please feel free to pass it on to a colleague or friend and encourage them to embark on the journey at **www.osullivanlaw.com/blog/**. *We also encourage you to join us on LinkedIn!*

Sincerely,

— O’Sullivan Estate Lawyers





ESTATE & TRUST PLANNING

Leaving Wealth Well to the Next Generation and Beyond

June 10, 2015

FROM TIME TO TIME IN THE NEWS we read about wealthy celebrities and business magnates who have publicly stated that their offspring should not expect to receive any sizeable inheritance upon the parent's death. In recent years, these pronouncements have come from a variety of people including Sting, Warren Buffett, Bill Gates, Gloria Vanderbilt and the late Dame Anita Roddick (founder of The Body Shop).

The frequently cited reasoning for this decision is that parents do not wish a sudden windfall inheritance to be a disincentive to their children in leading ambitious, productive, healthy and self-reliant lives. Moreover, some see significant — and non-monetary — intrinsic value in the fact that their money was self-made, and believe that their children should have a similar opportunity in forging their own paths and achievements, while cultivating their own personal wealth and self-worth.

These can certainly be valid and serious concerns. Instead of going to the extreme of complete or near disinheritance, however, it is possible to pass wealth on to the next generation and beyond in structured and well-thought-out ways that address and alleviate many of these issues.

One method of planning for the transfer of wealth to the next generation and beyond is through the use of a trust (either testamentary or *inter vivos*). A trust can have the benefit of delaying wealth transfer to children and grandchildren over a sustained period of time, with distributions being made at specified intervals such as upon reaching certain ages or dates well into adulthood. The trust can be tailored to meet a beneficiary's specific needs (and anticipated future needs) as well as the aspirations of the person establishing the trust. A trust can also ensure that the funds are managed by financially astute trustees who can see to the investment and distribution of

the income and capital for the child's/grandchild's benefit within the trust's parameters, while helping to preserve capital for the long-term.

Other creative but perhaps controversial wealth transfer techniques can be incorporated into a trust structure to further ensure that children or grandchildren have incentives and motivation to pursue their own success and self-sufficiency. So-called incentive trusts can stipulate, for example, that beneficiaries receive distributions or other incentives (such as having student loans paid off) upon the successful completion of a variety of education-related events (e.g., obtaining a bachelor's degree, a master's degree, etc.). Another idea is to use a "matching fund": once a child has graduated school and is employed, the trust is structured to match his or her income on an annual basis for a specific period of time. The more income a child makes at his or her profession, the greater the annual distribution from the trust.

Gifting funds to your children or grandchildren while you are living (provided that, of course, you have plenty of assets to look after your own needs and lifestyle first) may also be an option. These gifts could be tied to certain milestones in growing up — for example, funding post-secondary education, the down payment on a first home purchase or a business start-up. Smaller, structured gifts for defined purposes while you are living may provide you with the ability to be part of the decision-making process and allow you to guide and educate your children in the development of their financial literacy and business acumen — while also permitting you to observe how they handle money.

Leaving wealth well to the next generation and beyond may also involve holding candid family meetings and/or preparing ethical wills (see our November 25, 2014 post) in which you outline your reasoning for making certain decisions in formulating your estate plan, as well as your aspirations and expectations for the next generation.

As with all estate planning matters, proper advice and coordination among your professional advisors is critical in formulating an efficient and effective plan tailored to your particular situation.

Trusts and “Total Return” Investing in Challenging Times: Adopting a Winning Approach

July 2, 2015

ONE OF THE PERCEIVED DISADVANTAGES to using a trust in estate planning is that restrictions on trustees' investment decision-making under trust law will result in lower investment returns. In particular, this is a concern where a trust has an income beneficiary to whom income is paid, usually for his or her lifetime (frequently used where there is a surviving spouse), and on the income beneficiary's death, capital is paid to one or more capital beneficiaries.

The major overhaul to modern trust legislation in many jurisdictions, including to Ontario's *Trustee Act* in 1999, resolved the historic issue of inflexible restrictions placed on trustees' choice of investments to what was called the “legal list” of conservative, income-oriented investments. The adoption of the prudent investor rule in modern trustee legislation allows trustees to invest in any investment a prudent investor would. As well, under such legislation, including under the Ontario *Trustee Act*, trustees are to focus on the total return of a trust's investment portfolio.

The problem trustees are confronted with where there is an income beneficiary, followed by a capital beneficiary, is achieving a fair balance between generating income for the income beneficiary who is entitled to the trust's income, including interest and dividends, while ensuring — at a minimum — preservation of the trust fund's real capital value adjusted for inflation, where the trust provides for an equal balancing of the income and capital interests.

In our low-interest, almost deflationary times, there is a significant challenge to generating an appropriate income level for an income beneficiary if a will or trust agreement does not provide sufficient flexibility. Sometimes too much emphasis is

focused on generating interest and dividends at the expense of a “total return” approach which would allow trustees to shift asset allocations more nimbly, depending on market conditions, to investments which are growth-oriented to achieve better overall returns.

Incorporating flexible capital encroachment powers or including, where appropriate, the ability of trustees to pay, or an income beneficiary to withdraw, from the trust a fixed percentage of capital each year, or an amount equivalent to the total return of the trust on an inflation-adjusted basis are useful options. As well, letters of wishes setting out helpful guidelines can assist in the process of optimizing investment returns. These approaches can free the trustee from the traditional approach of looking only at the nature of the receipt and whether it is income or capital. Investment decisions can be better separated from distribution or allocation decisions. Too often, however, there is a lack of flexibility and standard provisions, not nuanced tailored ones, unduly constrain the trustee.

We foresee only an increasing need for and use of trusts of successive interests of an income beneficiary followed by capital beneficiaries in future for a variety of reasons including:

- » avoiding the costs of an increasingly onerous probate system, including legal expenses, valuations, fees and taxes paid to probate a will
- » providing for capital succession to children and further descendants, in particular for blended families and for high value estates
- » minimizing and deferring taxes
- » protecting wealth in general, including matrimonial and creditor protection

To optimize financial returns when using a trust, it will be increasingly important to adopt creative but careful approaches.

In the United States, the use of and experience with percentage trusts, called “unitrusts” and discretionary allocation trusts allowing trustees to adjust receipts between income and capital as part of modern portfolio theory and total return investing is

very developed, and most states have legislation for such purpose. In the Canadian setting, we are far behind. The Uniform Law Conference of Canada's 2012 *Uniform Trust Act*, which is model legislation that can be adopted by any Canadian jurisdiction, includes provisions to allow for discretionary allocation trusts and percentage trusts to facilitate a total return policy.

We foresee further development in the use of a total return approach in appropriate situations. While it is true that existing Canadian income tax legislation can make it difficult to fully embrace a total return approach for spouse trusts designed to get a tax-free rollover which require all trust income be paid to a spouse, thoughtful trust design can go a long way to protecting the interests of both the income beneficiary and the capital beneficiaries, while optimizing returns — a “win-win” for both.

What's Tax Got to Do With It?

Trust Planning in Wills After Graduated Income Tax Rates are Eliminated

September 15, 2015

WITH THE ADVENT ON JANUARY 1, 2016 of the new income tax rules eliminating graduated income tax rates and imposing tax at the top marginal tax rate for testamentary trusts (trusts set up in Wills), some people may be of the view that using trust-planned Wills is far less attractive or even no longer useful. However, this view is based on the narrow assumption that trust planning in Wills is only income tax-driven. Our view is that there are some excellent reasons to consider trust planning in your Will which have absolutely nothing to do with income tax, and that this change of legislation will in fact be the genesis for a renewed appreciation for using trusts in Wills.

In February I blogged about the continuing tax benefits of using trusts in your Will, including income splitting among lower income beneficiaries, the three-year period of the graduated rate estate and qualified disability trusts. While not an income tax benefit, setting up a trust in your Will can also avoid the payment of Estate Administration Tax (probate fees) on the value of the assets in the trust which would otherwise be paid by the beneficiary's estate if the assets were owned by them outright on their death. This is another potential tax savings of using a trust in your Will.

Further, the regulations under the *Estate Administration Tax Act* (Ontario) which came into effect January 1st of this year require an estate information return to be filed. The return must list all of the assets regarding which Estate Administration Tax has been paid and provide a considerable amount of detail regarding each asset. If you set up a trust in your Will, the trust assets should pass outside of the beneficiary's estate on their death, which would reduce the costs of compliance with these regulations since these assets would not be included in an estate information return.

Aside from the continuing tax benefits, there are several frequent estate planning objectives which a trust in your Will can address.

1. **You may be concerned** about assets being lost to a beneficiary's creditor — assets which are placed in a trust for a beneficiary are more insulated from creditor claims than assets otherwise transferred or paid directly to a beneficiary.
2. **You may be concerned** about assets falling into the hands of a child's spouse on marriage breakdown or falling into the estate of your surviving spouse who remarries after your death and passes the assets to a new spouse and not your children, grandchildren or your other beneficiaries but to someone else's. Assets which are placed in a trust are much less likely to be available to satisfy matrimonial claims or included in the value of the beneficiary's assets for matrimonial property claim purposes. The capital of a trust in the normal course will pass to those beneficiaries you direct, and not to the beneficiaries of a beneficiary's estate.
3. **You may worry** about a loved one's ability to manage funds if left to them outright, for a variety of reasons. Trusts can be a good choice for planning not only for a disabled beneficiary who will require lifetime care or who is receiving ODSP and therefore should not be given assets outright, but also for a beneficiary who may not be very good at managing money, or who is young and unable or unused to managing money. Different drafting options are available to either keep the management entirely out of the beneficiary's hands, to allow them some involvement but not control, or to provide a gradual increase of control over the management of the trust fund, thus acclimatizing the beneficiary to management without it coming all at once or at too young an age.

There are a variety of reasons why you should consider trust planning in your Will despite the income tax changes coming into effect in 2016. Because trusts are flexible and can be customized to fit a particular situation and beneficiary, they can both provide for your loved ones and provide you with peace of mind that your loved ones will be appropriately taken care of without undue control, responsibility or stress. And for most of us, that's a more valuable benefit than tax savings.

Proactive Charitable Giving: A Balancing Act

November 17, 2015

CHARITY BEGINS AT HOME, SO THEY SAY. This may be where it starts, but your estate plan is where your charity may end. Most of us will donate time or money to one cause or another during our lifetimes (who doesn't love Girl Guide cookies?). When we die, however, our charity will die with us unless we proactively make plans to carry it forward. Failing to plan means by default choosing not to make charity a part of your estate plan. This may be what you intend, but as with all aspects of your estate plan, a careful consideration of available options and making a conscious decision is usually preferable to letting the decision be made for you.

There are many reasons why you may not wish to include charitable giving in your estate plan on death.

- » **Quite simply, you may not have a charitable intent** and wish your family, dependents and other people who are important to you to solely benefit from your estate.
- » **You may have a charitable intent** but have loved ones who will need all of your estate to provide for them when you die, in particular if you have a spouse and/or children with special needs.
- » **You may have a general charitable intent**, but have no preference as to specific causes that should be supported, and prefer that your beneficiaries ultimately choose their own causes to give to after your death, instead of directing donations on your death.
- » **You may prefer to give only during your lifetime** in order to ensure oversight of your charitable giving for greater accountability than would be available after your death.

On the other hand, there are many reasons why you may choose to provide to charity after your death:

- » **You may wish to leave the charities** you wish to benefit regular donations similar to those you gave during your lifetime.
- » **You may feel that the size of your estate** will allow for your loved ones' support as well as charitable donations.
- » **You may be of the view that excessive amounts** left to your children or grandchildren would not be beneficial for them and would detract from their self-reliance and self-realization.
- » **Charitable giving during life and upon death** is integral to many people's spiritual or religious beliefs.
- » **Tax benefits of making a charitable donation** will be an added benefit to your estate, in addition to the personal and social benefits of charitable giving.

There are many ways to leave a charitable legacy, including:

- » a one-time lump-sum gift of cash or other property in your Will;
- » leaving funds in trust for distribution over time by your executor or by a charity for a directed purpose;
- » directing funds to be paid to a charity from a trust on the death of another beneficiary such as your spouse, setting up a donor advised fund with a financial institution to distribute funds to one or more charities (either specified or to be selected) during your lifetime and after your death;
- » gifting a life insurance policy, and setting up a charitable foundation.

The method that is right for you will depend on your personal priorities, circumstances and financial and tax situation, and may benefit from input from your professional advisors.

When deciding whether, how much, how and to which charities to leave funds or assets, there are a plethora of matters to consider and objectives and goals to balance. Careful consideration of all these matters so you make an informed decision will better ensure your objectives and wishes are fulfilled. As with many decisions, giving away money is easy — but giving it away *well* is hard!

Using Trusts: The Future is Bright

January 13, 2016

ON JANUARY 1ST, several new income tax rules for trusts and estates came into effect. An overview of these significant changes are discussed in our Special Advisory. While we understand that there is an ongoing dialogue between the Federal Ministry of Finance and several professional organizations regarding possible changes to two of these new rules, most, if not all, of the changes are here to stay. These changes do not eliminate the many and diverse benefits of trust planning, nor should trusts, including in Wills or established during one's lifetime, be considered as unattractive options.

I have previously blogged about the continuing tax benefits of using trusts in your Will. These benefits include:

- » income splitting among lower-income beneficiaries;
- » using the three-year period allowed for graduated rate estates;
- » using qualified disability trusts where applicable which will still be taxed at graduated rates; and
- » avoiding the payment of Ontario Estate Administration Tax and probate fees in other jurisdictions on the value of the assets in the trust which would otherwise be paid if the assets were to pass through your beneficiary's estate on their later death.

As an illustration, if you left \$1M to a beneficiary outright and that person had \$1M of their own assets, when the beneficiary dies the funds you left them which still remain and are owned by him or her at death are included in their estate's value. Their estate would pay approximately \$30,000 in Estate Administration Tax. If instead you left \$1M in a trust, the funds

are not considered to be an asset of your beneficiary's estate and their estate would only pay approximately \$15,000 in Estate Administration Tax on the value of their own assets.

Trust planning can allow for further savings as the extra expenses associated with complying with the regulations under the *Estate Administration Tax Act* (Ontario) can be minimized, including potentially expensive and time-consuming valuation of assets.

Regular readers may also recall my previous blog about some of the non-tax benefits of trust planning, which make trusts an attractive and useful option for estate planning regardless of the tax benefits. Trust planning is not only very important to avoid the many negative consequences of leaving assets directly to children and others who are not financially mature, but can also preserve capital for future generations as well as protect against future creditor or marital property claims. Some beneficiaries are also better protected if they are not left to manage an inheritance or gift on their own, but instead have the benefit of a co-trustee's skills.

Not only may your family members be better protected by trust planning in your Will, trust planning for yourself during your lifetime may better protect both you and your legacy to your beneficiaries. People are becoming increasingly aware of the ways that *inter vivos* trusts (trusts set up during your lifetime) can assist them in meeting their estate planning goals. For example, an *inter vivos* trust can:

- » better protect your assets from claims after death than having assets flow directly through your estate;
- » work as a substitute for asset management by an attorney for property for incapacity planning; and
- » minimize Estate Administration Tax for your estate on death (trust assets should not form part of your estate for Estate Administration Tax purposes, as discussed above).

The continued benefits of trust planning in your Will or during your lifetime are numerous and varied, notwithstanding the income tax changes which came into effect this month. Trusts can enhance and protect your beneficiaries' financial situation and your legacy to your loved ones, while allowing for flexibility

and tailoring to each unique situation, as well as delivering many tax benefits. For these reasons, we firmly believe that trust planning is not going away anytime soon, and instead the future will only see the increasing use of trusts.

One Key Ingredient for a Successful Estate Plan: Proper Asset Alignment

March 10, 2016

IN OUR AUGUST 2015 POST entitled “Keeping Your Estate Plan Healthy with Periodic Check-Ups” we raised the potentially problematic reality that your estate plan may only be truly up-to-date the day you sign your estate planning documents. We put estate plans in place to ensure that our wishes, intentions and goals are achieved in the event of incapacity or death. For most of us though, our day-to-day lives are perpetually changing — whether it be our relationships, residency, health, assets or values.

As highlighted in our August 2015 post, having a successful plan when you pass away (i.e., one that minimizes taxes, is in line with current laws, accomplishes your goals, minimizes family discord, and transfers and distributes all assets in your desired manner) depends upon you conducting periodic reviews to ensure it is kept up-to-date.

We identified an asset review as being a crucial component of these annual or periodic “check-ups” — in other words, looking at whether your current asset ownership and beneficiary designations are aligned with your current wishes and goals and reflect the structure of your current estate plan.

The process can be as simple as annually reviewing a summary of assets and liabilities to see if any changes or additions have occurred since the last review, and then consulting with estate planning professionals to determine if any such changes impact your estate plan. Assuming you completed a detailed summary of your assets and liabilities when you last updated your estate planning, your personal annual asset review would ideally look at and generally consider the following:

- » **Have you made changes to any assets** since the date of your estate planning documents or your last review, whichever is more recent (e.g. new account numbers, beneficiary designations, guaranteeing liabilities, registered owners, etc.)?
- » **Have you acquired any new assets** since putting your estate plan in place or since your last asset review?
- » **What are the current values of your assets** and have any values changed significantly since your last update or review?

The below scenario illustrates why periodic asset reviews are highly recommended.

Scenario: Your will leaves the residue of your estate equally to your two minor children in the event that your spouse predeceases you. This gift to your children includes the appointment of a trustee and detailed trust provisions controlling access to and the management and distribution of their respective shares while each child is under the age of 30 years. You then subsequently purchase a new life insurance policy on your life with a death benefit in the amount of \$2M, and list your spouse as the primary beneficiary and your two children equally as the alternate beneficiaries on the insurance company's beneficiary designation form.

Outcome: If your spouse predeceases you and your children both survive you and are under the age of 30, the proceeds will not be subject to the extensive trust provisions contained in your will — \$1M will be paid to each of them outright if each child is over the age of 18. If either child is under age 18, the funds will have to be paid into court with very limited ability to access the funds for their use prior to the age of majority, and the funds will then be paid out of court directly to each child upon attaining age 18.

A periodic asset review could have identified this new asset and ensured that your will was re-executed with an insurance declaration in it in order to apply the detailed trust provisions to the life insurance proceeds, as well as the residue of your estate, while at the same time maintaining any creditor protection and minimizing probate fees.

“Asset alignment” may sound more like something your auto mechanic handles, but in the estate planning context, it can help prevent unnecessary expense (including legal and accounting fees, probate fees, taxes, etc.), delays and potentially contentious scenarios that cause irreparable damage to family relationships. Described by one legal writer as proactive “maintenance-centric” estate planning, a periodic asset review is one component that aids in maintaining the health of your plan to ensure that when it comes time for its implementation, it will function properly.

Considerations in Appointing Guardians of Minor Children Under Wills

May 3, 2016

IN ADDITION TO PURCHASING A FIRST HOME, the birth of a child is another momentous life event that often spurs people to prepare a will. Expecting parents and parents of young children are usually keen to put wills in place in order to ensure that if something happens to them, their children will be cared and provided for. While many parents are aware that this planning includes appointing guardians of their minor children in their wills, they may not fully understand these appointments or the considerations that should go into making them.

It's first helpful to understand that a minor child's finances and property are dealt with separately from a minor child's custody and personal care — two discrete areas of responsibility in Ontario. Ontario's *Children's Law Reform Act* governs both areas and in this blog we will focus solely on custody.

The statute provides a **limited** right to the person "entitled to custody of a child" (usually one or both natural or adoptive parents) to appoint in his or her will a "custodian" for the child (in this blog post, we use the colloquially familiar term "guardian"). The right is limited because the appointment only applies if no other person is entitled to custody of the child at the date of the parent's death, and **it is only effective for 90 days from the date of the parent's death**. On or before the expiry of this 90-day period, a court application can be made for a permanent custody order.

Although guardianship appointments in wills do not create long-term legal rights for a child's custody, the parents' expression of their wishes on this issue is important. The written expression of the parents' preferred choice of guardian in their wills can be persuasive evidence for a court that is asked to determine

a child's permanent custody. This evidence is particularly important if a custody dispute arises after the death of the child's parents.

A person who has limited 90-day custody through a will or who has been granted permanent custody by a court has the same rights and responsibilities as a natural parent and must exercise those rights and responsibilities in the child's best interests.

Aside from the operation and effect of the legal rules, what other related considerations should parents take into account when preparing wills and making guardianship appointments? Here are a few:

1. **Parents should ensure** that they each appoint the same people in their respective wills. Under Ontario law, if both parents die simultaneously in a common accident, only those appointments naming the same people in both wills will be legally effective.
2. **Parents should discuss** the appointments with the intended guardians. Acting as a guardian carries great responsibility. Further, guardianship appointments in wills are only effective if the persons appointed consent to act.
3. **Should only one person** be appointed alone or instead together with their spouse? What if the couple were to separate or divorce? Or the family member you intended to have primary responsibility dies? Providing temporary legal custody of the child to a former family member could result. Each situation will be different in terms of what is appropriate and desirable.
4. **If the will contains a trust for a minor child**, it may also be wise for parents to include specific provisions and guidance for the trustee to make certain discretionary payments from the child's trust to the guardian for expenses the guardian incurs in caring for the child to minimize the financial burden on the guardian. Payments could be for such purposes as off-setting the guardian's increased household expenses, or for reasonable expenses associated with remodelling the guardian's residence to accommodate the child or purchasing a new vehicle in order to properly care for the child.

5. **Parents may consider** preparing a separate “Letter of Wishes,” which would be addressed to the appointed guardians and set out guidelines regarding their children’s care and upbringing, touching on such matters as philosophy for raising children, family values, religion, education, dating, marriage, career advice, extracurricular activities and hobbies, as well as the parents’ goals and wishes for their children.

Once new wills containing guardianship appointments have been signed, it is important to periodically revisit and review them to ensure they are updated when necessary. For example, children’s changing needs as they grow up may call for the appointment of different people. The personal circumstances of the named guardian(s) can also change. Relocating to different parts of the world for work, illness, starting their own family, the effects of aging — all are factors that can affect the appropriateness of someone being named as a guardian in a will.

Filtering out the Noise in Your Estate Planning

June 7, 2016

YOU'VE HEARD IT BEFORE: there's a lot of information out there these days. Thousands of hours of Youtube content are uploaded every day. Wikipedia entries are updated every minute. Blogs are written, websites created and refreshed. You can find information, accurate or not, on just about any subject, no matter how obscure, and instructions on how to do just about anything, from baking cookies to building a bomb. This overload of information extends to many important aspects of your life, and estate planning is not excluded. Google the words "estate planning Ontario" and you'll get thousands of results. Everyone has advice to give if you ask (or even if you don't). So how do you decide what to follow and what to ignore?

First, it's important to remember the difference between information and advice. In order to be an educated consumer, you should take the time to learn about estate planning in the place where you live. This helps you know a little about what is and what is not possible in that jurisdiction, what you should consider when starting to think about your estate planning, and what kind of estate planning you need and want. Advice on your particular situation from a qualified professional will be important to determining what information is relevant to your situation. For example, if you die without a will, the government could get your money, but only if you have absolutely no living next-of-kin at all.

Next, as my university professors were forever repeating, consider the source. When you do research, especially online, you need to know something about the source of the material you are reading, so you can evaluate how reliable it is. Who posted this? Do they have any professional qualifications which suggest they know what they are talking about? Is this

information up-to-date or has the law potentially changed since it was published?

This analysis is equally important when you get advice from someone in person. Do they have the necessary qualifications and experience to be able to advise me accurately? For example, estate professionals hear numerous stories of people being advised by those purporting to provide financial advice to put their assets in joint names with one or more children, mainly in order to avoid probate fees. Sometimes this is a good idea, sometimes it can be disastrous — in one recent case, parents who put an asset into joint names with their son ended up sorely regretting it when the son later separated from his spouse, who then successfully claimed a share of the value of this asset. (See our advisory “Planning to Minimize Estate Taxes” for further information on possible Estate Administration Tax (probate fees) minimization techniques.)

Further, the person giving you “advice” may not always be thinking solely of your best interests, even if you trust their expertise. An advisor may be trying to sell you a product or service, and in doing so may give you only the information or advice necessary to make the product or service attractive. It is very difficult to provide independent advice on products or services if your livelihood depends on selling them, as fulsome, objective advice may cause people not to buy. There are advisors who can and do give such advice, but you need to be sure that’s the type of person you’re dealing with and clarify whether there are any such conflicts of interest or whether the advice is truly independent.

There is so much information and advice out there that it can become a cacophony of sound, preventing us from sorting out the good from the bad and yes — the ugly. In order to create an effective estate plan which is truly in your best interests, you need to get expert advice to help you filter out the noise, unlearn common misconceptions, prevent mistakes that lead to unexpected consequences which can be both expensive and destructive to your family and your peace of mind.

The Many and Varied Uses of Letters of Wishes in Your Estate Plan

July 6, 2016

ESTATE PLANNING DOCUMENTS (such as a will, power of attorney for property, power of attorney for personal care, Henson-type trust and/or *inter vivos* trust) are the legal framework of an estate plan — the “apparatus” — which can seem to be a tricky network of legal rules, directions, and often unavoidably, a lot of legalese to navigate. Estate plans are sometimes short on information or guidance regarding the “soft issues”: the relationships, context, goals, aspirations, vision, preferences, history, etc. that inform the overall structure.

This is where a letter of wishes can be a valuable addition to your estate plan. It can “flesh out” or even “humanize” the estate plan. It can help to ensure your intentions are properly overlaid on the legal framework and carried out. It can also provide operating instructions to those in charge of carrying out your plan — e.g., your appointed attorneys for property or personal care, executors, trustees, and guardians of minor children or dependants with special needs.

Letters of wishes can function as these operating instructions. A letter of wishes is a formal document often drafted with the assistance of a lawyer. Where broad legal powers are granted to the trustee of a trust or under a power of attorney, a letter of wishes can provide guidelines to the trustee or attorney in exercising those powers. While a letter of wishes is typically not legally binding, it can be an effective method of communicating goals, values and other critical information. Also, in the case of trustees and attorneys (in their capacity as fiduciaries), they are required to take into account all relevant circumstances when making discretionary decisions, including letters of wishes.

There are many situations in which a letter of wishes can provide helpful guidance, including:

- » from a parent to a child's guardian(s) setting out the guiding values and principles for a child's care and upbringing;
- » to your executors and family members expressing your wishes regarding the distribution of specific personal belongings;
- » to provide comfort and guidance to executors or trustees in carrying out their duties; including with respect to the operation and handling of any businesses that may form part of your estate;
- » to provide your attorney for personal care with information regarding your views on certain medical treatments and preferences regarding other personal care matters beyond typical "end-of-life" matters such as accommodation, food, hygiene and accustomed lifestyle;
- » to give direction or guidance to your executors regarding choosing which charity or charities are to benefit from a gift under your will, and the parameters of such gift (including amount and any special purposes and/or terms);
- » to trustees of testamentary trusts for children or grandchildren regarding factors the trustees should take into account when exercising their discretion to distribute trust income and/or capital to the beneficiaries, including schooling, assistance with buying a first home, etc.;
- » where a Henson-type trust provides broad discretion with respect to payments for the benefit of a family member with special needs, a letter of wishes can provide the trustee with valuable information regarding a child's unique needs and care, and the parents' goals for such child;
- » to provide clarity and context to your executors, trustees and beneficiaries regarding what may at first glance appear to be an unequal distribution of your estate.

If there is concern that wishes expressed in a non-binding letter of wishes may not be considered or respected, you may wish to make them legally binding. This may mean including mandatory directions or instructions in the relevant estate planning document or a separate memorandum. Mandatory terms can however reduce the overall flexibility of the estate plan. As with all estate planning, proper advice should be sought regarding your goals and objectives and the best way to incorporate them into the framework of your unique estate plan.

Start the New Year Off on the Right Foot

November 30, 2016

AS OF TODAY, according to the Gregorian calendar, we are just over one month away from ringing in the New Year. If you are already contemplating your New Year's resolution, we thought we would help out in this blog post by providing you with a shortlist of "thinking points" for your estate planning to help you start 2017 with your best foot forward. What follows are five recommendations gathered from our past year's blog posts to assist in getting your estate plan into even better shape.

1. Take time to complete an annual asset review to ensure your assets are optimally aligned (see "One Key Ingredient for a Successful Estate Plan: Proper Asset Alignment")

If you haven't done so recently, consider preparing a summary of your current assets, including current values, how these assets are owned (e.g., solely, jointly with right of survivorship, as tenants in common, through a trust or corporation, etc.) and your beneficiary designations. You can then review this list in conjunction with your current estate planning documents, and consider whether your current asset ownership and the beneficiary designations you have made are aligned with your current wishes and goals and complement your estate plan. Once you have such a list prepared, it can be reviewed annually or more frequently if significant changes occur.

2. Consider the benefits of including trusts in your estate plan (see "Using Trusts: The Future is Bright")

Despite new income tax rules for some trusts and estates that were ushered in at the beginning of 2016, there remain many significant non-tax reasons for including trusts in your estate plan. While tax minimization is important, estate planning goals also often include protecting children's or grandchildren's inheritances (e.g., from matrimonial claims; for vulnerable or

spendthrift beneficiaries; or for capital succession purposes) where more simple approaches such as outright distributions or transferring ownership to a surviving spouse or children are not sufficient. Trusts can also serve as sophisticated incapacity planning tools, as well as will substitutes to keep assets out of the probate system as much as possible. Some tax-related benefits, such as income splitting, also remain despite the tax rule changes.

3. Consider whether you have connections to other countries (including the U.S.) through citizenship, residency, assets or beneficiaries (see “Canada, the U.S. and Going Borderless: Nowhere to Hide” and “The Two Certainities: Death and (Foreign) Taxes”)

It’s right around this time of year that some of us begin heading off to vacation homes in warmer climates, including the southern U.S. We’ve frequently written on peoples’ increasing global mobility and the planning challenges it presents. With the increasing reporting and sharing of information between Canada and the U.S., as well as the rules regarding certain assets and planning vehicles, it is now more critical than ever to seek professional advice regarding what impact the Canadian and U.S. legal and tax regimes might have on your estate plan and to adjust your plan accordingly.

In addition, having citizenship, owning assets or having beneficiaries who reside in other jurisdictions upon your death may result in unintended consequences for your estate, including double or triple taxation as a result of foreign taxes.

4. If you have minor children, revisit your guardianship planning (see “Considerations in Appointing Guardians of Minor Children under Wills”)

If you have minor children, take a moment to ensure that you have guardianship appointments in place in your will and if you do, consider whether the person(s) named are still appropriate given their current circumstances and your children’s. Also consider whether any additional instructions or wishes should be included in your will to your trustees (e.g., regarding making disbursements to guardians on account of expenses) or in a separate letter of wishes to the chosen guardian(s) (e.g., regarding your child’s upbringing).

5. If you've carried out your own probate fee minimization planning by transferring property into joint names with a child, consider the potential implications (see "Owning a Home Jointly with a Child — More Trouble than it's worth?")

We recently reviewed some of the concerns relating to real estate that is put into joint ownership with an adult child, which may result in more financial and emotional harm than good. While joint ownership could minimize probate fees, this is not necessarily always the case and the attendant potential consequences should be understood.

These are just a few items to ponder as 2017 approaches. As with all estate planning matters, if you have identified a potential issue in your estate plan, seek professional advice and guidance in addressing it.

Special Needs Planning: Knowledge is Power

January 17, 2017

AS PARENTS, WE WORRY ABOUT OUR CHILDREN: a truism that becomes even more true, and often extends to siblings, grandparents, aunts and uncles, when a child has special needs. We worry about what will happen to the special-needs individual, how they will care for themselves and be cared for, and how we should plan for their future and leave them funds for their support and care, or just for a rainy day, without jeopardizing their independence or sources of government support. And when we look for information, online or from professionals, sometimes we end up not only worried, but also confused. And this can lead to paralysis and lack of planning.

Often the confusion arises from not understanding how the various available sources of assistance and planning tools apply. Ontario Disability Support Program (“ODSP”) benefits, Henson trusts, disability tax credits, qualified disability trusts — these things can be difficult to understand, and more difficult to fit together in an understandable whole. And it is important to understand how they fit together, so that a family can coordinate planning for a special-needs individual, since a lack of coordinated planning can have unintended and negative consequences for them.

ODSP has strict limits on the assets and income a person receiving benefits from this program can have and receive. Certain assets, such as cash or investments (other than RESPs or RDSPs) of up to \$5,000, are excluded when a person’s eligibility for program benefits is determined. Since the cash or investment threshold is so low, it is important that a person who is or might be eligible for ODSP benefits not receive any assets or funds directly from family members or their estates to avoid jeopardizing these benefits. This includes insurance or other inheritances (particularly if the amounts will be more than \$100,000).

Fortunately, family members can plan for this issue by leaving funds in a special type of trust, called a Henson trust, which if properly drafted will allow funds to be used for the person's benefit without being considered an asset for ODSP purposes. A Henson trust is essentially a fully-discretionary trust which has certain specific provisions to ensure it meets the necessary criteria to avoid inclusion as a person's asset for ODSP purposes (for more information on discretionary trusts, see our client advisory "Using a Trust in Your Estate Plan"). As such, it can be used for any special-needs individual, whatever their need, to leave funds for their support and care without leaving them a lump-sum amount which they may not easily be able to manage. Any number of Henson trusts can be set up for an individual, both as current (*inter vivos*) trusts and through a Will (testamentary trusts): there is no limit on how many people can use one to leave funds for a particular special-needs person.

A Henson trust may or may not qualify as a "qualified disability trust," which is a special type of trust under the *Income Tax Act* (Canada) for individuals who qualify for the disability tax credit. If a trust is a "qualified disability trust," it will receive more favourable income tax treatment than if it does not. The criteria for qualified disability trusts are different from and in addition to those for Henson trusts, and only one trust that a special-needs individual is the beneficiary of can be a qualified disability trust for them. It is important to note that family members can leave multiple trusts, Henson trusts or otherwise, for a special-needs individual, but only one can be a "qualified disability trust" and thus access more favourable income tax treatment. Family members, and eventually trustees, will need to discuss and coordinate so that the most efficient outcome is available for the individual at the end of the day.

Henson trusts and qualified disability trusts are only two of several planning techniques available to families for special-needs individuals. It is important to plan ahead in a coordinated effort as a family, before any trusts are implemented or decisions are made, to ensure the best, most flexible plan for a particular individual's own unique needs is put in place by all family members. In these cases, coordination is truly invaluable, and professional advice and information will help overcome "confusion paralysis" and give families the power of knowledge so they can successfully implement an efficient and effective plan.

Safekeeping of Original Estate Planning Documents:

Hard Copies are Hard to Replace

April 19, 2017

IT IS BECOMING MORE AND MORE THE “NORM” in many areas of day-to-day life that in lieu of an original paper copy of a document being given to us during some form of transaction or interaction, the document is instead created and sent to us digitally. Consider for example car rental agreements, sales receipts, monthly phone bills, tickets to a concert or art exhibit, personal income tax returns, charitable donation receipts, etc. It's easy to get in the habit of receiving important documents in this manner, as well as relying on having them at our fingertips and readily available by quickly searching phones, tablets, PCs, external hard drives, cloud storage and email inbox folders, or even accessing these documents online and downloading them if and when needed.

With this flow of digital information, and the ease with which documents can be signed virtually and stored digitally, it is important to recognize and keep track of certain documents for which the original is vital and for which a digital copy is usually not an adequate substitute on its own. Original signed wills (which we will discuss in more detail in this blog post), original signed powers of attorney and original share certificates are all examples of such documents.

Where a person dies leaving a will, the estate trustee's authority to step into the deceased's shoes and administer the estate in accordance with the deceased's instructions and applicable estate law comes from the deceased's will. The original will is usually needed in order for the executor to prove his or her authority to the beneficiaries and third parties such as financial institutions, etc. Further, if the executor must probate the deceased's will in order to administer the estate assets, then generally the original signed will must be submitted to the court before the court will

proceed with processing the probate application and issuing a certificate of appointment to the estate trustee.

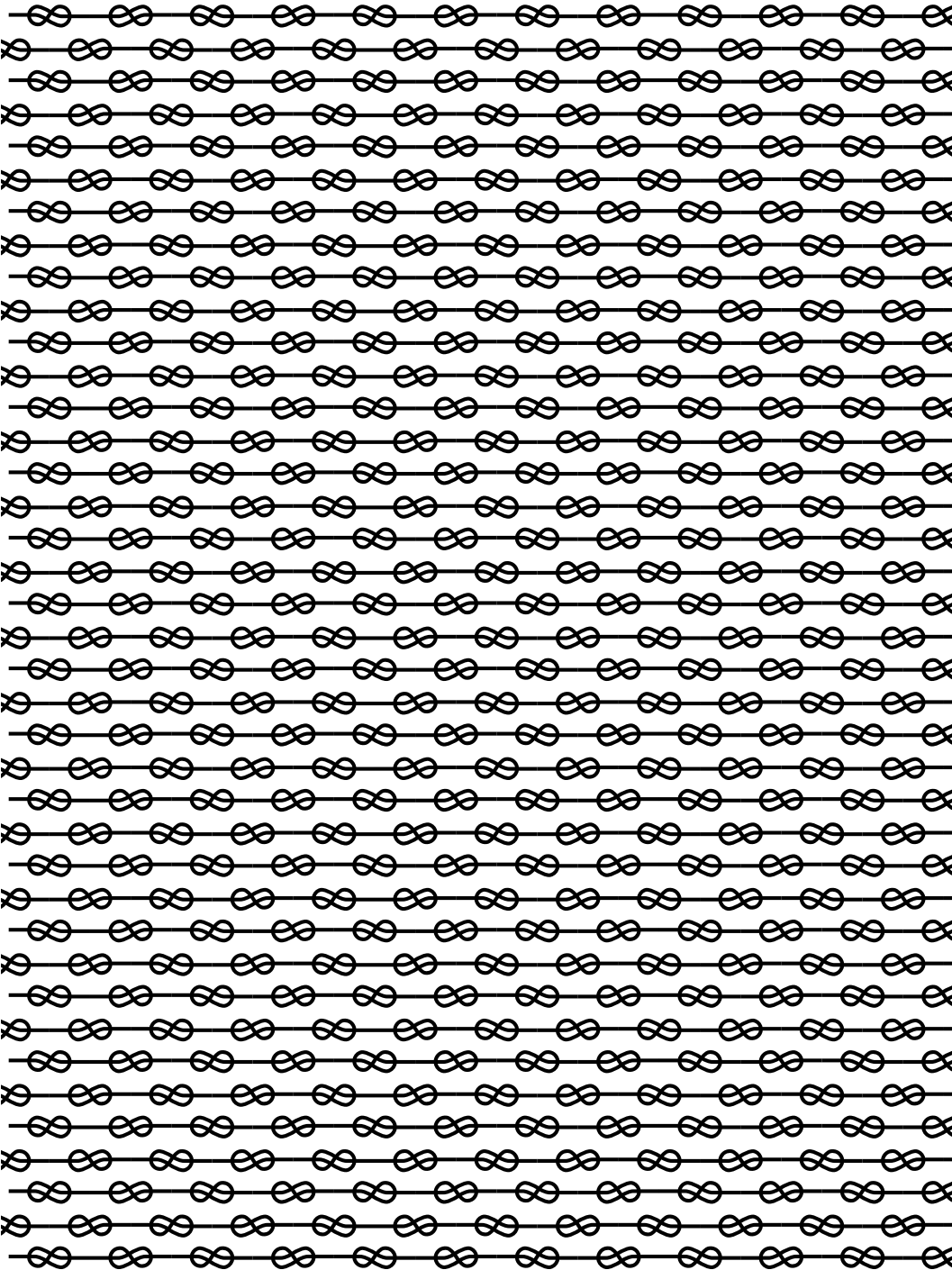
Based on Ontario case law, if a deceased's original will cannot be located after death, and if it can be shown that after it was signed but prior to its disappearance the will was traceable to and last in the possession of the deceased person, the deceased is presumed to have destroyed his or her will with the intent to revoke it. If a will is presumed destroyed, then the deceased is considered to have died intestate — or without a will. The deceased's personal property and real estate in Ontario would then be distributed based on Ontario's intestacy rules set out in the *Succession Law Reform Act*, and not in accordance with the deceased's wishes contained in the missing will. This outcome could have unintended and undesirable consequences (e.g., for a surviving common law spouse who may have been named as a beneficiary under the will but who would not automatically inherit pursuant to the current wording of Ontario's intestacy rules).

The presumption that a deceased person destroyed his or her will with the intention of revoking it if the original signed will can be traced to the deceased before his or her death and cannot be found after death can be rebutted with appropriate evidence to the contrary, depending on the particular facts of the situation. In Ontario, if an original will is lost, there are court processes available for proving the lost will in court. For example, if a photocopy of the signed will has been located, the estate trustee can commence a court process in order to have the photocopy of the will proved as the deceased's last will.

Proving a lost will adds unnecessary delays and expense to the administration of an estate, not to mention increased frustration and stress for the estate trustee and beneficiaries. There is also no guarantee that the lost will will be successfully proven in court.

While it may be convenient to have digital copies of estate planning documents such as wills and powers of attorney on hand, original signed copies are crucial. Accordingly, it is imperative that the originals be carefully safeguarded and appropriately stored in a secure location for future use. When stored, these documents should be protected from environmental damage (such as fire and water damage), from theft, as well as be accessible to the estate trustee after a person passes away. For example, the law firm that assisted with the preparation of

the will may also offer to store original estate planning documents in its vaults as part of its client service, which is also helpful for keeping track of the current versions of estate planning documents when changes need to be made.





FIDUCIARY ADMINISTRATION

Processes for Activating Powers of Attorney — Do You Know Where Your Documents Are?

July 14, 2015

THOSE OF YOU WHO WATCH U.S. network T.V. news at night are probably familiar with the catchphrase “It’s 11 (or 10) o’clock. Do you know where your children are?” Many comedic versions of this phrase have been coined over the years, and it has become part of our modern pop culture. Despite the obvious satirical uses, the message can still be a serious one, reminding us to check on those things most important to us, which we can sometimes lose sight of in our busy lives. Like so many things, powers of attorney for property and personal care are sometimes overlooked until they are most needed, and then finding and using them can sometimes prove challenging.

Knowing where powers of attorney are located and how and when they can be used is important for both grantors (i.e., those who execute the power of attorney and whose property or care will be managed under them) and attorneys (i.e., the persons appointed in a power of attorney to manage the grantor’s property or care and note “attorney” in this context has a different meaning than “lawyer”). Grantors should review the documents regularly to ensure they still meet their needs and are up-to-date. Attorneys will want to know where the documents are so that if they need to use them, particularly when urgent problems arise, they can do so.

Once located, if the documents need to be used right away, the attorney will then need to determine how they can be “activated” and used. If the documents are held by a third-party, such as by a lawyer or in a safety deposit box, there will usually be a process to complete in order to get access to them. This

can be a “catch-22” situation if the financial institution will not grant access to the safety deposit box without proof of authority and the power of attorney which provides such proof is located in the safety deposit box.

These issues can cause frustration for attorneys. Some grantors try to avoid this by keeping their powers of attorney available to their attorneys in their personal files or giving original powers of attorney to their attorneys. While this may simplify finding and retrieving the powers of attorney, it also greatly increases the potential for fraud and misuse, whether by the attorney or by an unrelated person who gains access to the documents (this is particularly of concern for powers of attorney for property). It may also create other problems, for example if the grantor executes new powers of attorney but fails to destroy all originals of their old powers of attorney, leaving conflicting powers of attorney in circulation which may lead to disputes and so-called “duelling powers of attorney.” Leaving powers of attorney with a third party such as a lawyer with express written directions on how and when to release them can avoid these types of problems, although individual solutions may be needed to suit complex situations.

Once the attorneys obtain the document(s), it is necessary to determine if the powers of attorney can be used. Under Ontario legislation, attorneys for personal care can only make decisions for the grantor if the grantor is incapable of making the particular personal care or healthcare decision in question. Attorneys for property can use a power of attorney for property immediately upon the grantor executing it, unless the document states otherwise. Some powers of attorney provide that they cannot be used until the grantor has been determined to be incapable of making decisions and may specify the manner of making this determination and the test(s) to be applied, although the laws of the place where the attorney seeks to use the power of attorney may need to be considered as well.

The question of how to determine if a person is not capable of making decisions can be difficult, even if a mechanism is provided in the power of attorney, especially if there is a dispute among those close to the grantor regarding whether the person is capable of making such decisions (see my February 2015 post). If such a situation is possible in the circumstances, some consideration should be given to putting more specific

provisions in the powers of attorney to address how incapacity will be determined and deal with any disputes which may arise.

Many popular catchphrases can not only give us a chuckle in the middle of our day but can remind us to take steps on important matters. Knowing where your powers of attorney are and how to access and use them can not only ensure that your interests and needs will be able to be taken care of in a timely manner, but can avoid a lot of frustration for your attorneys and loved-ones as well.

Confidentiality *Matters*:

Thoughts on Death and Privacy

October 28, 2015

PRIVACY AND THE PROTECTION OF PERSONAL DATA are a major concern in modern society. Complicated privacy legislation exists in many jurisdictions with the objective of protecting personal information by imposing multiple safeguards, some of which can be frustrating to deal with. With the increasing stores of digital information, we also frequently see reports of security breaches of government and major corporations' databases, not to mention instances of identity fraud, theft and other cyber-attacks.

Juxtaposed against society's increasing vigilance to attempt to safeguard the privacy of our financial and personal matters in a digital age, is the lack of such protection, and in fact, open public disclosure of sensitive personal information after a person dies which arises out of the probate process.

Many people are unaware that in a large number of Canadian and foreign jurisdictions, a probated will is a public document. Information regarding estate values included in court records relating to wills and probate applications are accessible and searchable by the general public.

For example, in Ontario, the public can obtain copies of wills as well as probate applications and grants for a fee where the personal representative of an estate filed a probate application with an Ontario court (except in the rare circumstance where a judge has ordered a file sealed). The probate application includes the value of the deceased's estate, including personal assets and real estate assets.

England and Wales is a jurisdiction that, for a fee, now makes digital copies of grants of probate and wills available for online public viewing anywhere in the world through a searchable database dating back to 1858.

Why is it that, particularly with respect to non-contentious estates, the value of a person's estate and the contents of his or her will, all of which we would consider private and sensitive information, is publicly disclosed upon death? In particular, given modern attitudes and public policy concerning privacy of information? There seems to be a huge disconnect.

While some documents may have historical and archival interest and importance to family members and genealogists, it would seem that the public display of one's will and probate grant after death has no value or significance, and should remain confidential. And a strong argument can be made that there is a potential harm in making this information available. For example, vulnerable persons and beneficiaries could become targets for financial abuse.

In 2013, perhaps recognizing this unnecessary invasion of personal privacy, the Law Society of England and Wales proposed an "opt-out" procedure for removing certain information from the grant of probate, including the value of estate assets in non-contentious proceedings.

Given this present reality, and that this sensitive information is publicly available after death through the court probate process (for example, overall net worth, which may include the value of private company interests such as long-held family businesses) and other matters such as the identities of their estate beneficiaries, there are planning options that can be considered to protect privacy.

A trust set up during one's lifetime can be used as a will substitute. If a trust is established prior to death and assets are transferred to the trustees to be held by them, the trust agreement, the trust assets and beneficiaries generally remain private upon the client's death. There is no need to use the probate process for assets held in a trust because they pass outside the estate. Special trusts for those aged 65 and older called alter ego trusts and joint partner trusts can be used to transfer assets on a tax-deferred basis to such trusts.

For assets that do not require a court grant to administer, one technique that may be available in certain jurisdictions, including Ontario, is the use of "multiple wills," i.e., executing a primary will and a secondary will. The primary will deals with assets that

require a grant of probate to administer them, such as financial assets with large institutions and real estate, and the second will deals with assets that typically do not require probate, such as shares of private family corporations, family loans and personal and household effects. Upon the death of the person who made the will, the executor discloses the existence of both wills to the court, but application is made for a limited court order for only the primary will, and matters relating to the secondary will, which often has the most significant value, generally do not become public.

Jointly-held property with right of survivorship and beneficiary designations may be other ways to achieve enhanced privacy of one's estate affairs upon death.

As with any estate planning, including the strategies briefly reviewed above, proper advice from a professional advisor based on a client's particular situation is critical.

Towards a More Just Society:

Law Commission of Ontario Breaks New Ground on Decision-Making

February 8, 2016

IN MY FIRST YEAR OF LAW SCHOOL — 1978 — Ontario introduced new legislation to allow a power of attorney to survive incapacity. It's amazing to think that prior to 1978 only legal guardianships through the court process (then called "committeeships") were available to allow a decision-maker to act on behalf of an incapable person.

And from there, in 1994 Ontario introduced the ground-breaking *Substitute Decisions Act, 1992* as a modern, comprehensive legislative framework to deal with substitute decision-making for both property and personal care.

A lot of water has passed under the bridge in the last twenty plus years, and with it attitudes and thinking with regard to substitute decision-making have evolved, including the added dimension of human rights which now heavily influences and informs the discussion on this issue. With an increasingly aging population, it is not surprising that we baby boomers are influencing the legislative agenda and demanding a more nuanced, sophisticated and human rights-based perspective when it comes to having others involved in making decisions for us when we are no longer able — or as able — to do so ourselves.

And so the stage has been set for the release on January 11, 2016 of the Law Commission of Ontario's *Interim Report on Legal Capacity, Decision-Making and Guardianship* for public feedback. It sets out a timely and fundamental review of Ontario's laws on these matters, and makes many significant recommendations for reform.

Some of the key recommendations include:

- » **Moving adjudication away from the courts** when a dispute arises involving legal capacity or decision-making, such as a dispute involving a power of attorney or legal guardianship. The court process is considered slow, expensive, complicated and unnecessarily adversarial. Instead, an expanded Consent and Capacity Board would provide improved access to the law and better monitor decision-makers, such as attorneys acting under a power of attorney. It would also facilitate the resolution of disputes, most of which involve family members.
- » **Many substitute decision-makers**, including attorneys under a power of attorney, do not understand their legal obligations — there is currently no proactive process that educates them. A series of measures are recommended to promote understanding of the law, provide information and education, including strengthening the role of professional educational institutions for such purpose and enabling adjudicators to require decision-makers to obtain education where appropriate.
- » **Reducing inappropriate intervention** and better protecting autonomy and self-determination, including statutory requirements to ensure a focus on the prior capable wishes of individuals, or on their current wishes and values as well as “co-decision-making” versus “substitute decision-making” to allow the incapable person to participate in and have support in making decisions, not simply taking all decision-making power away and placing it in the hands of others.
- » **Increasing accountability** under powers of attorney and preventing or curtailing misuse and abuse by requiring attorneys to make a “Statement of Commitment,” which also sets out their legal responsibilities and the repercussions for failure to fulfill them. As well, requiring the attorney to deliver a notice when he or she begins to act to certain persons specified in the power of attorney.
- » **Enabling greater choice of decision-makers**, including exploring the establishment of a licensing and

regulatory system for paid professional decision-making representatives.

The *Interim Report* sets forth wide-ranging measures for an improved, more responsive, and accountable framework for decision-making, while supporting individual self-determination. It represents a significant next step in the evolution of this increasingly important societal issue.

What is compelling is the fact that issues involving legal capacity and decision-making will ultimately affect every one of us in some way. We are all living longer and we are living for longer periods in various stages of diminished capacity.

Let us hope that our legislators give this initiative the priority it deserves to achieve timely and responsive law reform. If a civil society is to be judged by how well it treats its most vulnerable citizens, how we deal with decision-making for those with diminished capacity will be the acid test.

Fiduciaries, Mom and Apple Pie

March 22, 2016

ONE QUESTION THAT WE ARE FREQUENTLY ASKED is “When does my role as an attorney for property begin?” Often this question comes from an adult child, who wants to know either when they should start helping Mom or when they can start helping Dad with paying bills, making investment decisions, etc. It usually arises because the child sees that Mom or Dad needs a little (or a little more) help now, and they want to make sure that the parent who took care of them is now taken care of in turn.

This natural desire to help a parent who is beginning to need it would be characterized as wholesome and healthy by most in our society, arising from those values we cherish and hold up as part of our shared “good,” like “Mom and apple pie.” However, it also leads the child into the legal realm of attorney for property matters, where not only is it important to know when an attorney can or should begin to take on their appointed role, but what the consequences are of doing so.

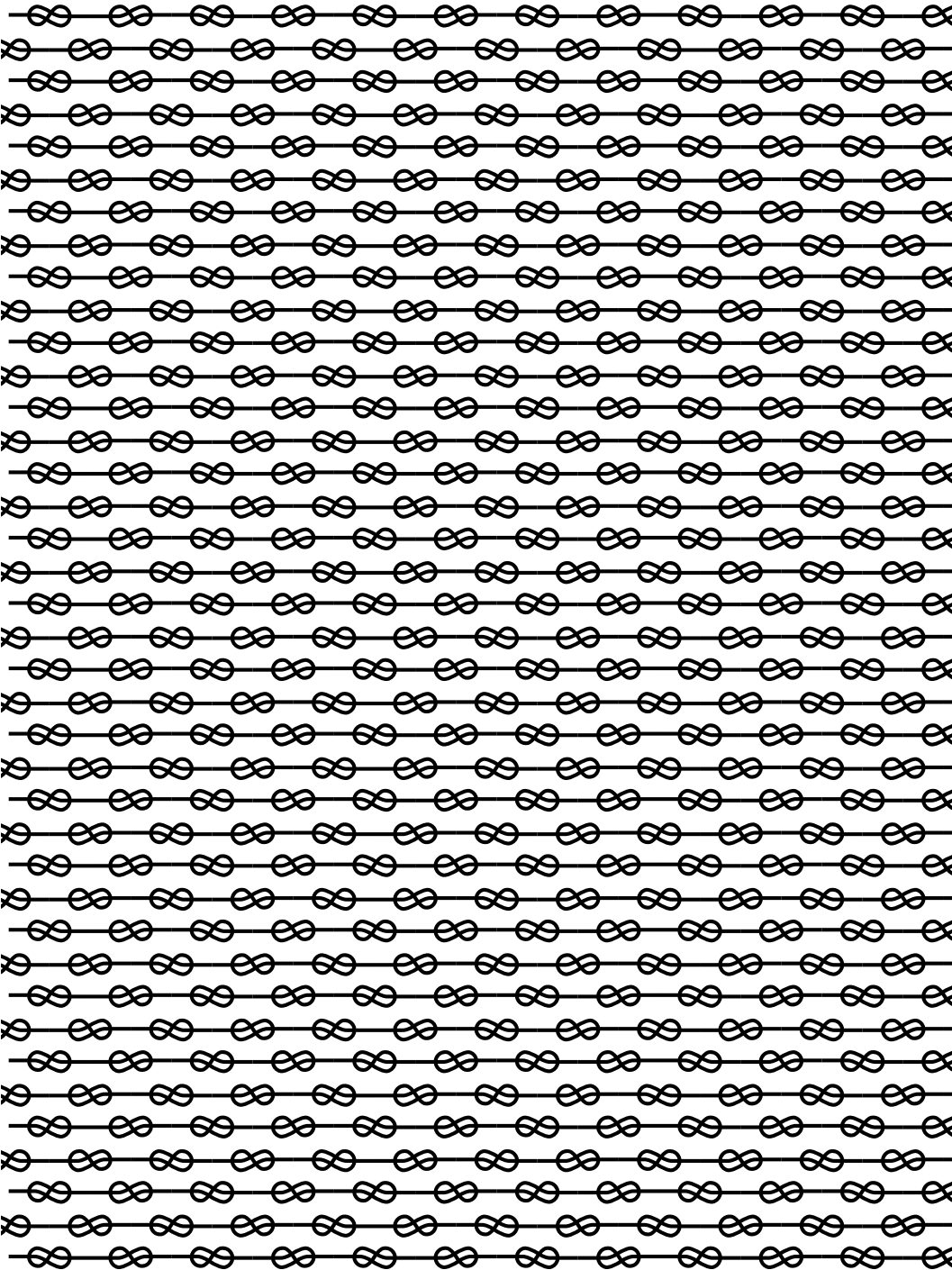
Unless the power of attorney for property states otherwise, and assuming that it is a continuing power of attorney for property and is not limited in some way, most powers of attorney for property on their face allow the attorney to begin acting from date of execution. Sometimes the power of attorney will be in safekeeping with the drafting lawyer with specific instructions which govern its release, for example only if the donor is capable and directs it be released, or if incapable, provided there are medical opinions which state the donor is incapable of managing his or her property. What is key is delivery of the power of attorney to the attorney.

The next question is whether the attorney *should* begin acting. This can be a difficult question, and will depend in part on the circumstances and what the wishes of the parent (or other person who appointed the attorney to act for them) are and whether they are prepared to allow the named attorney to begin to act on their behalf and deliver to them the power of attorney

so they can do so. These matters can be complicated if the parent is experiencing dementia and has grown suspicious of the child (unfortunately a not infrequent effect of dementia) or of others in their life. Sometimes the parent will ask the child who is acting as attorney to begin assisting them, for example, because of physical difficulties in paying bills, making the transition fairly easy; sometimes expert assistance is needed to navigate the complications that arise.

Commensurate with this question, but sometimes overlooked, is whether the appointed attorney should act at all. No one can be forced to act as an attorney for property against their will, and the appointed attorney can renounce the role if they wish. As part of this decision, it is important for an attorney to know the legal responsibilities and consequences associated with the role. As discussed in my blog on fiduciary accounting [**Fiduciary Accounting — Slicing the Pie Without Causing Indigestion** — attorneys for property are one type of fiduciary under the law. Fiduciaries are entrusted with an important role which provides them authority over the property of other persons. The role of a fiduciary comes with legal obligations, one of which is the duty to account to those with a financial interest in the property the fiduciary has been entrusted with. This duty, or any perceived failure to fulfill it, can lead to disputes with other interested parties, potentially dragging the attorney into an unforeseen quagmire of legal disputes and broken relationships if not properly and carefully handled.

My husband is fond of quoting his mother and grandmother, and one of their many pearls of wisdom is "Begin as you mean to go on." Good advice for many aspects of life, and good advice for attorneys when beginning to act. Care and planning, and proper legal advice, can greatly assist an attorney to start their role off right, preventing many future problems and costs and keeping the high ideals which usually accompany the beginning of such a role intact.





CROSS-BORDER & MULTIJURISDICTIONAL PLANNING & ADMINISTRATION

New EU Rules for Cross-Border Succession Now Apply from August 17, 2015

August 17 to September 1, 2015

WHEN A CLIENT DIES LEAVING ASSETS in more than one country, conflict of laws rules (also known as private international law or PIL rules) step in to help determine which country's law should govern succession of the estate. As outlined in our earlier blog post of July 16, 2013, to achieve more clarity and certainty, the European Union passed a law known as the Succession Regulation in July 2012. It is now fully operational in all EU member states as of **August 17, 2015** (except in Denmark, the U.K. and Ireland, which decided to opt out).

It is important to understand how the Succession Regulation operates and can be used in estate planning — the Succession Regulation can significantly impact all persons, including Canadians, with assets in or other ties to a participating EU member state.

Overview of the Succession Regulation

The Succession Regulation, among other matters, provides rules to determine which country's law will apply to a deceased person's estate (both personal property and real estate) and applies to estates of people dying on or after August 17, 2015 — whether with or without a will.

Under the Succession Regulation, in most cases a deceased person's "last habitual residence" will determine which country's laws apply, unless the deceased was "manifestly more closely connected" to another jurisdiction through his or her vital interests such as personal presence, family and, to a lesser extent, business and economic interests.

For example, if an Italian citizen with assets located in Italy moves to France and dies shortly after moving, Italian law will

most likely apply to the succession of the deceased's estate based on the closer connection rule.

A person can choose to apply the law of his or her nationality if it is different from his or her place of habitual residence. This feature is of particular importance to Canadians who have a EU connection. Also, if a person has dual or multiple nationalities, he or she can choose any of them to apply to his or her estate, even if it is a non-EU member state.

Below are some of the situations in which the Succession Regulation may be particularly relevant:

- » a Canadian citizen resident in a participating EU member state;
- » a Canadian citizen resident in Canada with assets in a participating EU member state; and
- » a Canadian citizen resident in a non-participating EU member state (e.g., the U.K.) with assets in a participating EU member state.

Avoid Forced Heirship Rules

As an example of how this new law can be helpful, consider the case of an Ontario resident with a vacation property located in Italy, a civil law jurisdiction. He or she can choose in his or her Ontario will that Ontario law should apply to the estate in Italy, including Italian real estate.

If correctly done, Ontario law should apply to the Italian real estate on his or her death on or after August 17, 2015. Without this new Regulation, Italian law would otherwise apply to Italian land. Italy's internal laws incorporate "forced heirship" rules, which an Ontario resident will usually wish to avoid with respect to his or her Italian property. Forced heirship laws — present in a number of EU member states — often provide a mandatory distribution scheme among a person's spouse and children, and not just to one's spouse.

In the Canadian estate planning context, the ability to apply a Canadian jurisdiction's laws to succession of property will help ensure forced heirship rules do not apply.

Another example is a Canadian citizen living in Germany and habitually resident there. Under the new Regulation, in the normal course, German law will apply to his or her worldwide assets, including assets outside of Germany. If there is real estate located in Ontario, the property falls under Ontario rules and is subject to Ontario law, but it can be brought into account in the German estate administration.

Habitual residence in Germany brings into play Germany's forced heirship rules — which is potentially unintended or unwanted. However, the new law permits the Canadian (assume he or she is domiciled in Ontario) to choose Ontario law under his or her will. Ontario's internal law would apply if the Canadian is considered domiciled in Ontario for property purposes, given that property matters fall under provincial law, and German law as a result will not apply.

It is important for Canadians who are habitually resident in an EU state to get advice on their estate planning to avoid the unintended application of the law where they habitually reside, and consider choosing their law of domicile of a Canadian province.

These new European rules are a welcome and positive development in estate planning and administration, including for Canadian clients who increasingly have ties to many EU jurisdictions given the ability to make a choice of law. In the Canadian context, it is critical to consider these rules when drafting a will for a client with connections to participating EU member states.

New Developments in Interjurisdictional Incapacity Planning

October 14, 2015

WITH THE ARRIVAL OF FALL, many readers may be preparing to escape the pending cold by travelling to warmer climates for extended stays. In our February 12, 2014 blog post we highlighted the potential concerns and practical issues if you become incapable of making either financial or personal care decisions (whether permanently or temporarily) while outside your 'home' jurisdiction, including if you have assets located there.

We noted the lack of harmonization to date among jurisdictions (particularly between Canadian and U.S. jurisdictions) in terms of what effect a power of attorney for property or personal care prepared in one place will have in another. We also discussed using multiple, complementary powers of attorney prepared in multiple jurisdictions as a possible planning solution.

More flexibility, however, may be on the horizon. In August 2015, the Uniform Law Conference of Canada (ULCC) approved the *Recognition of Substitute Decision-Making Documents Act* at its annual meeting (pending minor editorial revisions and its formal circulation to the provinces and territories). The Uniform Act is a joint project of the Uniform Law Commission of the United States (ULC) and the ULCC. The ULC adopted its version in July 2014.

This was the first time both bodies worked together on a joint project of this nature. The new uniform legislation in each country marks a significant step forward in promoting cross-border portability and effectiveness of powers of attorney for property and personal care.

As explained in each Act's introduction, because the majority of current substitute decision-making legislation in Canadian and U.S. jurisdictions do not have portability provisions to ensure

recognition of the validity of powers of attorney created in other jurisdictions, and do not protect a third party's good faith reliance on such documents, the purpose of powers of attorney can largely be defeated in cross-border situations. Lack of recognition and acceptance often results in legal guardianship through the court process, which is expensive, intrusive, restrictive and most importantly undermines personal autonomy (e.g., personally choosing who you wish to delegate financial and personal care decision-making to if you become incapable as opposed to a court appointment).

Uniform legislation serves as model legislation for provincial, territorial and state governments, and to be effective it must be enacted by individual jurisdictions.

If a jurisdiction enacts the uniform act, it will address: (1) the recognition of substitute decision-making documents made under the laws of another jurisdiction as being valid; and (2) third party acceptance and rejection of a substitute decision-making documents made in other jurisdictions.

For example, if Ontario enacts the ULCC's uniform act, and a corporate executive from New York, who had previously prepared New York powers of attorney under New York law in accordance with the Act, becomes incapable while temporarily living and working in Toronto, then third parties in Ontario will only be able to refuse the New York powers of attorney in accordance with the uniform act.

To continue the example, third parties in Ontario would be able to rely on the New York documents in good faith and moreover, subject to certain legitimate refusals and requests for additional information, would be obligated to accept the New York powers of attorney within a reasonable time. If the New York powers of attorney are unreasonably refused by an Ontario third party in violation of the legislation, then it is possible to pursue a court order compelling acceptance, with liability to the third party for legal costs if such an order is granted.

This new uniform legislation goes a long way in not only providing for recognition but also including provisions to ensure acceptance by third parties in enacting jurisdictions, which has been a major and practical challenge faced in using powers of attorney in the past. While Ontario's *Substitute Decisions Act*

does already contain 'portability' provisions, it does not have these desirable enforcement provisions.

It will be interesting to see the impact of this uniform legislation if it continues to become law in specific provinces, territories and states throughout North America.

Canada, the U.S. and Going Borderless: Nowhere to Hide

April 5, 2016

PERSPECTIVE IS IMPORTANT AND ILLUMINATING — only about fifteen years ago, or perhaps even less, it was not common to have to consider the impact our Canadian and U.S. tax and legal regimes have on estate planning and our affairs in general. The 49th parallel and the world's longest undefended border symbolized separate tax and legal regimes, and there was little recognition of the need to consider the impact of the laws on either side of it, notwithstanding many Canadians living south of it and many U.S. citizens living north of it.

The new reality is increasingly “borderless.” The current global agenda includes aggressive measures to ensure greater transparency and information exchange to stop leakage of tax revenues from financially-strapped governments. For example, between Canada and the U.S. under the *Foreign Account Tax Compliance Act* (FATCA) and our intergovernmental agreement with the U.S., Canadian tax authorities are now providing information on Canadian bank accounts of U.S. persons to U.S. tax authorities. Uncle Sam can now reach north to ensure its citizens are tax-compliant.

As another example of the free flow of information, as of June 30, 2014 when Canadians and Americans cross the border, their days spent are now computed and tracked by the U.S. and Canadian authorities when they enter and when they leave and this information is now shared. A Canadian can be treated as a U.S. resident for tax purposes and be subject to U.S. tax on their worldwide income if they meet the substantial presence test along with a number of other possible legal, health insurance and tax problems that can arise based on time spent in the U.S., and the information to do so is now readily available between the U.S. and Canada, unlike before.

Looking forward, the trajectory is towards increasing information exchange and transparency — not less, as the global agenda kicks in and moves into high gear. The question often posed “who is to know” is increasingly anachronistic, and even ingenuous, and it is important to come to grips with this new reality, and plan one’s affairs accordingly.

In our prior blog post “U.S. Securities and Other U.S. Situs Property: U.S. Estate Tax Issues for Canadian Residents Who are Not U.S. Citizens or Residents” we dealt with the problems arising from Canadians owning U.S. securities, subjecting them to potentially significant U.S. estate tax exposure of up to 40% — an issue that is still not sufficiently recognized by Canadian investors, the Canadian investment industry in general and investment advisors.

In our advisory “Will and Estate Planning Considerations for Canadians with U.S. Connections,” we set out various estate planning issues for Canadians with U.S. connections, including Canadians married to U.S. persons or with children who are U.S. persons. U.S. persons resident in Canada face a number of tax issues. For example, a number of standard planning vehicles such as TFSAs and RESPs and even Canadian mutual funds can create tax issues for U.S. persons. As well, U.S. persons earning income through a foreign corporation, such as a Canadian holding company, or who have interests in certain Canadian resident trusts, face complex U.S. tax rules that must be carefully navigated.

In particular, U.S. beneficiaries of Canadian discretionary trusts where passive income may be generated and not distributed, require legal and tax advice to avoid potentially punitive and adverse U.S. consequences.

In conclusion, as stated at the outset, perspective is important. The ways of the past have passed. There is nowhere to hide. The Canadian-American conundrum has to be tackled and dealt with in a proactive manner. Time to get on with it.

Don't Let Cross-Border Properties Turn into Cross-Border Pains

August 22, 2016

PERHAPS I SHOULD REFRAIN from re-stating the obvious, but it bears repeating — we live in an increasingly global and mobile society, where people move from jurisdiction to jurisdiction with relative ease. And when we're not picking up and moving residences, we're travelling to foreign destinations and buying property, opening bank accounts or acquiring other assets there. Then there are inherited properties abroad, or property held before the move to Canada.

All of this is good, or at least increasingly normal, and may speak to increasing affluence, but it can cause our families problems if we don't take steps to properly plan for how these assets will pass to them after we die. One way problems can arise is the probate process in many jurisdictions, which can be extremely cumbersome, and can take up what seems like a lot of unnecessary time and additional professional fees, not to mention frustration, compared to the process in Ontario or other Canadian provinces.

Probate is the name colloquially and generally used to refer to the process by which an executor named under a will obtains the court's confirmation that the will put forward is valid and the executor has the legal authority to administer the deceased's estate under it. While it is often assumed that probate is necessary for all estates where there is a will, this is not the case in most, if not all, jurisdictions. Probate is only necessary where the holder of a particular asset or assets (such as a financial institution for a bank account) or the public registry which is in charge of title to the asset (such as the land titles system in Ontario for most real property) requires a court certificate in order to allow the executor to deal with the asset.

This brings us to one potential problem with cross-border assets — often an executor will not only need a probate certificate (called a certificate of appointment of estate trustee in Ontario) in the deceased's home jurisdiction, but also any other jurisdiction where the deceased held property. This multiplication of probate certificates can not only multiply the time and expense normal to an Ontario probate application, but in some jurisdictions it can increase it exponentially.

For example, in some U.S. states, such as Florida, the court retains a supervisory role over an estate which is submitted for probate there. This means that, unlike in Ontario, where the court will only become further involved in the estate after a probate certificate is granted in certain specific and limited circumstances, a judge often oversees the executor's administration of the estate and must approve the administration at its end. Also, the paperwork required to be submitted to the court is much more complex and extensive than that required in Ontario.

Other problems can arise due to procedural or documentary mismatches, such as if more than one jurisdiction requires the original will for probate. If assets are held in civil law jurisdictions, which includes most of Europe, the court rules governing succession may not be compatible with those in Ontario, creating more expense and complications. Probate in Ontario may be needed prior to probate in another jurisdiction, increasing the time the administration of the assets will take. And in some jurisdictions, such as many Caribbean countries, the court does not proceed with the same level of expediency as in Ontario, sometimes taking up to two years to process an application.

Fortunately, there are a variety of methods for planning to avoid the worst of, if not all of, these problems. Setting up trusts, including a revocable trust, to hold assets by trustees instead of directly, executing separate wills for each jurisdiction, joint ownership of assets, and other planning methods can, if appropriate in the circumstances and properly implemented, assist in making the administration of extra-jurisdictional assets much easier. Because of the potential pitfalls, such as income or transfer tax implications, proper and complete advice is necessary, but if you plan ahead, you can fly off to your vacation home in peace, knowing you aren't setting your loved ones up for a crash-landing.

Appointing Non-Resident Attorneys for Property: Important Considerations

September 22, 2016

AN IMPORTANT DECISION IN ESTATE PLANNING is who to name as attorney for property. As discussed in other posts, an attorney for property is given the authority to manage your assets and finances while you are living but are incapable of doing so. A power of attorney for property or equivalent allows your chosen attorney to step into your shoes to ensure that you, your financial affairs and your dependants are properly looked after during any period of incapacity (whether permanent or temporary).

When choosing your attorney(s) for property, in addition to their relationship to you and their abilities (including financial responsibility, organizational skills, reliability, business and investment acumen, etc.), you should also consider where they reside — of particular concern when your attorney lives in the U.S. and you own securities within your Canadian investment portfolio. While there are some exceptions, under applicable U.S. legal and regulatory requirements governing securities dealers, a Canadian investment advisor may be unable to take instructions (even by phone) from a U.S. resident attorney for property unless the investment advisor is registered for such purpose in the U.S. state where the attorney for property lives. Each U.S. state will have its own specific rules and exceptions in this regard.

Where a person residing outside of Canada (in particular one residing in the U.S.) is being named as an attorney or alternate attorney for property, consideration should be given to appointing a Canadian resident attorney for property to act together with the non-resident attorney to assist in these situations. It may be advisable and beneficial to include certain special provisions in your power of attorney for property such as including the ability for a non-resident attorney to appoint a

Canadian resident to assist with certain financial and investment decisions and functions where such instructions can only be given by someone resident in Canada, or separating the role of an investment attorney from the general role of an attorney so non-U.S. resident attorneys perform the investment function.

Depending on the combined value of a Canadian resident's "financial accounts," there may be additional and potentially onerous U.S. reporting requirements where a U.S. resident attorney for property has been granted "signing authority" over the accounts. Specifically, the U.S. *Bank Secrecy Act* is drafted broadly so that a U.S. resident attorney for property who has been given signing authority over financial accounts held by financial institutions outside of the U.S. is required to file a Report of Foreign and Financial Accounts (FBAR) (FinCEN Report 114) if the value of the accounts exceeds \$10,000 USD in aggregate at any time during the calendar year. Applicable financial accounts include bank accounts, securities accounts, mutual funds, RRSPs, TFSA's and some insurance policies. For more information in this regard, see the *IRS Reference Guide on the Report of Foreign Bank and Financial Accounts (FBAR)* available on the IRS's website.

The example of "signing authority" provided in the IRS's *Reference Guide* is the following:

Megan, a United States resident, has a power of attorney on her elderly parents' accounts in Canada, but she has never exercised the power of attorney. Megan is required to file an FBAR if the power of attorney gives her signature authority over the financial accounts. Whether or not the authority is ever exercised is irrelevant to the FBAR filing requirement.

There are various civil and criminal penalties for failure to comply with the FBAR reporting and recordkeeping requirements.

There may be ways to narrow the application of the FBAR rules in the power of attorney document, such as including a clause expressly stating that the U.S. person has no authority over foreign (Canadian) financial accounts until the U.S. person accepts such authority in writing where appropriate to do so. Aside from the legal considerations mentioned above, there are also practical considerations to weigh when deciding whether to

appoint a non-Ontario resident attorney for property. While it is possible to have a non-resident attorney for property appointed who can manage your finances and property outside Canada by arranging for automatic bill payments, electronic statements and direct deposits, as well as through communicating by email, courier and telephone and employing agents in Ontario for certain tasks, such as filing income tax returns, it may simply be more expedient (when all factors are taken into consideration) to instead appoint an Ontario resident attorney for property.

Your choice of attorney for property is a personal one. His or her residence and any future plans for relocating however, are important considerations when choosing the appropriate person(s) and should be discussed with your advisors during the estate planning process.

For Better or For Worse... Especially If You Move

October 18, 2016

THERE ARE MANY THINGS THAT WE THINK ABOUT and plan for when we move — furniture, movers, schools, utilities...I could go on and on. There are even more things that we plan for when we move to another jurisdiction — language, taxes, visas, driving laws...and so it goes. But one thing you might never think about if you move to another jurisdiction is the impact of the matrimonial regime of your new home on your estate plan. Matrimonial laws can have a major impact on your estate plan, and not knowing what those effects might be can make the difference between your estate plan working the way it was meant to and not.

One major concern that matrimonial regimes the world over cause when considered in the context of an estate plan is how they limit a person's ability to transfer property on death when they wish to benefit people other than their spouse. This concern often arises in second-marriage situations, but there are also many other situations where it comes up.

In Ontario, if you die with a married spouse, your surviving spouse may make a claim against your estate for property equalization under the *Family Law Act* instead of taking what he or she is gifted in your will or on an intestacy if there is no will. However, if you move to another jurisdiction, the matrimonial regimes which may affect your estate plan may be very different and may not provide for equalization at all. And as noted in our previous blog, most civil law jurisdictions and some U.S. states (such as California) provide for some form of community of property. Under these regimes, if you are the spouse with legal title to property, you still may not have full legal ownership of it and may not have the right to gift some part or all of it to someone other than your spouse on death. This can have a serious impact on your desired estate plan and add additional

complexity when you move from a community property jurisdiction to a non-community property jurisdiction.

To make matters even more complicated, if you move internationally, conflict of laws principles may come into play and dictate that a different set of laws applies to matrimonial matters than those that apply to estate matters, which can cause some peculiar and unexpected results. If you and your spouse are separated, and/or live in different jurisdictions, different laws may apply in each of the places you live, creating further complexity. Pre-planning in the form of a marriage contract on which certain matters are agreed to, such a property rights on death, for example, may assist in some jurisdictions, but not all courts recognize them or will implement them as intended, and you may not be around to explain what your intentions were.

If this all sounds like a major headache waiting to happen, you are not alone in thinking that. Fortunately, help is available for these issues, although pre-planning before a move is vital. Remember to obtain advice before you move, and you can check one more item off your “move to do” list.

Fun in the Sun, Until the Probate Court Comes?

March 14, 2017

WHILE THIS WINTER IN TORONTO has been blessedly mild, colder weather makes many of us wonder why we live in a cold climate, or at least envy those who have vacation homes in warmer climates. While a vacation home in Florida or Arizona or other southern destinations may be a wonderful thing, planning is usually necessary to prevent it from becoming a burden after death for your family and executors. As an example, directly owning a vacation home in Florida or Arizona may give rise to the onerous process to probate a will in those jurisdictions. This is in addition to any U.S. estate tax exposure your estate may face due to direct ownership of U.S. real estate.

For example, in Florida the probate process requires that your executors either be your spouse or another relative, or be a resident of Florida. Unrelated non-resident executors are not eligible to apply for a Florida probate grant. This can limit your choice of executors where a Florida probate grant is necessary. If your chosen executors are not qualified for Florida probate purposes, the Florida court can appoint another qualified person instead, including a local professional or trust company.

Also, the Florida probate process requires a myriad of documents, for example direct witness statements or court-certified copies of all of the documents submitted to probate in Ontario, not just a court-certified copy of the Ontario probate certificate itself. This can create a problem if the witnesses aren't available or willing to swear the necessary statements or a delay while the necessary documents are obtained.

The Arizona probate process presents its own challenges. For one thing, the probate process takes a minimum of four months from start to finish, and likely longer in many cases. As part of the process it will also be necessary for your executor to run an

official notice to creditors for three consecutive weeks in a row in a local newspaper.

In both jurisdictions, probating the Will or obtaining an additional probate certificate does not just involve obtaining a certificate from the court, as it does in Ontario, and other Provinces in Canada. It also involves court supervision of the executors' administration of the estate. The executors must also "close" probate and obtain the court's sign-off at the end of the process, which requires a good deal of additional paperwork to be submitted to the court as well as expense and delay.

Further, if an Ontario probate certificate must be obtained first, as will often be the case, there will be an additional delay because the probate process in another jurisdiction cannot be started until the Ontario probate process is completed.

Fortunately, there are ways to plan your estate which will minimize or even eliminate the necessity for probate in the jurisdiction where you own a vacation home. Owning the home through a special Canadian-resident trust may be a possible option. Preparing a second Will to deal just with your vacation home and property in the other jurisdiction is another, and as well there are other options. For best results, consult a professional with cross-border experience in planning ownership of your vacation home to ensure your ownership structure provides maximum protection and optimizes your situation. Then sit back and relax in the sun.

Multiple Taxation on Death: The Taxpayer's Nightmare

April 3, 2017

WITH INCREASING GLOBALIZATION of people and their assets, a growing and often hidden threat is multiple taxation on death. Different countries tax in different ways on death, and when those laws collide, the same assets can be exposed to double and even triple tax or more.

Some countries tax the deceased or the estate on death, and some tax the beneficiary. There are also different bases for charging tax, such as citizenship, domicile, residency or the location of the assets.

Most jurisdictions impose some type of death, succession or estate tax. Canada, and a few other jurisdictions (including Australia, New Zealand, and Denmark) are unique in taxing capital gains on death. And there is growing talk in the U.S. of replacing its estate tax with a capital gains regime on death similar to Canada's.

It will be of increasing importance to understand how foreign taxes impact your estate plan. For example, what if your child or other beneficiary of your estate is subject to paying inheritance tax on the value of his or her inheritance because he or she lives in a country that has an inheritance tax? Countries that impose an inheritance tax include Croatia, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Japan, Korea, Luxemburg, Netherlands, Norway, Poland Serbia, Spain, Switzerland (some cantons), and Venezuela.

If you are a Canadian resident, your assets could be exposed to paying tax twice: Canadian capital gains tax on your death and inheritance tax by your beneficiary.

Most wills contain a "debts and death taxes" provision that provides for all death taxes to be paid by the estate so the beneficiaries receive the same net amount notwithstanding

local taxation. In particular, where inheritance tax is at a high rate, this may produce an unintended result and give rise to disgruntled beneficiaries who are not subject to inheritance tax. It is important to address this issue as part of the will planning process, in particular where there are existing beneficiaries resident in a country with an inheritance tax. Should the beneficiary bear the burden, or the estate and thereby indirectly all of the beneficiaries?

In Canada, we have some relief against double taxation on death but only with two countries, the U.S. and France where there are treaties in effect to provide relief on death by allowing taxes paid in one country to be credited against tax paid in the other.

In the European Union, the issue of multiple taxation on death is recognized as urgent — progress is being made to address the problem and adopt a solution such as a one tax system on death based on a deceased's habitual residence, "one succession — one tax" as advocated in a recent EU expert report, but there is a long way to go.

As with many legal and tax issues affecting estate planning for global families and any person with ties to another country, there is distinct disharmony — not harmony, which creates challenges and potential minefields. Multiple taxation on death is one — and the first step is awareness and identification of the issue with professional assistance, and then dealing with it.

Tax Reform Revealed:

Will the U.S. Become the Best Next Tax Haven?

May 4, 2017

ON APRIL 26, 2017 WITH GREAT FANFARE the White House announced bold proposals for tax reform, the primary objective of which is to stimulate economic growth. These reforms could be a real game-changer if they succeed in creating new jobs, fueling economic expansion, and making the U.S. more competitive — and dare I say it...making America great again.

In a nutshell, the Trump Administration principles for tax reform would among other things:

- » reduce tax brackets from 7 to 3
- » set rates at 10%, 25% and 35%
- » repeal the estate tax
- » set the top tax rate at 20% for capital gains and qualified dividends

No doubt, the White House has made tax reform a centerpiece and top priority. Key policy issues and concerns abound as to whether lost tax revenue will create gaping budgetary deficits, and as to who will really benefit from these reforms — will it be the wealthiest and top earners at the expense of middle earners who will shoulder future deficits and federal debt?

Corporate rates at 15% would switch the U.S. from having some of the highest tax rates of any OECD country to having some of the lowest and in the ballpark of Ireland at 12.5%, one of the most competitive countries in the world and which in the last quarter of 2016 grew at an enviable rate of 7.2%.

What remains to be seen is whether the economic growth that results from these steep tax cuts will be enough to finance their costs.

The U.S. estate tax was originally introduced to promote greater economic intergenerational equality, nation-building and social cohesion by limiting the ability to pass on inherited wealth. Its repeal would benefit the very wealthiest. The high present exemption level means the tax only applies to a person who in 2017 has a worldwide wealth of over \$5.49M (U.S.) and for a married couple over \$10.98M (U.S.). As a result, very few pay estate tax, only about 2 per 1,000.

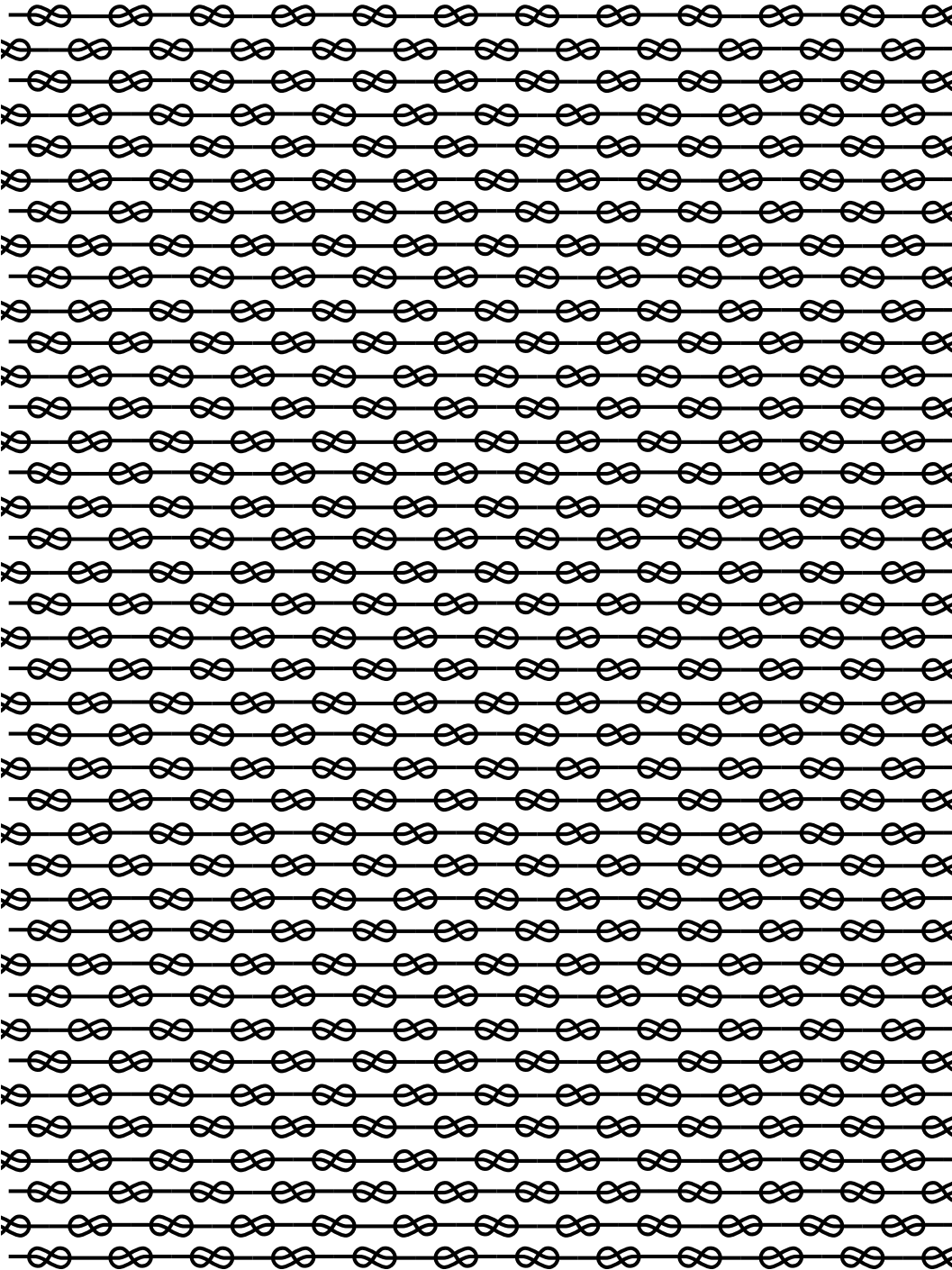
The Trump campaign proposal was to replace the estate tax with a capital gains regime on death. It is not clear under the new proposals whether the estate tax would be replaced by a different form of tax.

It is startling to think that these proposals could make the U.S. a preeminent tax haven for many.

The repeal of the estate tax would certainly help to minimize tax exposure and complexity in estate planning in owning a U.S. vacation home or other U.S. situs assets, including U.S. securities. Those who have a U.S. spouse, child or other U.S. beneficiary would no longer have to be concerned about exposing the wealth they pass on to a 40% tax at the beneficiary level.

And the proposal of a top tax rate of 35% might be attractive for those who have the ability to become a U.S. tax resident, in comparison to the top effective Canadian tax rate of over 53% in several Canadian provinces.

What the future holds and how tax reform in the U.S. will roll-out and the exact details are unknown and remain to be seen. But what is known is that the U.S. is now embarking on the biggest tax reform of a generation — pure and simple...or maybe not?





THOUGHT LEADERSHIP

On Death and Dying: The Supreme Court of Canada's Landmark Decision in *Carter v.* Canada (Attorney General)

May 13, 2015

THERE IS NO DOUBT that *Carter* has caused an enormous cultural shift for Canadians as Canada joins the few but growing number of jurisdictions that have decriminalized physician-assisted dying, including Belgium, Luxembourg, the Netherlands, and in the United States, Montana, New Mexico, Oregon, Vermont and Washington.

In a nutshell, in *Carter*, the Supreme Court in a unanimous decision held the criminal offence under the *Criminal Code* of aiding and abetting suicide and the *Criminal Code* provisions which say that no person may consent to death being inflicted on them are unconstitutional. In *Carter*, Gloria Taylor was diagnosed with ALS which causes progressive muscle atrophy eventually leading to difficulty in swallowing and breathing and sought the right to seek a physician's assistance if her suffering became intolerable.

The Court overturned the prior decision on this issue in *Rodriguez* as no longer being good law. It held the provisions under the *Criminal Code* are overly broad and that its blanket prohibition violated Taylor's rights to life, liberty and security of the person under the *Canadian Charter of Rights and Freedoms*. The Court found that individuals who meet specific criteria should be able to avail themselves of physician-assisted dying where: they are a competent adult; clearly consent to the hastening of the death; and have a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable.

But in many ways, *Carter* raises more questions than it answers.

Some of the questions that remain to be answered include to whom does Carter apply? For example, do you have to currently be “dying” or instead, not necessarily dying but suffering from a grievous and irremediable medical condition? An example might be severe and debilitating depression. Also, can you make a decision and give a directive in advance of having the medical condition? It seems the Court has said that the decision has to be concurrent with the event, and can’t be done beforehand, which rules out pre-planning prior to the onset of such a medical condition.

Even the nomenclature shows a lack of clarity and consistency. The term “physician-assisted suicide” is frequently used, the historic term euthanasia increasingly less, while the less pejorative “physician assisted dying” seems to be gaining more traction, in particular in the health community.

What will happen next? The Court has said Parliament and the provincial legislatures have twelve months to enact new legislation to uphold these fundamental rights if they wish to, but they are not obliged to. Doing nothing, however may be problematic given the risk it could expose doctors and other healthcare professionals to if there are no clear parameters for when an act may be criminal or not, and conversely could expose patients to possible abuse, including those most vulnerable. It would seem there will be a clear need to set out what constitutes consent to physician-assisted dying, and rigorous safeguards for providing consent, including appropriate witness requirements.

Undoubtedly, we are embarking on a new frontier which among many matters, may impact the scope of health care directives we prepare as part of our personal care planning.

Stay tuned for the legislative response we are all keenly waiting for.

Keeping Your Estate Plan Healthy with Periodic Check-Ups

August 18, 2015

YOUR ESTATE PLAN MAY ONLY BE TRULY UP-TO-DATE

the day you sign your estate planning documents. This statement no doubt may dismay you and perhaps be unwelcome, in particular given the effort, time and expense that goes into preparing wills, trusts and powers of attorney. The reality is that our lives are in a constant state of flux.

Our personal circumstances and those of close family members and friends who are beneficiaries in our estate plans change for many reasons: children becoming financially mature, marriage, divorce, births, deaths, relocations to different jurisdictions and new medical conditions, to name a few. Just as dynamic is the make-up of our assets — real estate is acquired and disposed of, the value of our net worth increases, new insurance policies or registered plans are acquired and beneficiary designations are changed. Layered on top of these are changes to tax and estate planning legislation.

Because of the fluid nature of peoples' lives and property and the significant impact change can have on the ultimate success of a person's estate plan, we have often taken the opportunity in past blog posts to highlight those situations that trigger a review of one's estate plan (see, for example, the following recent posts: July 28, 2015; May 29, 2015; March 5, 2015; December 10, 2014; and February 11, 2014).

The primary goal of any estate plan is to ensure our wishes, intentions and goals are fulfilled at some future point in time — often upon death. In preparation, we create estate planning documents, but for the most part, they only reflect a current personal and financial “snapshot” (albeit with some built-in flexibility for future circumstances). Creating an estate plan today that will optimize our situation five, ten, fifteen or twenty years down the road is simply not realistic.

A few examples: you named a close relative as your attorney for property, who a few years later moves to the U.K. and it is no longer practical for her to act in that capacity if you become incapable. Or you named guardians for your minor children in your will when the children were quite young, but due to changes in the guardians' personal circumstances or your relationship with them, they are no longer your desired choice to act as guardians. Or your child has moved to the U.S. and you are now concerned about the impact of U.S. estate tax on his inheritance.

We need a paradigm-shift. Estate planning should not be viewed as a "transactional" event, but instead should be viewed more holistically, as an ongoing and organic process. Just as our physical health changes as we grow older, requiring the need for regular assessments to evaluate and maintain our well-being, our estate plans need similar periodic check-ups and changes where appropriate to ensure their optimal performance when they are put into action.

A check-up could include a review of the following:

- (a) whether current wishes, goals and intentions match or differ from those reflected in your planning documents;
- (b) whether current asset ownership and beneficiary designations are aligned with your current wishes and goals and reflect your estate plan;
- (c) whether changed personal circumstances impact the estate plan; and
- (d) any new tax or legal developments.

A process for regular review and communication with one's estate planning advisors — similar to the ongoing relationship we have with our health care professionals for regular check-ups — is important. The focus should be on maintaining the plan to ensure that when it comes time for its implementation, it will function appropriately.

Some food for thought. We hope to write more on these ideas and develop them further in future posts. Stay tuned!

Family Meetings: An Underutilized Tool

December 16, 2015

IN OUR AUGUST 18, 2015 POST we raised the idea of regular check-ups for your estate plan in order to keep it current. Periodic reviews help to keep you refreshed about the details of your estate plan so that it can be maintained and changed when necessary — ensuring it will carry out your objectives when it comes into effect.

As we enter the holiday season, many of us will be gathering together with family and friends to celebrate and reflect on the past year, as well as make resolutions and plans for the New Year. In many cases, our family members and friends have been named in our wills and powers of attorney to carry out the roles of executor, trustee, attorney or guardian of minor children. We may have asked for a family member or friend's agreement before naming them as an executor, trustee, attorney or guardian in our estate planning documents, but often that's as far as we go in preparing them to carry out the plan.

You might consider making a further resolution — holding a family meeting convened by your professional advisors in the New Year to inform your named executors, trustees, attorneys and guardians, and certain selected family members about your estate plan at a “high level” and their respective roles.

Each family meeting will be unique in terms of the people invited to attend and the information covered. For example, some of the information reviewed may include:

- » how and when original documents (such as wills and powers of attorney) may be released;
- » the specific duties and responsibilities of executors, trustees, attorneys for property and for personal care, and guardians of children, as well as any other roles;
- » an overview of the plan;

- » types of discretionary decisions contemplated in the documents and what information and wishes are to be taken into account when exercising discretion; and
- » goals and intentions that inform the overall estate plan.

Information regarding your assets does not need to be disclosed at the family meeting—nor does the exact distribution scheme — although in certain circumstances, this may be desirable. Those invited to attend a family meeting can include the people who are named as executors, trustees, guardians, selected family members and professional advisors (e.g., your estate planning lawyer, accountant or financial advisor).

Family meetings provide an opportunity for communication about your estate plan and the key roles and responsibilities before a triggering event occurs (such as incapacity or death), in an informal yet structured setting. It allows your fiduciaries and key family members to have an overview in advance of your estate plan and their future roles when they are not overwhelmed or emotionally charged, and gives them the opportunity to ask questions.

We have found that people are increasingly receptive to the idea of holding family meetings and are even proactively requesting we convene them. It must be remembered, however, that your plans and wishes will change and so will your estate plan. A basic premise of a family meeting is to emphasize at the outset for all that the plan is current only as of the date of the meeting, and is changeable.

The best of the Season to you and yours from O'Sullivan Estate Lawyers!

Zen and the Art of Estate Plan Maintenance

May 25, 2016

YOU MAY REMEMBER THE BESTSELLER *Zen and the Art of Motorcycle Maintenance* which explores many themes, including the dichotomy between the “romantic” approach to life versus the “classical” approach — in the moment versus rational analysis — and the common ground linking them. The sense of mastery and peace of mind that comes with the author’s ability to maintain his older, classic motorcycle versus his friend’s lack of interest in understanding how to maintain his expensive new one and his resulting frustration when it breaks down, forcing him to rely on professionals to repair it, are key themes.

Many of us feel the same way about technology. Technological change happens so fast that even for those who are of the “classical” approach, it is difficult to maintain mastery. And many of us of the “romantic” approach just want the thing to work, and have neither the time nor the inclination to maintain the many devices we are surrounded by, and increasingly overwhelmed with, whether it be the multitude of apps on one’s iPhone yet to be tried and applied, or the intricacies of a Smart TV. Sometimes we end up feeling anything but smart.

When it comes to estate planning, your life situation and objectives can be uncomplicated or they can be complex, with many challenges to be met. Case in point: planning is generally straightforward for a couple with modest assets, a first marriage, children with no special needs and where all ties are domestic. But planning is another story for a couple with prior marriages, children from both the prior and the existing marriages (some of whom have special needs and will never be financially self-supporting), and where there are ties to other jurisdictions (such as U.S. citizenship), as well as high value assets located in several jurisdictions and an operating business to boot.

Yet in each situation, each client may say “keep it simple.” What they may really be saying is “I want my objectives fulfilled, but I want to understand my plan.”

And here lies the rub. Simple is not simple-minded or simplistic. In estate planning, to achieve individual objectives often means more complication and complexity in the plan, including how it is structured and documented.

It is key to ensure that each of us understands the plan and the important elements, notwithstanding often lengthy and complex provisions. Only then can it be ensured that one’s objectives and wishes are reflected.

In our view, this is best achieved in a comprehensive planning and review process, including preparing additional aids, such as flowcharts, pictorials and executive summaries of key terms.

When it comes to estate planning, it is important to find the common ground between the romantics who may not be so interested in the details but want to ensure “it works,” and the classicalists who take a keen interest in each detail and the relevant legal and tax rules and principles.

The role of the professional advisor is often to be the guide who can find the path to this common ground for each person in each individual situation. And in doing so, to ensure each client truly “owns” his or her plan. That is to have true peace of mind, which is so important in estate planning.

Redefining Family

August 8, 2016

SOMETIMES THE LAW LEADS in pushing societal change forward, but often it lags far behind, particularly in the face of scientific innovation and rapid technological change.

Over the past forty years or so, even how we define family has been subject to fundamental change, and in the future it will be even more so.

By way of historical perspective, in Ontario prior to 1978, when changes were made to the law, a child born outside of legal marriage was not considered to have status as a child when that term was used in a will unless the will provided otherwise. The term child meant only a child born within legal marriage.

Today, in Ontario, almost half, and in some other jurisdictions including Quebec, more than half of children are born outside legal marriage, illustrating the importance of legislative foresight.

In the early years after 1978, a common clause included in many Ontario wills and trusts maintained the pre-1978 concept, and expressly excluded a child born outside marriage. For many people, the legislators were perhaps ahead of their own thinking and wishes with regard to inheritance. These clauses often became part of "boiler plate." In the face of contemporary social reality given the number of children born outside marriage, their prevalence in many existing wills and trusts raise significant legal issues, and create possible unforeseen unfairness, but as well show how going against the winds of change can create practical problems.

Today, we also increasingly face the challenges of reproductive technology in estate planning, including its impact on who is considered a child, and who is not in respect to posthumously conceived children. Because conception can now occur both before and after death, our laws and estate planning must at least consider this possibility, and how best to deal with it.

Legislatures have started to react, some positively and some negatively, with regard to allowing posthumously conceived children to have inheritance rights. Twelve U.S. states have legislation to allow intestate rights for posthumously conceived children, as does one Canadian province — British Columbia. For public policy reasons, some jurisdictions have taken the stance that allowing posthumously conceived children inheritance rights would create impracticable obstacles in estate administration.

Wills and trusts, however, can be drafted to carry out each client's objectives, even if legislatures drag their feet. Appropriate definitions can expand the definition of child and other lineal descendants to include those who are posthumously conceived and born after a death, but with certain conditions and limitations, such as the period within which a person must be born after a testator's death.

None of us has a crystal ball to know where the world will be in the future on these issues and how it may impact our individual situations and family members. But what we do know is that the planning we carry out today has significant and lasting impact for future generations.

Who we include as a child or other descendant in our estate planning is important, just as the changes made in 1978 in Ontario and in many other jurisdictions were to include children born outside of marriage. Science has created an opportunity that did not exist until most recently. Now the challenge is to meet this new reality in a responsible and considered way.

Ethos for an Aging Society

November 2, 2016

IT IS QUITE REMARKABLE to think that notwithstanding our increasingly aging demographic,¹ the recognition of the rights of older persons as a distinct group has been largely absent in the field of human rights. Only recently the rights of older persons as a distinct group have begun to emerge and slowly become reflected in legal thinking and legislative change. There is increasing movement towards creating a United Nations international declaration or convention on the rights of older persons as older persons' rights have not generally been expressly recognized at the international level. One of the objectives for creating an international convention is to provide a concrete overarching legal framework for use by government around the world, including by guiding policy-making in order to address the distinctive human rights issues faced by older persons.

Such a framework is important in the trusts and estates context, including in the challenging area of legal decision-making. When cast under the glare of a human rights perspective, much of our existing legislation for legal decision-making seems archaic.

An example of how a human rights perspective can inform policy is reflected in the work of the Law Commission of Ontario, which in early 2016 released its *Interim Report on Legal Capacity, Decision-making and Guardianship* ("Interim Report"). It addresses the laws that apply to how decisions are made related to property, treatment and personal care where a person's decision-making is impaired, as reviewed in more detail in my February 8, 2016 blog post. Our current system relies on substitutes, that is, other persons appointed whether by power of attorney, statute or the court to make a decision on a person's behalf.

The Interim Report is grounded in a legal framework adopting certain foundational principles based on human rights principles and laws as found in the *Canadian Charter of Rights and*

Freedoms, the Ontario *Human Rights Code* and the *United Nations Principles for Older Persons*, including the principle of fostering autonomy and independence. As stated in the Interim Report, this principle recognizes:

The right of older persons to make choices for themselves, based on the presumption of ability and the recognition of the legitimacy of choice. It further recognizes the rights of older persons to do as much for themselves as possible. The achievement of this principle may require measures to enhance capacity to make choices and to do for oneself, including the provision of appropriate supports.

With regard to decision-making, the Law Commission's key recommendation is that existing laws should reduce inappropriate intervention and better protect autonomy and self-determination, including statutory requirements to ensure a focus on the prior capable wishes of individuals, or on their current wishes and values as well as "co-decision-making" versus "substitute decision-making" to allow the incapable person to participate in and have support in making decisions, not simply taking all decision-making power away and placing it in the hands of others.

The Interim Report asserts that current law is not sufficiently effective in ensuring that individuals retain control over their choices and their lives to the greatest degree possible, and that a lengthy history of paternalism exists towards older persons which restricts their lives and leads to negative results.

A number of other jurisdictions are currently studying or have similarly recommended or enacted legal changes to modernize laws regarding legal decision-making from a human rights perspective. For example, British Columbia's *Representation Agreement Act* is recognized as pioneering legislation for supported decision-making. Each of Manitoba, Saskatchewan, Alberta and Yukon has some form of supported decision-making.

It will be interesting to see how the rights of older persons in the human rights context evolve in the area of legal decision-making and other important legal areas that impact older persons. It could not be timelier, as these issues affect every one of us and our family members in the most fundamental of ways.

¹ The number of persons aged 60 and over is anticipated to rise from currently 740 million to 1 billion by 2020 (United Nations Human Rights – Office of the High Commission, www.ohchr.org).

Best Interest — Conflict of Interest: The Provision of Financial Advisory and Financial Planning Services

December 20, 2016

AS WE LOOK FORWARD IN OUR CRYSTAL BALL to looming issues on the horizon for 2017, one that certainly comes to the fore is the regulation of those who provide financial advice and financial planning services, often offered under the nomenclature of “estate planning” or “retirement planning” advice.

There is a lot of movement afoot as Ontario and other Canadian provinces grapple with how best to regulate those who offer financial advice and financial planning services given the lack of a comprehensive legal framework to do so.

One of the burning issues is whether a “best interests” standard should apply. Presently, there is no express obligation for those who provide financial product sales and advice (as opposed to portfolio managers) and financial planning advice to act in the client’s best interest. Financial planning as an activity is not subject to a general regulatory framework, and the provision of financial product sales and advice generally is subject to know-your-client and suitability requirements. A number of financial industry groups have recommended adoption of a best interests standard, in line with current changes in other major jurisdictions, including the U.K. and the U.S., as well as the Expert Committee to Consider Financial Advisory and Financial Planning Policy Alternatives appointed by the Ontario government in its preliminary recommendations of April 5, 2016.

The concern is that many clients believe and have the expectation that the financial advice and financial planning services they receive are based on their best interests, with no understanding that their advisor may in fact have a conflict and not be providing objective advice, in particular where his or her

compensation is a commission or other financial reward based on sales.

The best interests standard is one we as trust lawyers are well acquainted with, as it is derived from the law of equity and fiduciary relations. One of the fundamental requirements of a fiduciary is that he or she not place himself or herself in a position where his or her self-interest might conflict with his or her duty of loyalty to act in the best interests of his or her client or other person to whom the duty is owed.

Those involved in the professions are well-schooled in the fiduciary obligation owed to one's client. The category of fiduciaries includes lawyers, accountants, directors, agents, public officials, partners and others. There is a key difference between providing objective advice based on a best interest standard and "making a sale". The societal basis for creating the professions is arguably to place important and essential work into a protected class where the interests of the person receiving the service must always come first, and the rough and tumble buyer-beware profit-focused rules of the market place should not interfere.

No doubt, a robust regulatory environment that protects investors and those receiving financial advice and financial planning services is more important than ever as aging baby-boomers are in, or fast-approaching their retirement years. Requiring complete transparency is only fair. The need for independent, objective financial advice which often has a profound impact on important life decisions, in particular in financial planning, is critical for society in general, and clarity and a well-regulated legal framework is needed to support it.

We would like to take this opportunity to extend to all our readers a joyful holiday season and good health, peace and prosperity for 2017.

The Family Wealth Conversation — Too Little, Too Late?

March 1, 2017

ONE OF THE ISSUES OF INCREASING CONCERN to parents is having that family wealth conversation.

With increasing affluence, the present post-war baby boom generation is confronting more so than their parents had to, the best way to approach talking with their children about financial matters, including their eventual inheritance.

While we have formal education in core subjects such as mathematics, history and English as part of the standard elementary and secondary school curriculum, financial literacy is only beginning to become part of the education system.

Yet we know that generally when it comes to learning skills, whether it is a second language, a musical instrument, or downhill skiing, the earlier is generally the better. It seems however that the teaching of financial skills and financial education is often delayed until our children are in their late twenties and is often comprised of an informal mentoring process based on family discussion and tips, rather than a formal, objective approach.

“Too little, too late” perhaps best describes the present reality of financial education in most families. In RBC’s recent *Wealth Transfer Report 2017*, key findings include that the key to raising financial literacy and building financial confidence in our children is to start early, and that most of those surveyed believe a structured approach is more effective than an unstructured one.

A key finding of the Report (which we would likely all agree with) is that our present societal values include a reticence and lack of comfort in talking about financial matters, inheritance and death leading to inaction and a recurring cycle of inadequate financial guidance intergenerationally.

Simply repeating how our parents informally educated us is arguably not sufficient. Life and financial matters are more complex, and without proper financial management skills, our children's financial wellbeing and what they stand to inherit from us is at risk.

It seems the wealth management conversation is moving forward to now emphasize the importance of an open dialogue on money issues and to stress the need for greater financial literacy and a more formal approach. I would offer a comparison — many of the present generation of baby boomers learned to drive a car under the instruction of a parent as driver's ed was just beginning. But now, few if any of our children learn those skills without a formal education course with a qualified instructor.

Navigating through the complexity of our modern financial world and arriving at the desired destination intact and without any accidents along the route requires now more than ever a comprehensive and formal approach and open dialogue.



About the Blog Team

Margaret O'Sullivan

Margaret is the firm's managing partner. Her legal practice involves all aspects of private client work, including estate planning; will and trust planning; incapacity planning; estate dispute resolution; advising executors, trustees and beneficiaries and administration of estates and trusts, with a focus on high net worth, domestic multijurisdictional and cross-border matters.

Margaret is recognized in *The Best Lawyers in Canada 2017*, in the 2017 edition of *The Canadian Legal Expert Directory* as one of the most frequently recommended estate planning lawyers, in *The Who's Who Legal: Private Client 2016* "She provides all-round knowledge and always works towards the best solution for the client," and in *The Who's Who Legal: Canada 2016* as one of the five leading trust and estate lawyers in Canada. She is one of the six top-ranked private client lawyers in Canada in *Chambers Canada Guide 2017* "expertise and technical skills are excellent", *Private Client Band 1* as well as in *Chambers High Net Worth Guide 2016*. She is a recipient of the 2014 STEP Founder's Award for Outstanding Achievement and the Ontario Bar Association's 2013 Award of Excellence in Trusts and Estates Law. Past Deputy Chair and past member of the Board of Directors and Council for STEP Worldwide and a past Chair of the Professional Standards Committee. Past Deputy Chair of STEP (Canada) and past Chair of Editorial Board for *STEP Inside*. Past Chair, Trusts and Estates Section and member of Council, OBA. Elected Fellow, ACTEC, 1995. She is an Academician of The International Academy of Estate and Trust Law. Co-author, Canada Chapter, *International Succession Laws* (Tottel 2009), and a contributing author to *Widdifield on Executors and Trustees* (Carswell 2002), *The Private Wealth & Private Client Review* (Law Business Research 2014), *The International Comparative Legal Guide to: Private Client 2015* (Global Legal Group 2014) and *Private Client Multi-jurisdictional Guide 2014/15* (Practical Law Company 2014). Called to Ontario Bar in 1983.

Some insights about Margaret:

Favourite movies: *An Education*, *Moonlight*, *Love Actually*, *A Man For All Seasons*, *Judgment at Nuremberg* and *Superbad*

Favourite books: Biographies, anything by the Dalai Lama, Tom Wolfe or Leo Uris

Most inspiring historical or political figures: Winston Churchill and Mahatma Gandhi

Passions outside of law: Travel to as many interesting places I can, current affairs, anything outdoors (cottageing, boating, skiing, biking, hiking) gourmet dining, being a Canadian, films and musical theatre, and most of all my wonderful family

Emma Hamilton

Emma is an associate lawyer. Her practice includes estate planning, estate administration and estate dispute resolution. Prior to joining O'Sullivan Estate Lawyers, she practiced at a mid-size law firm in Calgary. She has experience in will, trust and succession planning, wealth transfer and incapacity planning, probate, estate and trust administration, special trust and estate court applications and family law matters, including domestic contracts. Emma is a student member of the Society of Trust and Estate Practitioners (STEP).

Emma has a J.D. from the University of Calgary, Faculty of Law. As part of her law studies, she spent a semester abroad at the University of Lucerne in Switzerland, summered at the United Nations Office on Drugs and Crime in Bangkok, Thailand and was a legal research assistant.

Emma has a Bachelor of Arts (With Distinction) from the University of Victoria where she majored in Political Science, with a focus on International Relations, and minored in Professional Writing.

Some insights about Emma:

Favourite movies: *Love Actually*, *La La Land*, *Grand Budapest Hotel*, *Home Alone*, *The Shawshank Redemption*

Favourite books: *All the Light We Cannot See*, *The Kite Runner*, *When Breath Becomes Air*, *The Help*, *Lovely Bones*, *Wicked*

Most inspiring historical or political figure: Malala Yousafzai

Passions outside of law: Practicing yoga and barre, playing piano, ballet, travelling to new and exciting countries, and exploring the local vibrant food scene





Susannah Roth

Susannah is a firm partner and she has a broad-based practice with a focus on estate and trust administration, guardianship matters and planning for persons with special needs.

Susannah is a member of the Editorial Board for STEP Inside, an Ontario Bar Association Council Member, a Past Chair of the Ontario Bar Association Trusts & Estates Section Executive and is currently a Trustee of the OBA Foundation. She is a Past Chair of the Ontario Bar Association Young Lawyers' Division Executive Committee and a Past Co-Chair of the Ontario Bar Association Young Lawyers' Division Continuing Legal Education Committee. Susannah was the 2011 inaugural recipient of the Ontario Bar Association's Heather McArthur Memorial Young Lawyers' Award which recognizes exceptional contributions and/or achievements in continuing legal education or the development of the law, for the benefit of the profession or the citizens of Ontario. Susannah was called to the Ontario bar in 2002.

Some insights about Susannah:

Favourite movies: *Clue, Gosford Park, Death to Smoochy, Serenity, Star Trek: First Contact, What Dreams May Come*

Favourite saying: People demand freedom of speech in compensation for seldom used freedom of thought (Soren Kierkegaard)

Passions outside of law: Getting in shape, watching sci-fi television shows and my husband's YouTube videos, making jam (when time permits), and travelling to many future exotic destinations

Sara Beheshti

Sara Beheshti is an associate lawyer. Her practice involves estate planning, estate administration and estate dispute resolution and real estate matters arising in the trust and estate context. Sara's estate planning practice includes will and trust planning, incapacity planning and estate administration. Sara also advises executors, beneficiaries and trustees on estate and trust administration.

Sara is frequently retained by lawyers, financial institutions, executors and individuals to act on real estate issues arising in estate planning, estate administration and estate litigation matters. Sara has broad experience in real estate transactions and estate conveyancing matters. She also provides title opinions and advice on claims affecting title, fraud prevention and the registration of title transfers, cautions, court orders and certificates of pending litigation.

Prior to joining O'Sullivan Estate Lawyers, Sara managed her own law practice with a focus on estate planning, estate administration and real estate law. Sara articulated at RBC Insurance and was called to the bar in 2008. Sara has a J.D. and a B.A.(With Distinction) in French Literature from the University of Toronto (Trinity College), and a Diplôme d'Etudes de Civilisation Française from the Sorbonne in Paris.

Sara has been a member of the OBA Trusts and Estates Section Executive since 2014 and chairs the Outreach Committee. She is Vice-Chair of the OBA Real Property Section Executive and has been a member-at-large since 2013. She is also a member of the Toronto Estates Solicitors & Litigators Association (TESLA).

Some insights about Sara:

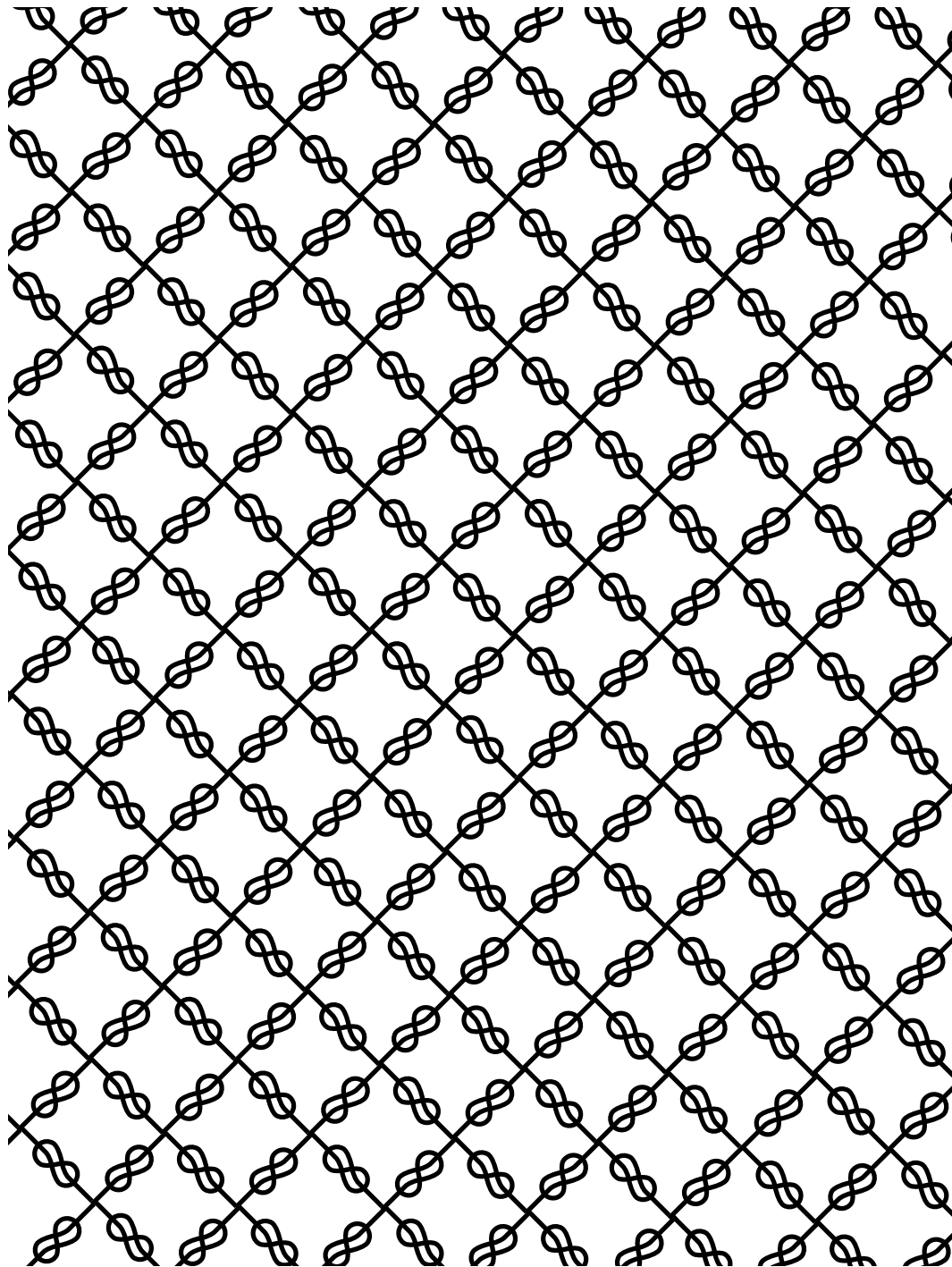
Favourite movies: *The Ice Storm, Serpico, Memento*

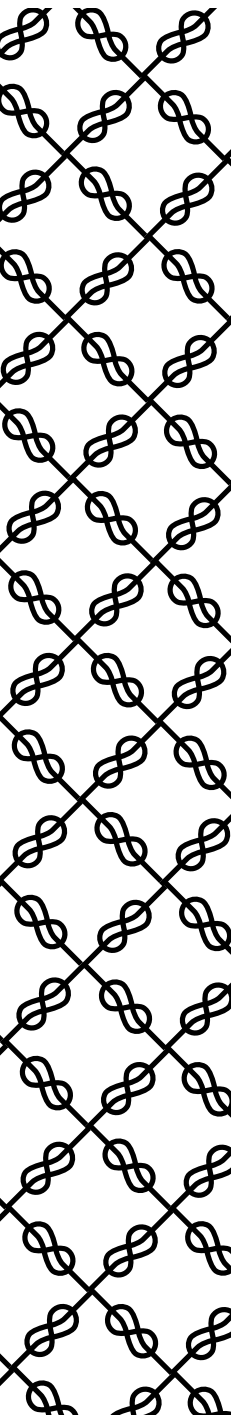
Favourite books: *The Emperor of All Maladies: A Biography of Cancer, Rabbit at Rest, The Power of Place*

Passions outside of law: Animal welfare, cooking, travel

Favorite musicians: Prince, LCD Soundsystem, Fleetwood Mac, The xx





**Disclaimer**

The comments and information offered in this booklet are meant to be general in nature, are limited to the law of Ontario, Canada, and are not intended to provide legal or tax advice on any individual situation. In particular, they are not intended to provide U.S. legal or tax advice. Further, specific comments and information contained in this compilation are up-to-date as of the original blog post publishing date—the law and certain related comments may no longer be current. Readers should not rely upon this information as a substitute for obtaining specific legal advice. Before taking any action involving individual situations, readers should seek legal or tax advice from their own professional legal or tax advisors to ensure it is appropriate to their personal circumstances.



osullivanlaw.com

