THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

BASICS OF WILLS AND ESTATE PLANNING 2019

PAPER 1.3

Overview of Estate Planning

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OVERVIEW OF ESTATE PLANNING

I. What Is an Estate Plan? Why Estate Planning?

The title of this course is "The Basics of Wills and Estate Planning". It could as easily been titled any of "The Basics of a Wills Practice", "Fundamentals of Preparing Wills", "A Primer on Drafting Wills" etc.

The phrase "estate planning" was deliberately added to highlight what hopefully is the theme of the course, that preparation of a Will is a broader task professionally than simply transcribing a client's wishes. The lawyer hired to prepare a Will must find out enough about the client to advise them on the law, make sure their plan makes sense, can be practically carried out, and that the client's instructions are informed instructions.

There is a tendency to think of estate planning as an esoteric, advanced, and specialized field of law practice. An area that is the preserve of tax experts, involving specialized subjects such as corporate estate freezes, railroad baron trusts and limited to the estates of the truly wealthy.

The essential point to understand is that every Will is part of an estate plan. For many clients the Will is the largest element to carry out the estate plan, but the preparation of the Will follows the plan and can't be considered in isolation from the plan. Perhaps this is understood intuitively but it is worth reminding ourselves of this fact from time to time.

While a lawyer may only want to draft Wills and might not think they have the skill set to be an "estate planner" it is really not possible to do the one job without doing the other. In fact if one thinks about it the most average client situation is where the lawyer is most likely called on to exercise the "estate planning" function. In the case of the very wealthy business person and the elaborate estate plan, all manner of other professionals, accountants, trust company estate planners, life insurance advisors, and tax lawyers may be called upon to create the "estate plan." But in the usual family situation the lawyer will not have the luxury of other assistance. The lawyer will be called on to advise the client on the estate plan.

II. Professional Responsibility and Liability

Understanding Wills as part of the larger estate plan highlights the extent of professional responsibility and liability when lawyers undertake preparation of clients' Wills.

As an aside it becomes obvious that the task of preparing a Will is not a simple one. It takes time and effort. This leads inevitably to the criticism, "But the clients won't pay that much for a Will." Hopefully during this course the idea that a Will is a valuable thing for the clients can be reinforced and lawyers can consider some of the ways to educate clients about the need for thoroughness and a properly prepared Will. The good news is most clients already recognize their Will is a very important document. They perceive it as necessary and valuable before they approach a lawyer. Lawyers need to build on that perception and explain to the clients the necessary steps to prepare a Will properly.

"But the client only wants a simple Will, they don't want all this estate planning junk!"

"What is wrong with just writing down what the client tells you he wants?"

Although it didn't involve preparation of a Will a decision of the BC Supreme Court (Cammack & Co. v. Kavanagh 2006 BCSC 1298) is worth noting. The court considered the liability of a professional who had prepared a co-owners agreement respecting property ownership. It turned out the agreement was flawed and didn't work as the parties had intended. The disappointed party sued the notary who had prepared the agreement. Among other things the notary argued that he was not liable as the client either hadn't instructed him on the particular point or didn't give sufficient instructions. The court rejected this argument and at paragraph 48 said as follows:

> I would add that, if Cammack did not receive sufficient instructions from Kavanagh, it was Cammack's duty to ask sufficient questions so that Kavanagh would understand that the instructions were deficient and needed to be corrected or expanded upon *The failure to ask these questions would be negligence in its own right.* (emphasis added)

In a decision of the Alberta Court of Queen's Bench decision Meir v. Rose 2012 ABQB 82, the court dealt with a situation where the solicitor failed to enquire as to the legal ownership of a parcel of land relying on the client's information that it was his. The client did not have title as it was in a company name and the gift made in the will failed. The solicitor was found negligent and liable to the disappointed beneficiary. Referring to an earlier Saskatchewan trial decision (Earl v. Wilhelm) the court quoted with approval:

> The duty requires a solicitor to make the inquiries necessary to satisfy himself that the wishes of the testator will be honored and given proper legal expression through the provisions of the will.

Interpreting the previous decision the court went on to say at paragraph 22:

> The Court held that it is insufficient to simply inquire of the testator what he wishes and then to record and thereafter prepare the will without anything further, likening this to a "a parts counterman or order taker."

The parallel to the Wills drafting situation is obvious. There are no shortcuts to doing a proper job. The lawyer as professional will be held to the high standard of doing the job properly. The lawyer can't fall back on the client's ignorance of the process.

For further information lawyers are encouraged to read the article by John Poyser "The Preparation and Execution of Wills": Everyday Issues and Changing Industry Standards (Estates Trusts & Pensions Journal Volume 25 Number 1 December 2005 p.31) which is reprinted with these course materials.

III. What Are the Goals of Estate Planning?

In simplest form an estate plan is the overall determination as to where and how an estate will be distributed on death. A Will should deal with everything one owns on death but that is not usually the whole story. In even the most basic family situation estate assets are handled by a variety of means. The family home and bank accounts are owned jointly by the husband and wife, and life insurance and RRSP's pass in the first instance to the spouses as named beneficiaries. The Will provisions must take into account and complement these provisions. It must immediately appear obvious that a lawyer who was unaware of these basic facts concerning his client's affairs is in an impossible position in advising that client and drawing the Will. This course therefore emphasizes the need to first obtain information, provide advice and only then take informed instructions.

Keeping in mind the comments that preparation of Wills always involve an understanding of the place of the Will in the estate plan there are a number of reasons for formal estate planning A non-exhaustive list includes:

a) minimizing tax and probate fees payable on death;
b) protecting an estate from creditors;
c) protecting an estate from the claims of disgruntled family members,;
d) arranging for the orderly transfer of control of a family business; and
e) ensuring the client's wishes for distribution of their estate are carried out.

IV. What Are the Components of a Typical Estate Plan?

In assessing the client's needs, the lawyer should obtain at least a "snapshot" of their current financial circumstances. In addition the lawyer needs to know the client's personal background, when and where they were born, details of marriages, children, and probably some knowledge of their extended family. In addition to the basic information on the client's family, the lawyer should learn the details and relationship of others whom the client wishes to benefit.

After advising the client on their situation the question is "Where does the client want their estate to go?" From that answer the lawyer can apply his knowledge and skill to create the most efficient plan to accomplish the client's wishes. The lawyer will want to canvass the following:

> At the very least the client must select who will act as executor and trustee, and consider how many alternates or additional trustees their situation requires.
>
> Based on an understanding of the clients financial situation, the lawyer should advise the client on potential taxes and liabilities at death that might in practice defeat their intentions. Discuss and conclude how these taxes will be paid or debts satisfied. If appropriate consider the use of life insurance.
>
> Consider and advise on any wills variation issues or potential claims. Decide if the client will approach potential wills variation claims, simply by making a fair plan and allowing everything to pass under their Will or if more aggressive measures are required. Consider and advise if the client should take steps to

minimize the assets passing under their Will thereby foreclosing potential wills variation claims.

Does the client want any special arrangements made to maintain a residence?

For minor children advise and provide a form of trust to satisfy basic maintenance costs, and for other payments and advances the children may need. Decide at what age children should receive the capital interest under a trust.

Are there specific cash legacies or gifts the client wants to make?

If a family business is involved, there may be special requirements to ensure the business can be carried on by surviving family members.

Don't forget to ask the client about their charitable intentions. Many clients forget about this until the lawyer asks, but often have charitable inclinations and may want to include these as part of their estate plan.

Discuss an "ultimate gift over" provision in the event the main distribution scheme fails.

Clients should also consider appointment of a guardian for minor children, and may also want to provide specific funeral wishes.

V. Commonly Used Tools to Implement an Estate Plan.

There are a number of ways to transfer an estate to others, and as we have noted the Will is only part of an estate plan. The lawyer may be called upon for other services, such as transfer of property ownership in addition to preparing the Will.

Jointly held assets such as real estate owned in "joint tenancy" or bank accounts with a right of survivorship, transfer automatically on death to the surviving owner. The law presumes they have transferred immediately before death, to the surviving owner, therefore they are not part of a person's estate on death, and are not affected by a Will.

Life insurance payable to a named beneficiary, or RRSP's with designated beneficiaries, go directly to the beneficiary, and not under a Will.

When advising clients on their estate plan one should keep in mind some of the basic estate planning tools which can include:

a) rearranging property ownership;

b) use of joint tenancy ownership;

c) life insurance, and specific beneficiary designations, or life insurance trusts;

d) annuities;

e) RRSP's and RIF's;

f) inter-vivos trusts;

g) corporate estate freezes;

h) gifts made during the client's lifetime; and

i) last but not least the Will.

As can be seen a Will is an essential part of the plan to distribute an estate on death, but it is only one part. Arranging property interests in different ways during one's lifetime can accomplish some or all of the intended distribution A Will must be drawn to accommodate the estate plan.

Even in a basic family a couple decide on a plan that provides on the death of one all of their assets pass to the surviving spouse, and only after the death of both spouses will there be a distribution amongst children. For minor children they may create a trust. As no one can predict which spouse will die first Wills are still needed to direct what happens on the death of the second spouse. While joint tenancy assets, and life insurance mean on the death of only one spouse no assets actually pass under the Will, the Will remains absolutely essential to direct what is to happen on the death of both. They may die within minutes of each other or years apart, but properly drawn Wills provide their plan is carried out regardless of who dies first, and without any need for the survivor to prepare a new Will after the death of the first spouse.

In most circumstances a Will is drafted to cover all the assets one owns at death. A basic principle of Will drafting, is no one knows when they will die, or what they will own at death. For example a person who thinks they have only a modest estate, could draw a Will today, suffer permanent incapacity from a stroke next week, and then inherit a large sum from another person's estate, prior to their own death. A properly drafted Will including a "residue" clause ensures, regardless what the person thought they owned, everything they in fact own at death is distributed.

Sometimes if there is an elaborate estate plan, the use of a combination of gifts, annuity purchases, and "corporate estate freezes", and perhaps transfer of assets to a trust, one might question the need for any Will at all. Everything is distributed outside of a Will. On death however there are always some assets that have not been dealt with and which must be taken care of by a Will. In addition a Will appoints an executor. The executor has legal authority over an estate. If there were legal actions over an estate, or actions commenced prior to death, or if after death it was necessary to pursue legal claims against others an executor would have that authority. For couples with young children it is important to appoint a legal guardian, and this of course can be done by a Will.

In summary then, no matter how simple or complex an estate, or how elaborate an estate plan, a Will is essential for everyone.