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ESTATE PLANNING

Back To the Future

Revisit Your Plan

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Putting together a properly planned will is time consuming and often frustrating. But I can tell you from personal experience that not having a will can cause heartache for those around you.

I've been a professional estate planner for close to 30 years, but my real start occurred in 1974 when my late father died of a sudden heart attack at the age of 50. My father was a busy engineer. So busy that he didn't have time to create a will, buy any life insurance, or do any estate planning. My late mother had no choice but to go back to work at 48 to support the family.

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It was tough going and a hard-learned lesson for others.

You don't have to be "rich" to have a will. If you have children, a spouse, a house, registered assets, bank accounts or a business, you need to take estate planning seriously. Neglecting this will (not can) cause even more trouble, time, costs and probably unnecessary taxes for those who are left after you.

A recent study revealed that only one in four Canadians has a full strategy in place for transferring their wealth to subsequent generations. One in three said they hadn't done anything in that regard. Developing an estate plan now - while you are alive and the sun is shining - will preserve and protect your assets and direct how they get distributed on death. Your plan will also maximize the size of your estate by incorporating strategies to minimize the taxes that quickly erode a financial legacy.

One of the most cost-effective ways to provide for your family and minimize your taxes is using tax-exempt life insurance. For married couples, a joint and last-to die (JLTD) life insurance policy is an excellent solution, as it costs much less than individual life insurance (often up to 40 per cent less) and is easier to qualify for, especially when either husband or wife has medical issues that would otherwise leave them uninsurable. When a couple buys it, the benefit gets paid out on the second death, exactly the time when taxes will come due.

But estate planning isn't just life insurance nor is it something that can be done only once and put away. You should revisit your will at least every five years. Life cycle events occur all the time and governments (federal and provincial) often implement or change taxes rules - all of which should ring the alarm to revisit your planning.

If you currently have an estate plan, congratulations! I recommend getting a second opinion that will confirm your planning is solid or reveal deficiencies that can be remedied now. We are often retained by lawyers and accountants to review their clients' planning. Not all professionals are specialists, be sure to get the best available advice.

These following events are triggers for reviewing your will

and powers of attorney and taking a second look at your overall estate plan.

Marriage or remarriage.

You should know that getting married or remarried revokes a previous will, although a separation does not affect a will at all. In any case, you want to make sure you don't have any unintended beneficiaries of your estate or have left anyone out.

Not having a will in place makes your estate "intestate", and a subject to potentially high legal costs. It puts all the decision-making power into the hands of your provincial government – i.e. who are the beneficiaries, and who gets what, with potentially negative tax repercussions. If there are children under 18, it could also leave a large part of your estate up to the court to invest.

Having adequate life insurance is an important part of your new life because it will ensure your new family has adequate financial protection should something happen to you.

If you are going into a second (third, fourth, etc.) marriage, contemplate a prenuptial agreement that will keep your assets with you should you divorce. Read my TaxLetter article from Oct. 2018, "Getting Married - Romance Meets Reality" and June 2017, "Common Law, Uncommon Considerations".

Divorce.

While this might sound counter-intuitive, divorce does not revoke a will. If you don't want your former spouse to get all of your assets, you must update your will, or make a new one in contemplation of a remarriage. Getting a new will in place immediately in a second marriage will reflect your current wishes and ensure that your children are looked after. This might also include getting new powers of attorney, executors, trustees and guardians if minor children are involved. Read my TaxLetter article from Oct. 2015, "Divorce: Determining the best way forward".

Birth or adoption of a child

This is a time when most people decide they should get a will because of concern over the child's guardianship if something happens to the parents. Ideally, this will be a trustworthy, responsible person who shares your values and has agreed to take on this important responsibility.

Unfortunately, there are some people who say they will not get a will until they agree on a guardian. But they should know that a will isn't permanently binding and if the named guardian decides not to take on the role, the courts can appoint someone else to step in.

Family trusts are popular estate- and succession-planning vehicles because they're versatile and effective tools to help manage family wealth and taxes. With a trust in place, you can control the timing and amount of distributions to beneficiaries, provide flexibility in structuring beneficiary payments, reduce tax bills for the family through income splitting and not be subject to probate fees. In Ontario, the probate tax is 1.5 per cent, so probate taxes of $15,000 are levied on every $1 million of assets.

This is also a time to review your insurance needs, including life, disability and critical insurance because you are now responsible for a new life. If something happens to you, will your spouse have adequate financial resources to raise your family alone?

Many people neglect disability and critical illness protection, crucial coverage for a breadwinner sidelined by illness or disability. Read my TaxLetter article from Nov. 2014, "What to consider when a new baby is on the way"

Illness or disability of a beneficiary

This usually requires specialized planning like a Henson Trust so your beneficiary can access government benefits. Putting together a Henson Trust will help protect the disabled beneficiary's assets while preserving and maximizing their access to government programs.

The key provision of a Henson trust is that the trustee has absolute discretion in determining whether to use the trust assets to provide assistance to the beneficiary, and in what quantity. The trust beneficiary uses their personal exemptions and tax credits to reduce their taxable income.

A recent Supreme Court of Canada decision ruled that Henson trusts are a valid estate-planning tool, but whether a particular Henson trust is effective depends on the terms of the particular trust and on the terms of the specific social benefits program.

You will need the help of an experienced wills and estate lawyer to put it all together. Without the trust, you may inadvertently prevent a child from accessing funds that could otherwise pay for helpful programs and other important government services. Read my TaxLetter article

from Aug. 2014 “What to consider when planning for kids with special needs”

Death of a beneficiary.

Some wills contain a “survival clause” that states that the beneficiary only becomes entitled to their gift under the will if they survive the will-maker by a certain time period, say 30 days. If the will doesn’t have a survival clause some provincial laws set out a five-day survival rule. These rules set out how the share is distributed if a beneficiary dies within five days of the deceased. If the survival rules aren’t a factor, the beneficiary’s share of the estate passes to the beneficiary’s estate, or if they don’t have a will, under the rules of intestacy in their province. This can become complicated – and simply adds another reason why you should update your will every so often.

Non-resident executors

Children grow up and often move to another country. Dual tax laws alone are a good reason to think twice about naming a non-resident adult child an executor. For example, a non-resident executor is considered to control a foreign bank account and may be required to file additional state and federal returns in the U.S. He or she may also need advice from a cross-border tax advisor, which may be costly and difficult to find depending on where the executor lives. If you have two adult children who get along, name them as co-executors and they can collaborate on who does what as executors. Otherwise, think about naming a backup executor.

Moving to Canada

You need to ensure that you are compliant with Canadian taxes and laws. But do you still have to pay taxes to the country where you lived previously? If you have an executor who is a non-resident Canadian living outside the country, he or she needs to know the rules – or know a professional who does.

The executor or trustee is no longer available

If your named executor or trustee is no longer available, doesn’t want the job or becomes incapacitated or unsuitable, it’s essential you revisit the will and make replacements. Failing to do so could cause long and costly delays after you die.

Significant change in your assets or net worth

Receiving an inheritance, selling your business or winning the lottery are all very pleasant, but they are also all reasons why you need to review your will. You may be able to increase the amount of money you had previously named for your beneficiaries or expand the number of people who you will now be giving to. In this case, see a professional about minimizing taxes. It’s also a time when you might want to leave more to your favourite charity or set up a philanthropic endeavour. Buying life insurance can help pay the taxes at death.

Buying a business.

If you are a company owner, a good estate plan can include the use of dual or multiple wills. It’s an effective estate planning strategy used mainly to help the estate of a deceased person pay as little as possible in estate taxes.

A primary will would take into consideration how you want to divvy up your estate for your family, while a secondary will looks after your business.

Each province may have different rules and restrictions and it’s best to consult a professional tax planner and lawyer to determine the best way to handle personal and business decisions. In the secondary will, assets are transferred to beneficiaries without the need for probate in Ontario.

Shareholder Agreements

No estate plan is complete without a will, and no business plan is complete without a shareholder agreement.

If you own shares in your business with one or more partners in a private corporation, you need to get a shareholder agreement in place just in case one of you becomes disabled or dies. Properly constructed, it will answer key questions such as: how the business will carry on without you and who will open the doors of the office if you aren’t there. But it will also outline who receives your shares upon your death, the purchase price to be paid and any other terms of the sale. Read my TaxLetter article from Nov. 2013, “How to use Life Insurance in Buy/Sell agreements”

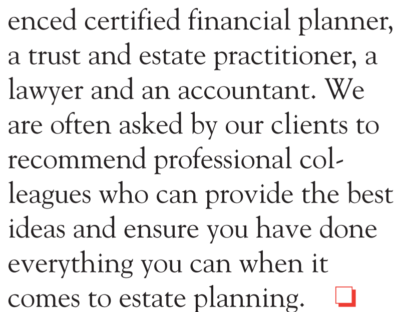
Acquiring additional property, like a cottage or a home outside the country.

Foreign real estate isn’t subject to Canadian provincial probate taxes but having a valid power of attorney and a will drafted in the area where the property is located will prove use-

ful. A valid will in the foreign country means the executor can manage the property there, including its sale, and take care of the necessary tax reporting and payments when the owners die.

At the bottom of this TaxLetter, you will find a link to our Estate Planning Toolkit. It will give you further insights as to what you should leave behind for your executor to make the transition to your will easier for everyone involved.

Don't do this alone. The only way to ensure your estate plan is complete, consistent with your will and not missing anything, is to align yourself with a team composed of an experienced certified financial planner, a trust and estate practitioner, a lawyer and an accountant. We are often asked by our clients to recommend professional colleagues who can provide the best ideas and ensure you have done everything you can when it comes to estate planning. ❑



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Watch "The New Philanthropy", my recent "Ted Talk" at Moses Znaimer's ideacity conference http://bit.ly/MarkHalpern

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Mark Halpern is one of Canada's top life insurance advisors, a Certified Financial Planner (CFP), Trust and Estate Practitioner (TEP), Master Financial Advisor – Philanthropy (MFA-P) and CEO of WEALTHinsurance.com®.
He guides successful business owners, who are already challenged for time, through the complex process of ensuring the people and organizations they care about are taken care of.
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