

Planning for the Inevitable:

Tips for Ensuring Your Intentions Are
Achieved on Incapacity and Death

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Ten Tips for Ensuring Your Intentions are Achieved

1. Plan for your death - among other things execute a Last Will and Testament.
2. Plan for your incapacity - among other things execute Powers of Attorney.
3. Consult your advisors.
4. Avoid the impulse to avoid “probate”.
5. Review how you hold title / who your designated beneficiaries are.

Ten Tips for Ensuring Your Intentions are Achieved

6. Honour your legal obligations to your dependants
7. Minimize taxes while achieving your philanthropic goals.
8. Protect your beneficiaries from others and from themselves.
9. Recognize the risk of litigation and guard against it.
10. Give careful consideration to who should act as your executor, attorney or guardian.

Tip # 1 – Plan for your Death

- Ensure that you have a Will
- Dying intestate (without a will)
 - Results in less going to your beneficiaries
 - Takes control over the disposition of your Estate assets out of your hands
- Provincial legislation dictates who is entitled to the net assets of the Estate and it may not reflect your intention
- Having a will can reduce taxes thereby maximizing the amount left to your beneficiaries

Plan for your Death (cont'd)

- Resist the temptation to “do it yourself”
- Ensure that your Will is up to date and reflects your intentions over time
- Keep up to date financial records together in one place

Tip # 2 – Plan for Incapacity

- Often overlooked
- Ensure you have Powers of Attorney
- If you fail to execute Powers of Attorney, the Public Guardian and Trustee (the “PGT”) is the statutory guardian empowered/required to make decisions on your behalf
- While family members can apply to the Court to replace the PGT, the application process is time consuming and costly

Plan for Incapacity (cont'd)

- Two types of Powers of Attorney
 - For Property
 - For Personal Care
- Attorney for Property
 - Can do anything with your property that you can legally do save and except make a will
 - Can appoint more than one and require them to act jointly or by majority

Plan for Incapacity (cont'd)

- Give direction to your Attorneys
 - For Property regarding authorized payments (e.g. to dependants, to charitable institutions etc)
 - For Personal Care regarding your care after you become incapable (e.g. living arrangements, medical treatment etc)

Tip #3 – Consult with Your Advisors

- Many are reluctant to spend the time or money to consult with legal, accounting and financial advisors
- The result?
 - Testamentary intentions are not achieved
 - More tax is paid to the government than needs to be
 - The Estate is depleted through litigation

Tip # 4 – Avoid the Impulse to Avoid “Probate”

- “Probate” the process whereby the Court certifies that a document is the Deceased’s Last Will and Testament OR that a designated person is authorized to administer an intestate estate
- “Probate” is not mandatory
- If probate is necessary, taxes equal to approximately 1.5% of the value of the Estate are paid at the time of the application

Avoiding “Probate” (cont’d)

- Clients sometimes take foolish steps to avoid estate administration taxes
 - Gifting property during their lifetime
 - Reregistering title to assets in joint names with spouse/children
- Can have adverse consequences both during your lifetime (taxes and loss of control) or following your death (assets pass to unintended beneficiaries)
- There are planning techniques which can help reduce taxes paid (e.g. multiple wills)

Tip #5 – Review Title / Beneficiary Designations

- Many clients are mistaken about how title to property is held or who the designated beneficiaries are of pension benefits, RRSPs/RRIFs, life insurance proceeds
- Title to assets should reflect your actual intentions – If it does not, steps should be taken while you are alive to clarify your intention (e.g. jointly held property with adult children)

Review Title / Beneficiary Designations (cont'd)

- You should revisit beneficiary designations from time to time as they may be out of date or ineffective (e.g. designating a minor as the beneficiary)
- Consider naming alternate beneficiaries so as to ensure the assets transfer outside your estate thereby reducing taxes

Tip #6 – Honour Your Legal Obligations to Dependents

- Depending upon your circumstances, you may not have complete testamentary autonomy
- E.g. - If you are married and do not have a domestic contract, your spouse may have rights to an equalization of family property or to support upon your death

Honour Your Obligations to Your Dependants (cont'd)

- Similarly, if you are providing financial support to a “dependant” (spouse, child, parent, grandchild, sibling) at the time of your death and you fail to make adequate provision for that dependant and they are in need of financial support they can assert a claim against your Estate

Honour Your Obligations to Your Dependants (cont'd)

- If you owe obligations to former spouses, existing spouses and/or children pursuant to a domestic contract it is important to honour those obligations
- If you fail to do so, your Estate will likely be embroiled in litigation

Tip #7 – Minimizing Taxes through Gifting to Charity

- Tax consequences of dying
 - Deemed disposition of capital property on date of death
 - Income inclusion for registered plans (e.g. RRIFs)
- Can result in a significant tax liability in your terminal tax return

Minimizing Taxes (Cont'd)

- Charitable gift receipts can be used to offset taxes otherwise payable on death
 - Can be used to offset up to 100% of income in terminal year – remainder can be carried back and applied against income in previous year or carried forward and applied against future income in the estate

Minimizing Taxes (Cont'd)

- Means of achieving your philanthropic goals while reducing your tax liabilities:
 - Endowment fund
 - Outright bequest in your Will
 - Gift of life insurance proceeds
 - Gift of RRSP or RRIF proceeds
 - Gift annuities
 - Charitable remainder trusts
- Net result – there may be more for your beneficiaries

Tip #8 – Protecting Your Beneficiaries

- Rather than distributing property outright, consider using testamentary trusts for:
 - Beneficiaries with disabilities
 - Beneficiaries with addictions
 - Beneficiaries in unstable relationships
- Using testamentary trusts may reduce aggregate taxes paid by splitting income between taxpayers

Protecting Your Beneficiaries

- In structuring testamentary trusts, consider:
 - Appointing the beneficiary as a co-trustee
 - Distributing capital in tranches over time
 - Requiring beneficiaries to enter into domestic contracts
 - Using fully discretionary trusts for disabled beneficiaries

Tip # 9 – Anticipate Litigation and Guard Against It

- Litigation is more common than you would think
- Usually brought by disappointed beneficiaries
- Examples
 - Challenges to the validity of Will
 - Applications to remove attorneys
 - Applications to interpret provisions of Will

Anticipating and Minimizing Litigation (Cont'd)

- With respect to management of personal care and property consider:
 - Appointing more than one person to provide a check and balance
 - Requiring the attorney to provide regular accountings
 - Encouraging the attorney to seek legal advice concerning their role at the outset

Anticipating and Minimizing Litigation (Cont'd)

- With respect to your Will
 - Be honest with your advisors about the potential for challenge to validity based on lack of capacity or undue influence
 - Leave a written record of the reasons for your decisions especially when treating family members differently
 - Manage expectations during your lifetime
 - Document gifts and loans to family members

Tip #10 – Appointing an Attorney, Executor or Guardian

- Clients tend not to give enough consideration to who should act as attorney, executor or guardian of their minor children
- Age, capacity, aptitude, skills and location of the attorney, executor and guardian are all relevant

Appointing an Attorney or Executor or Guardian (cont'd)

- In appointing an attorney, consider appointing more than one especially in respect of the management of your property (provided you address decision making)
- Be sure to give written guidance to your attorneys regarding the management of your property and your personal care

Appointing an Attorney or Executor or Guardian (cont'd)

- In appointing an executor, if the Will provides for spousal or testamentary trusts, the appointment of the “right” person may be critical
- In some cases, the appointment of an independent third party makes the most sense (e.g. a trust company, lawyer, accountant, financial advisor)
- Give the trustee guidance about exercising their discretion in administering trusts

Appointing an Attorney or Executor or Guardian

- In appointing a guardian for minor children, recognize that the appointment is only valid for 90 days
- The Court has ultimate jurisdiction to decide who serves as guardian
- Communicate your reasons for appointing a specific guardian
- Give the guardian written guidance regarding your intentions

Some Concluding Thoughts

- Have a plan !
- Ensure the plan reflects your intentions
- Revisit the plan often !

