Education Library

Will Planning

ESTATE PLANNING

RICHARDSON Wealth

There are many areas to address in constructing a comprehensive wealth plan. One of the most important areas to address is the will planning portion of the plan. After you have spent a lifetime building your wealth, your will gives you an opportunity to transfer the assets you have accumulated to your beneficiaries, including your family, friends or charitable organizations.

Why have a will in the first place?

Many people question the necessity of having a will. They simply want everything to go to their spouse if they die. Unfortunately, it is not that simple. In the event you die without a will, which is referred to as Intestacy, the government immediately steps in to "help". While you may want all your assets to go to your spouse, the legislation often splits the assets between the spouse and the children.

This could leave the spouse with insufficient assets to maintain their lifestyle while giving a large portion of the estate to children who may not require the funds. If the assets pass to the children, the surviving parent may not be able to access those assets for the benefit of the children while they are minors. Before you decide you do not need a will, make sure you understand what will happen to your estate without one. For additional information, you may further choose to read our article entitled *Dying Without a Will*.

A properly constructed will can address the following issues:

- Planning for probate fees and other costs
- Identifying your assets to be transferred through your estate
- Choosing an appropriate executor and/or trustee
- Determining your obligations to various possible beneficiaries
- Leaving specific legacies and bequests
- Naming guardians for infant or infirm dependents
- Using trusts to protect beneficiaries and deal with the residue of the estate
- Why have a will prepared by a professional
- Considering the personal elements of a will

Planning for probate fees and other costs

There are two schools of thought in this regard. One side says you should pass virtually nothing through your estate to minimize probate and estate fees.

While the other school of thought is that probate and estate fees are simply a cost to consider in developing a comprehensive estate plan. These fees are charged as a percentage of the assets which pass through the estate. The difficulty with the strategy of bypassing the estate is that it can defeat the more sophisticated estate planning strategies such as tax savings using testamentary trusts. If there are concerns as to the protection of the beneficiaries from their own spendthrift tendencies or other less desirable influences, you will not be able to address these issues without passing the assets through the estate and into a trust.

In the event you want to reduce or avoid probate fees, two of the commonly used strategies are:

A. Naming a beneficiary on an insurance policy, pension plan, registered plan or segregated fund
B. Making assets joint tenancy with right of survivorship (JTWROS)

Both of these strategies will pass the assets outside of the estate but they will preclude the ability to do any sophisticated planning. In determining choices under an estate plan, consideration should be given to using the benefits of a properly constructed will which may provide multiple years of tax savings by utilizing trusts and tax elections as opposed to one time savings on probate and estate fees. Your professional advisor can explore the different options with you to determine the different savings in your particular situation.

Two areas where it is beneficial to consider using a beneficiary designation are with registered plans and pension plans. These assets cannot be transferred to a trust without a taxable disposition occurring. Therefore, if there is a surviving spouse, a child who is a minor or a child who is dependant due to incapacity, consideration should always be first given to transfer these assets directly to the beneficiary by using an appropriate designation thereby avoiding a taxable disposition.

Choosing an appropriate executor and/or trustee

One of the most important choices in any will is the designation of the executor and/or trustee. While this person or persons may serve both of the functions of executor and trustee, it is not always the case. For purposes of this article we will assume it is the same party for both functions and use the term executor. The executor has several responsibilities including:

A. Reviewing the will and perhaps making final arrangements.
B. Protecting the assets of the estate by ensuring that appropriate insurance is in place for those assets.
C. Proper notification of the death of the deceased must be provided to all parties who dealt with the individual.
D. Value the estate and prepare and apply for probate.
E. Administering the estate including disposing of assets and paying tax.
F. Distributing the estate in accordance with the will including implementation of testamentary trusts (if applicable) and acting as the ongoing trustee.

Being an executor is an onerous task that can last for an extended period of time, particularly if there are trusts for young children to administer. The person being considered should be consulted before being named. As well, the executor should be well versed in financial and legal issues and have good decision making abilities. If there is no individual available to be the executor, then a professional or corporate trustee such as a trust company may be named. The executor should be given sufficient powers to adequately administer the estate including the power to make tax elections and the choice of the appropriate mix of investments.

The role of the executor is more fully explored in the article *Being an Executor*.

Determining your obligations to various possible beneficiaries

In making a will you need to consider all the people to whom you owe a duty to support. While some are obvious, like a spouse or minor children, others may be less obvious, such as adult children or parents for whom you have been providing support over the years. Often under provincial legislation these individuals may be allowed to make a claim. Even a spouse who does not feel that they have been adequately provided for within a will may have a claim for a different and larger amount under Provincial legislation.

You also need to consider whether or not you want all your children to be beneficiaries under your will. If you choose to exclude a family member from your will for some reason, you should address this specifically in your will. If the will is simply silent as to a specific individual who may have thought they would be remembered, an argument may be advanced that the testator simply forgot. Addressing the issue and perhaps even expressing a reason for the omission may prevent a challenge to the will.

Before making any estate plan it is important to speak to a professional who can help identify those individuals to whom you owe a duty in your will.

Leaving specific legacies and bequests

In preparing a will it is important not only to identify your beneficiaries, but also to identify what specifically to leave to each of them. The choices are many: from a specific gift of a certain item, to a specific sum of money, to the residue of the estate. Each possibility brings its own set of potential difficulties. The most problematic can be personal items such as jewellery, family heirlooms or the family cottage, all of which have significant emotional attachment. Not only must consideration be given as to the appropriateness of a specific property but also whether the beneficiaries can afford it. A good example is the family cottage which brings with it a host of memories as well considerable costs measured both in monetary terms and personal effort. Therefore, it may be preferable to discuss the potential distribution of your estate with your intended beneficiaries. For further information on succession planning for vacation properties please see our article entitled *Cottage Succession*.

It is also important in terms of estate distribution to recognize that "equal is not always fair". Depending upon each beneficiary's particular situation you may choose a different value of bequest.

However, you should always use caution in these decisions as it may cause an irreparable rift amongst siblings if one is seen as being favoured. If this is a choice you are going to make, you may want to discuss the rationale with the other beneficiaries or at least write a letter to the beneficiaries which may be read posthumously to explain your rationale.

If one of the beneficiaries is to be a charity you may want to explain that to the other beneficiaries to avoid litigation once you have passed away. One way to prevent any challenge to a specific gift is to give it away while you are still alive. An inter vivos gift is very difficult to challenge as long as the donor had the legal capacity to understand the nature of their act at the time of the gift.

A spouse who does not feel that they have been adequately provided for within a will may have a claim for a different and larger amount under Provincial legislation.

Naming guardians for infant or infirm dependents

For those with minor children one of the most important parts of a will is the naming of a potential guardian for the children. The word "potential" is important as the person named must still be approved by the court. The court will use the test of "best interest of the children" which can result in the determination of the parent being overridden. The recommendation in the will certainly goes a long way in directing the court as to the wishes of the deceased.

The naming of the guardian is something to which appropriate consideration is often not given. People simply name a close relative without necessarily considering the impact the decision will have on the long term development of the children. Some of the issues that should be considered are:

A. **Proximity** – if possible, you may not want the children moving out of their community.

B. **Education** – do the guardians hold similar views as to the importance of education and the availability of programs of academic excellence?

C. **Religion** – do the guardians share similar religious beliefs and place the same importance on religious training?

D. **Financial situation** – will the guardians be able to afford to care for the children and provide the opportunities that the deceased parents intended. This includes everything from sports, to recreation, to education. This issue can be solved with proper insurance planning in conjunction with a trust.

E. **Space in the new family** – Consideration must be given to the existing family which the children will be joining. Some factors to consider include: the number of children in the guardian's family; and will there be enough time and attention available for the additional children.

F. **Abilities of the guardian** – it is not necessary to have the same person acting as the guardian of the children and as the trustee of the assets of the children. For the guardian of the children the most important consideration is the ability to nurture the children and replicate the life experiences the deceased parent would desire for the children. Financial management issues can be addressed by others including corporate trustees.

Consideration must be given to the emotional impact the selection of the guardian will have on the children of the deceased as well as the family of the guardian. It is important to discuss the points listed above with your intended guardians at the time you are preparing your will. You should also inform the guardians of the financial planning you have put in place to ensure the guardian has the resources to provide for your children and to provide them with the "peace of mind" that there will not be a financial burden on the guardian's family.

Using trusts to protect beneficiaries and deal with the residue of the estate

There are occasions when trusts are a desirable method of distributing the residue of the estate. The residue is everything left over once all the specific costs and legacies of the estate have been paid. trusts can be utilized in the will for minor and adult beneficiaries, disabled beneficiaries (minor or adult), spendthrift spouses or children, or simply where tax deferral is desired. trusts can be discretionary wherein the trustee (which is often, although not always, the executor of the estate) has the power to decide how much of the income or capital of the trust will be paid out for the benefit of the beneficiaries. Alternatively, the specific amount to be paid out to the beneficiaries at specific intervals can be fixed in the will. A Henson Trust can be incorporated into a will for disabled beneficiaries. For an in-depth examination of using trusts in a will, please see our article entitled *Testamentary Trusts – An effective way to transfer wealth*.

Why have a will prepared by a professional?

While people value professional advice on issues such as medical, financial and even automotive problems, there is often an aversion to having a proper and complete will prepared. While it is possible in all the provinces, except British Columbia, PEI and Nova Scotia, to create a holograph will, (which is one prepared entirely in the testators handwriting and does not require witnesses) or to use a will kit, it certainly is not recommended. A will can provide the opportunity to pass on the wealth you have accumulated in the most tax efficient manner and protect that wealth for your direct beneficiaries and for generations to come. We would strongly recommend that you engage a specialist who is very experienced in the issues of will and estate planning to prepare your will. The cost will be returned many times over through tax savings, protection of your beneficiaries and peace of mind.

Considering the personal elements of a will

A will is much more than a legal document; it is an opportunity to ensure that your beneficiaries are cared for in a manner you intend for many years to come. There is often a reluctance to discuss estate issues, perhaps out of a fear of mortality on the testators part, or a concern of appearing greedy on the part of the beneficiary. A discussion with your family and other beneficiaries during the estate planning process allows the parties to understand what is contemplated and perhaps participate in the development of the plan. It also allows you to assist your beneficiaries in preparing to receive what in some instances may be substantial wealth. This in turn may become part of the planning process.

Conclusion

A will is a critical element in the wealth and estate planning process. There are many considerations that need to be addressed and balanced to make certain your final wishes come to fruition. Time, effort and expertise will result in a will that benefits your family for generations to come.

Tax & Estate Planning

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