Assante WEALTH MANAGEMENT

PLANNING YOUR WILL AND POWERS OF ATTORNEY

Introduction

This document contains background information regarding the planning of your Will and Powers of Attorney.

Its purpose is to provide you with a further understanding of the subject matter and related issues, in order to assist you in making key decisions.

Your Will – an important part of your Estate Plan

We often talk about why you ***need*** a Will. Perhaps it would be more appropriate to talk about why you ***want*** a Will – an up-to-date Will that reflects your current circumstances and is properly planned and created.

Your Will is a key legal tool that is used to implement your estate plan should you die. It will govern how your assets are dealt with, to whom they are given and who has the responsibilities to look after these matters.

Should you die without a Will (or with a Will that does not distribute all of your assets), the "intestacy" laws would apply. These laws can produce arbitrary results that would likely not reflect your wishes. Without an appropriate Will, the administration of your estate would be more complex and costly. Moreover, by not having an up-to-date and carefully thought out Will, you can miss the opportunity to use strategies to minimize tax and avoid family disputes.

An out-of-date Will can be almost as bad as not having a Will. It may not reflect your current circumstances and it may not even deal with all of your assets.

Tax implications of dying

Planning to minimize taxes is an important objective in estate planning. This is because, in Canada, there are significant tax implications to dying.

When a person dies he or she is deemed to sell all of his or her property for its value at that time. This fictional sale occurs immediately prior to death. Therefore, it is reported in the final tax return of the deceased person. This results in the following:

- The realization of any capital gains or capital losses (and the taxation of those gains)
- Registered plans, such as RRSPs and RRIFs, are taxed on their full value

There are some exceptions, the most significant being where property is left to a surviving spouse (or partner) or to a qualifying spousal trust. In that case, the tax implications are deferred until the surviving spouse dies or until the property is sold. Another exception relates to the principal residence exemption that may be used to shelter the capital gain that is realized on a home or recreational property.

Probate fees or taxes are also a consideration. The amount of the fee or tax is calculated based on the size of the estate.

What will be in your Estate

One of the first steps in planning your Will is to determine which assets will form part of your estate and thus, be dealt with by your Will.

The determination of which assets will form part of your estate depends upon how you own your property and whether you have named beneficiaries in life insurance policies, registered plans and the like. Property that is jointly owned will not form part of your estate. Similarly, where a beneficiary has been named in a registered plan or in an insurance policy, the proceeds will go directly to that beneficiary and are not governed by your Will.

Thus, it is important to examine the relevant documents (e.g. title documents, account documents etc.) to confirm the owner and type of ownership and whether a beneficiary has been named.

Essential elements of a Will

A properly planned and drafted Will should take into account your current financial and personal circumstances and it should reflect your goals regarding the distribution and administration of your estate.

Here are the essential elements of your Will:

Naming Executors, Trustees and Guardians:

- Who would be best suited to handle your estate, and manage any trusts created in your estate? Your executors handle the administration of your estate and the trustees manage any ongoing trusts that may be created under your Will. They do not need to be the same people.

- If you appoint multiple individuals to act together, how should decisions be made?

- If there are minor children, who would you wish to name as guardians?

Distribution of your assets:

- Who should receive your assets? You should name primary beneficiaries and alternate beneficiaries in case the primary beneficiaries die before you.

- Are there certain of your assets that you should deal with specifically? For example, your business interests, home, family cottage, personal effects, etc.

- Should testamentary trusts be used – for children (and grandchildren) or to hold assets for a spouse (see the discussion below regarding testamentary trusts).

Using Testamentary Trusts in your Will

Testamentary trusts can be useful tools in estate planning. They can offer ways to save income tax and can also provide peace of mind by allowing assets to be managed by trustees on behalf of your beneficiaries.

A "testamentary trust" is a trust that arises on an individual's death, so it only becomes effective on the death of the person making the Will. The terms and conditions that apply to the trust are usually set out in the person's Will.

The most common forms of testamentary trusts are:

- **Spousal Trust** – which is for the benefit of the surviving spouse. Rather than assets being transferred directly to the surviving spouse, they are held in trust for the spouse. Such a trust requires that all income of the trust be paid to the surviving spouse, and no one other than the surviving spouse can have access to the capital of the trust while he or she is alive.

- **Trust for Child** – which is for the benefit of a surviving child (or grandchild). Assets are held in trust for the surviving child or grandchild instead of being transferred directly into the beneficiary's hands.

The benefits of testamentary trusts include:

- **Reducing the total income tax payable** on the future income earned on the inheritance.

- **Helping to protect the beneficiaries' inheritance** from claims by creditors of the beneficiaries, family property claims and/or financial mismanagement by the beneficiary.

- **Ensuring that the testator's wishes and intentions will be respected** regarding the use of the inheritance.

Executors, Trustees and Guardians

Your executor is responsible for making funeral arrangements, safeguarding your assets and carrying out your wishes under the terms of your Will. Your trustee is responsible for administering any testamentary trusts which you set up under your Will. Often the executor and trustee are the same person but you may appoint a different individual to perform each role.

You may appoint more than one executor, and more than one trustee. In that case, you should indicate how decisions are to be made.

Your choice of executor(s) and trustee(s) should be given careful consideration. They will make crucial decisions and it is important that they have good judgment and business sense as well as be able to relate well with the members of your family. You should also consider such factors as availability, willingness, age, health, residency, trustworthiness, impartiality and financial stability.

It may be appropriate to discuss the appointment with your executors and trustees and familiarize them with your affairs.

In your Will, you may appoint a guardian for any child who is under the age of 18. However, you should be aware, that the appointment of the guardians for your child must be approved by the courts whose primary concern is the best interests of the child. While this means that your wishes or preferences are not binding on the court, it is still valuable to include your preferred guardians in your Wills.

Your Powers of Attorney – key documents to manage your affairs

Your Powers of Attorney are the key legal tools used while you are still alive if you have become unable to look after your financial affairs, or are unable to make decisions regarding your medical or personal care.

A Power of Attorney to manage property permits the appointed person(s) to deal with your assets. An “enduring” power of attorney is one that remains valid even after the individual granting the power becomes mentally incapable.

You may provide that the authority of the attorneys to act on your behalf only commences when you lose your mental capacity (sometimes referred to as a “springing” power of attorney), or alternatively that the attorneys may have authority with immediate effect.

A Power of Attorney to manage your health care authorizes the appointed person(s) to make personal or health care decisions on your behalf, should you become incapable of doing so.

You may revoke a Power of Attorney at any time while you are mentally capable.

Summary

There are a number of factors to consider as you plan your Will and Powers of Attorney. These include getting a clear picture of what is in your estate, identifying your beneficiaries, determining whether testamentary trusts will be used, and selecting your executors, trustees, guardians and attorneys.

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Your Notes and Questions: