

PLANNING FOR DEATH & DISABILITY



QUARRY PARK LAW

JONATHAN M. ABLETT

jon@quarryparklaw.com

(403) 398-2469

Some preliminaries

- This presentation will be available on our website
 - Website: quarryparklaw.com
- Unless stated otherwise, this presentation discusses laws as they apply to Alberta only!

Executive Summary

- Definitions and differences between a Will, Power of Attorney, and Personal Directive
- Important considerations for each of the above
- Executor, Agent, Attorney and Guardianship responsibilities
- Intestacy - What is it and why does it matter?
- Common pitfalls
- Pre-Planned funeral arrangements
- Elder Abuse

The 'Big 3' Documents

A Comprehensive estate plan will comprise of the following:

- Will
- Enduring Power of Attorney
- Personal Directive

Will

- What happens to your assets when you pass away
- Only operates after death
- Definitions:
 - Testator/Testatrix
 - Executor/Executrix, Trustee, and Personal Representative

Will

- How much discretion does the Testator have?
- The courts will strike down provisions in certain cases.
- Some provisions are not enforceable:
 - Burial and funeral arrangements
 - Organ donation

Will

- In other cases, the courts will find provisions unacceptable.
- Examples:
 - Gifts contrary to public policy
 - Will does not provide sufficiently for dependents
 - Will does not provide sufficiently for spouse
 - Gifts to minors
 - Guardianship

Will

- January 27, 2015: *Spence v. BMO Trust Company*, 2015 ONSC 615
 - Testator cut out one daughter out of the Will
 - Ontario court found that the gift in the Will was motivated by racist intention (black daughter married a white man, mixed race children)
 - Will was made unenforceable as it was contrary to public policy
 - The Will did not explicitly refer to any racist intent, but the court relied on outside evidence

Will

- Overturned on Appeal – 2016
- “[A]ssuming that Eric’s testamentary bequest had been facially repugnant in the sense that it disinherited Verolin for expressly stated discriminatory reasons, the bequest would nonetheless be valid as reflecting a testator’s intentional, private disposition of his property – the core aspect of testamentary freedom”
- Public trust vs. Private bequest

Will

Components of a Will:

- Header, revocation, contemplation of marriage (old Wills only)
- Executor, guardian
- Devolution of property to Executor
- Payment of debts
- Specific bequests of property and/or memoranda of household items
- Trusts (e.g. for minor children)

Will

Components of a Will (cont'd)

- Powers and compensation of trustee
- Family Disaster clause
- Debt forgiveness
- *In Terrorem* clause

Enduring Power of Attorney

- 2nd of the 'Big 3' Documents
- 'Enduring' lasts after incapacity, after incapacity it cannot be revoked
 - Exceptions: court order, death or incapacity of attorney
- Immediate vs. Springing
- Attorney (does not mean lawyer)

Enduring Power of Attorney

- Appoints an Attorney to deal with legal and financial affairs
- The Attorney can sign documents on your behalf, buy and sell things with your money, deal with land and property, etc.
- Attorney has a Fiduciary Duty
 - Gifts

Personal Directive

- Comes into effect after incapacity
- 'Living Will'
- Agent

Personal Directive

- Non-financial matters
- Medical treatments, living arrangements, personal activities
- Guilt relief: 'Pull the plug' clause, comfort measures in case of critical illness
- Limits on agent's powers unless specifically mentioned:
 - Sterilization
 - Psychosurgery
 - Removal of tissue
 - Research activities without benefit to maker

Personal Directive

- Agent must follow the wishes of the maker, and if unclear, Agent must act in best interests of maker.
- Agent protected from liability for decisions made in good faith
- Agent must keep records for 2 years

Important Considerations

- International assets
 - Can have international Wills
(there is a convention which Alberta has ratified in law)
 - Tax issues
 - U.S. Estate Tax (Are you a USA citizen?)
- Changing a Will
 - Use a Codicil

Important Considerations

- Private Company Shares
- If you own a company: Who gets the shares? Who will replace you as director?
 - Provided for in Unanimous Shareholder's Agreement?
- Estate Freeze

Important Considerations

- Life Insurance
 - Can be useful if you have dependents that will suffer a financial shock without your income to support them.

Important Considerations

- Pre-Planned Funerals
- Funeral costs are paid out of the estate anyway, but this helps so that Executors are not scrambling to find money to pay for the funeral
- Inform your Executor that you have made arrangements
- There are different mechanisms:
 - Life-insurance based
 - Trust-based contract with funeral home
- Pre-paid doesn't necessarily mean fully paid, and 'extras' can amount to several thousand dollars.
- Make sure you understand what is pre-paid and what isn't

Important Considerations

- Organ Donation
 - Alberta Organ and Tissue Donation Registry:
 - <https://myhealth.alberta.ca/Pages/OTDRHome.aspx>
 - Or go to a Registry, or sign the back of your health care card
 - Make sure registration is consistent with your Personal Directive/Will
- Personal Directive Registration
 - Records the Agent name, and location of the Personal Directive.
 - <http://humanservices.alberta.ca/guardianship-trusteeship/opg-personal-directives-registry.html>
- Safekeeping your documents

Intestacy

- When you die without a valid Will
- Consequences
 - Who gets what?
 - Court Application for Trustee to deal with the estate
 - Can be very expensive and time-consuming
 - Guardianship questions

Common Pitfalls

- Disabled beneficiaries
 - Inheritance can interfere with AISH receipts
 - 'Henson Trusts' are not recognized in Alberta
 - Work around the regulatory framework through RDSP's and other vehicles
 - Must be very careful here

Common Pitfalls

- Formalities
 - Wills can be potentially set aside if the strict execution formalities aren't followed.
- Memoranda of Household Items
 - If it's not made in advance, it is not enforceable
 - For super-important new gifts, make a Codicil if not provided to the residual beneficiary.

Common Pitfalls

- Lapse
 - Beneficiary pre-deceases the Testator
 - Anti-lapse provisions in legislation operate such that it is distributed as if the beneficiary had died intestate.
- Ademption
 - Property no longer exists
 - Beneficiary gets nothing!

Common Pitfalls

- Vague Descriptions
 - e.g. 'my gold ring'
 - What if you have many gold rings?
- Gifts to minors
 - Must wait until they are 18

DIY Wills

- I don't recommend them, even for simple estates
- There are a lot of things that can go wrong – e.g. formalities, trusts.
- Lawyers carry insurance
- An estate and peace of mind is normally a lot more valuable than the few hundred bucks a Will costs.
- Complicated estates – forget about it

Elder Abuse

- Forms of abuse
 - Neglect, physical, emotional, financial
- Theft
- Forcing changes to a Will when you don't want to
- Forgery
- Withholding money

- If done by an Attorney or Agent, this is a violation of their duties

Elder Abuse

- Resources for help:
 - Police
 - Family Violence Info Line: 310-1818
 - Calgary Kerby Elder Abuse Line: 403-705-3250

- More info:

<http://www.seniors.alberta.ca/seniors/elder-abuse-resources.html>

Thank you

Jonathan M. Ablett

Barrister & Solicitor

Quarry Park Law

(403) 398-2469

jon@quarryparklaw.com