

LEGAL UPDATE

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WILLS AND ESTATES PLANNING - SPECIAL EDITION

MINOR CHILDREN AS LIFE INSURANCE BENEFICIARIES: THE PITFALLS

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paid to the beneficiary with interest, in a lump sum when he or she reaches 18 years of age.

In some cases insurance policies designate a Trustee in case the beneficiary is still a minor. However if this designation consists of nothing more than selecting a Trustee, it will not solve the problem. The insurance company will be obliged to pay the money to the Trustee but the Trustee will be under the same restrictions. The money must be held and invested and paid out to the beneficiary in full upon reaching 18 years of age.

In either case, contrary to many people's expectations, the life insurance proceeds are not generally available for ongoing living expenses of the child. By Court application the guardian of the child can seek to demonstrate that some portion of the money is necessary for a particular expense. However to be successful the Court would have

Parents will often name minor children as primary or alternate beneficiaries of life insurance policies in the belief that this will, by itself, be sufficient to provide support for the children in the event of the parents' death. This is a mistake.

Life insurance proceeds are not part of the estate of the deceased, unless the estate is the named beneficiary. They flow directly to the beneficiary. The Executor or Trustee named in the Will will have no control over the life insurance proceeds.

Where the beneficiary of the insurance proceeds is a minor and the life insurance policy does not otherwise specify, the **Insurance Act** requires that the insurer pay the insurance proceeds into Court to the credit of the minor. The proceeds will be retained by the Court and

to be satisfied that the expense could not be afforded by the guardian.

There are two solutions. Either the insurance policy should designate the estate as the beneficiary and the Will should give specific directions to the Trustee of the estate as to the use of this money, or a separate "insurance trust" should be created for the life insurance policy specifying a Trustee for the policy and the powers and discretion of the Trustee to use the monies for the day-to-day support of the child.

SEPARATION VERSUS DIVORCE: DIFFERENT EFFECTS UPON YOUR WILL

A divorce revokes any bequest made to an ex-spouse in a Will made prior to the divorce. However a separation, even if documented by a Separation Agreement or a Court Order, has no such effect.

If there is no Will then, once again, a separation alone will have no impact upon what happens to the estate. An estranged spouse would be entitled to all of the estate if there are no children or, if there are children, the first \$200,000.00 plus a portion of the remainder.

The same is true for beneficiaries designed under life

insurance policies and RRSPs. Separation does not prevent the estranged spouse from receiving such assets if he or she remains the designated beneficiary.

Similarly if any real property remains owned as "joint tenants" the surviving spouse would become the sole owner, despite any prior separation. This can be altered by changing the form of ownership from joint tenancy to what is called "tenants-in-common". This allows each of the co-owners to deal with their half interest separately in their Wills. The interest of a deceased tenant-in-common will not automatically pass to the survivor.

It is therefore very important to review and revise a Will and overall estate plan upon a matrimonial separation, since the safeguards created for divorced couples will not be of any assistance.

WHERE TO KEEP YOUR WILL

Your Safety Deposit Box may be the worst place to store your Will. Bankers, being a cautious bunch, are reluctant to let just anybody have access to a deceased person's Safety Deposit Box. They want to see proof that the person seeking access is the authorized representative of the estate **before** allowing access. Where is that proof? Only in the Will.

Leaving the Will with your lawyer is probably the best idea. You should keep a photocopy in

your house and note on it where the original is kept. A photocopy alone is not sufficient. If the original Will cannot be found there is a presumption in law that it was destroyed intentionally with the intent to revoke it. While that presumption can be overcome with sufficient evidence this would entail a Court application with the resulting cost and delay, a significant further burden on the beneficiaries.

THE IMPORTANCE OF TIMELY REVIEW OF YOUR WILL

Most of us are aware of the importance of having a carefully prepared Will. Even in the case of a modest estate a properly prepared Will saves needless work and expense and provides the peace of mind of knowing your wishes will prevail.

It is also true that most people are aware of the importance of reviewing their Will from time to time. However most of us fail to do so with any regularity. We tend to forget that the rapidly passing years may bring many changes: changes to your own financial situation, such as the amount and location of assets and liabilities; changes in the circumstances of friends and relatives who might be considered as beneficiaries; and changes to the prevailing law.

The most obvious benefit of timely review were highlighted recently by a client who had frequently mentioned he wanted us to review his Will. Of concern was the fact that he could not remember if it had been drafted before or after his divorce five years before. After reminding him to bring in the will on several occasions without results, the client finally admitted he could not find the Will. "But", he added "don't worry about it because I'm almost certain now it was done after the divorce." We pointed out to him, of course, that it did not matter at all when the Will was drafted. If it could not be found, it was of no use whatsoever!

A copy of a Will is not just as good as an original. There is a rebuttable presumption in law that if the original Will cannot be found, the Testator must have destroyed it with the intention of revoking it.

In some cases a timely review of a Will reveals that it is no longer valid at all. For example, a Will made by a Testator who subsequently marries is void, unless the Will expressly states it was made in contemplation of the marriage (although a surviving spouse can elect to uphold the Will).

Divorce has a similar, although more limited effect. The divorce voids the Will insofar as it leaves any bequests

to the ex-spouse. This can create what is known as a "partial intestacy" where there is a valid Will but it does not deal with all of the Testator's property. In such a case the estate is governed by both the laws dealing with intestacy and the laws dealing with Wills.

An equally inconvenient situation can arise when, although there is a valid Will, the person named as Trustees cannot or will not act in that capacity. Such a possibility should be considered when reviewing your Will. Is your original choice of Trustees and alternate Trustees still sound? Should a trust company be appointed to act as co-Trustee, to relieve the burden of work, or as an alternative Trustee, if the original Trustee is unable or unwilling to act?

Also to be considered is whether or not you have in any way contracted away your freedom to distribute your estate as you chose. Such contractual limitations are frequently found in Separation Agreements and Shareholders' Agreements.

Of course of prime importance when reviewing your Will is to consider how your financial situation may have changed. Keep in mind that a significant portion of your assets may be outside your estate and therefore outside your control by a Will. This includes property held in "joint tenancy" with others, life insurance and RRSPs. You will also need to consider whether you have assets outside the jurisdiction of Ontario. If so, you will have to learn

whether or not the jurisdiction in which such assets are located will recognize the Ontario Will. Other jurisdictions will have different requirements for the validity of a Will and some may have special rules about the distribution of property regardless of the Testator's wishes.

COMPENSATION FOR ESTATE TRUSTEES

An Estate Trustee, formerly called Executor or Executrix, is entitled to receive payment for administering an estate. In many cases where the Trustee is a close family member no compensation claim will be made, but the entitlement exists no matter what the relationship of the Trustee to the Testator may be.

Where a claim for compensation is made it is up to the Court to decide what is fair and reasonable, unless all of the beneficiaries consent. But if any of the beneficiaries are minors Court approval of the Trustee's compensation is required.

The amount of compensation can vary widely from estate to estate, depending upon how complex the work may be and how much money is being administered. A general rule of thumb is 5% of the value of the estate. This compensation claim by the Trustee is in addition to the legal fees that will be charged

if, as if almost always the case, the Trustee retains lawyers to assist with the administration of the estate.

The extent to which the Trustee relies upon the lawyers, and thereby increases the legal fees charged to the estate, will impact upon what is fair and reasonable compensation for the Trustee.

You can, in your Will, reduce your Trustee's entitlement to compensation, or specify that your Trustee receive no compensation. Of course the person you choose as your Trustee may decline to act under such circumstances.

WHAT WE DO WELL

An important part of the practice of Macdonald Sager Manis LLP consists of lending transactions and debt enforcement for many major financial institutions. The qualities that make us stand out in these highly competitive areas – thoroughness, cost consciousness, timely reporting and attention to detail – extend to all our areas of practice including:

- Litigation
- Banking & Finance
- Wills & Estates
- Bankruptcy/Insolvency/

Debtor-Creditor

- Family Law
- Corporate Transactions
- Real Estate
- Shareholder/Partnership Disputes
- Leasing
- International Transactions
- Construction Contracts & Litigation
- Franchise Law
- Labour & Employment Law
- Trademark

We would be pleased to be of assistance to any of our existing clients, or new clients, in any of these areas.

THE FINE PRINT

The articles contained herein are not intended to be an exhaustive review of the law or to constitute legal advice, but rather to merely highlight issues you should be aware of. Proper well informed legal advice will be necessary should these issues affect you or your business.

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