

WILLS and ESTATE PLANNING: A Beginner's Guide - Presentation

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Wills & Estate Planning: A Beginner's Guide - June, 2009

Disclaimer

Today's presentation is a "hit the high points" of some key areas regarding wills and estate planning, with a very heavy emphasis on wills. It is not a detailed canvass of the current state of the law nor does it stand as formal legal advice nor does it purport to be a "complete briefing. (In the interest of brevity this presentation does not address many very important issues, such as intestacy and guardianship of children, to name just two.)".

This presentation is a "starter" on key issues that you must consider. Estate planning and the preparation of wills should be done in full consultation with your lawyer and financial advisor(s).

Thank You.

David Sanders thanks the Society for Learning in Retirement for their kind invitation to come and speak to their group on March 17, 2009.



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**The first thing to remember is.....?
You are not going to survive your own death.**



**Once you realize that,
everything thereafter is just good planning.**

What is “Estate Planning”?

Estate Planning is planning for, and executing so far as possible:

- the preservation, increase and protection of assets during your lifetime to ensure that what you want gets done;
- the orderly and tax effective transfer of your assets to the beneficiaries both during your lifetime and on death; and
- the continued preservation of property once it has been transferred to the beneficiaries.

Fundamental starter questions:

- What do you own? What will you or may you own?
- What do you owe? What will you or may you owe?
- How can you own more and owe less?
- Who do you have to provide for? Who do you think it best to provide for? [Who you are legally *obliged* to support is not the same as who you *wish* or *need* to support.]
- Does your family have enough money to manage without you?
- Who do you want to get your property. Which property? And how?

Bottom line: *What's the best way to achieve all of these?*

Estate Planning – Tools and Troubles

Estate Planning tools include:

- Wills.
- Powers of Attorney for Property and Personal Care.
- Life and other insurance.
- Gifts
- Trusts
- Joint ownership
- Life insurance

Three ways of distributing your estate:

- Before your death, with lifetime transfers.
- After your death, through your will.
- After your death, through insurance and related private distributions.



Wills - Page 1

Testamentary capacity

- Can the testator actually legally dispose of the property, movables or immovables?
- Age of majority reached (or exceptions such as marriage or armed services)?
- Testator mentally capable?
 - Understand the nature and extent of assets.
 - Comprehending and appreciating the persons who should / will receive the assets.
 - Undue influence.

Marriage

- Wills made in contemplation of marriage need have a statement to that effect.
- Marriage revokes a will executed to prior to date of marriage.



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Provision for Dependents

SLRA's two-tiered definition of dependant (both required to be a dependent). Dependent must be:

- a spouse, parent, child or sibling of the deceased.
- someone to "whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death".

"Spouse", "parent" and "child" all have expanded definitions under the SLRA. Egs:

- **Spouse** "includes a former spouse, a common law spouse, and a same sex spouse with whom the deceased was cohabiting continuously for a period of not less than three years, or with whom the deceased was in a relationship of some permanence if they are the natural or adoptive parents of a child."
- **Parent** "includes a grandparent and a person who has demonstrated a settled intention to treat the deceased as a child of his or her family, except under an arrangement where the deceased was placed for valuable consideration in a foster home by a person having lawful custody;
- **Child** "includes a grandchild and a person whom the deceased has demonstrated a settled intention to treat as a child of his or her family (other than a foster child)". [Laidlaw & Tator, "Estate Litigation"]



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Spouse's Interest

[See "Family Law Act" page.]

"Restrictions on alienation"

Examples:

- Joint tenancies
- Limited interests (egs: estates for life, partnership property, joint bank accounts).
- Corporate shares with limitations on transfer
- Franchises.
- Controlled items; egs: firearms or currency.
- Professional society rules on business transfer
- Contracts / agreements limiting right of disposition.
- Property subject to a lien or charge.



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Executors

- Limitations on age (eg: age of majority)? Status? Citizenship? Practical limitations (eg: age of contemporaries)? Currently or likely to be a bankrupt? Conflicts of interest?

[Please also see "Executors" pages.]

Life Insurance

- Avoid payments into the estate unless necessary to clear debts.
- Be certain and thorough as to beneficiary designations.
- Be cautious of restrictions regarding changing beneficiary designations, assignment, or commutation of income payments.

Beneficiaries

[Please see section on Beneficiaries.]

Charitable Gifts

- Correct name.
- Purpose of the gift.
- Alternate provisions.



Wills - Page 5

Perpetuities and Accumulations

- No accumulation of income of income beyond 21 years from a testator's death.
- Ensure that a no gift will vest outside the perpetuity period.

Execution of the Will.

- Form is important, and may vary from jurisdiction to jurisdiction.
- Affidavits of Execution:
 - are required;
 - need be properly done (eg: age of witnesses).



Beneficiaries

Who do you choose?

Intensely personal to the testator and to their family and/or personal situation, but some things are to be borne in mind:

- Are there alternative methods of giving which achieve the same end? For example:
 - outright bequests;
 - life interests with or without powers to encroach;
 - trust funds;
 - discretionary powers in the trustees to split income or to encroach on capital;
 - provisions for gifts over.
- "Need and greed" issues.

What must you consider?

- The classes of people who may be entitled to support by a deceased under Part V of the SLRA.
- Any potential claims that could be made by people covered by statute but not to be included in the will.
- Any possible restriction that would prevent the beneficiary from enjoying the will's benefits.



Beneficiaries - *continued*

Other things to consider:

- Any restrictions under the applicable law?
- Minors; related trust issues.
- Children born outside of marriage: are they to be included? Does phrasing elsewhere in the will or applicable legislation preclude them? (Ontario: "these children must be specifically excluded if that is the intent". [Histrop])
- Stepchildren: "If these children are to benefit, they should be specifically included." (Cross-reference: Dependents' right to support.)
- Adopted children: In Ontario, these children will be treated as natural children unless the will provides otherwise.
- Mentally incapable persons. Is the proposed beneficiary capable of managing his or her property?
- Beneficiaries in foreign jurisdictions. Are there any restrictions on the payment or transfer of gifts to foreign beneficiaries? Tax issues.



Executors

The executor (f: executrix) is the person you select in your will to handle your estate when you die.

Things to consider:

- Age (too young? too old?) and skills of the executor
- Consent of the executor.
- Resources available to the executor (judgment valued more than skills which can be obtained professionally)?
- Conflicts of interest.
- Solid plan for alternate executors.
- DR plan for executors.
- What is the will actually doing? Different situations might require different talents.
- Specialized executors for specialized functions.
- Spouses: what if there is an FLA election? There, (s)he is treated as predeceased.



Executors - *continued*

Trust company to act as trustee:

- Assets to be administered that require the experience, expertise and specialized skills of a trust company organization.
- Onerous duties of administration would place too great a burden in terms of time and effort on any individual(s).
- Assets to be held in trust over a period of years and the administration therefore requires the continuity, permanency and record-keeping provided by a corporate trustee.
- Impartiality solution to conflicting interests.
- Security regarding physical arrangements, governmental supervision and malpractice insurance.



Guardianship: Who looks after your children?

Probably the hardest question

- Deeply personal and deeply troubling.
- Best choice isn't necessarily family. *But...*
- not picking family can be a problem.
- Trust is not a one-size fits all matter: financial trustworthiness may be found in different people than you want to raise your children.
- The need to be clear in how your children are looked after.
- The courts *never* lose their jurisdiction over your children, and can make a "best interests" order different than that found in the will.



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Specific Drafting Issues

Correct names

- Take the time and trouble to find out!
- Clarify "known as" issues, if necessary.

Anticipating Future Events

- Likely or possible events: deaths, incapacity, marital breakdown, FLA entitlement.
- Even "merely possible" events: unexpected deaths, adoptions,

Gifts to minors

Trust provisions:

- "eventualities awareness"; conflicts between guardian and your trustee;
- right to pay out interest or capital as required;
- right to make payments directly to guardian.

Beware small gifts holding up administration. Alternatives: asset purchases (eg: bonds); payment to guardian on bare trust satisfies obligation.



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Specific Drafting Issues - *continued*

Survivorship Clauses

- Thirty days is common.

Ademption

- Meaning: specific bequest cannot be made.
- Remember, SLRA has given beneficiaries some limited rights re substitution of property.

Abatement

- Meaning: net assets inadequate to meet bequests made in the will.
- Best addressed in pre-planning rather than get involved of intricacies of addressing the problem.

Lapse

- Meaning: beneficiary predeceases testator or does not outlast survivorship period.
- Problem: gift reverts to residue when that may not be what is intended.
- Best addressed in proper selection and naming of alternate beneficiaries.



Specific Drafting Issues - *continued*

Residue

- Meaning: everything that's left (and/or value thereof) after all specific bequests are done.
- Best addressed in proper selection and naming of beneficiaries, alternates and "issue *per stirpes*" (not "children") designations.

Trust Wills

- Occur most commonly regarding minors or disabled adults; often for extended periods.
- Need to address eventualities such as death, interest and principal over extended period.
- Be cautious of the "Rule in *Saunders and Vautier*". (Solutions: "gift over".)

Partial Intestacies

Frequently occur when:

- draftsmen fail to account for interest accumulations;
- failure to have gifts over of residue.

Solution: Have a thorough lawyer! This is very much a question of technical competence.

Class Gifts

If you are going to give a gift to a class you must *define membership* in that class. (Eg: "nephews": does it include stepchildren?)



Specific Drafting Issues - *continued*

Beneficiary Designation

Designation, by will, of beneficiaries under life insurance, pension plans, RRSPs, retirement income funds. Be cautious:

- it supersedes all previous designations that may have been made by the testator;
- it covers only up to the date of the will, and does not cover after-acquired policies, (*etc.*).

When it's a good idea.

- When the testator wants the proceeds to be held for the beneficiary on trust until a certain age.

When it's a bad idea:

- When objective can be achieved more efficiently outside of the will.



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Family Law Act Issues (Page 1)

Succession Law Reform Act process:

Under Part V of the *SLRA* a survivor spouse may apply to a court for support from the estate of the deceased spouse; it's discretionary; there is no absolute right to it.

Family Law Act process:

The FLA allows a surviving spouse to choose. They can:

- trigger an equalization, just as if they had been separated as of the date of death; or
- the benefits under the deceased's will or intestacy.
- This must be done within six (6) months of the deceased's death.



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Family Law Act Issues (Page 2)

Things to bear in mind:

- Any gifts to the surviving spouse in the deceased spouse's will are revoked unless the will expressly provides for retaining them.
- "Life insurance owned by the deceased spouse and lump sum pension payments payable upon the deceased spouse's death are credits against the surviving spouse's section 5 entitlement. Any excess is recoverable by the deceased spouse's personal representative unless the deceased leaves a written designation to the effect that the surviving spouse is to receive the payment under the policy or plan in addition to the section 5 entitlement." [Histrop, "Will Planning and Drafting."]

COMPLEXITY ALERT!

- Domestic Contract preparation to address Family Law Act issues.
- Trusts and other transfer options.



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Trust Issues

What's a "Trust"?

Property that is held by one person (the "trustee") for the benefit of another (the "beneficiary").

Types of Trusts

- Many! *Black's Law Dictionary* takes 5 pages just to list them all.

Key facts

- Can be designed in advance. Example: a specific trust fund set up for a child's education.
- Can arise out of Wills: a parent leaving money to a child; a child taking under another's will as the alternate beneficiary .

The impact on estate planning:

- Uncertainty, disputes and litigation can arise out of funds which flow to those without the legal capacity to handle the money themselves.

Some means of dealing with trust issues through careful planning:

- Integrate with rest of estate planning
- Plan for worst cases, including unpleasant possible changes in the future.
- Avoid conflict between different types of trustees.



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Tax Issues

Who are you?

- Foreign citizenship can give rise to tax issues independent of foreign assets.
- If necessary, retain foreign counsel or domestic counsel called abroad.

“Death taxes”

- While “succession duties” are notionally gone they remain in the form of “Estate Administration Tax”, (formerly “probate fees”): 0.5% on the first \$50,000 [\$2500] and 1.5% over \$50,000.
- Deemed disposition of certain assets on death: GICS, for example, have a very high tax rate.

Some areas of potential problems:

- Testator has foreign assets.
 - Real Property is handled differently than personal property.
 - Tax issues may arise in foreign jurisdictions.
- Foreign beneficiaries.

Some means of addressing tax issues:

- Retention of qualified financial professionals.
- Joint ownership.
- Trusts with life interest, (not subject to tax on death of beneficiary). Problem: tax consequences of holding capital assets in trust.
- Beneficiary designations for insurance, RRSPs, pension plans.



Some areas of concern

Change is the only constant

- People and their lives change and these changes may necessitate a change in your estate planning. Don't leave things static; re-examine them.

People often don't act the same after a loved one has died.

- Dissatisfaction with estate distribution: they got too little.
- Dissatisfaction with estate distribution: others got too much.
- *With you dead, the old restraints are gone*; saying and doing things which they wouldn't have (but may often have wanted to) while you were alive.

Testators are often reluctant to face the worst

- The limitations of the people in their lives (i.e.: can't be trusted with money).
- Difficult choices. *eg*: An even split amongst children may not be fair but it may be wise.

Potential trouble areas include

- Lack of thoroughness (on your part and/or that of the solicitor).
- Failure to balance technical (i.e. legal) with fiscal planning
- Second families; “Venn families”.
- Significant life changes not provided for in planning, or adapted to when they occur.
- Being “*in loco parentis*” to dependent children.
- Will coordination between spouses



ADR – Alternate Dispute Resolution

ADR: What is it?

Alternative Dispute Resolution (ADR) can be defined as resolving disputes through means other than direct negotiation or the intervention of the court system or administrative law tribunals. It is well established as a less expensive, faster means of resolving disputes.

What does it include?

- **Dispute prevention through:**
 - effective planning;
 - consultation with heirs and trustees;
 - proper legal drafting.

- **Dispute resolution through the setting up of mechanisms in the will for:**
 - trustee decision making;
 - resolution of disputes amongst trustees;
 - if necessary, removal of trustee(s);
 - resolution of disputes arising out of the will by means of [mediation](#) or [arbitration](#).

A great number of estate disputes can be avoided if handled right at the preparation stage, and can avoid court if proper ADR clauses are incorporated.



Power of Attorney

What is a "Power of Attorney"?

"A Power of Attorney is a legal document that gives someone else the right to act on your behalf."

In Ontario there are three kinds of Power of Attorney:

- "A **Continuing Power of Attorney for Property** covers your financial affairs and allows the person you name to act for you even if you become mentally incapable."
- "A **Power of Attorney for Personal Care** covers your personal decisions, such as housing and health care." (Note: The POAPC is the document which gives the attorney the authority; a "**living will**" is the document which details your instructions regarding your care, i.e., what the attorney must do with that authority.)
- "A **Non-Continuing Power of Attorney for Property** covers your financial affairs but can't be used if you become mentally incapable. You might give this Power of Attorney, for example, if you need someone to look after your financial transactions while you're away from home for an extended period of time."



“Stump the Suit.”: Q&A session



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David Sanders - A Short Bio

David Sanders was born in Toronto and raised in Thornhill. He started his undergraduate studies at Glendon College (York University's bilingual campus) and graduated from Osgoode Hall Law School in 1989. He articulated in Toronto, and was called to the Bar of Ontario in 1991. His first position as a lawyer was with Rural Legal Services, handling legal aid cases including duty counsel for provincial offences court, unofficial mediator for the small claims court, and in his very first call as a lawyer, the legal implications of a too-amorous bull.

With that contract complete he returned to the GTA where he worked with a number of boutique and specialist firms, moving into his own practice with friends in 1997, where he remained until 2002. His practice with Sanders, Lyn & Ragonetti centred on small and medium sized enterprises, (including and especially their corporate and litigation problems), estate planning, (including wills, powers of attorney and estate litigation), and property and real estate property disputes and lawsuits.

During this period he became convinced of the need not only for dispute resolution methods superior to the court system but also for the even better choice of dispute *prevention* through effective personal and business planning and systems design. To that end he obtained a Certificate in Dispute Resolution from the University of Toronto's demanding program and qualified as a Level II arbitrator with the Arbitration and Mediation Institute, both in 1996-1997.



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David Sanders - A Short Bio - Continued

Leaving the law when he moved to London in 2002, David Sanders went into private research work. He then handled administrative, research and writing work with the London Homeless Coalition, followed by a spell as the Strategic Planner for the London Employment Help Centre.

David Sanders founded Camberwell House Solutions (a full service alternative dispute resolution ("ADR") firm) in 2007, and created its companion firm, Camberwell House Litigation, upon his return to the law in 2008. Camberwell House Litigation which provides legal services with specific emphases: small and medium-sized business, estates work and condominiums.

Full details on the practice areas of Camberwell House are available.

David Sanders has two daughters, age 21 and 11. He is active with several charities and nonprofits and struggles with his longstanding addiction: buying and reading far too many history books.



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