Alzheimer Society
MANITOBA
Dementia Care & Brain Health

Care 4 U Conference

Complex Legal Considerations

DISCLAIMER

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ESTATE PLANNING TOOLS

- Powers of Attorney
- Last Will and Testament
- Health Care Directive (Living Wills)
- Will Substitutes (including Joint-accounts, Joint-Tenancy), Trusts

POWERS OF ATTORNEY (POA's)

- **What is a PoA?** It provides someone (one or more, acting jointly or in series) the authority to deal with your financial affairs/property while you are still living, but when you might be unable to adequately deal with your affairs yourself
  - In many cases, the most important one.

- **How does it work?.** A Power of Attorney document gives POWERS to another person- e.g. the right to deal with your property and personal care- but they do not own the property
  - ALL actions taken by attorney must be in DONOR's best interests- regardless of what the attorney's interests are
  - Personal care decisions can be some of the most important decisions of your life

- **General or specific?** Most of the POA's I draft are general POA's – they are very comprehensive documents providing an attorney with a wide latitude to generally deal with all of a given person's financial and property affairs. However, it is possible to draft a POA for a specific purpose (Hey, Bob, here's a POA to sell my house while I'm out of the country).

SOME POA CONSIDERATIONS & TERMS

- **"Springing" POA.**
  - This refers to a POA that is in effect upon a certain precondition, such as the determination that the person to whom the POA relates (the "Donor"), is incapable of managing their financial affairs
  - The general rule is that unless specified this power will be in effect right away
  - You can mix/match – i.e. a spouse's power is in effect right away, a child or friend's power only once you're incompetent
- **Multiple / Joint / Alternate Attorneys.**
  - It's important to carefully consider the person who will be your attorney – are they careful with money? Do they get along with other family members?
- **What if someone dosen't have one?**
  - Committeeship (next slide)

Committeeships

- **What is it?**
- **Has to be as bad as it can get**
  - No triggering at in between “grey” period
- **Time consuming**
  - Process involves two physicians and at least one court hearing
  - Additional hearings may be necessary to carry out basic steps like selling a house
- **Expensive**
  - Mid-four-figures at a minimum

LAST WILL AND TESTAMENT

- **The best known – what is done when you die?**
  - Your will speaks from your date of death, and operates to dispose of your assets in the manner you have set out in the document
  - Your wishes can be as simple as "all to my spouse, then to my kids equally", or as complicated as you can imagine
- **Important Considerations in a will / things to think about:**
  - **Blended families** – step-children, previous families, 2nd or 3rd marriages, pre-existing assets
  - **Marriage** – in Manitoba, getting **married <u>revokes</u>** your existing will (unless you specifically say so in the will). If you have a will and get married, get a new one.
  - **Divorce** – in Manitoba, getting **divorced <u>does not revoke</u>** your existing will. It does, however void a gift to a divorced spouse. **Remember, separated is NOT divorced.**
  - **Executors** – you don't have to make your children your executors, and you don't have to make all of them. Can act jointly or in series.

LAST WILL AND TESTAMENT CONTIN..

- **A Typical Simple Will Structure**
  - **Revocation**
    - Revokes previous wills and codicils – **but may also revoke other "testamentary dispositions", including life insurance designations**"
  - **Executors**
    - Names the people that will handle your affairs
  - **Specific gifts**
    - These are specifically named sums or gifts or discernable amounts to particular people or classes of people (your grandchildren, for example)
  - **Residual gifts**
    - What is left over (typically the overwhelming majority of the estate)
  - **Misc. Provisions**
    - Other declarations, designations, administrative power provisions, funeral directions, etc.

LAST WILL AND TESTAMENT CONTIN..

- **Important Considerations in a will / things to think about:**
  - **Specific Gifts / Personal Property –** if you have personal property of particular value (sentimental or otherwise), you can give it away specifically in your will. Or, during your lifetime. Make sure you don't forget something that may cause fights later.
  - **Life insurance –** some policies have death benefits, some act as investment vehicles. What type do you have? Who are the beneficiaries? (are they the same as with the will?)
  - **Consistency –** you want to ensure that you don't just do a will, but forget to look at how your property is held, or ignore a POA. Make sure that your will is consistent with other beneficiary designations, such as on your TFSA, or pension, or Life Insurance.

LAST WILL AND TESTAMENT CONTIN..

- **Important Considerations in a will / things to think about:**
  - **Trusts –** where you have spendthrift beneficiaries, or minor beneficiaries, you may wish to put a trust in place with specific restrictions or provisions so the money isn't all released to them at the age of 18, or until they can handle it
  - **Beneficiaries with a disability–** if you have children or beneficiaries with an disability, a particular kind of trust – a "Henson" trust – may be advisable to avoid benefit claw-backs
  - **Cutting people out –** you may not want to provide for your separated spouse (but remember the *Family Property Act*) or for a particular adult child or person. That's fine in principle, and in the case of adult children, relatively unassailable. However, sometimes this is either not advised, or the law may operate to deny you what you want to do
  - **Life estates –** when you may not want to leave your current house to your second husband, but still want to make sure he has somewhere to live for the final years of his life, you can create a life estate in property
  - **What if you don't have one? -** Intestacy

PLANNED GIVING

- Gifts to charities
  - You may wish to give money to a particular charity or organization that you love and support.
  - If you make a gift to a charity, your estate will be able to make use of charitable receipts to reduce some of their income tax liability (in some cases quite significantly).
- Why should I consider it?
  - A gift in your Will lets you make the gift of a lifetime to a cause you believe in – a gift you might not be able to afford while you're alive.
  - "People think that leaving money to a charity will diminish what they can leave to their kids. But because of Canada's tax regulations, you can give money to a charity that you would otherwise give to Canada Revenue Agency in taxes. And if your net income in the year of your death is lower than the amount you give, your executor can claim a rebate against your previous year's income and add that to your estate." - Colleen Bradley

PLANNED GIVING cont.

- How does it benefit the charity I care about?
  - That charity uses funds to support its current programs, launch new ones, renew buildings and equipment, perhaps take a risk on something promising but untried. When it receives a gift through someone's Will, the charity can use that gift for something special – something it couldn't do otherwise. Or it can save and invest the gift so that the yearly interest goes on supporting programs you've been giving to year by year. Talk to the charity you love about using your bequest in the way you'd like it to be used.
  - Anyone can make a bequest. The amount doesn't matter – but supporting a cause you cherish, leaving a legacy of values as well as financial disbursements, matters a lot.

HEALTH CARE DIRECTIVE (Living Will)

- Making decisions about your health care treatment – do you want a blanket DNR in place? What about where there is no possibility of saving your life – palliative care only, but no extraordinary life-prolonging measures?
- Often called a "Living Will" (but not in Manitoba) and the person making the decisions is called the "Proxy"
- Like the PoA, a proxy can't overrule a competent person.
- You can get them prepared at a lawyers office, but be aware that there is no requirement to do so, and preparing one yourself has the same legal force and effect as one done by a lawyer:
  - http://www.gov.mb.ca/health/livingwill.html

HEALTH CARE DIRECTIVE cont.

- A proxy must be able to make AN INFORMED CHOICE and therefore must be able to speak to the medical provider and understand the options.
- If complex instructions necessary should seek advice from a medical practitioner- not your lawyer
- One thing to keep in mind – some consistency in the decision-makers between documents (POA and HCD) can be helpful – what if the person making health care decisions decides on an experimental treatment in Mexico that the person holding the purse strings refuses to fund?
- Sometimes better to leave instructions blank!
- What if there isn't one: WRHA or any Regional Health Authority has protocols

DIY - WHAT COULD GO WRONG?

- **You use a will kit, and it's not executed with the formalities of *The Wills Act*.**
  - This can have unintended consequences for beneficiaries and your estate. It can sometimes be fixed but typically it's worth it to pay someone the cost to do it correctly the first time.
- **Lack of consistency**
  - You give away a gift in a will of property, but that property is held jointly (and passes immediately on death to that person, who could be different from the person you attempted to give the property to under the will)
- **Beneficiary designations**
  - *The Insurance Act* of Manitoba does all kinds of fun things, including telling you that if you designate a beneficiary(ies) of a life insurance policy and that person dies, that money may go to their estate (and not pass under your will)
- **Not planning for taxes – RRSP's, other registered investments**
  - This is a **HUGE** potential issue. Deemed dispositions, lack of a principal residence exemption, lack of understanding tax implications of various actions can mean that the only beneficiary under your estate is CRA
- **Not planning for disasters**
  - You may think something may not happen… but some simple planning could have ensured that your affairs were taken care of the way you'd wanted…

CAPACITY CONCERNS

- **Capacity is task-specific**

- **A person might be able to make all, some, or none of these documents**
  - Wills, Powers of Attorney, and Health Care Directives all have their own capacity thresholds

- **A doctor's diagnosis is helpful but a lawyer well-practiced in wills is *more* helpful (in this instance)**

HOW DO I START?

- Speak with your accountant, financial advisor, or lawyer if you want to do some estate planning
- If you know what you want to do and have a simple estate, visit a lawyer and have them prepare and draw up a will and/or POA and/or HCD for you
- At the very least, start thinking about the end of your life, despite its difficult and uncomfortable nature – estate planning is one more way you can show love to those you care about

QUESTIONS?

Also, the disclaimer repeated..

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